

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

THE SHELDON ABEND REVOCABLE  
TRUST,

Plaintiff,

v.

STEVEN SPIELBERG; DREAMWORKS,  
LLC; PARAMOUNT PICTURES  
CORPORATION; VIACOM, INC.; NBC  
UNIVERSAL, INC.; UNIVERSAL  
PICTURES CORPORATION; and UNITED  
INTERNATIONAL PICTURES, B.V.,

Defendants.

CASE NO. 08-CIV-7810 (LTS)(JCF)  
ECF Case

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

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## I. PRELIMINARY STATEMENT

Defendants Paramount Pictures Corporation, Steven Spielberg, DW Studios L.L.C., Viacom Inc. and United International Pictures, B.V. (the “Paramount Defendants”) bring this motion for partial summary judgment on the copyright infringement claims of plaintiff The Sheldon Abend Revocable Trust (“Plaintiff”) on the ground that there is no substantial similarity of *protectable* elements between Plaintiff’s short story and the motion picture *Disturbia*.<sup>1</sup>

Plaintiff’s primary basis for alleging that *Disturbia* infringes upon the short story – that Plaintiff owns a “situation” allegedly conceived by Cornell Woolrich – is belied by the fact that general plot ideas are not protected by the Copyright Act. Moreover, the plot of the short story is not original to that work, but appears in prior works, including a story by H.G. Wells. Equally important, the Court need only look at the two works themselves to determine that Plaintiff’s claims are defective – Plaintiff’s short story *It Had To Be Murder* (a.k.a. *Murder From A Fixed Viewpoint*; a.k.a. *Rear Window*) (the “Short Story”) and the movie *Disturbia* are so different in expression that there is no basis for a finding of substantial similarity as a matter of law.

## II. STATEMENT OF FACTS

### A. Plaintiff’s Claim For Copyright Infringement

Plaintiff’s alleges the Paramount Defendants’ movie *Disturbia* infringes Plaintiff’s copyright in the Short Story by Cornell Woolrich. See First Amended Complaint (“FAC”) ¶¶ 1, 23, 86-95. Woolrich wrote the Short Story in 1942. *Id.* at ¶ 23. Plaintiff claims that *Disturbia* and the Short Story “are essentially the same story as both emerge from a situation conceived and created by Woolrich which constitutes the ‘spring board’ for the *Disturbia* Film.” *Id.* ¶ 86.

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<sup>1</sup> This motion is directed only at Plaintiff’s claims to the extent they are premised upon its short story, as opposed to the motion picture *Rear Window*. Compare Brenner Decl., Ex. A, with *Id.*, Ex. B. If necessary, the motion picture *Rear Window* will be the subject of a separate motion.

**B. H.G. Wells' Short Story *Through A Window* (1895), And Other Pre-Existing Works**

The basic situation of a man, who is confined in some manner to his residence and while watching through his window, sees what he believes to be murder-related activity and is then jeopardized in his residence by the murderer (*i.e.*, the entire premise of the Short Story), pre-dates Plaintiff's 1942 Short Story. In H.G. Wells' short story *Through A Window*, published in 1895, the protagonist, Bailey, is confined to his home because something is wrong with his legs, which are bandaged, and he remains in an "idle capacity." Brenner Decl., Ex. C at 59, 65, 70 & 72. Because he "simply can't work," and although it can be "dull," he watches the world "in front of [his] window." *Id.* at 59-61. Bailey has developed "a wonderful eye for details," and he describes the many people he watches from his window, stating "I should never have thought I could take such an interest in things that did not concern me". *Id.* at 59-61.

One morning, while watching from his window, Bailey sees a murderer and then becomes threatened by that murderer. *Id.* at 64-65, 68, 70-73. As Bailey's housekeeper, "Mrs. Green," reports to him (she had been outside when she learned the news), a mad man has killed someone and stabbed others with a big knife, and is on the loose. *Id.* at 61-69. Shortly thereafter, the murderer climbs onto Bailey's balcony, but Bailey cannot flee because his legs are incapacitated. *Id.* at 70-71. Having no weapon with which to defend himself, Bailey grabs a medicine bottle. *Id.* at 71. As the murderer approaches with his knife, outsiders shoot the murderer. *Id.* at 72. Mortally wounded, the murderer still attempts to attack Bailey, who hits the murderer with the medicine bottle. *Id.* at 72-73. The murderer then dies. *Id.*

