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## Harry Potter and the Copyright Act: Have the Courts Finally Waved a Magic Wand by Defining Fair Use for Secondary Authors

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# Casenotes

## HARRY POTTER AND THE COPYRIGHT ACT: HAVE THE COURTS FINALLY WAVED A MAGIC WAND BY DEFINING FAIR USE FOR SECONDARY AUTHORS?

### I. INTRODUCTION: “BUT . . . YOU’RE WIZARDS! YOU CAN DO MAGIC! SURELY YOU CAN SORT OUT – WELL – ANYTHING!”<sup>1</sup>

Unlike works of fiction, which contain clearly defined protagonists and antagonists, the line between good and evil in the legal realm is often blurred. Since she first began publishing the *Harry Potter* series in 1997, author J.K. Rowling has been involved in several lawsuits claiming copyright infringement.<sup>2</sup> In the most recent lawsuit involving the *Harry Potter* series, *Warner Brothers Entertainment, Inc. v. RDR Books*, Rowling and Warner Brothers Entertainment (“Warner Brothers”) mounted a legal challenge under one of the most nebulous portions of Copyright Act, the fair use defense.<sup>3</sup> In this suit, Warner Brothers challenged a *Harry Potter* fan’s publication of a reference guide to the *Harry Potter* series, alleging that publication of this guide constituted copyright infringement of Rowling’s work.<sup>4</sup> In response, *Harry Potter* fan, Steven Vander Ark, pursued his “defenses and affirmative defenses of copyright fair use under 17 U.S.C. § 107, copyright misuse, and unclean hands.”<sup>5</sup> After weighing the fair use factors in light of the purposes of current copyright law, the court ruled in favor of Warner Brothers.<sup>6</sup>

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1. J.K. ROWLING, *HARRY POTTER AND THE HALF-BLOOD PRINCE* 18 (2005).

2. See Lawrence Van Gelder, *Hogwarts in India Challenged*, N.Y. TIMES, Oct. 12, 2007, available at [http://www.nytimes.com/2007/10/12/arts/12arts-HOGWARTS-ININ\\_BRF.html](http://www.nytimes.com/2007/10/12/arts/12arts-HOGWARTS-ININ_BRF.html) (discussing unrelated lawsuit involving Harry Potter series).

3. See *Warner Bros. Entm’t, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 517-18 (S.D.N.Y. 2008) (explaining plaintiff’s claim brought under 17 U.S.C. § 101); see also *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (explaining that plaintiff claimed defendant committed copyright infringement).

4. See *Warner Bros. Entm’t, Inc.*, 575 F. Supp. 2d at 517, 521 (indicating action brought by plaintiff and describing how defendant’s work may infringe on plaintiff’s work).

5. *Id.* at 518.

6. See *id.* at 554 (concluding that plaintiffs had established copyright infringement and that defendant had not proved affirmative defense of fair use).

As presently enacted, the Copyright Act seeks to promote science and arts by granting exclusive protection for creative works.<sup>7</sup> The Copyright Act's fair use clause seeks to alleviate some of the otherwise harsh effects of the Act.<sup>8</sup> The fair use clause states,

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include – (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>9</sup>

This Casenote will explore the court's application of the Copyright Act in *Warner Brothers Entertainment, Inc. v. RDR Books* and the impact that this landmark decision will have on copyright law. Section II discusses the history and purpose of copyright law.<sup>10</sup> It then fully discusses the concept of copying and the four fair use factors.<sup>11</sup> Sections III and IV provide a comprehensive analysis of the court's reasoning in *Warner Brothers Entertainment, Inc.*<sup>12</sup> Section V then explores the long-term impact that this decision may have on one of the most problematic areas of copyright law, the fair use defense.<sup>13</sup> Finally, Section VI provides cautionary recommendations for those authors maneuvering within the evolving copyright framework.<sup>14</sup>

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7. See U.S. CONST. art. I, § 8, cl. 8 (“[P]romot[ing] the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

8. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2008) (discussing mitigating effect of fair use).

9. Copyright Act of 1976, 17 U.S.C. § 107 (2008).

10. For a further discussion of the fair use factors, see *infra* notes 78-115 and accompanying text.

11. For a further discussion of the history and purpose of copyright law, see *infra* notes 53-77 and accompanying text.

12. For a further discussion of the court's reasoning, see *infra* notes 117-184 and accompanying text.

13. For a further discussion of the potential impact, see *infra* notes 186-193 and accompanying text.

14. For a further discussion of recommendations, see *infra* notes 188 and accompanying text.

## II. BACKGROUND: "THE TROUBLE IS, THE OTHER SIDE CAN DO MAGIC TOO . . ." <sup>15</sup>

Since 1997, J. K. Rowling has published seven books in the *Harry Potter* series.<sup>16</sup> The hugely popular series chronicles the development and adventures of Harry Potter, a young wizard at the Hogwarts School of Witchcraft and Wizardry.<sup>17</sup> The series explores "a fictional world filled with magical spells, fantastical creatures, and imaginary places and things."<sup>18</sup> Rowling holds a U.S. copyright for each of the seven *Harry Potter* books.<sup>19</sup> Following the phenomenal success of the books, Warner Brothers obtained the exclusive film rights for the entire series.<sup>20</sup> Six *Harry Potter* films have been released to date, and each of these films is subject to a copyright.<sup>21</sup> Additionally, Rowling has published three derivative companion books to the series, the proceeds from which have been donated to charity.<sup>22</sup> The court explained that "[n]either of the companion books [was] written in narrative form; instead each book chronicle[d] and expand[ed] on the fictional facts that unfold in the *Harry Potter* series."<sup>23</sup> Since 1998, Rowling has repeatedly expressed her future intention to publish a "*Harry Potter* encyclopedia" to benefit charity, after the series is complete.<sup>24</sup> This charitable writing, "is expected to reflect all of the information in the *Harry Potter* se-

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15. J.K. ROWLING, *HARRY POTTER AND THE HALF-BLOOD PRINCE* 18 (2005).

16. See Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 518 (S.D.N.Y. 2008) (noting Rowling's series of books and adventures of series' main character, Harry Potter).

