

## COPYRIGHT LAW

### 'Harry Potter Lexicon'

**F**EW SUCCESSFUL television shows or films fail to generate unauthorized fan Web sites, newsletters or even reference books, analyzing and commenting on characters and plot lines. This activity is both a benefit and burden for the owners of copyrights in the underlying works. It keeps loyal followers engaged and helps recruit new ones. On the other hand, fan activity can compete with authorized marketing efforts, making it more difficult for copyright owners to exploit their rights to sell derivative works and merchandise. Balancing these factors, some copyright owners tolerate—or even encourage—fan activity. When a copyright owner decides to take action, however, difficult copyright questions arise, including whether the challenged activity amounts to infringement of the owner's copyright and, if so, whether it is protected as fair use.

These questions are at the heart of *Warner Bros. Entm't Inc. v. RDR Books*, 2008 WL 4126736 (S.D.N.Y. Sept. 8, 2008), an action filed by the author of the Harry Potter book series and the film studio behind the Harry Potter movies against the publisher of an unauthorized Harry Potter encyclopedia written by a devoted fan. After a bench trial, the court found for the copyright owners. While it found that the encyclopedia was not a derivative work, the court nevertheless held that it violated the owners' exclusive right of reproduction and was not protected by fair use.

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By Lewis R. Clayton



#### Lexicon at issue originated on a fan's Web site

Plaintiff J.K. Rowling wrote the fabulously successful Harry Potter novels, as well as two companion books that expand upon the events that unfold in the novels. Rowling's co-plaintiff, Warner Bros. Entertainment Inc., owns the copyright in the film versions of the novels.

Defendant RDR Books sought to publish *The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Material*, a 400-page A-to-Z encyclopedia describing the people, places and things—characters, places, magic spells and imaginary games—featured in the Harry Potter novels, companion books and films. The *Lexicon* is written by Steve Vander Ark, the creator of the popular fan Web site "The Harry Potter Lexicon." Although much of the material in the *Lexicon* book is available online, the plaintiffs never challenged the Web site. In fact, before bringing suit, Rowling was quoted praising the Web site as a source of information about the Harry Potter series. Rowling testified at trial, however, that she was concerned that publication of a book version of the *Lexicon* would diminish the market for the Harry Potter encyclopedia that she planned to write.

When RDR Books refused requests to halt publication, the plaintiffs filed suit, seeking a permanent injunction and statutory damages. The defendant consented to a restraining order halting publication until trial on the merits.

At trial, the plaintiffs stressed the *Lexicon's* extensive verbatim copying of language from the Harry Potter works. Rowling described the use of some of the best parts of her writing as taking all of the "plums in [her] cake." Given the nature of the works, the court found it appropriate to apply the quantitative/qualitative test in *Ringgold v. Black Entm't Television Inc.*, 126 F.3d 70 (2d Cir. 1997), to determine whether there was actionable copying sufficient to infringe the plaintiffs' exclusive right of reproduction. Under that test, the quantitative component addresses the amount of the work that is copied, while the qualitative component addresses the copying of protected expression, as opposed to unprotected ideas or facts. Both the quantitative and qualitative components of the test were met because many of the *Lexicon's* entries contain "direct quotations or paraphrases, plot details, or summaries of scenes from one or more of the Harry Potter novels," and reproduce an even greater portion of Rowling's companion books.

The defendant argued that the *Lexicon* is not substantially similar to Rowling's original works because its content is factual—describing the content of the Potter works. The court rejected that argument, finding that the defendant had appropriated Rowling's expression—the words she had used in the Potter books and companion materials. As the court wrote: "each 'fact' reported by the *Lexicon* is actually expression invented by Rowling."

The court then turned to the question of whether the *Lexicon* violates not only

the plaintiffs' right of reproduction, but also their right to control the production of derivative works. The plaintiffs relied on *Twin Peaks Prods. Inc. v. Publ'ns Int'l Ltd.*, 996 F.2d 1366 (2d Cir. 1993), in which a guidebook based on the *Twin Peaks* television series was found to be a derivative work. But the court found that, unlike the *Twin Peaks* guidebook, the *Lexicon* did not contain elaborate plot summaries that abridged the original work. Also, rather than simply transforming the material from one medium to another, as was the case in *Twin Peaks*, the *Lexicon* takes material from voluminous and diverse sources and condenses and reorganizes it into a reference guide. Therefore, the *Lexicon* "no longer 'represents [the] original work[s]' of authorship," and thus does not constitute a derivative work.