Other works pre-dating Plaintiff's Short Story also feature the juxtaposition of watching through a window and criminal activity. In Arthur Conan Doyle's 1903 *Sherlock Holmes* story "The Adventure of the Empty House," Sherlock Holmes and his assistant, Watson, conduct a stake-out of a building on the opposite side of the street. Brenner Decl., Ex. D at 456. From the



stake-out room, they watch through a window, trying to capture a dangerous criminal. *Id.* Holmes advises Watson to get a better view and “draw a little nearer to the window, taking every precaution not to show yourself”. *Id.* Ultimately, the criminal sneaks into the stake-out room (to Holmes’ surprise), Holmes and the criminal struggle, Watson subdues the criminal by hitting him on the head with the butt of a gun, and the police arrive. *Id.* at 458.

In addition, the 1924 version of the *Arabian Nights* tale “The Story of Ali Baba and The Forty Thieves” involves a sequence where the heroine, a slave, surreptitiously watches out of a window in order to prevent a murder: “[S]he blew out the light and remained silent at the kitchen window to see what would happen” in the yard. Brenner Decl., Ex. E at 24 & 26.

Finally, the idea of voyeuristic watching through windows is not original to the Plaintiff’s Short Story. For example, in *The Sand-Man*, a short story written by E.T.A. Hoffman (1776-1822), a young student voyeuristically watches his female neighbor through his window.<sup>2</sup>

**C. Plaintiff’s Short Story**

The Short Story takes place over the course of four days, with adult Hal Jeffries telling the reader, in a first person narrative, the details of his thoughts and how he processed the clues to a murder. As he collects clues, Jeffries relates his entire thought process to the reader.

Hal Jeffries is incapacitated by a leg cast and is restricted to either a chair by his window or the bed in his bedroom. Brenner Decl., Ex. A at 1, 27. As the story begins, he has had the cast for a long time (the reader meets him less than 4 days from its removal). *Id.* Jeffries lives alone in an urban second-floor apartment room, which is miserably hot. *Id.* at 1, 22. His rear window faces a quadrangle of buildings and, bored, he watches a selection of neighbors. *Id.* at

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<sup>2</sup> He could “by looking out of his window, see straight into the room where Olimpia often sat alone.” Brenner Decl., Ex. F at 202-03. To get a clearer look at her, the young man used “a glass . . . that brought out things so clearly”, and he “remained standing at the window [with] his gaze riveted unchangeably upon the divinely beautiful Olimpia.” *Id.* at 203.

1-2. He interacts with none of them until he becomes curious about the activities of Lars Thorwald, whose chronically ill wife appears to have disappeared. *Id.* 2-8. Jeffries surreptitiously watches Thorwald from a fixed viewpoint – his bedroom window (notably, the Short Story was titled *Murder From A Fixed Viewpoint*). *Id.* at 2-8, 13; *see also* FAC ¶ 23.

Thinking about the clues, Jeffries suspects that Thorwald has murdered his wife. Brenner Decl., Ex. A at 2-9. Jeffries phones Inspector Boyne, an “old friend” and detective whom he has not seen for years, and tells Boyne about his suspicions. *Id.* at 10-11, 15. Because Boyne has “always valued [Jeffries’] opinion highly,” Boyne “didn’t question [his] reliability” and immediately began a police investigation of Thorwald. *Id.* at 11-12. Boyne authorizes secretive police approaches to Thorwald’s apartment which turn up nothing incriminating. *Id.* at 11-13. After a policeman locates a woman in the countryside who identifies herself as Mrs. Thorwald, Boyne no longer believes that a murder has occurred. *Id.* at 14-15.

Undaunted in his belief, Jeffries embarks on a scheme to draw Thorwald out and obtain more evidence of a murder. *Id.* at 15. First, Jeffries has his obedient servant of ten (10) years, Sam, slip a provocative note under Thorwald’s apartment door: “*What have you done with her?*” *Id.* at 3, 15, 18. As Jeffries watches, Thorwald becomes visibly upset by the note and paces his fourth floor apartment – a reaction which confirms to Jeffries that Thorwald is, in fact, “Guilty!” *Id.* at 16. Thorwald’s pacing coincidentally mimics those of a rental agent showing a renovated place on the sixth floor of Thorwald’s apartment building, suggesting a difference in the two units Jeffries cannot quite pinpoint in his mind. *Id.* at 16-17 & 20.