17. See *id.* ("Written for children but enjoyed by children and adults alike, the *Harry Potter* series chronicles the lives and adventures of *Harry Potter* and his friends as they come of age at the Hogwarts School of Witchcraft and Wizardry and face the evil Lord Voldemort.") (citations omitted).

18. *Id.* (citations omitted).

19. See *id.* (naming each book in series and fact that Rowling "owns a United States copyright in each").

20. See *id.* (discussing commercial success of *Potter* series). "The books have won numerous awards, including children's literary awards and the British Book Award." *Id.*

21. See *id.* (indicating that due to success of series, books were made into films).

22. See *id.* at 519 (reciting facts of case); see also Avra Bossov, *J.K. Rowling's Tales of Beetle the Bard Released Today*, EASTSIDE ONLINE, Dec. 4, 2008, <http://www.eastside-online.org/entertainment/jk-rowlings-tale-of-beetle-the-bard-released-today/> (discussing release to benefit charity).

23. Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 519 (S.D.N.Y. 2008). The first companion book provides a history of "quidditch," an imaginary sport featured in the *Harry Potter* series. *Id.* The second is an encyclopedia of the fictional beasts and beings of the *Potter* universe. See *id.* (noting subject of *Fantastic Beasts and Where to Find Them*).

24. See *id.* (acknowledging Rowling's stated intent to publish accompanying encyclopedia).

ries[,]” supplemented with new material.<sup>25</sup> Preparations for the encyclopedia are underway.<sup>26</sup>

In 1999, Steven Vander Ark, while reading the second book in the series, began taking notes on the unfolding details of the books for his own personal use.<sup>27</sup> Inspired by an online *Harry Potter* discussion group, he soon expanded the detail and shared the notes with other fans of the books.<sup>28</sup> In 2000, Vander Ark launched the website, “The *Harry Potter* Lexicon” (“website” or “Lexicon”).<sup>29</sup> At the time it was established, the purpose of the website, “was to create an encyclopedia that collected and organized information from the *Harry Potter* books in one central source for fans to use for reference.”<sup>30</sup> User feedback led Vander Ark to adapt the website to include an index that allows for alphabetical searching of entries.<sup>31</sup> In addition to numerous indexed lists of people, places and things from the series, the website also contains supplemental fan art, commentary, timelines, forums, essays and interactive data.<sup>32</sup> The website allows for unrestricted public access at no cost.<sup>33</sup> Throughout the maintenance of this online database, Vander Ark publicly expressed that publication of a companion guide to the *Harry Potter* books would be a copyright violation.<sup>34</sup> Vander Ark went so far as to state “on a public internet newsgroup that he would not publish the Lexicon ‘in any form except online’ without permission because Rowling, not he, was ‘entitled to that market.’”<sup>35</sup>

Initially, the website was positively received, even by Rowling herself.<sup>36</sup> In 2004, Rowling praised Vander Ark’s work on her own website, posting that “this is such a great site that I have been known to sneak into an internet café while out writing and check a

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25. *Id.*

26. *See id.* (detailing Rowling’s preparations including assembling materials and requesting information from other sources).

27. *See id.* at 520 (describing content of notes as including “descriptive lists of the spells, characters, and fictional objects”).

28. *See id.* (stating Vander Ark’s notes included “descriptive lists of the spells, characters, and fictional objects in *Harry Potter*”).

29. *See id.* (indicating that Vander Ark started working on “The *Harry Potter* Lexicon” website in 1999, with its opening coming following year).

30. *Id.*

31. *See id.* (explaining that only after initial launch did “A-to-Z index” appear on website).

32. *See id.* (describing website formation and attributes).

33. *See id.* (explaining website’s use of volunteers and minimal advertising that allow for free use).

34. *See id.* at 522 (commenting on Vander Ark’s opinion regarding copyright infringement and publication of companion guide).

35. *Id.*

36. *See id.* at 521 (discussing initial response).

fact rather than go into a bookshop and buy a copy of *Harry Potter* (which is embarrassing). A website for the dangerously obsessive; my natural home.”<sup>37</sup>

When Vander Ark began discussions with RDR Books about the publication of portions of the website, he was aware of Rowling’s stated intentions to publish a *Harry Potter* encyclopedia.<sup>38</sup> On August 6, 2007, Roger Rapoport, the president of RDR Books, contacted Vander Ark to explore the publication of portions of the website in a book.<sup>39</sup> Initially, Vander Ark expressed concerns regarding the legality of turning the website into a book.<sup>40</sup> Rapoport dispelled Vander Ark’s concerns with reassurance that publication of the website was legal.<sup>41</sup>

Vander Ark’s knowledge of Rowling’s intentions is evident from communications between Vander Ark and Rowling’s literary agent in the United Kingdom.<sup>42</sup> Vander Ark contacted the literary agent, stating he would be “‘a good candidate for work as an editor, given [his] work on the Lexicon,’ should Rowling start working on an encyclopedia or other reference for the *Harry Potter* series.”<sup>43</sup>

After Rapoport allayed Vander Ark’s concerns about the legality of publishing the Lexicon, “Rapoport and Vander Ark agreed that the content of the book would be limited to the encyclopedia sections of the Lexicon website that presented descriptions of the persons, places, spells, and creatures from the *Harry Potter* works.”<sup>44</sup> The first page of the Lexicon manuscript proclaims that “[a]ll the information in the *Harry Potter* Lexicon comes from J.K. Rowling, either in the novels, the ‘schoolbooks,’ from her interviews, or from material which she developed or wrote herself.”<sup>45</sup> Vander Ark

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37. *Id.* (citations omitted). Vander Ark received further praise of the website and its usefulness from a senior editor of subsequent novels within the series, a producer of the *Harry Potter* films and the licensed producer of the *Harry Potter* video games. *See id.*

38. *See id.* (“Prior to any discussions with RDR Books about publishing portions of the Lexicon website as a book, Vander Ark was aware of Rowling’s public statements regarding her intention to write a *Harry Potter* encyclopedia upon completion of the seventh book in the series.”).

39. *See id.* at 521-22 (detailing relationship between Rapoport and Vander Ark).

40. *See id.* at 522 (noting Vander Ark’s concerns regarding publication of companion guide).

