

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

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PAUL GREGORY ALLEN, TRUSTEE OF THE	:
ESTATE OF ADRIAN JACOBS,	:
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Plaintiff,	:
	:
	:
-against-	:
	:
SCHOLASTIC INC.,	:
	:
	:
Defendant.	:
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No. 10 cv 5335 (SAS) ECF CASE

**MEMORANDUM OF LAW OF PLAINTIFF PAUL GREGORY ALLEN, TRUSTEE OF
THE ESTATE OF ADRIAN JACOBS, IN OPPOSITION TO DEFENDANT
SCHOLASTIC INC.'S MOTION TO DISMISS**

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PRELIMINARY STATEMENT

In 1987, Adrian Jacobs wrote *The Adventures of Willy the Wizard - No. 1 Livid Land* (“*Willy*”), hoping to find a broader audience for the wizard stories he liked telling his friends’ children. The book was published that year with a small run. The heart and core of the story concerns a wizard who takes part in a year-long international competition with a central task of rescuing human hostages held by a community of half-human/half-animal creatures and, with the help of others, emerges victorious. The story unfolds with a detailed plot that includes unique settings, characters and incidents, and a concept and feel unusual to the fantasy genre. Thirteen years later, Scholastic Inc. (“Scholastic” or “Defendant”) published *Harry Potter and the Goblet of Fire* (“*Goblet*”), which uses the same unique concept and pattern, including similar settings, characters and incidents, resulting in a book that harkens back to *Willy*.

Scholastic moves to dismiss pursuant to Rule 12(b)(6), vehemently arguing Trustee asserts a “meritless claim.” Scholastic nevertheless concedes that Trustee’s Complaint alleges J.K. Rowling and her literary agent had access to *Willy* before *Goblet* was published and impliedly concedes – for purposes of the Motion alone – that Rowling copied *Willy* to a probative extent. Bearing in mind these concessions, the Court may consider the only grounds for Scholastic’s Motion: whether Trustee has failed to allege a plausible claim of substantial similarity. In a parallel case brought by Trustee in England against Rowling and her U.K. publisher, the Court recently ruled that the similarities in the works preclude summary judgment in the defendants’ favor, requiring trial on the merits. Given the similarities in the concept and pattern of *Willy* and *Goblet*, Trustee submits the same result is appropriate here. Trustee’s claim can be dismissed only if no reasonable juror could rule in his favor, a conclusion that cannot be reached on the basis of the submissions properly before the Court.

FACTUAL BACKGROUND AS ALLEGED IN TRUSTEE'S COMPLAINT

I. *THE ADVENTURES OF WILLY THE WIZARD – NO 1 LIVID LAND.*

Willy, published in 1987, tells the story of a Swiss wizard who enters a year-long wizarding tournament. *Willy*, p. 5, col. 1, ¶ 4; p. 3, col. 1, ¶ 6. Willy, the hero, is a famous adult wizard; he was an absent-minded dreamer when, at age fourteen, his father, who ran an angel repair shop, initiated him into the magical community by giving him the Book of Secrets, which an angel had delivered for Willy. *Id.* p. 5, col. 1, ¶ 4 - col. 2, ¶ 9. Willy went on to attend wizard college, where he studied ancient wizard history and other subjects. *Id.* p. 3, col. 1, ¶ 6.

The tale begins when Willy accidentally touches his number two magic wand and catapults himself to cloud 13. *Id.* p. 1, col. 1, ¶ 3. Fortunately, Willy carries a handy means of instant travel called “pocket *sesame*,” a jeweled dagger that Aladdin gave to Willy. *Id.* p. 1, col. 1, ¶ 5. Willy touches the dagger and – “presto” – he is walking on Precious Boulevard off Sultan’s Row on his way to Napoleon’s castle. *Id.* p. 1, col. 1, ¶ 5 - col. 2, ¶ 2.

When Willy arrives in the great hall of the castle, he sees a banner announcing, “IT IS FORBIDDEN TO CAST SPELLS WHILE YOU VISIT THE CASTLE. THE PENALTY FOR THE THOUGHT ... WILL BE BANISHMENT TO TREATMENT ISLAND.” *Id.* p. 2, col. 2, ¶ 2. Willy (who had thought of turning all the *wizards* into *lizards* as a joke) is terrified to realize that banishment to the horrible island prison is possible. *Id.* p. 2, col. 2, ¶ 1-5.

A magnificent carriage drawn by two large green panthers arrives. *Id.* p. 3, col. 1, ¶ 1. Duke Wizard Louis Dix-Sept enters the great hall where he announces “the year of the wizards’ contests.” *Id.* p. 3, col. 1, ¶¶ 5-6. He informs the competitors that they will each receive further details about the “competitions,” prizes, and penalties. *Id.* p. 3, col. 1, ¶ 6. As the Duke departs, Willy looks around and realizes that he is surrounded by wizards of all nationalities, an immense wizarding brotherhood. *Id.* p. 3, col. 2, ¶ 2. Willy is contemplating the international scope of

wizardry when Spanish wizard Pedro Matadoria alerts him that they must be on their way. *Id.* p. 3, col. 2, ¶ 3. Willy suggests taking the invisible flying swan taxi, a magical means of transport he can summon at any time. *Id.* p. 3, col. 2, ¶ 4. Because the swan taxi will not go all the way to Spain, Willy gives Pedro a gold snuff box and instructs Pedro on how to use the powder to reach his final destination. *Id.* p. 3, col. 2, ¶¶ 5-6.

Willy returns to his home in Memories Hideaway, where he oversees a community of elves and former tourists. *Id.* p. 5, col. 1. (Willy enchanted an entire family years before, and the original members and descendants make Willy's Brew, produce Swiss Wizard Chocolate, and run Willy's angel repair shop. *Id.* p. 5, col. 1, ¶¶ 3-4; p. 13, col. 1, ¶ 1.) Willy also has apprentices, Tinken, Taylor, Soldyar, and Delight (*id.* p. 1, col. 1, ¶ 1; p. 12, col. 1, ¶ 1) who protested their working conditions by giving Willy a new laboratory. *Id.* p. 1, col. 1, ¶ 1.

Once home, Willy receives instructions about the first task and retires to the bathroom, where he keeps a magical reading apparatus. *Id.* p. 8, col. 1, ¶ 1. There are various magical accoutrements such as Aqua Superba, an additive that clears the mind and recharges the system, available only to 5-star wizards. *Id.* p. 8, col. 1, ¶ 2. While relaxing in the bath, Willy feeds the instructions into his magical apparatus so he can read them: "GAIN ENTRANCE TO LIVID LAND! AND RELEASE FEMALE PRISONERS FROM ANGRY SAM'S COMPOUND. FORTY POINTS AWARDED FOR EACH PRISONER RESCUED." *Id.* p. 8, col. 1, ¶¶ 3-4. Any wizard earning 1000 stars receives life membership in Stellar Land. *Id.* p. 8, col. 1, ¶ 4.