In order to lure Thorwald out of his apartment, Jeffries telephones Thorwald and, under the pretense of a blackmail scheme, agrees to meet him at a local park to discuss hush money. *Id.* at 17-18. After Thorwald leaves for the meeting, Jeffries has Sam break into Thorwald’s apartment, not to investigate anything, but to make it look as though the place has been searched,

hoping that Thorwald would conclude that the blackmailer had searched the apartment and located evidence. *Id.* at 18-20. Sam obediently does as he is told, and then leaves Thorwald's apartment before Thorwald returns. *Id.* at 18-19. Thorwald returns, speaks to his blackmailer (Jeffries) on the telephone, and realizes that his blackmailer has found nothing. *Id.* at 20.

Trying to identify his blackmailer, Thorwald phones Jeffries and, apparently recognizing Jeffries' voice, seems to realize that Jeffries has been spying on him. *Id.* at 20-21. Shortly thereafter, Jeffries finally figures out that the difference between Thorwald's 4<sup>th</sup> floor apartment and the renovated apartment on the 6<sup>th</sup> floor was an "upward jump" in the 6<sup>th</sup> floor kitchen, because the floor had been raised for decorative effect. *Id.* at 2, 22, 25-26. Jeffries deduces that Thorwald had buried his wife's body in newly-poured cement in the kitchen floor of the 5<sup>th</sup> floor apartment, which was still being renovated. *Id.* at 25-26.

Jeffries attempts to telephone Inspector Boyne, but the line goes dead; Thorwald had entered Jeffries' building and cut the telephone line. *Id.* at 23. Jeffries realizes that Thorwald has come to kill him, but he is so incapacitated by his cast that he cannot "get up out of [his] chair." *Id.* Jeffries sets a clay bust on his shoulder and wraps himself in a rug to give the intruder a false target in the darkened room. *Id.* at 23-24. Falling for the ruse, Thorwald shoots the bust just as Boyne arrives. *Id.* at 24-25. Thorwald escapes through the window, drops two stories to the ground, climbs to the top of his own building, and shoots at Jeffries' window where Boyles and Jeffries are watching. *Id.* Boyne returns fire, striking Thorwald, who drops 6 stories to the ground, dead. *Id.* at 25. Just as Jeffries had deduced, Anna's remains are found interred in the kitchen floor of the renovated apartment on the fifth floor. *Id.* at 25-26.

Wrapping things up with Boyne, Jeffries speculates that Thorwald may have been poisoning his wife for some time, but hastily killed her after she caught him in the act. *Id.* at 26. Jeffries concludes that Thorwald caught a "break" – the cement on the renovated kitchen floor in

the fifth floor apartment had not yet hardened, providing an opportunity to hide the body. *Id.* Next, Thorwald may have concocted a scheme to suggest that his wife had gone upstate. *Id.* at 26-27. Jeffries surmises that Thorwald was in love with another woman, who impersonated his wife Anna when the police were investigating upstate. *Id.* at 26. Thorwald probably intended to collect insurance on his wife, whose clothes would have been found, but not her body, in an apparent suicide in an upstate lake. *Id.* at 26-27. In the end, a doctor arrives to remove Jeffries' cast, ironically stating to Jeffries, "You must be tired of sitting there all day doing nothing." *Id.*

**D. Defendants' Motion Picture, *Disturbia***

*Disturbia* begins with a sequence set a year before the main events of the film. Teenager Kale Brecht is enjoying a fishing trip with his father. The scene is idyllic – their relationship is playful, and they genuinely appreciate each other. On the drive home, Kale is at the wheel when a horrific accident takes his father's life. Brenner Decl., Ex. B, *Disturbia* at 00:01:00 – 00:05:33. A year later, Kale is now a troubled and depressed teen. His Spanish teacher attempts to shame Kale for not doing his homework by invoking Kale's father, and the 17-year old punches him in the face. Days later, Kale is in court and, because this incident is his third run-in with the law, he is sentenced to 3 months house arrest in his spacious suburban home in California. Kale is fitted with an ankle bracelet that will summon the police if Kale moves beyond a 100-foot radius around a monitor plugged inside his house. *Id.* at 00:05:45 – 00:09:33.