41. *See id.* (stating Rapoport claimed he had explored legal issues and determined publication to be legal).

42. *See id.* at 521 (reporting on Vander Ark’s communications with Rowling’s literary agent).

43. *Id.*

44. *Id.* at 522.

45. *Id.* at 525.

claims that much of the content of the manuscript is derived from outside sources, but fails to cite outside sources with the exception of four dictionary citations.<sup>46</sup> Instead, most of the encyclopedia-style entries are followed by citations to Rowling's original work.<sup>47</sup> The court determined that, "[a]lthough it is difficult to quantify how much of the language in the Lexicon is directly lifted from the *Harry Potter* novels and companion books, the Lexicon indeed contains at least a troubling amount of direct quotation or close paraphrasing of Rowling's original language."<sup>48</sup> The Lexicon also fails to consistently use quotation marks when directly quoting from Rowling's language.<sup>49</sup> With a planned publication in October of 2007, RDR Books strategically planned the encyclopedia's publication to both be the first of its kind to incorporate the seventh and final *Harry Potter* installment and capitalize on holiday sales.<sup>50</sup>

After learning of the planned publication of the website, Rowling and Warner Brothers notified Vander Ark and Rapoport by email "that the Lexicon appeared to infringe Rowling's copyrights and request[ed] that RDR Books cease publication of the book."<sup>51</sup> After several failed attempts to prevent the publication of the Lexicon without litigation, Rowling and Warner Brothers filed suit on October 31, 2007.<sup>52</sup>

### A. History and Purpose of the Copyright Act

The stated purpose of the Copyright Act is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times

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46. See *id.* (discrediting claims that "the Lexicon uses material from outside reference sources, such as Bullfinch's Mythology, Field Guide to Little People, New Shorter Oxford English Dictionary, and online encyclopedias"). The court recognizes, however, that "it is not possible to confirm [Vander Ark's] claim because, aside from four dictionary citations, no other citations to third-party works appear in the Lexicon." *Id.*

47. See *id.* (stating majority of citations are to Rowling's original work).

48. *Id.* at 527.

49. See *id.* ("The Lexicon occasionally uses quotation marks to indicate Rowling's language, but more often the original language is copied without quotation marks, often making it difficult to know which words are Rowling's and which are Vander Ark's."). Specifically, the Lexicon includes poems and songs taken directly from Rowling's work. See *id.* at n.6. When these portions of the book came under scrutiny, Vander Ark conceded that "these entries took too much." *Id.*

50. See *id.* at 522 (noting significance of first incorporation of final *Harry Potter* book in guide). On July 21, 2007, Rowling released the seventh book, *Harry Potter and the Deathly Hallows*. See *id.* at 518.

51. *Id.* at 523.

52. See *id.* at 523-24 (detailing numerous attempts to prevent publication). Throughout preliminary communications, Vander Ark and RDR Books claimed objections to the publication were "unwarranted." *Id.* at 524.

to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>53</sup> The Copyright Act seeks to reconcile the “inevitable tension between the property rights it establishes in creative works, which must be protected to a point, and the ability of authors, artists, and the rest of us to express them or ourselves by reference to the works of others, which must be protected up to a point.”<sup>54</sup> The copyright holder has exclusive rights to create and authorize reproductions of the original work, develop derivative works, and distribute copies of the original work for profit.<sup>55</sup> To mediate these interests, the fair use doctrine balances conflicting purposes to determine which interest more fairly controls.<sup>56</sup> The defense of fair use is one of the most troublesome issues in existing copyright law.<sup>57</sup>

As a general principle, “[i]n truth, in literature, in science and in art, there are, and can be, few, if any things, which, in an abstract sense, are strictly new and original throughout.”<sup>58</sup> Literature, science and art necessarily rely and build upon prior works.<sup>59</sup> As such, the concept of transformative work is not novel.<sup>60</sup> These works have been in existence for decades.<sup>61</sup> Fan fiction, commentaries and derivative works have served important functions in our culture, such as breaking down racial and gender barriers.<sup>62</sup> The Internet has amplified the impact of derivative works by providing a more accessible medium for distribution.<sup>63</sup> Additionally, the In-

53. U.S. CONST. art. I, § 8, cl. 8.

54. See *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (discussing competing interests and existing tensions).

55. See Copyright Act of 1976, 17 U.S.C. § 106 (2008) (outlining exclusive rights available to holder of copyright). For a full quotation of this Section, see *supra* note 7 and accompanying text.

56. See *id.* (“The fair use doctrine mediates between the two sets of interests, determining where each set of interests ceases to control.”).

57. See *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (noting problems inherent in fair use defense).

58. *Emerson v. Daview*, 8 F.Cas. 615, 619 (no. 4,436) (CCD Mass. 1845).

59. See *id.* (“Every book in literature, science and art, borrows and must necessarily bor[r]ow, and use much which was well known and used before.”).

60. See *id.* (discussing transformative works).

61. See Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497, 503 (2008) (“Fanworks have existed for decades.”).

62. See Anupam Chander and Madhavi Sunder, *Everyone’s a Superhero: a Cultural Theory of “Mary Sue” Fan Fiction as Fair Use*, 95 CAL. L. REV 597, 602-03 (2007) (discussing importance of “Mary Sue” fan fiction to encourage promotion of heroines in television, literature and film).

63. See *id.* at 600 (discussing impact of World Wide Web that “brings their work to the world”).



ternet and technology have enabled fan-based works to extend beyond the traditional medium of text “to include music and video.”<sup>64</sup>

Until codified in the Copyright Act of 1976, copyright law and the concept of fair use was defined by common law.<sup>65</sup> The common law origin of the defense of fair use likely contributes to current confusion, because prior applications of fair use were broad and at times contradictory.<sup>66</sup> Prior to its codification, some courts held that “an insubstantial similarity was not actionable and was therefore a ‘fair use.’”<sup>67</sup> Other courts determined that fair use protected the copier of a theme or idea from copyright violation, but not the copier of the expression of ideas.<sup>68</sup> Since the Copyright Act of 1976 codified fair use, the concept has evolved into a defense available even if the alleged offending work is substantially similar to the original work.<sup>69</sup> Instead, courts must engage in a four-factor balancing test, considering the purpose and character of the use, the nature of the protected work, the amount and substantiality of the portion used and the effect of the use on the potential market.<sup>70</sup>

## B. Copyright and Fair Use

The defense of fair use is a mixed question of law and fact that must be conducted on a case-by-case basis.<sup>71</sup> A bright-line rule does not exist, because “fair use permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which [the] law is designed to foster.”<sup>72</sup> In *Campbell v. Acuff-Rose Music*, the Supreme Court held that “the statute, like the doctrine it recognizes, calls for case-by-case analysis . . . [T]he four statutory factors [cannot] be treated in isolation, one from an-

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64. Rebecca Tushnet, *supra* note 61, at 503.

