

Thing 001698 (*The Lexicon*)

Between 1997 and 2007, J. K. Rowling published seven books in the *Harry Potter* series: *Harry Potter and the Philosopher's Stone* or *Harry Potter and the Sorcerer's Stone* (1997), *Harry Potter and the Chamber of Secrets* (1998), *Harry Potter and the Prisoner of Azkaban* (1999), *Harry Potter and the Goblet of Fire* (2000), *Harry Potter and the Order of the Phoenix* (2003), *Harry Potter and the Half-Blood Prince* (2005), *Harry Potter and the Deathly Hallows* (2007). The *Harry Potter* series chronicles the lives and adventures of Harry Potter and his friends at the Hogwarts School of Witchcraft and Wizardry and face the evil Lord Voldemort. *Harry Potter* has been written for children but enjoyed children and adults alike. The *Harry Potter* series achieved enormous success and has been translated in many languages. Rowling owns the copyright to each of the books. Warner Brothers obtained from Rowling the exclusive film rights to the seven-book *Harry Potter* series. Warner Brothers licensed certain rights to Electronic Arts to create video games based on the series. As a result of the success Rowling also published a series of companion books which feature in the *Harry Potter* series: *Famous Wizard Cards*, *The Daily Prophet* a newspaper, *Quidditch Through the Ages* a guide to the flying broomsticks sport called Quidditch, *Fantastic Beasts & Where to Find Them*, an A-to-Z encyclopedia of beings. These bring to life the fictional school-books they represent in the *Harry Potter* novels. The companion books have fictional authors, forewords written by Albus Dumbledore, handwritten notes to Harry from his friends, a game of tic-tac-toe sketched

on one page, a library log and warning by the Hogwarts librarian, and a "Property of Hogwarts Library" stamp. Rowling stated on a number of occasions that she plans to publish a *Harry Potter* encyclopedia.

In 1999, Steve Vander Ark, a librarian from Michigan, made a user driven fan website called *Harry Potter Lexicon* with a group of around eight volunteers. It assembles on-line shared knowledge among fans about spells, characters, creatures, magical items, places etc... from the books into searchable A-to-Z indexed lists. It includes entries, like for example: *Encyclopedia of Spells*, *Encyclopedia of Potions*, *Wizards*, *Witches*, and *Beings*, *The Bestiary*, *Gazetteer of the Wizarding World*, etc.... The content of the encyclopedia entries on the Lexicon website is drawn primarily from the *Harry Potter* series and the companion books. The website was online since 2000 and became an important reference guide for fans. Rowling, Warner Brothers and Electronic Arts admitted that they have been using the website while developing the series. In 2004 Rowling posted on her website about *Harry Potter Lexicon* website:

"This is such a great site that I have been known to sneak into an internet cafe while out writing and check a 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."

In July 2005, Vander Ark received a note from Cheryl Klein, a Senior Editor at Scholastic Inc. American publisher of the *Harry Potter* series, thanking him and his staff:

“for the wonderful resource [his] site provides for fans, students, and indeed editors and copyeditors of the Harry Potter series, [...] who referred to the Lexicon countless times during the editing of [the books in the series], whether to verify a fact, check a timeline, or get a chapter and book reference for a particular event.”

In September 2006, Vander Ark was invited by Warner Brothers to the set of the film *The Order of the Phoenix*, where he met David Heyman, the producer of all the Harry Potter films. Heyman told Vander Ark that Warner Brothers used the Lexicon website almost every day. In July 2007, Vander Ark visited the studios of Electronic Arts, the licensed producer of the Harry Potter video games, where he observed printed pages from the Lexicon covering the walls of the studio. In August 2007, Roger Rapoport, of the U. S. publishing company RDR Books, contacted Vander Ark to publish a print version of the encyclopedia sections from the fan website under the title *The Harry Potter Lexicon*. They conceived of the book as an encyclopedia organized in the A-to-Z format, rather than by topic as the Lexicon website is organized, to allow the user to find information as quickly as possible. Rapoport started contacting foreign publishers and included Rowling’s statement about the Lexicon website, which gave the impression that she supported the publication of the Lexicon book.