Kale makes full use of his restricted world, moving from room to room and window to window, going outside to the lawn, to the patio and to stand by the hedges. He initially takes to the couch potato existence, occupying himself with videogames, iTunes, and TV in his room until his mother – frustrated by his sloth – cuts them off. *Id.* at 00:10:23–14:20:20. Kale grudgingly does chores and makes a sculpture made of Twinkies. *Id.* at 00:15:00–00: 15:48. He is then drawn to the window by the arrival of new neighbors, specifically an attractive teenage

girl named Ashley. Concurrently, Kale makes his first neighborhood enemies when he finds a burning bag of excrement at the front door and runs down the street to chase after the younger kids who left it. This triggers Kale's ankle alarm; Officer Gutierrez – already hostile to Kale, since he is a cousin of the Spanish teacher Kale punched – arrives and cuffs him. Kale is warned that the next infraction will land him back in court. As a safeguard, Kale gives himself a visual cue by roping off the boundaries of his spacious yard with string. *Id.* at 00:16:20 – 00:21:17.

Back inside, Kale watches his various neighbors with binoculars – including the kids who left the burning excrement and a near-middle-age married couple, the husband of which is having an affair with the maid. Kale observes, dismissively and in passing, his neighbor Robert Turner, a man old enough to be his father. Kale and his Korean best friend Ronnie (a girl-crazy goofball character) also gaze at the attractive new neighbor, Ashley, swimming in her pool next door. *Id.* at 00:22:16 – 00:25:26. Kale then devises a scheme to meet Ashley by his outdoor mailbox, and their nascent romance begins. *Id.* at 00:25:30 – 00:27:13.

After seeing news reports about missing women in Texas and other towns, Kale notices that Turner's car fits the description of the car owned by the Texas serial killer. *Id.* at 00:13:15 – 00:14:00, 00:27:26- 00:27:47, 00:30:40 - 00:31:20. While outside, Kale hides and watches Turner through the fence that separates their properties. Kale and Ronnie spy on Ashley as she swims in her pool; she catches them and goes to Kale's room. Ronnie tells her that they are spying on Turner who may be the serial killer, and she agrees to join in a "stake out." Using surveillance equipment that Ronnie has taken from his uncle, the 3 teens begin to investigate Turner, albeit in a casual manner that involves eating pizza and a near romantic kiss between Kale and Ashley. *Id.* at 00:32:20 – 00:46:20. After the stake out, as Kale sees a redheaded woman struggling to leave Turner's house, the flash on Kale's video camera goes off inadvertently and Turner apparently sees him spying. Kale then sees what he believes to be the

redhead leaving Turner's house (which, we later learn, was Turner in a redhead wig). *Id.* at 00:47:50 – 00:50:20 & 1:32:05 – 1:32:07.

Later, Ashley has a pool party, which Kale jealously tries to ruin by blaring dated music out of his window. Ashley confronts him, and they kiss. While making out, they miss a scream and blood splattering across the inside of Turner's window. However, Ashley then sees Turner dragging a blue bag with blood on it to his garage. *Id.* at 00:55:05 – 1:02:50. The teenagers decide to investigate Turner's garage. As Ashley covertly follows Turner on a shopping trip, Ronnie enters Turner's other car to get the password for his garage door opener. Aware that he is being followed, Turner confronts Ashley in the store's parking garage, and frightens her with chilling sexual innuendo. Thereafter, Ronnie realizes that he left his cell phone in Turner's car. Wearing a video camera linked to Kale's computer, Ronnie then breaks into Turner's garage to retrieve his cell phone and look for the bloody blue bag. *Id.* at 1:02:05 – 1:11:20.

While inside the garage, Ronnie sees a blue bag: there is something decomposing inside. When Ronnie appears to panic that someone else is there and his video feed goes dead, Kale runs over to Turner's house with a baseball bat, and his ankle bracelet again summons Officer Gutierrez, who handcuffs Kale outside Turner's garage. Fearing for Ronnie, Kale desperately shouts that Turner is a "lying son of a bitch" and tells Gutierrez about the blue bag. Gutierrez reluctantly asks Turner for permission to look in the bag and inside the house. Turner agrees; the bag turns out to contain the remains of deer which Turner was disposing of, and Ronnie is not found in the house. *Id.* at 1:11:29 – 1:17:30.

