

upon positions. Presidents and provosts, and perhaps associations of these academic leaders, must play a major role in order to push matters along to get agreement. Of equal importance, senior academic leadership is critical to getting something done once there is agreement on a comprehensive set of positions. NASULGC is certainly willing to help, but it is important that several other groups be deeply involved. Further, any effort in this area must take into account the excellent work done by others. Over the past half dozen or more years, a number of thoughtful people and organizations have examined many of these issues in great detail, including the President's Council of Advisors on Science and Technology (PCAST), the National Academies, and the Council on Competitiveness. A university effort should be informed by that work, not re-create it.

As the process moves forward to develop a comprehensive set of positions, concrete plans need to be made for an adequately funded structure to advance this agenda in Washington and across the country. Staffing should not be large but must include significant expertise in intellectual property, academic policy, and operations and economics. This is a several-year effort as the issues will continue to evolve.

In conclusion, there appears to be an imbalance in the application of intellectual property rules that is impacting our core mission of creating and distributing knowledge. Accordingly, the academic community should find a way to agree on a comprehensive set of positions and develop a structure to support advancing those positions in Washington.

Adapted from a presentation at the Association of Research Libraries Membership Meeting, May 2008.

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HOW FAIR USE PREVAILED IN THE HARRY POTTER CASE

by Jonathan Band¹

In a highly publicized decision issued on September 8, 2008, US District Court Judge Robert Patterson ruled that Steven Vander Ark's *Harry Potter Lexicon* infringed J. K. Rowling's copyright.² Although J. K. Rowling prevailed in the litigation, the big winner actually was fair use.

The *Lexicon* is a hard-copy A-to-Z encyclopedia of the characters, spells, creatures, places, events, and magical items in the series. (Rowling did not challenge the online version of the *Lexicon*.) Judge Patterson found that the *Lexicon's* purpose was transformative under the first fair-use factor—the purpose and character of the use. Judge Patterson concluded that the *Lexicon* was a reference guide intended to make “information about

the intricate world of Harry Potter readily accessible to readers”:

To fulfill this function, the *Lexicon* identifies more than 2,400 elements from the Harry Potter world, extracts and synthesizes fictional facts related to each element from all seven novels, and presents that information in a format that allows readers to access it quickly as they make their way through the series.

The court further noted:

[t]he utility of the *Lexicon*, as a reference guide to a multi-volume work of fantasy literature, demonstrates a productive use for a different purpose than the original works. The *Lexicon* makes the elaborate imaginary world of Harry Potter searchable, item by item, and gives readers a complete picture of each item that cannot be gleaned by reading the voluminous series, since the material related to each item is scattered over thousands of pages of complex narrative and plot.

Judge Patterson observed that “the demand for and usefulness of this type of reference guide” was demonstrated by the existence of similar companion works for other series, such as the *Chronicles of Narnia*. The judge also found that J. K. Rowling herself admitted to consulting an online version of the *Lexicon*, as did the producer of the film version of the fifth novel. Judge Patterson took care to distinguish the *Lexicon's* “function as a reference guide” from the trivia book on the *Seinfeld* TV series at issue in *Castle Rock Entertainment Inc. v. Carol Publishing Group Inc.*, 150 F.3d 132 (2d Cir. 1998). While the trivia book simply entertained *Seinfeld* fans, the *Lexicon* sought to “aid the reader or student of Harry Potter by providing references about elements encountered in the series.”

Judge Patterson held that the *Lexicon* was transformative even though it did not contain significant commentary or analysis. Providing “an alphabetized catalogue of elements from the Harry Potter world” was sufficient basis for rendering the *Lexicon* transformative.

Considering the fourth fair-use factor, the effect of the use on the potential market for the work, Judge Patterson rejected J. K. Rowling's argument that the *Lexicon* would impair the market for an encyclopedia she planned to write. Judge Patterson ruled that “the market for reference guides to the Harry Potter works is not exclusively hers to exploit or license, no matter the commercial success attributable to the popularity of the original works.” Judge Patterson added that “[t]he market for reference guides does not become derivative simply because the copyright holder seeks to produce or license one.”

When looking at the broader implications of the case, Judge Patterson stated that “[i]n striking the balance between the property rights of original authors and the

freedom of expression of secondary authors, reference guides to works of literature should generally be encouraged by copyright law as they provide a benefit [to] readers and students....” He later added that “reference works that share the *Lexicon’s* purpose of aiding readers of literature generally should be encouraged rather than stifled.”

