

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Daniel Patrick Moynihan
3 United States Courthouse, 500 Pearl Street, in the City of
4 New York, on the 13th day of September, two thousand and
5 twelve.

6
7 PRESENT: RICHARD C. WESLEY,
8 BARRINGTON D. PARKER,
9 Circuit Judges,
10 JOHN GLEESON,
11 District Judge.*
12
13

14
15 TONY DITOCOCO,
16
17 Appellant,
18

19 -v.-

11-4438-cv

20
21 RICK RIORDAN, DISNEY/ABC INTERNATIONAL
22 TELEVISION CO., INC., WALT DISNEY CO.,
23
24 Appellees.
25
26
27

* The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

1 FOR APPELLANT: MARC TOBEROFF, Toberoff & Associates,
2 P.C., Malibu, CA.
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4 FOR APPELLEE: SANFORD M. LITVACK, Hogan Lovells US LLP,
5 New York, NY (Theresa M. House, Hogan
6 Lovells US LLP, New York NY; David
7 Singer, Jenner & Block, Los Angeles, CA,
8 *on the brief*).
9

10 Appeal from the United States District Court for the
11 Southern District of New York (Stein, J.).
12

13 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
14 **AND DECREED** that the judgment of the United States District
15 Court for the Southern District of New York is **AFFIRMED**.

16 Author Tony DiTocco appeals from a judgment of the
17 United States District Court for the Southern District of
18 New York (Stein, J.), granting Appellees' motion to dismiss
19 Appellant's claims for copyright infringement. The district
20 court determined that Appellees' five *Percy Jackson & the*
21 *Olympians* books are not substantially similar to Appellant's
22 books, *The Hero Perseus* and *Atlas' Revenge*, as a matter of
23 law. We assume the parties' familiarity with the underlying
24 facts, the procedural history, and the issues presented for
25 review.

26 This Court reviews *de novo* a district court's dismissal
27 of a complaint for failure to state a claim upon which
28 relief can be granted. See *Peter F. Gaito Architecture, LLC*

1 *v. Simone Dev. Corp.*, 602 F.3d 57, 61 (2d Cir. 2010). To
2 succeed on a claim for copyright infringement, the plaintiff
3 must show (1) that the defendant had access to the
4 copyrighted work, and (2) substantial similarity between the
5 protectible elements of the respective works. *Williams v.*
6 *Crichton*, 84 F.3d 581, 587 (2d Cir. 1996). Presuming
7 access, courts may determine substantial similarity on a
8 motion to dismiss because “no discovery or fact-finding is
9 typically necessary, . . . what is required is only a visual
10 comparison of the works.” *Gaito*, 602 F.3d at 64 (internal
11 quotation marks omitted).

12 Where, as here, we are comparing subject matter that
13 contains both protectible and unprotectible elements, we
14 apply the “more discerning” ordinary observer test to
15 determine substantial similarity: “we must attempt to
16 extract the unprotectible elements from our consideration
17 and ask whether the *protectible elements, standing alone,*
18 *are substantially similar.*” See *Knitwaves, Inc. v.*
19 *Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1002 (2d Cir. 1995)
20 (emphasis in original) (internal quotation marks omitted).
21 In making this determination, we compare the works’ “total
22 concept and overall feel.” *Gaito*, 602 F.3d at 66 (internal

1 quotation marks omitted). The copyright holder must be
2 protected not only from literal copying but also from
3 infringement that is apparent only by comparing the
4 aesthetic import of the works in their entirety. See *id.*
5 However, ideas are not protected, only their expression.
6 See 17 U.S.C. § 102(b); *Nichols v. Universal Pictures Corp.*,
7 45 F.2d 119, 121 (2d Cir. 1930) (Hand, J.); *Walker v. Time*
8 *Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986).
9 Similarly, this Court withholds copyright protection from
10 *scenes a faire*, which are "sequences of events that
11 necessarily result from the choice of a setting or
12 situation." *Williams*, 84 F.3d at 587 (internal quotation
13 marks omitted).

14 In light of these principles, we affirm the well-
15 reasoned opinion of the district court.

16 Both sets of books chronicle the adventures of a young
17 male protagonist named after the Greek hero Perseus.
18 Appellees' *Percy Jackson & the Olympians* series tells the
19 story of demigod Percy Jackson as he battles classical Greek
20 monsters while traveling all over the country with his
21 fellow supernatural friends. In Percy's world, the Olympic
22 gods live among us - they wear sunglasses, use cell phones

1 and ignore their demigod offspring. By contrast, in
2 Appellant's two novels, PJ Allen is a popular, athletic
3 young man who is whisked away in his dreams to Ancient
4 Greece where he fights mythical beasts and helps to restore
5 order to the world by recreating important events in Greek
6 mythology that have been erased from history.

7 The subject matter of these novels necessitates
8 significant reliance on Greek mythology for many characters,
9 settings and classic stories. This material has entered the
10 public domain and is not protectible. See, e.g., *Bissoon-*
11 *Dath v. Sony Computer Entm't Am., Inc.*, 694 F. Supp. 2d
12 1071, 1088 (N.D. Cal. 2010). By comparing the protectible
13 elements of the parties' works, with an eye toward the
14 "total concept and overall feel," the district court
15 properly determined that the two sets of books are not
16 substantially similar as a matter of law.

17 For the foregoing reasons, the judgment of the district
18 court is hereby **AFFIRMED**.

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20 FOR THE COURT:
21 Catherine O'Hagan Wolfe, Clerk
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