Willy sets his apprentices to work researching Livid Land. *Id.* p. 8, col. 2, ¶ 2. They learn that Livid Land, an island off the tip of Papua, is populated by Kanganatives, who have the torsos of humans and the legs of kangaroos. *Id.* p. 8, col. 2, ¶ 3 - p. 9, col. 1, ¶ 3. Livid Land is protected by a Sky-to-Ocean barrier which can only be penetrated with a password. *Id.* p. 9, col.

2, ¶ 2. The apprentices also discover that there is an unguarded, underground tunnel accessible from the ocean floor. *Id.* p. 9, col. 2, ¶ 4. Willy and his apprentices formulate a plan to use the tunnel and penetrate the Sky-to-Ocean barrier. *Id.* p. 9, col. 2, ¶ 6.

Willy dispatches the Pixie Elf Brigade to Livid Land to learn the password. *Id.* p. 11, col. 1, ¶ 2. Once they discover it, Willy posts an elf as a spy in Livid Land. *Id.* p. 12, col. 1, ¶ 1 - col. 2, ¶ 1. The elf learns Kanganatives cannot resist chocolate. *Id.* p. 14, col. 2, ¶¶ 1-2. Through an arrangement with Angel Squadron and a flock of invisible swans, Willy makes sleep-inducing chocolate rain over Livid Land, enchanting the Kanganatives. *Id.* p. 14, col. 2, ¶ 3 - p. 16, col. 2, ¶ 3. After an apprentice charms the Italian sailor standing guard, Willy's helpers save ten of the hostages (*id.* p. 16, col. 2, ¶¶ 3-4), winning this part of the tournament. *Id.* ¶ 5.

II. HARRY POTTER AND THE GOBLET OF FIRE.

Goblet, published in 2000, is the fourth in a seven-book series that chronicles a young wizard's life at Hogwarts, a wizard school housed in a magnificent castle. Harry Potter was an absent-minded dreamer when, at age eleven, he received an invitation to attend Hogwarts and learned that his parents were wizards who were killed by the evil Lord Voldemort. *Id.* p. 20.

When Harry and his friends return to Hogwarts after their summer holiday, they gather in the Great Hall (*id.* pp. 171-73), where the central theme of the book is revealed: Hogwarts will be hosting the Triwizard Tournament, a year-long competition between wizard schools from three different countries. *Id.* pp. 186-89. The students go back to their regular schedules to await further details about the tournament and the foreign students' arrival. The French delegation, led by Madame Maxime, soon arrives in a carriage the size of a house, pulled by giant winged horses. *Id.* 242-44. Each school is to be represented by one senior student, but Harry is mysteriously chosen as a fourth competitor. *Id.* pp. 255-56, 268-71.

The year-long contest will involve three tasks. *Id.* p. 255. In the first task, each competitor faces a dragon and retrieves a golden egg, which holds a clue to the second task. *Id.* pp. 349-356, 361. When opened, the egg emits an incomprehensible sound. *Id.* pp. 365-66. Cedric, the other Hogwarts contestant, tells Harry that he should “take a bath” using the bathroom reserved for school prefects and “mull things over in the hot water.” *Id.* p. 431. The prefects’ bathroom is a magical place. *Id.* p. 459. The pool-sized tub is surrounded by taps that pour different colors and varieties of foam and bubbles. *Id.* p. 460. Still, Harry is unable to figure out how to get the clue out of the egg. *Id.* Guided by an apparition named Moaning Myrtle, Harry listens to the egg under water and hears a riddle revealing that the second task is to rescue something from a community of merpeople who live at the bottom of the Hogwarts lake. *Id.* pp. 461-65. The something, Harry later learns, is Harry’s best friend, who is held hostage along with three others. *Id.* pp. 491, 498. Harry and his friends spend the next several weeks researching and discussing how Harry can reach the bottom of the lake. *Id.* pp. 479-89. An elf named Dobby overhears two teachers talking about gillyweed, a plant that will allow Harry to breath underwater, and steals some for Harry. *Id.* pp. 490-91. Ultimately, Harry is able to reach the bottom of the lake, overcome the resistance of the merpeople and rescue two of the hostages, thus earning forty-five points. *Id.* pp. 499-503, 507.

The final task is to navigate an immense hedge maze filled with magical obstacles. *Id.* p. 551. The first person to locate and grasp the trophy in the center of the maze will be the overall winner. *Id.* p. 633. Harry and Cedric reach the trophy first and decide to grab it at the same time. *Id.* pp. 632-35. The trophy turns out to be a “portkey,” an object that, when touched, transports one instantly to another location. *Id.* p. 636. Upon touching the trophy, Harry and Cedric arrive at a graveyard where Voldemort awaits. *Id.* pp. 637-38. After a confrontation in

which his fellow competitor is killed, Harry uses the portkey to return to Hogwarts, where he receives the prize of 1000 Galleons. *Id.* pp. 638, 657-69, 710.

III. J.K. ROWLING'S ACCESS TO *WILLY*.

Adrian Jacobs authored *Willy* in 1987, after a friend encouraged him to write down wizard stories he told friends' children. *Trustee's Complaint* [Dkt No. 1] ("Compl.") ¶¶ 7, 10; *Willy*, dedication page. Jacobs approached Christopher Little, a literary agent who agreed to represent him in finding a publisher for *Willy*. *Id.* ¶¶ 10-11. Little sent Jacobs' manuscript to several publishers, but did not find one willing to accept it. *Id.* ¶¶ 12-13. Ultimately, Jacobs published *Willy* through Bachman & Turner. *Id.* ¶ 14. Still, Jacobs was hopeful that Little could find a foreign publisher, so Jacobs delivered approximately 1,000 of the published copies of *Willy* to Little. *Id.* ¶¶ 15-16. Little did not secure a foreign publisher for *Willy*. *Id.* ¶ 17.

In 1994, Little became literary agent to J.K. Rowling, author of the *Harry Potter* series. *Compl.* ¶¶ 18-19. At the time that Little and Rowling became acquainted, Rowling had, at most, completed a manuscript of *Harry Potter and the Sorcerer's Stone* ("*Stone*"), the first book in the series. *Id.* ¶¶ 18, 20. Little, his editors, and Rowling all had access to *Willy* prior to finalizing the draft of *Stone*, as well as during the writing and editing of the subsequent books in the series, including *Goblet*, the single *Harry Potter* book at issue in this case. *Id.* ¶¶ 18-21.