Kale's mother goes to Turner's home to smooth things over and explains how Kale blames himself for his father's death. Meanwhile, Ronnie returns to Kale's home to play a practical joke on Kale, pretending to be dead in Kale's closet. Ronnie had just been hiding to avoid the police. Kale then watches the video Ronnie shot inside Turner's house, and notices the

face of a dead woman inside a grate. Concurrently, Turner attacks Kale's mother by slamming her head against the wall. Turner then arrives at Kale's house and hits Ronnie with Kale's bat (*i.e.*, Turner does not bring his own weapon). Turner then attacks Kale with the bat, but Kale narrowly evades the blow. Turner and Kale struggle throughout the house and in the front yard; Turner knocks Kale unconscious and drags him back into Kale's house. *Id.* at 1:18:00 – 1:24:12.

When Kale awakens, he is bound with duct tape, and Turner methodically tells him about his plan to set Kale up for slitting his mother's throat, and then make it look like Kale committed suicide. Ashley's just-in-time arrival at Kale's house results in a struggle which allows the teens to get to the roof and jump into Ashley's pool to escape Turner. *Id.* at 1:24:13 - 1:27:57.

Armed with hedge clippers, Kale hurries to Turner's house to find his mother. Inside, he discovers a dead woman in a vent, a pristine operating room and a macabre wall of mementoes from Turner's victims. Meanwhile, because Kale's ankle bracelet had summoned the police, Officer Gutierrez arrives and Turner breaks the officer's neck with his bare hands. As Kale searches the basement of the house, he falls about five feet into a subterranean pool filled with dead, bloated bodies. Hearing her muffled cries, Kale locates his mother, who is still alive but is tied up. He begins to free her as Turner arrives. A fight ensues, ending with Turner stabbed in the leg by Kale's mother and in the chest by Kale with the shears. Turner drops through old floorboards into the subterranean pool approximately five feet below that is filled with the bodies of Turner's victims. Although he does not move, it is unclear whether or not Turner is dead (or might return in a sequel). Kale and his mother walk out of Turner's house as the sound of police car sirens can be heard finally approaching from a distance. *Id.* at 1:27:58 – 1:36:39.

The next day, the police free Kale from his ankle bracelet early "for good behavior." Kale then exacts revenge on the young neighborhood pranksters by posing on the telephone as a satellite company employee, and alerting their mother that they are watching pornographic

content on television. Kale and Ashley then make out as Ronnie starts to videotape them. Kale gives Ronnie “the finger,” and the movie ends. *Id.* at 1:36:40 – 1:39:11.

### III. ARGUMENT

#### A. Standards For Copyright Infringement

In order to establish copyright infringement, a plaintiff must show that (1) it is the owner of a valid copyright, and (2) defendants copied elements of the copyrighted work which are both original and subject to copyright protection. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996); *Denker v. Uhry*, 820 F. Supp. 722, 728 (S.D.N.Y. 1992). The second prong of the test (copying) is itself separated into two elements – a plaintiff must show *both* that: (1) the defendant actually copied the plaintiff's work; and (2) the copying is illegal because a *substantial similarity* exists between the defendant's work and the protectable elements of the plaintiff's work. *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992). Thus, even assuming that a plaintiff could show that the defendant actually copied its work, the plaintiff still must also show that the defendant's work bears *substantial similarity* to those elements in Plaintiff's work which are original and otherwise protected by the Copyright Act. *Id.* at 140-41; *Denker*, 820 F. Supp. at 728-29; *Williams*, 84 F.3d at 587; *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986).<sup>3</sup>

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<sup>3</sup> The rationale for this rule is that “[n]ot all copying . . . is copyright infringement.” *Feist Publ'ns, Inc.*, 499 U.S. at 361. Thus, even where the defendants do not contest access and actual copying, courts reject claims for copyright infringement on the basis of lack of substantial similarity. *Walker*, 784 F.2d at 52 (summary judgment based upon finding of no substantial similarity; assumed access and actual copying); *Arden v. Columbia Pictures Indus., Inc.*, 908 F. Supp. 1248, 1258 (S.D.N.Y. 1995) (finding no substantial similarity; defendants conceded access and actual copying); *Denker*, 820 F. Supp. at 728 (same); *Williams*, 84 F.3d at 587 (same).



