Dale M. Cendali
Claudia E. Ray
Courtney L. Schneider
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Tel: 212-446-4800
Fax: 212-446-4900

Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL GREGORY ALLEN, TRUSTEE OF THE ESTATE OF ADRIAN JACOBS,	:	
Plaintiff,	:	10 Civ. 5335 (SAS)
- against -	:	ECF Case
SCHOLASTIC INC.,	:	
Defendant.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT SCHOLASTIC INC.'S MOTION TO DISMISS

PRELIMINARY STATEMENT

Seeking to avoid dismissal, Plaintiff Paul Gregory Allen ("Allen") tries a little magic. For his first act, Allen attempts to make issues appear where none exist, spending much of his opposition to Defendant Scholastic Inc.'s ("Scholastic") motion to dismiss, dated October 20, 2010 (Plaintiff's "Opposition"), addressing "access" and "probative similarity," which Scholastic has not put at issue for purposes of its September 16, 2010 motion (Defendant's "Motion"), and referring to an interlocutory U.K. court decision. For his next act, Allen tries to make similarities between *The Adventures of Willy the Wizard -- No 1 Livid Land* ("*WTW*") and *Harry Potter and the Goblet of Fire* ("*Goblet*") appear out of thin air by artful mischaracterizations of the plots, characters, settings, themes and total concept and feel of both books. For his final act, Allen tries to make material differences between *WTW* and *Goblet* disappear, using sleight of hand to gloss over the specifics of *WTW* and *Goblet*. But Allen is no wizard, and his magic act is nothing more than smoke and mirrors. Ultimately, Plaintiff cannot establish that *WTW* and *Goblet* are substantially similar, and this copyright infringement action should be dismissed.

ARGUMENT

I. Plaintiff Attempts To Avoid Dismissal By Raising Irrelevant Issues

In this Motion, Scholastic assumes *arguendo*, solely for the purposes of the Motion, both access and probative similarity, and focuses instead on the critical point that Plaintiff is unable to establish that *Goblet* is substantially similar to *WTW*.[1] Plaintiff, however, attempts to obfuscate this clear legal issue by devoting pages of his Opposition to factual issues with respect to access

[1] Probative similarity, a means of establishing copying in fact, is not a part of the substantial similarity analysis. *See Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 123 (2d Cir. 1994).

and probative similarity.[2] *See* Pl.'s Opp. 10-14. His attempt is unavailing. In fact, even if this Court were to assume that Ms. Rowling avidly read *WTW* over a pot of tea (which she did not), this case still warrants dismissal as Plaintiff cannot show substantial similarity of any protectable expression. *See Blakeman v. The Walt Disney Co.*, 613 F. Supp. 2d 288, 305 (E.D.N.Y. 2009) (granting dismissal where, "even assuming *arguendo* that probative similarities do exist between the two works and there was actual copying," plaintiff could not demonstrate substantial similarity).

Plaintiff also attempts to escape dismissal by wrongly introducing an extraneous interlocutory foreign order relating to his copyright infringement case in the U.K. against Bloomsbury Publishing PLC and J.K. Rowling. *See* Pl.s' Opp. 7-8. That foreign opinion is irrelevant here because it involves different parties, different standards of law and does not constitute a final judgment.[3] *See Maersk, Inc. v. Neewra, Inc.*, No. 05 Civ. 4356, 2010 WL 2836134, at *12 (S.D.N.Y. July 9, 2010) (no weight given to foreign adjudication where defendant was not party to action and ruling did not constitute final judgment); *Gordon and Breach Science Publishers S.A., STBS, Ltd. v. Am. Inst. of Physics,* 905 F. Supp. 169, 178-79 (S.D.N.Y. 1995) (foreign judgment could not be considered where parties in U.S. action were not

[2] Plaintiff's repeated claim that Scholastic has conceded access is wrong. Defendant only assumed the elements of access and probative similarity *arguendo*, to allow the Court to focus on the dispositive legal issue in this case.