65. See NIMMER & NIMMER, *supra* note 8 (explaining current confusion likely stems from broad terms by which concept was defined prior to codification).

66. See *id.* (discussing impact of common law roots).

67. *Id.*

68. See *id.* (distinguishing between protections some courts have made available to copier of themes and copier of expressions).

69. See 17 U.S.C. § 107 (2008) (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.”).

70. See *id.* (defining four-factor test).

71. See *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 386 F. Supp. 2d 324, 328 (S.D.N.Y. 2005), *aff’d*, 448 F.3d 605 (2d Cir. 2006) (finding rigid interpretation of Copyright Act contrary to very purpose of Act); see also *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006).

72. NIMMER & NIMMER, *supra* note 8 (citations and internal quotations omitted).

other.”<sup>73</sup> The analysis requires evaluation of the four factors as a whole with consideration of the stated statutory purpose of copyright.<sup>74</sup> The fair use defense turns on whether allowing or preventing the use would better serve the Copyright Act’s purpose to promote science and arts.<sup>75</sup> Some commentators suggest “that fair use is predicated on the implied or tacit consent of the author. This is manifestly a fiction, for a restrictive legend on a work prohibiting copying in whole or in part gives no greater protection than the copyright notice standing alone.”<sup>76</sup> The failure to seek permission for use of a protected work does not alone establish bad faith.<sup>77</sup>

The first factor, the purpose and character of the use, considers whether the alleged infringing work is intended for commercial use or for nonprofit purposes.<sup>78</sup> It is the ability to make a profit that decides commercial use, not the motive to make a profit.<sup>79</sup> One commentator explained that “[i]n practice, and regardless of whether all creative activity can be reduced to a utility function, people who understand themselves to be participating in a non-commercial activity produce different kinds of works than people who are deliberately participating in market exchanges.”<sup>80</sup> Commentators on the fair use factors find the concept of noncommerciality difficult to conceive.<sup>81</sup> Fair use is implicated as a result of the “flattening of creative incentives, copyright’s exclusive rights/incentive model finds noncommercial work difficult to assimilate . . . .”<sup>82</sup>

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73. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994) (citations and internal quotations omitted).

74. *See id.* (“All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

75. *See Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (explaining fair use defense).

76. NIMMER & NIMMER, *supra* note 8.

77. *See Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) (stating failure to seek permission is not per se bad faith).

78. *See Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 611 (2d Cir. 2006) (defining first factor).

79. *See id.* (distinguishing between motive and ability to make profit).

80. Tushnet, *supra* note 61, at 513.

81. *See id.* (questioning existence of noncommercial motives).

82. *Id.* at 507.

Noncommercial creative uses, precisely because they are not motivated by copyright’s profit-based incentives, are more likely to contain content that the market would not produce or sustain, and thus should be more readily recognized as transformative, even without the generally recognized markers of criticism or parody often found in commercial works found to be transformative.

*Id.*

The “transformative” nature of the work is equally important when considering the first factor.<sup>83</sup> The purpose and character of the use analysis asks:

[W]hether the new work merely “supersedes the objects” of the original creation, (“supplanting” the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.<sup>84</sup>

A finding of fair use does not require such transformation, but it does weigh heavily in favor of fair use because it is consistent with the very purpose of the Copyright Act to promote science and arts.<sup>85</sup> In *Castle Rock Entertainment v. Carol Publishing*, the court explained that an alleged infringing use furthers the purpose of copyright law when it utilizes copyrightable expression in the original work to transform it into “new information, new aesthetics, new insights and understandings.”<sup>86</sup> Merely repackaging a protected work to exploit the original creative properties in a new way fails to qualify as transformation.<sup>87</sup>

Alternatively, the court in *Bill Graham Archives v. Dorling Kindersley, Ltd.* considered the transformative nature of protected concert posters included in a biographical book.<sup>88</sup> The court found that, “[w]hile there are no categories of presumptively fair use, courts have frequently afforded fair use protection to the use of copyrighted material in biographies, recognizing such works as forms of historic scholarship, criticism, and comment that require incorporation of original source material for optimum treatment of their subjects.”<sup>89</sup> Furthermore, the creative arrangement and display of the images within the book sufficiently established fair use.<sup>90</sup>

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83. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (explaining justification turns on extent use is transformative).

84. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citations and internal quotations omitted).

85. See *id.* (discussing transformation as furthering purpose of Copyright Act).

86. *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

87. See *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (providing examples of insufficient showing of transformation where original photograph modified into painting or original work hung in museum was later published in magazine).

88. See 448 F.3d 605, 608-09 (2d Cir. 2006) (reciting facts).

89. *Id.* at 609 (citations omitted).

90. See *id.* (finding fair use based on arrangement and display).

The second factor considers the nature of the copyrighted work.<sup>91</sup> This factor requires an examination of the reasonable expectations of authors and artists.<sup>92</sup> The court further explained that “[t]his section relates to whether the original work is creative as opposed to factual, as well as to whether the work has been previously published.”<sup>93</sup> There are two relevant distinctions. First, greater protection is afforded to expressive or creative works than factual works.<sup>94</sup> Second, narrower protection is provided to unpublished works. This factor acknowledges that some works receive greater protection, because those works are closer to the intended purpose of the copyright law.<sup>95</sup> This factor is given less weight or even no weight in the analysis of certain transformative uses.<sup>96</sup>

Next, consideration is given to the amount and substantiality of the portion used in relation to the copyrighted work as a whole.<sup>97</sup> The third factor applies to the work claiming copyright protection, not the allegedly infringing work.<sup>98</sup> This factor entails both a qualitative and quantitative analysis. This factor is often ruled in favor of the copyright holders “where the portion used by the alleged infringer is a significant percentage of the copyrighted work, or where the portion used is ‘essentially the heart of’ the copyrighted work.”<sup>99</sup> In *Bill Graham Archives*, the court found that “[q]uantitatively, the third factor looks to the degree to which the original work was copied.”<sup>100</sup> Qualitatively, the third factor examines the impact of the derivative work on the copied original

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91. See Copyright Act of 1976, 17 U.S.C. § 107 (2008) (defining four factors).