In order to assess substantial similarity, courts employ the “ordinary observer” test,<sup>4</sup> and focus on the plot, theme, characters, dialogue, pace, mood, sequence, setting and total concept and feel of the two works. *Williams*, 84 F.3d at 588; *Arden*, 908 F. Supp. at 1260; *Risdon v. Walt Disney Prods.*, 1984 WL 1181 \*3 (S.D.N.Y. 1984). This assessment “requires a side-by-side comparison of the relevant works.” *Historical Truth Prods., Inc. v. Sony Pictures Entm’t, Inc.*, 1995 WL 693189 \*7 (S.D.N.Y. 1995). Simply because a work is copyrighted does not mean that every element of that work is protectable. *Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.*, 210 F. Supp. 2d 147, 160 (E.D.N.Y. 2002). Thus, before comparing the two works, the Court must filter out and disregard unprotectable elements, such as general plot ideas, “scenes a faire” (situations and incidents which flow naturally from a basic plot premise or which are standard in the treatment of a given topic)<sup>5</sup> and elements otherwise not original to the plaintiff’s work. *Williams*, 84 F.3d at 588; *Walker*, 784 F.2d at 48; *Williams v. Chrichton*, 860 F. Supp. 158, 167 (S.D.N.Y. 1994); *Historical Truth.*, 1995 WL 693189 at \* 7; *Boyle v. Stephens, Inc.*, 1998 WL 80175 \*2 (S.D.N.Y. 1998); *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 310-11 (S.D.N.Y. 1999) (concepts that flow predictably from the general plot idea are not protectable).

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<sup>4</sup> When comparing a written work to a movie, the “ordinary observer” test considers “whether, in the eyes of the average lay observer, the [defendants’] works are substantially similar to the protectable expression in the [plaintiff’s] works.” *Williams*, 84 F.3d at 587. Where the work contains unprotectable elements, the ordinary observer’s inspection “must be more ‘discerning,’ ignoring those aspects of a work that are unprotectible in making the comparison.” *Laureyssens*, 964 F.2d at 141.

<sup>5</sup> Moreover, incidents, characters and settings which are standard in the treatment of a given topic are not protected. *Historical Truth Prods., Inc.*, 1995 WL 693189 at \*7. Likewise, “[s]tock’ elements of a particular genre of fiction” are not protectable. *Id.* There are numerous examples of *scenes a faire*. *Williams*, 84 F.3d at 589 (electrified fences, automated tours, dinosaur nurseries and uniformed workers are “classic *scenes a faire* that flow from the uncopyrightable concept of a dinosaur zoo”); *Walker*, 784 F.2d at 50 (“[e]lements such as drunks, prostitutes, vermin and derelict cars would appear in any realistic work about . . . policemen in the South Bronx,” and thus are unprotectable *scenes a faire*).

Once the unprotectable elements are filtered out, the court “must take care to inquire only whether the *protectible elements, standing alone*, are substantially similar.” *Williams*, 84 F.3d at 588 (quotation omitted). The comparison of protectable elements must show “not just ‘similarity,’ but a ‘substantial similarity,’ and it must be measured at the level of the concrete ‘elements’ of each work, rather than at the level of the basic ‘idea,’ or ‘story’ that it conveys.” *Idema v. DreamWorks, Inc.*, 162 F. Supp. 2d 1129, 1179 (C.D. Cal. 2001).

**B. The Court May Find A Lack Of Substantial Similarity As A Matter Of Law**

It is well-established that “a court may determine non-infringement as a matter of law on a motion for summary judgment, either because the similarity between two works concerns only ‘*non-copyrightable elements of the plaintiff’s work*’ . . . or because no reasonable jury, properly instructed, could find that the two works are substantially similar[.]” *Warner Bros., Inc. v. Am. Broad. Co.*, 720 F.2d 231, 240 (2d Cir. 1983); *Flaherty v. Filardi*, 388 F. Supp. 2d 274, 286 (S.D.N.Y. 2005). Courts within the Second Circuit have frequently dismissed copyright infringement claims at the summary judgment stage, and at the pleading stage, after comparing the works at issue and determining that there is no substantial similarity between them. *Williams*, 84 F.3d at 590-91 (affirming summary judgment; children’s book featuring a dinosaur zoo was not substantially similar to the movie *Jurassic Park*); *Walker*, 784 F.2d at 46-47, 51 (affirming summary judgment based on lack of substantial similarity between book *Fort Apache* and movie *Fort Apache: The Bronx*); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980) (affirming summary judgment based on lack of substantial similarity of protected material); *Flaherty*, 388 F. Supp. 2d at 279, 286 (finding no substantial similarity between plaintiff’s screenplay and defendants’ movie *Bringing Down the House*).<sup>6</sup>