IV. PROCEDURAL HISTORY.

On July 13, 2010, Trustee filed a Complaint alleging that *Goblet* infringes the copyright to *Willy*, and seeking damages and ancillary injunctive relief. Trustee requested trial by jury for those issues so triable. Scholastic moved to dismiss on September 16, 2010 ("Mot.") [Dkt Nos. 8-9] on the sole ground that the two works are not substantially similar.

Since Scholastic filed its Motion, the High Court of Justice, Chancery Division, of England and Wales issued an Approved Judgment in Trustee's copyright infringement suit,

refusing to enter summary judgment against him on his claim against Rowling and U.K. publisher Bloomsbury Publishing Plc. *See* Approved Judgment, Oct. 14, 2010, attached as Ex. 1 to Declaration of Joseph A. Patella, Oct. 20, 2010 (“Patella Dec.”); *Compl.* ¶¶ 69-70. Trustee initiated the suit in England in 2009, after more than five years of correspondence between the parties. *Patella Dec.* Ex. 1, ¶¶ 8, 10.¹ After some fact and expert discovery (*id.* ¶¶ 49-79), Bloomsbury and Rowling moved for summary judgment. *Id.* ¶ 2. The court rejected defendants’ application under English law, which requires that summary judgment be granted only where “it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance.” *Id.* ¶ 11.

The court reviewed evidence regarding Rowling’s access to *Willy*, and Trustee’s expert reports and statements. *Patella Dec.* Ex. 1, ¶¶ 49-79. The court noted defendants’ unwillingness to produce certain highly relevant documents, such as the manuscripts of *Stone*, “including those incorporating Mr. Little’s suggestions for amendment, whatever they may have been,” “a series of crammed notebooks in which [Rowling] says she recorded her ideas,” and Little’s diaries (except for a single entry). *Id.* ¶ 64. The court expressed concern that defendants’ refusal to produce documents deprived Trustee of “an opportunity to test the evidence given on behalf of the defendants against the relevant documents.” *Id.* Regarding substantial similarity (*id.* ¶¶ 80-86), the court expressed reservations (*id.* ¶ 90), but found that Trustee had “a real prospect of establishing that collectively [the similarities] represent the core” of *Willy*. *Id.* ¶ 86. The court thus denied summary judgment: “the claim is far from fanciful and raises many disputes of fact and complex issues of law which are self evidently wholly unsuitable for summary determination.” *Id.* ¶ 3.

¹ Contrary to Scholastic’s assertions that Trustee waited ten years (*Mot.* at 1), Trustee brought the similarities to the attention of Rowling and Bloomsbury in 2004. *Patella Dec.* Ex. 1, ¶ 8.

ARGUMENT

I. STANDARD OF REVIEW.

In deciding a Rule 12(b)(6) motion to dismiss, the Court must “accept as true all of the factual allegations contained in the complaint” (*Bell Atlantic v. Twombly*, 550 U.S. 544, 572 (2007)), and “draw all inferences in the light most favorable to the non-moving party.” *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007). *See also Arista Records LLC v. Does*, 604 F.3d 110, 119-20 (2d Cir. 2010) (*Twombly* does not require complaint to establish *prima facie* case, nor does it impose heightened pleading standard). To defeat a motion to dismiss, a claimant’s allegations must only be plausible. *Twombly*, 550 U.S. at 555. A complaint “does not need detailed factual allegations;” the “allegations must be enough to raise a right to relief above the speculative level” (*id.*), that is, enough to make the claim “plausible” (*id.* at 570). Only the Complaint, including materials attached to or incorporated in it, may be considered on a motion to dismiss. *Rothman v. Gregor*, 220 F.3d 81, 88-89 (2d Cir. 2000).

The Court should not dismiss a copyright infringement claim unless *no reasonable juror* could find substantial similarity. *See, e.g., Lone Wolf McQuade Assoc. v. CBS Inc.*, 961 F. Supp. 587 (S.D.N.Y. 1997) (declining to hold as a matter of law that no reasonable trier of fact could find works substantially similar). Courts are cautious about deciding claims solely in reliance on their own lay opinions because “[s]ubstantial similarity is customarily an extremely close question of fact.” *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980). *See also Yurman Studio, Inc. v. Castaneda*, 591 F. Supp. 2d 471, 485 (S.D.N.Y. 2008) (Scheidlin, J.) (“[S]ubstantial similarity is customarily an extremely close question of fact....”); *Great Am. Fun Corp. v. Hosung N.Y. Trading Inc.*, 935 F. Supp. 488 (S.D.N.Y. 1996) (where “at least some of the parties’ marionettes bear a strong, if not striking similarity,” substantial similarity “should be reserved for the trier of the fact -- or at least the summary judgment stage”).

In each copyright dismissal case Scholastic cites, the issues were far more simplistic and the claims weaker than Trustee's. *See Mot.* at 10-11. In *Buckman v. Citicorp*, No. 95 Civ. 0773(MBM), 1996 WL 34158, at *3 (S.D.N.Y. Jan. 30, 1996), the court dismissed some of plaintiff's copyright claims as based on ideas, not tangible works. The court also dismissed the claim based on the one idea that plaintiff *had* expressed in tangible form: plaintiff created a credit card application form which contained only a few copyrightable elements not found in defendant's form. *Id.* at *4-5. In *Adams v. Warner Bros.*, No. 05 Civ. 5211(SLT)(LB), 2007 WL 1959022, at *4 (E.D.N.Y. June 29, 2007), the court dismissed plaintiffs' complaint which contained "no allegations" that defendants had access to plaintiffs' design. Moreover, "[t]he only similarities that the respective works share is the generalized idea of a transportation tunnel or tube and the basic cylindrical shape." *Id.* at *5. *See also Mot.* at 10-11, *citing Le Book Publ'g, Inc. v. Black Book Photography, Inc.*, 418 F. Supp. 2d 305 (S.D.N.Y. 2005) (dismissing claim that compilation infringed copyright because arrangement of listings differed); *Bell v. Blaze Magazine*, No. 99 Civ. 12342(RCC), 2001 WL 262718, at *4 (S.D.N.Y. Mar. 16, 2001) (dismissing plaintiff's infringement claim because accused magazine articles "all relate to unprotectable concepts and ideas and not Plaintiff's expression of these ideas"); *Boyle v. Stephens Inc.*, No. 97 Civ. 1351(SAS), 1998 WL 80175, at *6 (S.D.N.Y. Feb. 25, 1998) (dismissing claim that mutual fund concept infringed copyright; only similarities were between unprotected elements). Only the flimsiest of copyright cases are dismissed under Rule 12(b)(6).