Rowling’s literary agent, Neil Blair of the Christopher Little Literary Agency, first learned of the Lexicon book when he saw an advertisement on

www.PublishersMarketplace.com announcing that RDR Books would be publishing *The Harry Potter Lexicon*, scheduled for release in late October 2007. On September 18, 2007, Warner Brothers wrote a cease-and-desist letter to RDR Books, notifying them that *The Harry Potter Lexicon*, infringed on Rowling’s copyrights. Rapoport replied to Warner Brothers’ counsel that he intended to study the various issues with RDR Books’ legal advisers. On October 11, 2007, RDR Books sent Warner Brothers a letter claiming that Warner had violated Vander Ark’s rights in the in *Hogwarts Timeline* of the Lexicon website. RDR refused to delay publication and refused to provide a copy of the manuscript. On October 31, 2007, Warner Brothers filed suit in court for a preliminary injunction. Since the filing of this lawsuit, RDR Books has revised the front and back covers. Specifically, RDR Books removed the quotation of Rowling’s 2004 statement about her use of the Lexicon website from the back cover of the Lexicon. RDR Books changed the title from *The Harry Potter Lexicon* to *The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Materials*. On September 8, 2008, the court case *Warner Brothers Entertainment v. RDR Books* took place at the United States District Court. Judge Robert Patterson held that:

“ [...] Each entry, with the exception of the shortest ones, gathers and synthesizes pieces of information relating to its subject that appear scattered across the Harry Potter novels, the companion books, The Daily Prophet newsletters, Fa-

*mous Wizard Cards, and published interviews of Rowling. [...] The snippets of information in the entries are generally followed by citations in parentheses that indicate where they were found within the corpus of the Harry Potter works. [...] [For example] “Crouch, Bartemius Barty, Sr.” containing one citation for nearly a full page of material * [...] [T]he Lexicon includes commentary and background information from outside knowledge on occasion. For example, the Lexicon contains sporadic etymological references, “Colloportus”.* [...] [T]he Lexicon fits in the narrow genre of non-fiction reference guides to fictional works. [...] the Harry Potter series is a multi-volume work of fantasy literature, similar to the works of J.R.R. Tolkien and C.S. Lewis. Such works lend themselves to companion guides or reference works because they reveal an elaborate imaginary world over thousands of pages, involving many characters, creatures, and magical objects that appear and reappear across thousands of pages. [...] Although 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. [...] For example, in the entry for “armor, goblin made”, the*

*Lexicon uses Rowling’s poetic language nearly verbatim without quotation marks. * [...] The Lexicon entry for “Dementors” reproduces Rowling’s vivid description of this creature sometimes using quotation marks and sometimes quoting or closely paraphrasing without indicating which language is original expression. * [...] The Lexicon entry for “Boggart” takes strands of dialogue from Harry Potter and the Prisoner of Azkaban and closely paraphrases it in the third person. * [...] A number of Lexicon entries copy Rowling’s artistic literary devices that contribute to her distinctive craft as a writer. For example, the Lexicon entry for “brain room”, uses Rowling’s evocative literary device in a very close paraphrase. * [...] The Lexicon’s close paraphrasing is not limited to the seven Harry Potter novels, but can be found in entries drawn from the companion books as well. For example, the entry for “Montrose Magpies” uses language from *Quidditch Through the Ages*. * [...] Aside from verbatim copying, another factual issue of contention at trial was the Lexicon entries that contain summaries of certain scenes or key events in the Harry Potter series. Most frequently, these are the longer entries that describe important objects, such as the “Deathly Hallows”, * or momentous events, such as the “Triwizard Tournament”*, or that trace the devel-*

opment of an important character, such as Harry Potter, Lord Voldemort, Severus Snape, and Albus Dumbledore. [Warner]’s expert testified at length that in her opinion these entries constitute plot summaries [...] [SUBSTANTIAL SIMILARITY] While acknowledging actual copying, [Vander Ark] disputes that the copying amounts to an improper or unlawful appropriation of Rowling’s works. [...] [Warner and Rowling] have shown that the Lexicon copies a sufficient quantity of the Harry Potter series to support a finding of substantial similarity between the Lexicon and Rowling’s novels. [...] Although hundreds of pages or thousands of fictional facts may amount to only a fraction of the seven-book series, this quantum of copying is sufficient to support a finding of substantial similarity [...] The quantitative extent of the Lexicon’s copying is even more substantial with respect to *Fantastic Beasts and Quidditch Through the Ages*. [...] As to the qualitative component of the substantial similarity analysis [...] Each of the 2,437 entries in the Lexicon contains fictional facts created by Rowling [...] What matters at the infringement stage of this case is that the copied text is expression original to Rowling, not fact or idea [...] It follows that the same qualitative conclusion should be drawn here, where each fact reported by the Lexicon is actually expression invented by