[3] Plaintiff also mischaracterizes the U.K. decision. Although Mr. Justice Kitchin declined to discharge the case at this time, focusing on factual issues regarding access which are not present here, he explained that "the similarities upon which Mr[.] Allen relies seem to me to constitute ideas which are relatively simple and abstract and I strongly incline to the view that they are at such a high level of generality that they fall on the ideas rather than the expression side of the line." *See* Decl. of J. Patella dated Oct. 20, 2010 ("Patella Dec."), Ex. 1 ¶ 86. He concluded that "it is highly improbable" that Allen's copyright claim will succeed and indicated that he would require Allen to post a bond in order to be permitted to continue with the case. *Id*. at ¶ 90.

parties in foreign action and there were different standards of law); *Scheiner v. Wallace*, 832 F. Supp. 687, 693 (S.D.N.Y. 1993) (effect will only be given to final judgment on the merits from foreign court). Moreover, the U.K.-law based decision that Plaintiff cites is inapposite as this case involves U.S. substantive and procedural law. *See Black & Decker Corp. v. Sanyei Am. Corp.*, 650 F. Supp. 406, 409 (N.D. Ill. 1986) (intellectual property issues involve "separate and independent rights arising from the unique laws of each nation").

II. Motion To Dismiss Can Be Decided Without Further Discovery Or Experts

Seeking to avoid dismissal, and to obtain uniquely private information regarding Ms. Rowling's writing process, Plaintiff repeatedly claims, without citing any relevant cases, that discovery is needed. In fact, "[w]hen a court is called upon to consider whether the works are substantially similar, no discovery or fact-finding is typically necessary, because 'what is required is only a visual comparison of the works.'" *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (quoting *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991)). Because no amount of discovery will change the content of *WTW* and *Goblet*, costly and burdensome fact discovery is unnecessary to decide this case.

Plaintiff also contends, without support, that experts are necessary to decide the issue of substantial similarity. This assertion is wrong. Courts routinely assess substantial similarity, whether under the "ordinary observer" test or the "more discerning" test, without expert opinion. *See Gaito*, 602 F.3d at 67-69 (without relying on experts, Court found that architectural designs were not substantially similar as they shared only generalized ideas); *Telebrands Corp. v. Del Labs., Inc.*, No. 09 Civ. 1001, 2010 WL 2541218, at *9-10 (S.D.N.Y. June 15, 2010) (granting defendant's motion to dismiss based on lack of substantial similarity without expert opinion where court found that allegedly similar features were public domain); *Boyle v. Stephens*, No. 97

Civ. 1351, 1998 WL 80175, at *4-6 (S.D.N.Y. Feb. 25, 1998) (finding no substantial similarity without expert opinion).

In addition, Plaintiff tries to distinguish the numerous cases on which Scholastic relies, *see* Motion 10-11, where courts in this Circuit dismissed copyright infringement claims based on a lack of substantial similarity, arguing that those cases are "more simplistic and the claims weaker" than the issue here. Pl.'s Opp. 9. But those cases, which are no more "weak" than this one, stand for the established proposition that dismissal is warranted where the only similarities consist of unprotectable ideas. *See Bell v. Blaze Magazine*, No. 97 Civ. 0773, 2001 WL 262718, at *4-5 (S.D.N.Y. Mar. 16, 2001) (defendant's use of general ideas such as hip hop and lengthy sentences for drug crimes in its magazine articles did not support copyright infringement claim); *Le Book Publ'g, Inc. v. Black Book Photography, Inc.*, 418 F. Supp. 2d 305, 309-10 (S.D.N.Y. 2005) (dismissing plaintiff's copyright infringement claim where there were distinct differences between the works' protectable expression); *Boyle*, 1998 WL 80175, at *6 (finding no substantial similarities between the copyrightable elements of the parties' brochures); *Buckman v. Citicorp*, No. 95 Civ. 0773, 1996 WL 34158, at *5 (S.D.N.Y. 1996) (granting motion to dismiss where the only similarities between the parties' credit card applications amounted to uncopyrightable ideas); *Adams v. Warner Bros.*, 05-5211, 2007 WL 1959022, at *4-5 (E.D.N.Y. June 29, 2007) (dismissing plaintiff's copyright claim where the only similarity was the idea of transportation). Furthermore, Plaintiff has not offered any relevant cases where the works at issue shared such general ideas and yet avoided dismissal.