By contrast, Trustee's claim sets out each required element of copyright infringement: access (*Compl.* ¶¶ 10-21), probative similarities (*id.* ¶¶ 26-30), and substantial similarities in themes and plots (*id.* ¶¶ 26-58) and in character and setting elements (*id.* ¶¶ 60-67). In *Gal v. Viacom Int'l Inc.*, 403 F. Supp. 2d 294 (S.D.N.Y. 2005), defendants moved to dismiss based

upon a lack of substantial similarity between defendants' novel and plaintiff's screenplay. The court pointed out that for purposes of dismissal, "Defendants concede their access to Plaintiff's work," but that "[the parties] do not seem to address the question of whether there are similarities 'probative of copying between the works,'" thus the court "assume[d], for the purposes of the motion, that sufficient probative similarity exists to raise the inference of actual copying." *Id.* at 299. In refusing to dismiss, the court ruled that "despite differences between the [works], when the similarities are viewed through the prism of Rule 12(b)(6) I am unable to conclude that 'no reasonable trier of fact could find the works substantially similar.'" *Id.* at 307 (citation omitted).

Scholastic would have this Court dismiss Trustee's claims now, relying heavily on attorney argument masquerading as factual matter and exceeding the page limit by shifting argument comparing the works into attorney declarations. *Declaration of Dale Cendali* ("Cendali Dec."); *Declaration of Claudia Ray* ("Ray Dec."); *Declaration of Courtney Schneider* ("Schneider Dec."). With access and probative similarity admitted, the remarkable similarities between the works preclude dismissal.

II. TRUSTEE ALLEGES A PLAUSIBLE CLAIM OF INFRINGEMENT.

A. Elements Of A Copyright Infringement Claim.

To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Feist Pub., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). With respect to copying, a claimant must first show that his work was *actually copied*. Actual copying may be established "either by direct evidence of copying or by indirect evidence, including access to the copyrighted work, similarities that are probative of copying between the works, and expert testimony." *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 137 (2d Cir. 1998), *citing Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992).

The offer of proof and analysis proceed in a recognized sequence. “*It is only after actual copying is established* that one claiming infringement then proceeds to demonstrate that the copying was improper or unlawful by showing that the second work bears “substantial similarity” to protected expression in the earlier work.” *Malibu Textiles, Inc. v. Carol Anderson, Inc.*, No. 07 Civ. 4780(SAS), 2008 WL 2676356, at *5 (S.D.N.Y. July 8, 2008) (emphasis added), *quoting Castle Rock*, 150 F.3d at 137.

Scholastic’s Motion puts only substantial similarity at issue. By acknowledging that Trustee has pleaded access (*Mot.* at 9 n.4) and remaining silent on probative similarity, Scholastic asks the Court to proceed directly from its admission of access to an analysis of substantial similarity. To reach the substantial similarity question on a Rule 12(b)(6) motion, however, the Court must first accept Scholastic’s concession that it has nothing to say at this stage about probative similarity *and must be taken to have admitted access and probative similarities – that is, actual copying – for purposes of its dismissal motion.*

Analyzing the elements of copyright infringement out of sequence would force the Court to consider whether there are sufficient allegations that the defendant has *improperly* copied a plaintiff’s work without first being satisfied that the evidence establishes a reasonable possibility that a defendant copied anything at all, which would break the normal sequence of analysis and deprive a plaintiff of the inference normally present at the substantial similarity phase. Moreover, analysis of probative similarities can be a complex process sometimes requiring dissection of text with the assistance of expert testimony. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (to determine actual copying, “analysis (dissection) is relevant, and the testimony of experts may be received...”). This process cannot be replicated at the dismissal stage, except

in the simplest of cases, before turning to substantial similarity. For present purposes, the Court must, therefore, assume that actual copying has been shown.

B. Trustee Alleges A Plausible Claim Of Actual Copying.²

1. Actual Copying – Access.

Access is generally considered first. “[A]ccess through third parties connected to both a plaintiff and a defendant may be sufficient to prove a defendant’s access to a plaintiff’s work.” *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988). There is no question that Little became Rowling’s literary agent about seven years after *Willy’s* publication. As Trustee alleges here (*Compl.* ¶¶ 10-21), a plaintiff may establish access with “evidence that a third party with whom both the plaintiff and defendant were dealing had possession of plaintiff’s work.” 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.02[A] (2010). *See also Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 53 (2d Cir. 2003) (citation omitted) (access means that author or his intermediary had reasonable possibility of seeing prior work).

Scholastic recognizes Trustee has alleged access (*Mot.* at 9 n.4), although it also complains about its own admission and, relying on facts outside the pleadings, claims that it could “negat[e] any claim of prior access.” *Id.* at 12 n.6. Scholastic’s naked assertion that it could “easily establish” that Rowling completed *Stone* before she ever met Little (*id.*) – presumably by providing her manuscripts – flies in the face of the English court’s conclusion that “Ms Rowling has declined to disclose the manuscripts of [*Stone*].” *Patella Dec.* Ex. 1, ¶ 64. Moreover, Scholastic admits access, and cannot go outside the dismissal record or ask the Court to draw inferences in its favor. *In re NYSE*, 503 F.3d at 95.

² Trustee relies primarily on indirect evidence of actual copying (*Compl.* ¶¶ 24-58), but does not limit his claim exclusively to indirect evidence.

2. Actual Copying – Probative Similarities.

For good reason – the complexity of proof normally offered on the issue – Scholastic’s Motion avoids discussion of probative similarity, apparently conceding it. In an analysis adopted by this Circuit, Professor Alan Latman describes probative similarities:

A common form of indirect proof of copying--but far from the only form--is a showing of defendant’s opportunity to come into contact with plaintiff’s work and such similarities between the works which, under all the circumstances, make independent creation unlikely. Such similarities may or may not be substantial. They are not, however, offered for their own sake in satisfaction of the requirement that defendant has taken a substantial amount of protected material from the plaintiff’s work. Rather, they are offered as probative of the act of copying and may accordingly for the sake of clarity conveniently be called “probative similarity.”

Laureyssens, 964 F.2d at 140, quoting Latman, “Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 Colum. L. Rev. 1187, 1214 (1990). Such similarities “at least raise a question of actual copying” (*Laureyssens*, 964 F.2d at 140), and need not rise to the level of copyright infringement; their purpose is solely to show that it is unlikely that two works were created independently. Latman, 90 Colum. L. Rev. at 1214.