92. See *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) (discussing analysis conducted in application of second factor).

93. *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 386 F. Supp. 2d 324, 330 (S.D.N.Y. 2005), *aff'd*, 448 F.3d 605 (2d Cir. 2006) (internal quotations omitted).

94. See *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 325 (S.D.N.Y. 2008) (finding greater protection for creative or expressive works).

95. See *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)) (finding greater protection afforded some works).

96. See *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 144 (2d Cir. 1998) (recognizing second factor may not be given significant consideration for some transformative uses).

97. See *Wade Williams Distrib., Inc. v. Am. Broad., Co.*, No. 00 Civ. 5002(LLM), 2005 WL 774275, at \*22 (S.D.N.Y. Apr. 5 2005) (listing four factors).

98. See *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (“We review this factor with reference to the copyrighted work, not the infringing work.”).

99. See *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 480 (2d Cir. 2004) (discussing third factor’s qualitative and quantitative aspects of third factor in fair use consideration).

100. *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 386 F. Supp. 2d 324, 330 (S.D.N.Y. 2005), *aff'd*, 448 F.3d 605 (2d Cir. 2006).

work.<sup>101</sup> Although the copying of a protected work in its entirety does not weigh in favor of fair use, it does not completely preclude claiming the defense.<sup>102</sup>

Application of the third factor to the Lexicon requires examination of the original *Harry Potter* series claiming protection.<sup>103</sup> Warner Brothers claims that the alleged infringing work “is comprised of widespread misappropriation of Ms. Rowling’s fictional characters and universe, including list after list of spells and potions, imaginary places, fantastic creatures and invented games.”<sup>104</sup> Although Warner Brothers claims “widespread misappropriation,” the complaint fails to clarify quantitatively how much of Rowling’s original writing was included in the Lexicon.<sup>105</sup> Neither party claims that the Lexicon copied the original works in their entirety.<sup>106</sup> The quantitative impact of the original work on *Harry Potter* Lexicon, however, is clear.<sup>107</sup> The book is intended to be a companion to the original series.<sup>108</sup> Therefore, the original series is the very foundation of the derivative work.<sup>109</sup> Nonetheless, creative placement of material from the *Harry Potter* series within the larger framework of the derivative work may balance the qualitative importance.<sup>110</sup>

The effect of the use on the potential market for or value of the copyrighted work is the final fair use factor.<sup>111</sup> The Second Circuit stated that:

In considering the fourth factor, [the] concern is not whether the secondary use suppresses or even destroys the

101. *See id.* (analyzing qualitative aspect).

102. *See id.* (finding copying of entire work does not favor nor preclude fair use defense to copyright infringement). In *Bill Graham Archives*, the defendant copied posters and tickets for historical value in a biographical work. *See id.* The images were reduced in size and were interspersed among the text and other images. *See id.* The court found that the reduced size of the images reduced the qualitative impact of the copied collection. *See id.*

103. *See id.* (“We review this factor with reference to the copyrighted work, not the infringing work.”)

104. Complaint at 2, Warner Bros. Entm’t, Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2007) (No. 07CV9667).

105. *See generally id.*

106. *See id.* (outlining how alleged infringing work violated copyrights of original).

107. *See id.* (detailing Lexicon’s impact).

108. *See id.* (identifying alleged infringing word as “companion book”).

109. *See id.* (discussing original series’ influence on Lexicon).

110. For a further discussion of permissible incorporation of copyrighted material within a publication, see *supra* note 77 and accompanying text.

111. *See* *Blanch v. Koons*, 467 F.3d 244, 257-58 (2d Cir. 2006) (providing fair use factors).

market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work. The market for potential derivative uses includes only those that creators of original works would in general develop or license to others.<sup>112</sup>

The court's consideration extends beyond the market harm caused by the particular infringement and examines whether the challenged use, if popularized, will negatively impact the potential market for the protected work.<sup>113</sup>

The fourth factor presents a unique question in defining the market. Commentators have suggested that market harm is indeed a key factor, but warn of copyright owners overstating their actual market.<sup>114</sup> While those clinging to fair use claim that fan fiction creates no-economic harm, holders of a protected work argue that derivative works impair financial gain by impairing their ability to authorize the use.<sup>115</sup>

### III. NARRATIVE ANALYSIS: "YOU'RE FIGHTING A LOSING BATTLE THERE, DEAR"<sup>116</sup>

#### A. Copying and Substantial Similarity

In order to establish a *prima facie* case of copyright infringement, Warner Brothers had to demonstrate "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."<sup>117</sup> There was no dispute regarding the Plaintiff's ownership of valid copyrights in the *Harry Potter* series

112. *Id.* at 258.

113. *See* *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 327 (S.D.N.Y. 2008) (defining effect of use upon potential market factor to include potential impact if challenged use became widespread). In *Lennon*, the court applied the fair use test to the unauthorized use of the song "Imagine" in a video. *See id.* Although the widespread unauthorized use of the song would impact the market for licensing, the transformative nature of the use to express a message weighed stronger. *See id.* As a result, the court found the third factor to have little impact upon the defendant's fair use defense. *See id.*

114. *See* *Tushnet*, *supra* note 61, at 514 ("Market harm is a key fair use factor, but the markets to which a copyright owner is entitled may change over time. In particular, a copyright owner may start licensing certain uses, then claim market harm from any unlicensed use.").

115. *See id.* ("The copyright owner's response to the no-economic harm argument is generally to argue that even if an unauthorized use is not substituting for current sales, the owner could be making more money if he had the right to authorize the use.")