III. Plaintiff's Vague Generalizations Highlight Lack Of Substantial Similarity

Whereas Scholastic's detailed Motion and declarations examine each alleged similarity in the Complaint, Plaintiff avoids discussing the actual texts and submits no declarations or charts evidencing that *Goblet* copied protectable expression from *WTW*. Plaintiff's utter lack of

evidence of substantial similarity proves Scholastic's point -- that the only commonalities between the *WTW* and *Goblet* constitute unprotectable ideas.[4]

Plaintiff also repeatedly asserts that *Goblet* appropriates the "heart and core" of *WTW*. Pl.'s Opp. 15, 18. He relies heavily on *Smith v. Little, Brown & Co.* 245 F. Supp. 451 (S.D.N.Y. 1965), but the facts of that case do not support Plaintiff's claim. In *Little, Brown*, unlike here, defendant's book shared an overwhelming number of actionable similarities with plaintiff's manuscript -- both works were about the historical figure Grania O'Malley, began on her eighteenth birthday as she set out to watch for her father's return from sea, involved an unusual marital arrangement under which Grania agreed to spend half her time with her husband's people and half with her own, featured similar characters, and involved a horse named Maeve. *Id*. at 458. In contrast, Plaintiff cannot articulate any such actionable similarities here.

Moreover, copyright law has evolved since 1965 when *Little, Brown* was decided. For example, in 1991 the Second Circuit recognized that where a work contains both protectable and unprotectable elements, "the observer's inspection must be more discerning," comparing the similarities between the *protectable* material, standing alone, to determine substantial similarity. *Folio Impressions*, 937 F.2d at 765-66. The Second Circuit, applying this concept in *Williams v. Crichton*, found that works that shared a dinosaur zoo setting with automated tours and dinosaur nurseries were not substantially similar as "sequences of events that 'necessarily result from the choice of a setting or situation,' do not enjoy copyright protection," and the "similarities" all

[4] This is not the first time that Scholastic has been faced with such a meritless and mercenary action. In *Scholastic Inc. v. Stouffer*, Nancy Stouffer similarly claimed that Ms. Rowling had copied her poorly written books to create the *Harry Potter* series. *See* 221 F. Supp. 2d 425 (S.D.N.Y. 2002). There, Scholastic asked the late Judge Schwartz to vindicate Ms. Rowling and Scholastic, which he did, in granting summary judgment in their favor. *Id*. at 445.

flowed from the "uncopyrightable concept of a dinosaur zoo." 84 F.3d 581, 587, 589 (2d Cir. 1996) (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986)).

Plaintiff does not attempt to distinguish *Williams*. Nor does he try to distinguish this Court's decision in *Hogan v. DC Comics*, 48 F. Supp. 2d 298 (S.D.N.Y. 1999), finding no substantial similarity between two works involving half-vampire, half-human characters named Nicholas Gaunt, beyond stating that it involved summary judgment instead of a motion to dismiss. There is no reason, however, why the Court's analysis of ideas versus expression would not apply equally here. Not surprisingly, Plaintiff also does not attempt to distinguish *Blakeman*, 613 F. Supp. 2d at 314, finding no substantial similarity between works involving a Presidential election; *Mallery v. NBC Universal, Inc.*, No. 07 Civ. 225, 2007 WL 4258196, at *6 (S.D.N.Y. Dec. 3, 2007), finding no substantial similarity between works involving the destruction of landmark buildings in New York City, predictions confirmed by a newspaper reporter, and attempts to prevent tragic events in light of the future; or *A Slice of Pie Productions LLC v. Wayans Bros.*, 487 F. Supp. 2d 41, 48 (D. Conn. 2007), finding no substantial similarity between works involving "African American characters disguising themselves as Caucasian characters, and men disguising themselves as women."