Although the standard for establishing probative similarity is lower than for substantial similarity, probative similarity analysis typically requires close examination of “the entire work, not just the protectable elements.” *Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 123 (2d Cir. 1994), citing Latman, 90 Colum. L. Rev. at 1214. In determining whether two works contain probative similarities, courts may “dissect” the works to see whether linguistic features of the texts indicate that the later work was likely created with reference to the earlier one, a step frequently requiring expert analysis. See *Arnstein*, 154 F.2d at 468. Because similarities probative of copying might not be immediately obvious to a lay observer, expert testimony can be crucial to a proper analysis. In *Arnstein*, the Second Circuit held that the “trier of the facts must determine whether the similarities are sufficient to prove copying. On this

issue, analysis (dissection) is relevant, and the testimony of experts may be received....” 154 F.2d at 468. Following *Arnstein*, *Laureyssens* found fault with the trial record for *not* including expert testimony, “which would help to resolve whether a question of actual copying has been shown.” *Laureyssens*, 964 F.2d at 140 & n.9. This Court further explained:

Evidence admissible on the issue of “probative similarity” includes expert testimony “dissecting” the two works and discussing the works’ relationships to other earlier works, for the purpose of illuminating whether similarities between the two works are more likely due to copying or independent creation.

McDonald v. Multimedia Entm’t, Inc., No. 90 Civ. 6356(KC), 1991 WL 311921, at *2 (S.D.N.Y. July 19, 1991).

Trustee submits that in this case, probative similarity is alleged and not disputed. Should the case proceed to discovery and summary judgment or trial, fact discovery and expert testimony would be required for a proper consideration of probative similarities, including questions regarding linguistic features of the texts, the relationship of the works to earlier works, typicality in the fantasy literature genre, unique ideas and elements shared between the works, and related questions not properly addressed without experts. Hence, Trustee urges the Court to accept Scholastic’s concessions and consider the sole question presented, substantial similarity, with the understanding that – for purposes of the Motion – Scholastic admits actual copying.

C. Trustee Alleges a Plausible Claim of Improper Copying.

1. Standards for Determining Substantial Similarity.

Scholastic’s sole argument for dismissal is that Trustee’s Complaint does not sufficiently allege substantial similarities between *Willy* and *Goblet*. In determining whether two works are substantially similar, courts apply the ordinary observer test, which asks “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted

work.” *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 309 (S.D.N.Y. 1999) (citations omitted).³ In *Castle Rock*, the Court of Appeals ruled that “substantial similarity”:

[R]equires that the copying [be] quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred. The qualitative component concerns the copying of expression, rather than ideas The quantitative component generally concerns the amount of the copyrighted work that is copied, which must be more than ‘de minimis.’

150 F.3d at 138, quoting *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997). “Indeed, in cases of alleged copyright infringement it has long been appropriate to examine the quantitative and qualitative degree to which the allegedly infringed work has been borrowed from, and not simply the proportion of the allegedly infringing work that is made up of the copyrighted material.” *King v. Innovation Books*, 976 F.2d 824, 829-30 (2d Cir. 1992), citing *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 565-66 (1985). “It is only when the similarities between the protected elements of [the plaintiff’s work] and the allegedly infringing work are of ‘small import quantitatively or qualitatively’ that the defendant[s] will be found innocent of infringement.” *Williams v. Crichton*, 84 F.3d 581, 588, 590 (2d Cir. 1996). As put by Judge Learned Hand, “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir.), cert. denied, 298 U.S. 669 (1936) (film substantially copied protected elements of play).

Where, as here, a later work appropriates the “heart and core” of an earlier work, they are substantially similar. *Smith v. Little, Brown & Co.*, 245 F. Supp. 451, 459 (S.D.N.Y. 1965). In *Little, Brown*, the plaintiff sought an injunction prohibiting publication of a novel about Irishwoman Grania O’Malley, accusing defendant of plagiarism. The court explained that

³ Scholastic relies heavily on *Hogan*; however, it is a summary judgment case in which the court received evidence about access (48 F. Supp. 2d at 308-09) and what elements of the works’ characters were unprotectable ideas in the public domain (*id.* at 312 n.5). *Hogan* thus teaches that in-depth factual analysis should be reserved, at the least, for summary judgment.

“[b]oth quantity and quality are to be considered. How much of plaintiff’s work has been copied and how important is the portion copied to the work as a whole?” *Id.* at 458. With respect to quantity, the court determined that only a small portion of the plaintiff’s work had been copied, and that it constituted only a relatively small part of the accused work. *Id.* at 459. The court acknowledged that portions of plaintiff’s work did not appear in defendant’s, that defendant “invented variations of her own upon the incidents related by plaintiff,” and that defendant created some characters of her own. *Id.* Yet, the quality of the plaintiff’s work – its “heart and core” or “concept and pattern” – was appropriated:

[T]hat of a young girl, rugged and uncouth, skilled in horsemanship and [] marksmanship, who becomes of age, who celebrates that event with revelry, and very shortly thereafter, by reason of her father’s unexpected death, emerges, after a political struggle within the clan, as the chief and leader of her people.

Id. at 459. On this basis, the *Little, Brown* court denied defendant’s motion to dismiss.

As alleged in the Complaint and detailed here, *Goblet* repeats the “heart and core” of *Willy*. *Willy*’s story is that of a wizard, initiated late into the world of magic, who enters a year-long international competition, must use a bathroom equipped with magical gimmicks to decipher the competition’s main challenge, and, with assistance from others, rescues human hostages from half-human/half-animal guards, emerging victorious to receive a valuable reward. *Goblet*’s concept and pattern is the same. *Compl.* ¶¶ 24-68. That portions of *Willy* do not appear in *Goblet*, that Rowling reshaped certain aspects and varied Jacobs’ plot points and other elements, and that she created characters of her own does not insulate Scholastic from liability.

Where a work contains both protectable and non-protectable elements, courts may apply the “more discerning ordinary observer” test. *Folio Impressions Inc. v. Byer Cal.*, 937 F.2d 759, 767 (2d Cir. 1991). Pursuant to this test, the fact-finder focuses on similarities that “relate to protectible material.” *Id.* at 765. Under either version of the test, the Court considers whether

plot, characters, setting, sequence, and total concept and feel of the works are similar. See *Hogan*, 48 F. Supp. 2d at 311-13. In applying the more discerning ordinary observer test, the court explained that “[e]ven when two works are dissimilar in many respects, substantial similarity between them may still be found where their similarities are important in the overall context, whether qualitatively or quantitatively.” *Id.* at 309, citing *Williams*, 84 F.3d at 588.