116. J.K. ROWLING, *HARRY POTTER AND THE PRISONER OF AZKABAN* 55 (1999).

117. *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 533 (S.D.N.Y. 2008) (citations omitted).

and the two companion books.<sup>118</sup> Additionally, it is undisputed that the Lexicon took substantially from Rowling's original work.<sup>119</sup> The court determined that "Vander Ark openly admitted that he created and updated the content of the Lexicon by taking notes while reading the *Harry Potter* books and by using without authorization scanned, electronic copies of the *Harry Potter* novels and companion books."<sup>120</sup>

Under the substantial similarity test, the appropriate inquiry is whether the copying, quantitatively or qualitatively, constitutes legal infringement.<sup>121</sup> In the quantitative analysis, the court looked at the amount of copying not only directly quoted and closely paraphrased, but also other protectable expressions from the original.<sup>122</sup> The Lexicon took portions of copyrighted material from an entirely original work. Therefore, "a lower quantity of copying will support a finding of substantial similarity."<sup>123</sup> The court determined that Warner Brothers met the substantial similarity burden.<sup>124</sup>

Turning to the qualitative component of substantial similarity, the court found in favor of the Plaintiff.<sup>125</sup> The court characterized the Lexicon as a reporting of facts that were the invented expressions of Rowling.<sup>126</sup> The court rejected Vander Ark's argument that the organization of the facts diminished similarity and held that this rearrangement more properly applied to the transformative purpose of the fair use defense.<sup>127</sup>

118. *See id.* (recognizing copyright ownership over *Harry Potter* series and two companion books). The court focused its analysis on the seven *Harry Potter* books and two companion books, deciding not to reach a decision regarding ownership of supplemental materials including the newsletter and videogame. *See id.* at 533-34.

119. *See id.* at 534 ("There is no dispute that the Lexicon actually copied from Rowling's copyrighted works.")

120. *Id.*

121. *See id.* ("[T]he copying is quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred." (internal citations omitted)).

122. *See id.* at 534-35 (discussing court's substantial similarity quantitative analysis).

123. *Id.* at 535 (acknowledging difference in quantitative analysis between "wholly original" work and work "mixed with unprotected elements").

124. *See id.* ("The Lexicon draws 450 manuscript pages worth of material primarily from the 4,100-page *Harry Potter* series.")

125. *See id.* at 536 (finding Vander Ark's use of protected work did not alter original work sufficiently).

126. *See id.* (analogizing the Lexicon to trivia books based upon other fictional copyrighted works).

127. *See id.* ("While this distinction is important, Defendant's argument goes to the fair use question of whether the Lexicon's use has a transformative purpose,

## B. Derivative Work

Next, the court addressed the Plaintiffs' additional claims that the Lexicon violated their right of reproduction as well as their right to control the production of derivative works.<sup>128</sup> Rejecting these claims, the court found an insufficient showing that the Lexicon is a derivative work, because it reorganized and condensed the *Harry Potter* books for a different purpose.<sup>129</sup>

## C. Fair Use

### 1. Purpose and Character of the Use

After considering the first and most critical factor of fair use analysis, the court found the Lexicon had a transformative purpose as a reference guide and as a supplement to the *Harry Potter* series.<sup>130</sup> The court ruled that because "it serves these reference purposes, rather than the entertainment or aesthetic purposes of the original works, the Lexicon's use is transformative and does not supplant the objects of the *Harry Potter* works."<sup>131</sup> Additionally, the court stated that portions of the Lexicon offer "new information, new aesthetic insights and understandings," supporting a finding of a transformative use.<sup>132</sup>

The court, however, found that the Lexicon's use of the *Harry Potter* companion books is far less transformative because the companion books also serve a reference purpose.<sup>133</sup> Consequently, the Lexicon's inconsistent transformative use of Rowling's original works diminished its transformative character.<sup>134</sup>

Next, the court addressed the second consideration relevant to character of the use, the secondary work's commercial or nonprofit

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not to the infringement question of whether the Lexicon, on its face, bears a substantial similarity to the *Harry Potter* works.").

128. *See id.* at 538 (asserting additional claims).

129. *See id.* ("By condensing, synthesizing, and reorganizing the preexisting material in an A-to-Z reference guide, the Lexicon does not recast the material in another medium to retell the story of *Harry Potter*, but instead gives the copyrighted material another purpose.").

130. *See id.* at 541 (finding transformative purpose).

131. *Id.*

132. *Id.* at 543 (quoting *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (internal quotations omitted)).

133. *See id.* at 542 (finding that although there is no supporting testimony, companion books clearly serve reference purpose).

134. *See id.* at 544 (concluding transformative character diminished by entries that use original work for original entertainment purpose).



nature.<sup>135</sup> The court found that the nature of the Lexicon's use of the copyrighted material was commercial gain.<sup>136</sup> Vander Ark's intention to be the first published reference book released after the completion of the *Harry Potter* series was evidence of such a pecuniary purpose.<sup>137</sup> The court, however, held that Defendant RDR Books' evasive actions and intentional delays were insufficient to establish willful bad faith.<sup>138</sup> Balancing the fair use factors, the court concluded that the "[d]efendant reasonably believed its use was ultimately fair."<sup>139</sup>

## 2. *Amount and Substantiality of the Use*

The second factor of the fair use analysis examines whether the amount and substantiality of the copyrighted work used in the Lexicon is reasonable in relation to its transformative purpose of creating a reference guide.<sup>140</sup> The court hesitated to substitute its own judgment for the author's regarding the amount of copying "reasonably necessary" to complete an A-to-Z reference.<sup>141</sup> The court held that in order "[t]o fulfill its purpose as a reference guide to the *Harry Potter* works, it is reasonably necessary for the Lexicon to make considerable use of the original works."<sup>142</sup> Nonetheless, the court found that the Lexicon's verbatim copying and close paraphrasing resembled the extensive borrowing that is usually committed by a copyright holder.<sup>143</sup> The court found that the Lexicon took more than reasonably necessary, without identifying each specific violation within the Lexicon.<sup>144</sup> As acknowledged by the court, application of the reasonably necessary analysis to Rowling's two companion books is a clearer case, because the Lexicon takes di-

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135. *See id.* at 545 ("[T]he commercial or nonprofit nature of the secondary work is an explicit part of the first fair-use factor").