As these cases make clear, even if the Court accepted that Scholastic took the "heart and core" of *WTW* -- a story 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 valuable reward" -

- such unprotectable ideas cannot support a finding of substantial similarity.[5] Pl.'s Opp. 16. In fact, Plaintiff states that *Goblet* is similar to *WTW* in "*concept*," *i.e.*, idea. *Id*. (emphasis added). Because "a copyright does not protect an idea, but only the expression of an idea," Plaintiff's alleged "similarities" cannot support his claim for copyright infringement. *Williams*, 84 F.3d at 587 (citations omitted). Furthermore, Plaintiff's attempt to find similarities between the plots, characters, settings, themes and total concept and feel of the works is unavailing.

A. The Plots Of Both Works Differ

Plaintiff cannot establish substantial similarity between the plots of *WTW* and *Goblet*. Plaintiff admits "[t]hat wizards might compete to demonstrate their prowess is, perhaps, an idea." Pl.'s Opp. 18. Despite his arguments to the contrary, the unprotectable idea of a competition involving wizards is the only commonality between the works. Nevertheless, Plaintiff attempts to create similarities between the works, going so far as to misquote *WTW* to make it seem as though Willy, like Harry, is involved in a "multi-event tournament." *Id*. 19 n.9. However, the text of *WTW* states that Willy "had won *his* particular wizard's test," Motion, Decl. of D. Cendali, dated Sept. 16, 2010, Ex. 1, 16 (emphasis added), not that "[Willy] had won *this* particular wizard's test," (emphasis added) as Plaintiff states. Pl.'s Opp. 19 n.9. Moreover, nothing else in *WTW* suggests that Willy competed in a "multi-event tournament."

As "the works themselves supersede and control contrary descriptions of them," *Walker*, 784 F.2d. at 52, this Court need only look to the actual text of the works to find that *WTW* -- a story about an adult wizard who attends a wizard convention, then goes home and reads the

[5] Even this description of the so-called "core" of *WTW* is inaccurate. Among other things, Willy "deciphers" nothing in his "bathroom-cum-study." Motion 14. Rather, he merely reads the rules of his particular wizard contest off a screen in the comfort of his home. *Id*.

instructions for his wizard contest on a screen while lying in his bath and instructs his apprentices to rescue female prisoners from a prison on Livid Land -- and *Goblet* -- a story about a teenage boy who returns to school to learn that he has mysteriously been chosen to compete in an inter-school Tournament, which requires him to battle a dragon, recover a sleeping friend from the bottom of a lake and navigate a magical labyrinth, which he learns was all designed to lead him into the hands of Lord Voldemort -- are not substantially similar. Motion 12-13.

That Plaintiff points to uncopyrightable elements, including competitions, bubble-baths and "numbers in the 40s," does not support a finding of substantial similarity. Pl.'s Opp. 19 n.7, 20; s*ee Williams*, 84 F.3d at 590 (no substantial similarity where plaintiff alleged similarities including dinosaur nurseries and stranded characters encountering ferocious dinosaurs; "those scenes that appear similar in their abstract description prove to be quite dissimilar once examined in any detail"); *Abend Revocable Trust v. Spielberg*, No. 08 Civ. 7810, 2010 WL 3701343, at *6-7 (S.D.N.Y. Sept. 21, 2010) (no substantial similarity where both works told the story of a "male protagonist, confined to his home, who spies on neighbors to stave off boredom and, in doing so, discovers that one of his neighbors is a murderer"); *Hogan*, 48 F. Supp. 2d at 310 (no substantial similarity between unprotectable ideas where both works involved half-human, half-vampire characters named Nicholas Gaunt who sought to uncover their true origins through flashbacks or memories, faced the choice of pursuing good or evil, were indoctrinated into the forces of evil by killing, and had a "sinister genealogy"). Tellingly, Plaintiff does not cite a single case in support of the claim that the plots of *WTW* and *Goblet* are substantially similar.