Scholastic argues that some elements of *Willy* and *Goblet* are unprotectable as common to the genre, in the public domain or *scènes à faire*. *E.g.*, *Mot.* at 19-22. Identifying such elements for the purpose of filtering them out would require the more discerning ordinary observer test, making the case inappropriate for dismissal, since the Court cannot consider facts outside the record or draw inferences in Scholastic’s favor.⁴ See *In re NYSE*, 503 F.3d at 95. Similarly, Scholastic’s argument that any element appearing in the first three *Harry Potter* books must be identified and disregarded (*Mot.* at 12) is incorrect for two reasons. First, those works are not properly before the Court on this Motion to Dismiss.⁵ Second, Trustee has alleged that Rowling gained access to *Willy* before finalizing the manuscripts for any of the books (*Compl.* ¶

⁴ In *Odegard Inc. v. Safavieh, Inc.*, 398 F. Supp. 2d 275, 277 (S.D.N.Y. 2005), on summary judgment, the court found no substantial similarity after considering evidence that plaintiff’s carpet design contained elements in the public domain, including the design of an antique kimono and border designs commonly used in carpets before the mid- to late 1990s. Trustee submits that expert analysis is appropriate and necessary under the Second Circuit’s “more discerning ordinary observer test” for the purpose of filtering out which elements of *Willy* are not common to the genre, in the public domain or *scènes à faire*. See 4 Nimmer § 13.03[E][2] (expert analysis could benefit fact-finder in determining substantial similarity).

⁵ Scholastic’s view that the Court may rely upon works other than *Willy* and *Goblet* in deciding the Motion, based on Trustee’s single reference to those works in the Complaint (*Mot.* at 8 n.3), is misplaced. On dismissal, the Court must limit its analysis to the allegations and “any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in it by reference... and documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit.” *Rothman*, 220 F.3d at 88-89. Material outside the complaint may be considered only “where the complaint ‘relies heavily upon its terms and effect,’ which renders the document ‘integral’ to the complaint.” *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). In addition to the English court’s decision, the materials properly before the Court at this time are the Complaint, the briefs, *Willy* and *Goblet*.

20), an allegation the Court must accept on a motion to dismiss. *Twombly*, 550 U.S. at 572. Assuming Rowling copied from her own earlier works in producing *Goblet*, that fact would not insulate any copyright infringement in *Goblet*, to the extent Rowling’s earlier works copied from *Willy*.

2. Trustee Alleges a Plausible Claim of Substantial Similarities Between *Willy* and *Goblet*.

Although Scholastic claims in at least three places that the *only* similarity between the two works is the *idea* of a wizard competition (*Mot.* at 1, 12, 13), Scholastic offers page after page of intricate factual distinctions between other apparently similar elements. Scholastic’s detailed attempt to distinguish numerous incidents in *Willy* from similar incidents in *Goblet* – going so far as to distinguish the shape of the tubs, the color of the walls, and the specific magical mixtures available in the bathrooms that play a central role in both plots (*id.* at 22) – belies Scholastic’s argument that the two works share nothing more than an underlying idea. To the contrary, the “heart and core” (*Little, Brown, supra*) of *Willy*, comprised of protectable plot, sequence, characters, setting, theme, and total concept and feel, is appropriated in *Goblet*.

a. Plot and Sequence.

The plots and sequences of *Willy* and *Goblet* provide the clearest examples of the similarity between the works.⁶ Both take place around the same event, a year-long wizard competition. *Willy*, p. 3, col. 1, ¶ 6, p. 8, col. 1, ¶ 4; *Goblet*, pp. 186-89, 254-55. That wizards might compete to demonstrate their prowess is, perhaps, an idea. But the competitions in both works are expressed similarly with the same structure: they are year-long, multi-event, international tournaments comprised of side-by-side, non-aggressive tasks orchestrated and

⁶ The English court acknowledges, despite reservations, that Trustee “has a real prospect of establishing” that five shared main elements and 22 sub-elements “collectively represent the core of [*Willy*’s] architecture.” *Patella Dec.* Ex. 1, ¶ 86.

scored for points by an overseeing body.⁷ *See id.* Both contemplate a reward tied to 1000 units. *Willy*, p. 8, col. 1, ¶ 4; *Goblet*, p. 188. The lengths of the tournaments differ in one minor respect, as Scholastic observes: the tournament in *Goblet* occupies a school year, while the tournament in *Willy* presumably takes a full year. *Schneider Dec.* ¶ 4. This difference does not make the tournament in *Goblet* an original expression. *See Lone Wolf*, 961 F. Supp. at 594-95 (immaterial differences, such that one character “drives a mud splattered white Dodge Ram” while the other “drives a clean blue or gray pick up,” do not detract from substantial similarity).

The inauguration of each competition further shows the similarity of expression. In each book, the announcement takes place in the great hall of a castle. *Willy*, pp. 2-3; *Goblet*, pp. 171-73, 186-89. The intended competitors in each book are wizards from a variety of real-world countries.⁸ *Id.* In each book, the competitors, having heard the announcement, return to their normal lives to await further news of how the competition will proceed. *Id.* Even the texture of each competition is similar; in each, an important French wizard causes a stir by arriving in an ornate carriage drawn by fantastical creatures. *Willy*, p. 3, col. 1, ¶¶ 1-5; *Goblet*, pp. 242-44.

Plot similarity can be seen in the single task⁹ portrayed in *Willy* compared to the second task in *Goblet*, both involving the rescue of hostages. *Willy*, p. 8, col. 1, ¶ 4; *Goblet*, pp. 491, 498. *Goblet* contains scenes and tasks not found in *Willy*, but the extra material in *Goblet* is not relevant to the infringement inquiry. While it may be “apparent that the portion of plaintiff’s

⁷ The scoring systems for both tournaments tasks are substantially similar, primarily involving numbers in the 40s. *See Willy*, p. 8, col. 1, ¶ 4; *Goblet*, pp. 506-07.

⁸ Scholastic claims that *Willy* has “no apparent competitors” (*Mot.* at 13), but the reader meets several potential candidates, Gambling Kentucky and Pedro Matadoria, and the great hall of Napoleon’s Castle where the contest is announced “revealed a dramatic scene. There were wizards everywhere.” *Willy* p. 2, col. 2, ¶¶ 2, 6; p. 3, col. 2, ¶ 3.