136. *See id.* (finding in favor of Plaintiff).

137. *See id.* at 545-46 ("[O]ne of the Lexicon's greatest selling points is being the first companion guide to the *Harry Potter* series that will cover all seven novels").

138. *See id.* at 545 (rejecting Plaintiffs' argument that Defendant acted in bad faith).

139. *Id.* at 546.

140. *See id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

141. *See id.* (acknowledging hesitation in placing judgment).

142. *Id.*

143. *See id.* at 548 (characterizing Lexicon's use of original work as "[s]ame sort of extensive borrowing that might be expected of a copyright owner, not a third party author").

144. *See id.* (avoiding line-drawing in reasonably necessary analysis).

rectly from the short books with only a slightly transformative purpose.<sup>145</sup>

### 3. *Nature of the Copyrighted Work*

The court engaged in a valuation of the relative levels of protection afforded certain types of copyrighted works.<sup>146</sup> As a fictional or creative work, the *Harry Potter* series is afforded a greater level of copyright protection than factual works.<sup>147</sup>

### 4. *Market Harm*

In assessing the impact on the original work's market, the court considered not only the impact on the primary market for the *Harry Potter* series, but also the current and potential market for derivative works.<sup>148</sup> The court recognized that the fourth factor examines "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original."<sup>149</sup> The court acknowledged that the *Lexicon* is not a derivative work.<sup>150</sup> Therefore, the court rejected Plaintiffs' argument that the *Lexicon*'s publication would impact the potential market for an encyclopedia published by Rowling.<sup>151</sup> Further, Plaintiffs' failed to present any evidence to support finding that the publication of the *Lexicon* would impair sales of the *Harry Potter* series.<sup>152</sup>

In contrast, the court found that publishing the *Lexicon* could harm sales of the series' companion books.<sup>153</sup> Although the Plaintiffs presented no supporting testimony, the court found that the *Lexicon*'s use of poems and songs from the *Harry Potter* series con-

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145. *See id.* at 548-49 (finding that *Lexicon* took from short books with similar purposes). "As a result, the amount and substantiality of the portion copied from the companion books weighs more heavily against a finding of fair use." *Id.*

146. *See id.* at 549 (recognizing greater protection afforded to those works closer to intended purpose of copyright protection).

147. *See id.* (characterizing *Harry Potter* series and companion books as "giv[ing] life to a wholly original universe of people, creatures, places, and things").

148. *See id.* (acknowledging two primary considerations to fourth fair use factor analysis).

149. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (internal quotations omitted)).

150. *See id.* at 550 ("The market for reference guides does not become derivative simply because the copyright holder seeks to produce or license one.").

151. *See id.* (rejecting argument of market harm on Rowling's planned encyclopedia).

152. *See id.* (finding no plausible basis that *Harry Potter* series sales would be harmed).

153. *See id.* (noting negative market impact on similar companion books).

stituted an additional source of possible market harm for derivative works. As a result of their use, the Lexicon impaired the copyright holder's potential market to reproduce and license these materials.<sup>154</sup>

The court held that "[t]he fair-use factors, weighed together in light of the purposes of copyright law, fail to support the defense of fair use in this case."<sup>155</sup> The court balanced the factors, and held that the first and third factors weighed against a finding of fair use.<sup>156</sup> Furthermore, the court found the fictional nature of the works and the potential for market harm supported protecting the copyrighted work.<sup>157</sup> In conclusion, the court acknowledged the important competing interests of the consumer value of reference guides and the protection of original material, before reaching a determination in favor of the Plaintiffs.<sup>158</sup>

#### IV. CRITICAL ANALYSIS: "[P]REDICTING THE FUTURE IS A VERY DIFFICULT BUSINESS INDEED."<sup>159</sup>

Throughout the decision, the court attempted to carefully limit the scope of its decision and expressed some hesitation in passing judgment.<sup>160</sup> First, the court avoided copyright analysis of the newsletters and videogames associated with *Harry Potter*, based upon an evidentiary concern.<sup>161</sup> Second, the court avoided characterizing the Lexicon as a derivative work, drastically limiting the application of the decision.<sup>162</sup>

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154. *See id.* at 551 (holding unfair impairment of market for poems and songs).

155. *Id.*

156. *See id.* (finding lack of consistent transformative purpose weighs against fair use).

157. *See id.* (noting importance of protecting work).

158. *See id.* (discussing competing interests).

In 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 readers and students; but to borrow from Rowling's overstate views, they should not be permitted to 'plunder' the works of original authors, 'without paying the customary price', lest original authors lose incentive to create new works that will also benefit the public interest.

*Id.* (internal citations omitted).

159. J.K. ROWLING, *HARRY POTTER AND THE PRISONER OF AZKABAN* 426 (1999).

160. *See generally* Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

161. *See id.* at 553-54 (avoiding copyright analysis of newsletters and games).

162. *See id.* at 539 (rejecting Plaintiffs' claims of derivative work).

Additionally, the court expressed on-going hesitation to “substitute its own judgment for that of an author.”<sup>163</sup> The court cautiously applied its legal judgment to the literary works out of duty under the Act.<sup>164</sup> This hesitance demonstrates the court’s dedication to the stated purpose of the Copyright Act.<sup>165</sup>

The court’s rejection of the Lexicon as a derivative work further clarifies copyright law.<sup>166</sup> Although the Lexicon borrowed extensively from the *Harry Potter* series and companion works, the court found it did not rise to the level of a derivative work.<sup>167</sup> The court reached this finding primarily because it transformed the original work into a different medium.<sup>168</sup>

Furthermore, the court did not equivocally find the purpose and character of the use in favor of the Plaintiffs.<sup>169</sup> Instead, the court clearly determined the Lexicon’s use of the *Harry Potter* series was indeed transformative.<sup>170</sup> The Lexicon’s use of the companion guides with a similar purpose to the Lexicon weighed in favor of the Plaintiff.<sup>171</sup> Therefore, the court relied upon the companion guides to reach this determination.<sup>172</sup>

The court took a more expansive approach to the application of the fourth fair use factor.<sup>173</sup> The companion books alone carry the fourth factor for the Plaintiffs.<sup>174</sup> Nonetheless, the court, absent supporting testimony from the parties, found that the market for other potential derivative works could be harmed.<sup>175</sup> The court unnecessarily surmised that the Lexicon would negatively impact the potential market for other uses of “songs and poems in the *Harry Potter* novels.”<sup>176</sup> These conjectures of the court are un-

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163. *Id.* at 546.