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<sup>6</sup> See also *Historical Truth*, 1995 WL 693189 at \*7 & \*13 (no substantial similarity between (footnote continued)

Summary judgment is particularly appropriate where, as here, the court has the respective literary and motion picture works before it, and can easily compare them and determine that the works are not substantially similar in protected expression. As courts have explained,

In determining copyright infringement, the works themselves supersede and control contrary allegations and conclusions, or descriptions of the works as contained in the pleadings. . . . If after examining the works themselves, this Court determines that there is no substantial similarity, then the plaintiff here can prove no facts in support of his claim which would entitle him to relief[.]

*Boyle*, 1998 WL 80175 at \*4 (quotation omitted); *Flaherty*, 388 F. Supp. at 283-84 (“The Court must resolve the copyright infringement question posed in the instant motion practice solely by comparing Plaintiff’s screenplay and Defendants’ finished movie.”); *Kretschmer*, 1994 WL 259814 at \*8 (stating “I have read plaintiff’s work and viewed defendant’s film, which is the best evidence of whether the two works are substantially similar”; finding no substantial similarity).

The instant case presents precisely the sort of situation where summary judgment has been repeatedly granted. As set forth below, a comparison of the elements of the Short Story and *Disturbia* makes clear that the works share no similarities which are protected by the Copyright Act, and are fundamentally dissimilar in expression.

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plaintiff’s script and defendant’s movie *Universal Soldier*); *Arden*, 908 F. Supp. at 1249-50 (no substantial similarity between novel and film); *Hudson v. Universal Pictures Corp.*, 2004 WL 1205762 \*4 (E.D.N.Y. 2004)(no reasonable jury could find a substantial similarity between the protected elements of the works); *Risdon*, 1984 WL 1181 at \*3 (screenplay and movie *Tron* not substantially similar); *Kretschmer v. Warner Brothers*, 1994 WL 259814 \*11 (S.D.N.Y. 1994); *Denker*, 820 F. Supp. at 736; *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1112 (E.D.N.Y. 1985), *aff’d*, 788 F.2d 2 (2d Cir. 1985); *Smith v. Weinstein*, 578 F. Supp. 1297, 1303-04 (S.D.N.Y. 1984); *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 727 (S.D.N.Y. 1982) (same); *Alexander v. Haley*, 460 F. Supp. 40, 44, 46 (S.D.N.Y. 1978) (same); *Fuld v. National Broad. Co.*, 390 F. Supp. 877, 883 (S.D.N.Y. 1975) (same); *see also Bell v. Blaze Magazine*, 2001 WL 262718 \*4 (S.D.N.Y. 2001) (granting motion to dismiss copyright infringement claim based on lack of substantial similarity); *Boyle*, 1998 WL 80175 \*4 & \*6 (same).

C. **There Is No Substantial Similarity Between Any Protectable Elements In Plaintiff's Short Story and Defendant's *Disturbia***

1. **There Is No Actionable Similarity In Plot**

(a) **The Basic Plot Idea Is Not Protectable**

“It is well settled that copyright law protects only plaintiff’s particular expression of his ideas, not the ideas themselves.” *Arden*, 908 F. Supp. at 1258; 17 U.S.C. § 102(b).<sup>7</sup> As this principle is applied to literary works, general plot ideas of a work are not protected under the Copyright Act. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930)(a plaintiff can have no “monopoly” over a general plot idea); *Arden*, 908 F. Supp. at 1259-60 (generalized plot ideas are not protected, “even if first conceived by plaintiff”).

Courts in the Second Circuit have followed this principle of law for at least 78 years. In *Nichols*, the Second Circuit reviewed a copyright action in which the plaintiff alleged that the defendants’ movie infringed the plaintiff’s play. 45 F.2d at 120. The plots of each work featured “a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation.” *Id.* at 122. Writing for the court, Judge Learned Hand held that this similarity in plot constituted a mere general idea, not subject to copyright protection: “A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*.” *Id.*

Simply put, no one can own a general plot idea for a story. *Davis*, 547 F. Supp. at 726 (no protection for plot “about the Vietnam War and its effects on people’s lives, and . . . love triangles in which the betrayed member of the triangle commits suicide”); *Giangrasso v. CBS*,

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<sup>7</sup> “The rationale for this rule [is]: ‘To grant property status to a mere idea would permit withdrawing the idea from the stock of materials that would otherwise be open to other authors, thereby narrowing the field of thought open for development and exploitation.’” *Arden*, 908 F. Supp. at 1258 n.3 (citation omitted).