⁹ Both works contemplate a multi-event tournament. *Goblet* p. 187 (“three magical tasks”); *Willy* p. 3, col. 1, ¶ 6 (“year of the wizards’ contests”) (emphasis added); *id.* p. 16, col. 2, ¶ 5 (“[Willy] had won *this particular wizard’s test* . . .”) (emphasis added).

manuscript which [the defendant] copied constituted only a relatively small part of [the defendant's] book ... that is not the test. The question is whether [the defendant] appropriated a material and substantial portion of plaintiff's work." *Little, Brown*, 245 F. Supp. at 458.

Both tasks get off to a similar start when the main character mulls the challenge over in the bath.¹⁰ *Willy*, p. 8, col. 1, ¶ 1 - col. 2, ¶ 1; *Goblet*, pp. 458-66. Willy uses "Aqua Superba," a green additive available only to 5-star wizards. *Willy*, p. 8, col. 1, ¶ 2. Harry adds pink, blue, white, and purple additives found only in the prefects' bathroom. *Goblet*, p. 460. During the bath, each wizard learns the nature of the task – to rescue human hostages from a community of half-human, half-animal creatures who reside in an isolated location protected by a physical barrier. *Willy*, p. 8, col. 1, ¶ 4; *Goblet*, pp. 463-64. (Harry learns that he must rescue something, later finding out that the something is a hostage.)

Each wizard spends the next several weeks working with helpers to overcome the central difficulty of the task, which is to breach the physical barrier that protects the community of half-human, half-animal creatures, free the hostages and earn points. *Willy*, p. 8, col. 2, ¶ 1 - p. 9, col. 2, ¶ 6; *Goblet* pp. 479-89. Willy does not know how to penetrate the Sky-to-Ocean barrier, and Harry needs a plan to survive under water. *See Willy* p. 9, col. 2, ¶ 2; *Goblet* p. 481. Through friends who conduct library research, strategize, and gather information by spying and eavesdropping, each wizard is able to overcome the obstacle. Willy learns the password to the Sky-to-Ocean barrier and forms a plan to put the Kanganatives to sleep, and Harry receives

¹⁰ Scholastic claims "a bathroom is a stock setting that is not protectable." *Mot.* at 22, citing *Bill Diodato Photography, LLC v. Kate Spade LLC*, 388 F. Supp. 2d 382, 392 (S.D.N.Y. 2005). In *Diodato*, the court granted summary judgment because the idea of showing a woman's feet as she sits in a bathroom to highlight fashion accessories was not new. *Id.* Trustee does not assert the exclusive right to use a bathroom as an element of the setting. Instead, Trustee points to the similar role that each bathroom plays in the *unfolding plots*, as the place where the protagonist learns his task is to rescue something from a community of magical creatures.

gillyweed, which allows him to breathe under water. *See Willy* p. 8, col. 2, ¶ 1 - p. 9, col. 2, ¶ 6; p. 12, col. 1, ¶ 1; p. 14, col. 2, ¶ 1-2; *Goblet*, pp. 481-492.

Scholastic attempts to distinguish the tasks by focusing on granular detail. For instance, Scholastic observes that Kanganatives and merpeople – despite their half-human, half-animal nature – are different in appearance. *See Ray Dec.* at ¶ 6. The court did not consider distinctions at this level to be significant in *Lone Wolf*, 961 F. Supp. at 594-95 (*see supra*).¹¹

Scholastic argues that Harry’s friends research more extensively than Willy’s apprentices. *Mot.* at 14-15. The distinction fails. *Compare Willy*, p. 9, col. 1, ¶ 5 (“I have sent Black Reply Paid Message to Zoto in North Ceylon. He has a library of reference books on uncharted lands and rivers.”) *with Goblet*, p. 485-86 (“[Harry] sat with Hermione and Ron in the library ..., tearing feverishly through page after page of spells....”). Likewise, Scholastic notes that Harry received some unsolicited advice, while Willy only received help he requested. *Mot.* at 15. This argument ignores that Harry, like Willy, received help by request (*see, e.g., Goblet*, p. 482) and that both wizards *required* considerable assistance.

b. Characters.

Unlawful appropriation is further established by the similarities between some of the characters. *See Hogan*, 48 F. Supp. 2d at 311-13. Both protagonists are famous male wizards, initiated late into wizarding (in pre-/early adolescence), who receive formal education in wizardry, and are chosen to compete in year-long wizard competitions.¹²

The two characters do bear some differences. Harry is a teenager, and Willy is an adult. Harry is the more fully developed subject of a seven-volume series, and Willy is the more

¹¹ The English court acknowledges “the rescue of humans ... apparently held captive by a community of half-human, half-animal creatures” is a shared element. *Patella Dec.* Ex. 1, ¶ 37.

¹² The English court further acknowledges that the allegation that “both characters contrast sharply with the image of an elderly, all-powerful, all-knowing wizard of the type found in many previous stories” could not be disregarded on summary judgment. *Patella Dec.* Ex. 1, ¶ 67.

quickly fashioned hero of a single, short volume. But similarities between Willy and Harry need not be total to support a claim of copyright infringement. The standard that Scholastic cites regarding whether two characters are similar (*Mot.* at 19) can be traced to *Warner Brothers, Inc. v. American Broadcasting Companies, Inc.*, 530 F. Supp. 1187, 1193 (S.D.N.Y. 1982). At issue in *Warner Brothers* was a potential violation of the *character* copyright in Superman, a character with a stand-alone copyright that does not depend on the storyline. *Id.* Trustee does not claim a copyright in the *character* Willy, nor does Trustee claim that the character Harry, by himself, infringes the character Willy. Rather, the similarities between Willy and Harry are evidence that *Goblet*, as an entire work, infringes *Willy* as an entire work. In this context, the similarities between the two main characters are significant. Furthermore, there are other characters that bear similarities as alleged in the Complaint (*e.g.*, ¶ 38).

c. Setting.

Willy and *Goblet* portray magical worlds set within real-world Europe. *Willy* includes descriptions of wizarding life, many of which appear in *Goblet*. The opening paragraph of *Willy* introduces Willy's apprentices, who protested then changed their working conditions. *Willy*, p. 1, col. 1, ¶ 1. This expression is picked up in *Goblet*, as house elves protest their working conditions. *Goblet*, pp. 375-84.

Magical means of transportation further demonstrate the similar settings. Willy travels through a chilly cloud and escapes using pocket sesame, an object that when touched will – like a “portkey” (*e.g. Goblet*, pp. 73, 635-36, 669) – whisk him to another location. *Willy*, p. 1, col. 1, ¶ 5 - col. 2, ¶ 2. Both *Willy*'s Swan taxi and *Goblet*'s Knight Bus are systems of transportation a wizard can summon at any time that explicitly evoke real-world public transportation. *See Willy*, p. 3, col. 2, ¶ 4-6; *Goblet*, p. 126. Scholastic would distinguish these means of transport by noting their different appearance. *Ray Dec.* ¶ 13. Nevertheless, the systems function similarly.