Given these pro-fair-use holdings, which will be extremely helpful in future fair-use cases, why did Judge Patterson rule against the *Lexicon*? The answer turns on the specific facts unique to this case.

First, many of the entries contained lengthy verbatim copies or close paraphrases of descriptions in the Harry Potter novels. Judge Patterson found that the *Lexicon* reproduced more of these “colorful literary device[s]” or “distinctive description[s]” than “reasonably necessary for the purpose of creating a useful and complete reference guide.” The court concluded that verbatim copying of descriptions of even ordinary objects “demonstrates Vander Ark’s lack of restraint due to an enthusiastic admiration of Rowling’s artistic expression, or perhaps haste and laziness...in composing the *Lexicon* entries.” Additionally, the *Lexicon* reproduced in their entirety many of the songs and poems contained in the novels. Judge Patterson found that the *Lexicon* harmed a possible derivative market for print publication of these songs and poems.

Second, the case concerned not only the seven Harry Potter novels, but also two short companion books written by Rowling. These books, *Quidditch through the Ages* and *Fantastic Beasts & Where to Find Them*, appear as reference books used by the students at Hogwarts in the novels. *Fantastic Beasts*, for example, is an A-to-Z encyclopedia of the imaginary animals that exist in the Harry Potter universe. Because the *Lexicon* presents much of the same information in the same way as these two companion books, Judge Patterson found that the *Lexicon* “is transformative to a much lesser extent” with respect to the companion books than to the novels. Moreover, Judge Patterson found that the *Lexicon* could harm the sales of the companion books: “consumers who purchased the *Lexicon* would have scant incentive to purchase either of Rowling’s companion books, as the information contained in these short works has been incorporated in the *Lexicon* almost wholesale.”³

Although ruling for the plaintiffs on the particular facts of this case, Judge Patterson’s decision leaves ample room for the creation of reference guides to literary works, even when the guides do not contain scholarly criticism or analysis. The decision also provides a clear roadmap for how to avoid infringement claims when creating such guides; the guide’s author must take care not to copy more “highly aesthetic expression” than necessary to achieve the guide’s educational purpose. Moreover, the guide’s author must exercise even greater care when copying material from reference works created by the original author.

Taking a step back, one can draw three broader

lessons from the decision. First, fair use is alive and well. The decision makes clear that expression can be incorporated into transformative works, so long as the expression is reasonably necessary for achieving the transformative purpose. Even though the fair-use privilege failed under the specific facts of this case, the court assessed only the minimum amount of statutory damages—\$750 per work infringed, for a total of \$6,750. Judge Patterson had the discretion to assess damages as high as \$1.35 million. Presumably the judge awarded the minimum rather than the maximum in part because the defendant had “the reasonable belief that [the *Lexicon’s*] use of the Harry Potter works constituted fair use....”

Second, courts get fair use. Judge Patterson unquestionably understands the policies that underlie the fair-use doctrine, and the importance of striking the proper balance between protection and the dissemination of information. Indeed, the decision demonstrates once again that the federal judiciary understands fair use better than Congress, which repeatedly advances legislation that encroaches on fair use and the public domain. The judiciary also understands fair use better than the executive branch, which consistently opposes the adoption of fair-use principles by our trading partners.

Third, fair use can thrive only if defendants can litigate long enough to get their day in court. Plaintiffs in copyright cases often have very deep pockets; here, Rowling, one of the wealthiest authors in history, was joined by Warner Brothers, the purchaser of the film rights to the Harry Potter series. Fortunately for the *Lexicon’s* publisher, the Fair Use Project of Stanford Law School’s Center for Internet and Society participated in its defense. Public interest “law firms” such as the Fair Use Project and the Electronic Frontier Foundation play a critical role in leveling the copyright-litigation playing field to ensure that courts have the ability to consider the merits of assertions of the fair-use privilege.

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² *Warner Bros. Entertainment Inc. and J. K. Rowling v. RDR Books et al*, ___ F.Supp.2d ___, 2008 WL 4126736, S.D.N.Y., September 8, 2008 (NO. 07 CIV. 9667 (RPP)).

³ While Judge Patterson may have reached the right result given the amount of expressive material the *Lexicon* copied, one can debate some of Judge Patterson’s specific holdings. Most notably, Judge Patterson ruled that “fictional facts” are expression protected by copyright. However, it is a fact that the novels describe a certain set of events and characters. A reference work should be able to report on that fact, so long as it is clear that the reference work is reporting on the fact and not participating in the fiction.