164. *See id.* (acknowledging difficulties of applying court’s judgment to literary works).

165. For a further discussion of the stated purpose, see *supra* notes 53-54 and accompanying text.

166. *See Warner Bros. Entm’t, Inc., v. RDR Books*, F. Supp. 2d 513, 538 (S.D.N.Y. 2008) (interpreting “derivative work” to exclude this reference work).

167. *See id.* at 539 (determining that Lexicon was not derivative work).

168. *See id.* (stating that original work was transformed into different medium).

169. *See id.* at 541 (describing court’s reasoning).

170. *See id.* (noting that Lexicon use was transformative of *Harry Potter* series).

171. *See id.* (“The Lexicon’s use of Rowling’s companion books, however, is transformative to a much lesser extent.”).

172. *See id.* (addressing use of companion guides).

173. *See id.* at 549-51 (applying fourth fair use factor).

174. *See id.* at 551 (weighing fourth fair use factor in Plaintiff’s favor).

175. *See id.* at 550-51 (finding potential for market harm).

176. *Id.* at 551.

characteristic of a judicial decision that does not otherwise extend beyond what is necessary to decide the case at hand.

In order to reach a decision in favor of the Plaintiffs, the court selectively applied copyright law to the *Harry Potter* series and companion books.<sup>177</sup> Throughout the decision, the court traversed between the *Harry Potter* series, the companion books and the works as a whole without addressing the impact of this complication.<sup>178</sup> In regard to the first fair use factor, the court made use of the *Harry Potter* series to find a transformative purpose.<sup>179</sup> The court then focused its analysis on the *Harry Potter* series in evaluating the third fair use factor.<sup>180</sup> Additionally, the court avoided naming either the *Harry Potter* series or the companion books as the basis for finding the second factor, the nature of the copyrighted work, favored the Plaintiffs.<sup>181</sup> The court briefly described the works collectively as "imaginative and creative fictional works," without elucidating to which works it was referring.<sup>182</sup> Finally, the court relied upon the companion books to decide the fourth fair use factor.<sup>183</sup> In finding in favor of Plaintiffs, the court rejected the argument that the Lexicon would negatively impact the market for the *Harry Potter* series, but found that sales of the companion books may be harmed.<sup>184</sup> The court's cumulative patchwork approach to fair use analysis confuses the decision and diminishes its potential precedential value.<sup>185</sup>

## V. IMPACT: "ALL WAS WELL"

Although the United States District Court for the Southern District of New York reached a decision in favor of the copyright holder in *Warner Brothers Entertainment, Inc.*, the decision bears encouraging elements for both copyright holders and secondary writ-

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177. *See generally id.* (applying copyright law selectively).

178. *See generally id.* (noting court's hesitance with impact of decision).

179. *See id.* at 541 (finding Lexicon's use of the companion books transformative to lesser extent than *Harry Potter* series).

180. *See id.* at 548 (finding third factor weighs in Plaintiff's favor). "Weighing most heavily against Defendant on the third factor is the Lexicon's verbatim copying and close paraphrasing of language from the *Harry Potter* works." *Id.* at 547.

181. *See id.* at 548-49 (deciding second factor in favor of Plaintiff generally).

182. *Id.* at 549.

183. *See id.* at 550-51 (deciding fourth fair use factor using companion books).

184. *See id.* (finding "no plausible basis to conclude that publication of the Lexicon would impair sales of the *Harry Potter* novels," but could harm sales of companion books).

185. *See generally id.*

ers.<sup>186</sup> First, the court avoided characterizing the reference guide as a derivative work, which would have effectively established copyright infringement for all works of this kind.<sup>187</sup> This refusal provides some practical guidance to secondary writers on how to avoid copyright infringement.<sup>188</sup>

Second, the court's fair use analysis regarding the purpose and character of the use likely extends the interpretation of "transformation."<sup>189</sup> The court acknowledged a fine distinction between the purposes of the *Harry Potter* series and the reference guide.<sup>190</sup> Consequently, the court leaves the door open for secondary writers to craft similar reference guides with the protection of fair use.

Third, the overall tone of the decision falls short of condemning reference works similar to the *Lexicon*.<sup>191</sup> Unlike the tone of other relevant copyright infringement decisions, the court in *Warner Brothers, Entertainment, Inc.* was careful to recognize the importance of fiction reference guides.<sup>192</sup> At times, the tone of the decision borders on condescension toward the Plaintiffs' position.<sup>193</sup> This possibly represents the court's unwillingness to condemn this entire form of expression. Although the decision provided considerable guidance to one of the most unformulated areas of copyright law, the court fell far short of "waving a magic wand."<sup>194</sup>

Meg Reid\*

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186. *See id.* at 551 (announcing court's decision while commenting on importance of reference materials and secondary works).

187. *See id.* at 538 (rejecting Plaintiffs' derivative work claim).

188. *See id.* at 539 (advising writers on how to avoid copyright infringement).

189. *See id.* at 541 (discussing extent of transformation of *Lexicon*'s use of *Harry Potter* series and companion books). For a further discussion of the standard for transformation, see *supra* notes 82-101 and accompanying text.

190. For a further discussion of transformative purpose analysis, see *supra* notes 128-132 and accompanying text.

191. *See generally* Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (describing reference works without condescending tone).

192. *See generally id.* (acknowledging importance of fiction guides); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (providing further support for these works).

193. *See Warner Bros. Entm't, Inc.*, 575 F. Supp. 2d at 538, 544 (noting that although Vander Ark's analysis is not always rigorous it is at least novel).

194. *See Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (noting existing difficulties related to fair use defense).

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