Scholastic also notes that Floo powder in *Goblet* is used to access the Floo network of chimneys, while snuff in *Willy* does not require a network of chimneys. *Ray Dec.* ¶ 15. Yet, both involve wizards carrying powder in pocket-sized containers and using it to transport themselves magically from one place to another. *See Willy*, p. 3, col. 2, ¶ 6, *Goblet*, p. 47.

Each book involves formal education for wizards that mirrors education in the real world. *Willy*, p. 3, col. 1, ¶ 6; p. 10, col. 2, ¶ 3; *Goblet*, p. 85. Each wizard studies wizard history. *Willy*, p. 3, col. 1, ¶ 6; *Goblet*, p. 234. Both works discuss a terrifying prison where wizards who violate regulations are detained and punished harshly. *Willy*, p. 2, col. 2, ¶¶ 2-8; *Goblet*, p. 23. Both works also portray special hospitals for wizard illnesses, including mental illness. *Willy* goes to Hospital Space to receive treatment for the Wizard Woes. *Willy*, p. 10, col. 2, ¶¶ 1-2. Likewise, parents of a student in *Goblet* are treated at St. Mungo's Hospital for Magical Maladies and Injuries for insanity brought on by magical torture. *Goblet*, p. 603. Scholastic's assertion that these hospitals are not similar (*Ray Dec.* ¶ 16) intrudes on the jury's domain.¹³

Scholastic tries to distinguish the similarities between the works and to portray the similarities as *scènes à faire*, for instance arguing that the magical town known for its brewing and candy manufacturing in *Goblet* differs from the magical town known for its brewing and chocolate manufacturing in *Willy*. *Mot.* at 22-23 (noting that “Hogsmeade looked like a Christmas card” with “little thatched cottages ... covered in a layer of crisp snow,” while the bungalows in *Willy* “melted falling snow on impact”). Nonetheless, the sheer magnitude of the taking adds up. Rowling's ability to reshape Jacobs' expressions cannot strip Jacobs' copyright:

An original story once passed on to another gifted with facile craftsmanship can conceivably be reshaped and channelled [*sic*] toward different narrative

¹³ The English court discusses overlapping aspects of the two works, noting the parties' dispute regarding the uniqueness of these aspects, and concludes that “it is quite impossible to resolve disputes of this kind on a summary judgment application.” *Patella Dec.* Ex. 1, ¶¶ 39-40, 70, 72.

objectives, once being possessed of the seminal burning sparks with which to feed the literary fire. The extent of such reshaping should not exonerate the unauthorized taking of an author's work.

Charell v. Quicksilver Productions, Inc., 1983 WL 14925, at *4 (N.Y. Spec. Term 1993) (declining to dismiss claim that a book infringed a one-page narrative outline the plaintiff submitted to the same parties who later published the book).

d. Themes.

Both works contain similar themes such as friendship, teamwork, and the value of personal ingenuity. Another shared theme is the international scope and unity of the wizard community. Willy arrives at Napoleon's Castle seeing "wizards of all races" in their native dress, including "wizards from Ivory Coast and Delhi," and is struck by "the immensity of the Wizard brotherhood." *Willy*, p. 3, col. 2, ¶ 2. His friends and fellow competitors include wizards from such places as China and Spain. *Id.* ¶¶ 2-3. Likewise, when arriving at the Quidditch World Cup, Harry sees "African wizards" in "long white robes," and contemplates "how many witches and wizards there must be in the world." *Goblet*, pp. 81-82. Harry also learns that there are wizard schools in other countries, which had not occurred to him before. *Id.* p. 85.¹⁴ The purpose of the Triwizard Tournament is to strengthen international wizarding bonds. *Id.* p. 187.

e. Total Concept and Feel.

Ultimately, *Willy* and *Goblet* feel similar. Unlike some notable cases where works at issue fell into different genres – for instance, in *Williams*, one book was a children's book and the other an adult thriller (84 F.3d at 589) – the two books here are both fantasy literature for children. They both have the same goal of immersing children in a magical world where fantasy and reality coexist, and in the quest for success of the central wizard hero.

¹⁴ The English court analyzes five main elements and 22 "sub-plots, themes, and incident" of *Willy* and *Goblet*, ultimately concluding that Trustee's claims of similarity in "plots and themes" could not be resolved on summary judgment. *Patella Dec. Ex. 1*, ¶¶ 28-47, 86.

Whether a casual reader of the two books would recognize *Willy* in *Goblet* given the differing lengths of the works, the quality of Rowling's additional material, and the challenges of Jacobs's writing style can be answered, in part, by borrowing the concept of reverse confusion from Trademark Law. "[R]everse confusion occurs when the junior user's advertising and promotion so swamps the senior user's reputation in the market that customers are likely to be confused into thinking that the senior user's goods are those of the junior user: the reverse of traditional confusion." 4 McCarthy on Trademarks and Unfair Competition § 23:10 (4th ed.). See also *Banff, Ltd. v. Federated Dept. Stores, Inc.*, 841 F.2d 486, 490 (2d Cir. 1988). A similar phenomenon is present here. Anyone familiar with *Goblet* who read *Willy*, not knowing *Willy* had been written first, would conclude that *Willy* infringed *Goblet*, or at least the central competition in *Goblet*. The similarities in plot, characters, setting, themes, concept and feel would lead the ordinary observer to conclude that Jacobs had summarized from Rowling, changing a few elements to create the appearance of originality.

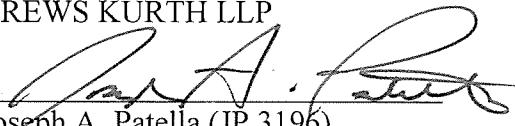
CONCLUSION

The Second Circuit has stated that "[i]t is only when the similarities between the protected elements of plaintiff's work and the allegedly infringing work are of 'small import quantitatively or qualitatively' that the defendant will be found innocent of infringement." *Williams*, 84 F.3d at 588 (citations omitted). In Trustee's case in England, although expressing doubts about Trustee ultimately prevailing, the Court, applying a summary judgment standard similar to the one that would be applicable here, held that summary judgment could not be granted and has allowed Trustee's case to advance to trial. *Patella Dec. Ex. 1*. Where Scholastic's Motion concedes Rowling copied from *Willy* and Trustee shows that such a large portion of the material in *Willy* is mirrored in *Goblet*, it would be error for the Court to conclude that no reasonable jury could find *Goblet* substantially similar to *Willy*.

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