Rowling. [...] Reproducing original expression in fragments or in a different order, however, does not preclude a finding of substantial similarity. [...] the Lexicon’s rearrangement of Rowling’s fictional facts does not alter the protected expression such that the Lexicon ceases to be substantially similar to the original works. [...] Notwithstanding the dissimilarity in the overall structure of the Lexicon and the original works, some of the Lexicon entries contain summaries of certain scenes or key events in the Harry Potter series [...] Under these circumstances, [Warner Brothers] have established a prima facie case of infringement. [...] [DERIVATIVE WORK] [Warner Brothers] allege that the Lexicon not only violates their right of reproduction, but also their right to control the production of derivative works. The Copyright Act defines a derivative work as “a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted [...] A work is not derivative, however, simply because it is based upon the pre-existing works. If that were the standard, then [...] book reviews would fall under the definition [...] Given that the Lexicon’s use of

plot elements is far from an elaborate recounting and does not follow the same plot structure as the Harry Potter novels [...] 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. [...] Under these circumstances, and because the Lexicon does not fall under any example of derivative works listed in the statute, [Warner Brothers] have failed to show that the Lexicon is a derivative work. [...] [FAIR USE] [RDR Books] contends that even if [Warner Brothers] have shown a prima facie case of infringement, the Lexicon is nevertheless a fair use of the Harry Potter works. An integral part of copyright law, the fair use doctrine is designed to “fulfill copyright’s very purpose, To promote the Progress of Science and useful Arts [...] by balancing the simultaneous needs to protect copyrighted material and to allow others to build upon it”. [...] The fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. [...] Most critical to the inquiry under the first fair-use factor is whether and to what extent the new work is transformative. [...] The fair use doctrine seeks to protect a secondary work if it “adds value to the original-if [copyrightable ex-

pression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings, because such a work contributes to the enrichment of society. [...] The purpose of the Lexicon’s use of the Harry Potter series is transformative. [...] 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. [...] The Lexicon’s use of Rowling’s companion books, however, is transformative to a much lesser extent. [...] [T]he companion books can be used for a reference purpose. [...] [T]he content of the companion books takes on the informational purpose of the schoolbooks they represent in the novels. [...] Although the Lexicon does not use the companion books for their entertainment purpose, it supplants the informational purpose of the original works by seeking to relate the same fictional facts in the same way. [...] while not its primary purpose, the Lexicon does add some new insight, of whatever value, as to the Harry Potter works. The transformative character of the Lexicon is diminished, however, because the Lexicon’s use of the original Harry Potter works is not consistently transformative. [...] the Lexicon copies distinctive original language from

the Harry Potter works in excess of its otherwise legitimate purpose of creating a reference guide. Perhaps because Vander Ark is such a Harry Potter enthusiast, the Lexicon often lacks restraint in using Rowling's original expression for its inherent entertainment and aesthetic value. [...] Some of the longest entries contain few or no citations to the Harry Potter works from which the material is taken. [...] Courts will not find fair use when the secondary use can fairly be characterized as a form of commercial exploitation, but are more willing to find a secondary use fair when it produces a value that benefits the broader public interest. [...] In this case, [RDR Books]'s use of the copyrighted works is certainly for commercial gain. [...] The question is whether the amount and value of [RDR Books]' original expression used are reasonable in relation to the Lexicon's transformative purpose of creating a useful and complete A-to-Z reference guide to the Harry Potter world. [...] To 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. [...] [RDR Books] argues that it is impossible to describe an imaginary object that exists only in a fictional world without using some of the language that invented it. Certainly, the Lexicon must be permitted to refer to an object by its

invented name and describe some of its invented attributes to fulfill its purpose as a reference work; but again, the use must be reasonable in light of that purpose. [...] [T]here are a number of places where the Lexicon engages in the same sort of extensive borrowing [...] As a result, the amount and substantiality of the portion copied from the companion books weighs more heavily against a finding of fair use. [...] In creating the Harry Potter novels and the companion books, Rowling has given life to a wholly original universe of people, creatures, places, and things. Such highly imaginative and creative fictional works are close to the core of copyright protection, particularly where the character of the secondary work is not entirely transformative. [...] Courts must consider harm to not only the primary market for the copyrighted work, but the current and potential market for derivative works as well. [...] Because the Lexicon's use of the companion books is only marginally transformative, the Lexicon is likely to supplant the market for the companion books. [...] Rowling testified that if the Lexicon is published, it would destroy her will or heart to continue with [writing her own] encyclopedia. [...] The fair-use factors, weighed together in light of the purposes of copyright law, fail to support the defense of fair use in this case."

The court concluded that RDR Books have established copyright infringement of the *Harry Potter* series, *Fantastic Beasts & Where to Find Them*, and *Quidditch Through the Ages* by J.K. Rowling. RDR Books has failed to establish its affirmative defense of fair use. The publication of *The Lexicon* is prohibited.