Having found *prima facie* infringement of the right of reproduction, the court turned to whether the *Lexicon* qualifies as a fair use of the Harry Potter works considering the four factors set out in § 107 of the Copyright Act. Under the first factor, which evaluates the purpose and character of the use, the court found that the *Lexicon*'s use of the Harry Potter novels is transformative because it makes information from the series available for reference purposes rather than for the purely entertainment or aesthetic purposes of the original works. The court noted that Rowling, her publisher and the producer of the Harry Potter films all admitted to using the *Lexicon* Web site regularly as a reference source. The utility of the *Lexicon* as a reference guide also distinguished it from the *Seinfeld* trivia book at issue in *Castle Rock Entm't Inc. v. Carol Publ'g Group Inc.*, 150 F.3d 132 (2d Cir. 1998), which merely repackaged the show to entertain its viewers, and from the book at issue in *Twin Peaks*, which simply abridged the plots of the television series.

The court rejected the plaintiffs' argument that the *Lexicon* was not transformative because it adds no significant analysis or commentary, or is allegedly of low quality—one of the plaintiffs' experts claimed that the work "contributes nothing new other than occasional facetious phrases and facile jokes that are condescending to children." The court found that the *Lexicon*'s "lack of critical analysis, linguistic understanding, or clever humor is not determinative of whether or not its purpose is transformative."

Two considerations, however, weighed against transformative use. First, the

*Lexicon*'s use of Rowling's companion books was "much less transformative" because those works serve more of an informational purpose than the novels. The *Lexicon* could be seen as supplanting, rather than complementing, those works. Second, the court found that the *Lexicon* often took too much of the original works: "[T]he *Lexicon* often lacks restraint in using Rowling's original expression for its inherent entertainment and aesthetic value." That same finding tipped the third fair use factor—amount and substantiality of the use—in the plaintiffs' favor.

■ **The court found that the lexicon was not a derivative work, but still ruled that it violated the owners' exclusive right of reproduction.** ■

The second fair use factor—the nature of the copyrighted work—also weighed in the plaintiffs' favor because creative and fictional works are entitled to robust copyright protection. As for the final fair use factor, the effect on the market for the copyrighted work, the court found that the *Lexicon* is unlikely to substitute for the Harry Potter novels. Evidence that the *Lexicon* would harm sales of Rowling's planned encyclopedia was irrelevant because an encyclopedia, the court found, is not a derivative work: "[T]he market for reference guides" is "not exclusively [Rowling's] to exploit or license, no matter the commercial success" of the original works.

On the other hand, the court found that the *Lexicon* could harm sales of Rowling's companion books, because the information in those works has been incorporated into the *Lexicon* "almost wholesale."

Balancing the factors, the court rejected the defendant's claim of fair use and enjoined publication.

## Implications of the 'Harry Potter' decision

Although the court's decision was a clear victory for the copyright holders, there are words of comfort for supporters of the defendant's position. The court recognized the transformative nature of reference guides to fictional works and emphasized that such guides need not contain scholarly analysis or commentary in order to be transformative, and that the copyright holder's views as to the quality of the infringing work are not relevant. It also observed that such reference guides "should be encouraged rather than stifled," and that the creator of the original copyrighted works does not have the exclusive right to exploit uses that are not derivative of the original work.

On the other hand, to qualify as transformative, such works must do more than offer the plot summaries and abridgements found in the *Twin Peaks* and *Castle Rock* cases. And the decision highlights the need to appropriate only that portion of the underlying work necessary to achieve the transformative purpose. Indeed, the defendant's decision to borrow so much of Rowling's expression may well have been the key factor in the decision. As the court said, "a copier is not entitled to copy the vividness of an author's description for the sake of accurately reporting expressive content." ■