*Inc.*, 534 F. Supp. 472, 476 (E.D.N.Y. 1982) (plot of a live radio broadcast from a remote location being interrupted by a man with a gun – not protectable); *Midwood v. Paramount Picture Corp.*, 1981 WL 1373 at \*1, \*3 & \*5 (S.D.N.Y. 1981) (plot idea of sheriff whose own posse and townspeople desert him and capitulate to outlaws, and sheriff’s search for the outlaws – unprotectable); *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985) (plot of “criminal organizations that murder healthy young people, then remove and sell their vital organs to wealthy people in need of organ transplants” and “the adventures of a young professional who courageously investigates, and finally exposes, the criminal organization” – not protected because “[n]o one can own the basic idea for a story”).

In light of *Nichols*, *Davis*, *Giagrasso*, *Midwood* and *Berkic*, the basic plot idea of a protagonist who, while confined in some manner to his residence, watches through his window and sees what he believes to be murder-related activity and who ends up being threatened by the murderer in his residence, is nothing more than a general plot idea. Such an idea cannot support Plaintiff’s copyright infringement claim because Plaintiff can own no monopoly over this basic plot premise. When this basic plot premise is filtered out of the comparison between the Short Story and *Disturbia*, it is evident that Plaintiff’s copyright claim fails as a matter of law. This motion should be granted on this ground alone.

Separately, Plaintiff’s claim fails for the independent ground that copyright protection “extends only to those components of a work that are original to the author.” *Boyle*, 1998 WL 80175 at \*2. Thus, elements of a work are not protectable where they exist in “previously published fictional material.” *Fuld*, 390 F. Supp. at 881-82; *Flaherty*, 388 F. Supp. 2d at 289 (alleged similarities were unoriginal and thus not protected); *Gal v. Viacom Intl, Inc.*, 518 F. Supp. 2d 526, 546-47 (S.D.N.Y. 2007) (allegedly similar story elements held unprotectable where they had appeared in third party works).

Here, the general plot idea in the Short Story is not original to Plaintiff's work. Indeed, 48 years *before* Plaintiff's Short Story was written, H.G. Wells employed the exact same premise in *Through A Window*, which featured the plot idea of a character, confined in some manner (leg injury) to his residence, watching through his window what he believes to be murder-related activity and being threatened in his residence by the murderer. Accordingly, under *Boyle, Fuld, Flaherty* and *Gal*, the Short Story's general plot premise is not protectable.

Moreover, elements of surreptitious, voyeuristic and investigative watching through a window are also not original to Plaintiff's work. These elements were featured in pre-existing works, including *Through A Window*, the Sherlock Holmes story "The Adventure of the Empty House," the ancient *Arabian Nights* tale "The Story of Ali Baba and The Forty Thieves" and *The Sand-Man*. See *Supra* Part II, B. These elements are not protectable.

(b) The Plots Of The Short Story And *Disturbia* Are Different In Expression

Where a general plot premise is given different expression in the works at issue, courts have found the works not to be substantially similar. In *Denker v. Uhry*, the court found no substantial similarity between plaintiff's novel and defendants' film *Driving Miss Daisy*, even though each work was "about an elderly, white Jewish person, who, in the face of advancing age and resulting loss of independence, requires the assistance of a black helper, and after initial resistance, develops a friendship with the helper." 820 F. Supp. at 730. Despite using the same generalized plot idea, the court found that the works were not substantially similar because "[b]eyond this level of abstraction, . . . the works are markedly dissimilar." *Id.*

Likewise, in *Arden v. Columbia Pictures Indus., Inc.*, the plaintiff claimed that the defendants' movie *Groundhog Day* infringed plaintiff's novel. 908 F. Supp. at 1249. Both works were "based on the same idea, a man trapped in a day that repeats itself over and over[.]" *Id.* The court ruled that "it is clear that the idea of a repeating day" is not protectable. *Id.* at