B. The Characters Differ Completely

Plaintiff's claim, citing *Hogan*, that Scholastic's "[u]nlawful appropriation is further established by the similarities between some of the characters" is also unavailing. Pl. Opp. 21. In *Hogan*, this Court found no substantial similarity where the half-vampire, half-human main

characters were white males in their early 20s named Nicholas Gaunt, with thin-to-medium builds, pale skin, and dark messy hair.[6] 48 F. Supp. 2d at 311-12. Here, Willy and Harry have nothing in common other than being wizards. Motion 19-20. Indeed, Plaintiff *admits* that the Harry Potter character does *not* infringe Willy's character. Pl.'s Opp. 22. As Plaintiff does not allege that any other characters in *Goblet* are infringing, his argument that the characters create substantial similarity fails.

C. The Settings Are Not Similar

Plaintiff also cannot show substantial similarity based on the settings in *WTW* and *Goblet*. In fact, he has so little to say about their "similar" settings that he begins by pointing to the fact that both works are set in "Europe." Pl.'s Opp. 22. But one cannot copyright "Europe." Plaintiff then alleges a laundry list of "similarities" between the settings, including that they both depict transportation for wizards, schooling for wizards, wizard hospitals, wizard prisons and towns inhabited by wizards. But the uncopyrightable idea of a wizard community leads to elements such as transportation, schools, hospitals, prisons, and towns. *Williams*, 84 F.3d at 589 (finding that the uncopyrightable idea of a dinosaur zoo led to settings such as a "dinosaur zoo or adventure park, with electrified fences, automated tours, dinosaur nurseries, and uniformed workers"). Because Plaintiff neither challenges this conclusion nor cites to any relevant case law supporting his claim of substantial similarity based on the works' settings,[7] his claim that the "sheer magnitude of the taking adds up" borders on absurdity. Pl.'s Opp. 23.

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[6] Plaintiff's reliance on *Hogan* also contradicts its own claim that this decision is somehow less relevant because the case was decided on a motion for summary judgment.

[7] Plaintiff inexplicably tries to rely on a New York state law case, *Charrell v. Quicksilver Productions, Inc.*, which is not even a copyright case, but rather an idea/submission case and thus wholly inapposite. 1983 WL 14925 (N.Y. Spec. Term 1993).

D. The Works Do Not Share Any Similar Themes

With an almost indecipherable plot and essentially no character development, *WTW* has no themes. Plaintiff's claim that it includes themes such as "friendship," "teamwork," and "the value of personal ingenuity" can only be seen as a desperate, post-hoc attempt to stave off dismissal by manufacturing themes that do not exist. Pl.'s Opp. 24. Regardless, Plaintiff does not dispute that *Goblet* has real, discernable, powerful themes such as coming of age, life and death, and the struggle between good and evil, which *WTW* lacks. As such, Plaintiff cannot rely on any similarity between the works' themes to support a finding of substantial similarity.

E. Total Concept And Feel Of The Works Differ

As Scholastic stated in its Motion, and which Plaintiff barely attempts to dispute, the total concept and feel of the works differ completely. Although Plaintiff tries to argue that the works "feel similar" by asserting only that *WTW* and *Goblet* are both "fantasy literature for children," Pl.'s Opp. 24, even this is untrue as *Goblet* appeals to both children and adults alike, whereas *WTW*, although not really appropriate for any audience, was admittedly intended solely for children. Moreover, Plaintiff does not attempt to dispute Scholastic's characterization of *Goblet* as a suspenseful and well-written book -- something that *WTW* is not. Indeed, by Plaintiff's own admission, there are "challenges" in Mr. Jacobs' writing style. Pl.'s Opp. 25. This is certainly not the case with Joanne Rowling's award-winning *Harry Potter* series and, as a result, the works do not feel similar in their plot, characters, settings or themes. [8]

[8] Presumably as a last ditch effort to avoid dismissal, Plaintiff refers to reverse confusion under trademark law. Pl.'s Opp. 25. Plaintiff has not alleged reverse confusion, however, nor does it have any bearing whatsoever on the substantial similarity analysis.

Date: November 4, 2010

Respectfully submitted,

s/Dale Cendali

Dale M. Cendali
Claudia Ray
Courtney L. Schneider
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Tel: 212-446-4800
Fax: 212-446-4900

Attorneys for Defendant
SCHOLASTIC INC.