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Warner Bros. Entertainment Inc. v RDR Books

2008 U.S. Dist. LEXIS 67771 (S.D.N.Y. 8 September 2008)

A US District Judge determines that a 'Harry Potter' reference guide infringed 'Harry Potter' copyrights, rejecting a fair use defence due to a lack of quality and consistency.

On 8 September, a United States District Judge, after a non-jury trial, determined that the Harry Potter Lexicon - authored by librarian Steven Vander Ark ('Vander Ark') and intended to be published by RDR Books - would have infringed several 'Harry Potter' copyrights, and awarded the plaintiffs $6,750.00 US, in 'statutory' damages and an injunction against the work's publication[1].

The primary issue being tried was whether the Lexicon could avail itself of the 'fair use' defense under 17 U.S.C. 107: '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. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include;

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
- the effect of the use upon the potential market for or value of the copyrighted work'.

The Judge found that extensive word for word repetition in the reference work of large passages, sometimes without appropriate quotation marks, disqualified it for the fair use defense.

Background

The plaintiffs in the case were J. K. Rowling ('Rowling'), the author of *Harry Potter and the Philosopher's Stone*, six additional fictional books and two 'companion' books, and Warner Bros. Entertainment ('Warner'), the motion picture company owning the film rights in the Harry Potter series. Rowling had stated on many occasions that she planned to publish a Harry Potter encyclopedia, but had not done so.

Since 2000, Vander Ark had been publishing a web site entitled 'Harry Potter Lexicon' as an online reference work, without protest from Rowling or Warner. Indeed, on one occasion the producer of Warner's films invited Vander Ark to the movie set and told him that Warner used his website almost every day. On another occasion, Rowling publicly stated of the Lexicon: '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'.

Their generosity of spirit evaporated quickly, however, when, in September of 2007, they learned of Vander Ark's plan to put his work into book format. Suit was rapidly commenced, and a preliminary injunction motion made. The preliminary injunction hearing and trial of the merits were rolled into one, and conducted in April 2008.

The Court's findings of 'fact'

The Court found that, 'the snippets of information in the entries are generally followed by citations in parentheses that indicate where they were found', but also that, 'the thoroughness of the Lexicon's citation...is not consistent; some entries contain very few citations in relation to the amount [of] material provided'.

The Court found it helpful to analogize to other companion reference guides to fantasy literature, specifically referring to *Companion to Narnia* by Paul F. Ford, and *Fact, Fiction, and Folklore in Harry Potter's World*, by George W. Beahm, finding the Companion to Narnia to be 'far more erudite and informative than the Lexicon[2]'.

At the trial, Rowling testified that the website which had once been her 'natural home' was, now that it was presented in book form, 'plundering all of the plums in [her] cake'.

Judge Patterson felt that the Lexicon contained 'a troubling amount of direct quotation or close paraphrasing'. On other occasions, however, he seemed to be criticizing the Lexicon for 'sporadically leav[ing] out material'.

At times, he felt, the author was imitating Rowling's writing style.

The Court's conclusions of law

The Court rejected the plaintiffs' argument that the Lexicon was anything other than 'transformative', but did accept that at times the verbatim copying exceeded what was reasonably necessary, thereby weakening the 'transformative' nature of the reference work.

It opined that '[although] the Lexicon is generally useful, it cannot claim consistency in serving its purpose of pointing readers to information in the Harry Potter works'.

On the issue of the 'amount and substantiality' of the copying, the Court found this issue to 'tip' in favor of the plaintiffs, due to the 'verbatim copying' of 'highly aesthetic expression'. The Court felt this copying 'demonstrate[d] Vander Ark's lack of restraint due to an enthusiastic admiration of Rowling's artistic expression, or perhaps haste and laziness as Rowling suggested'. The Court acknowledged, however, that '[determining] how much copying of fictional facts and plot elements

from the Harry Potter series is reasonably necessary to create a useful and complete reference guide presents a difficult task'.

On the issue of market harm, the Court rejected plaintiffs' arguments that an encyclopedia is a 'derivative work', and that Rowling therefore has the exclusive right to market an encyclopedia, holding that 'the market for reference guides to the Harry Potter works is not exclusively hers to exploit or license'. Furthermore, Judge Patterson noted, there was 'no plausible basis to conclude that publication of the Lexicon would impair sales of the Harry Potter novels, although he did agree that it would impair sales of the 'companion' books, and on that basis concluded that the 'market harm' factor likewise 'tipped' in favor of Rowling. Surprisingly, the Judge added that '[although] there is no supporting testimony, one potential derivative market that would reasonably be developed or licensed by Plaintiffs is use of the songs and poems in the Harry Potter novels'.

The Court concluded the fair use defense to be unavailing, in essence basing its conclusion that in the court's opinion, the work was 'not erudite' enough, and its 'thoroughness' 'inconsistent' - i.e. the work was doomed not because of its purpose or mission, but because its quality was not good enough, and it therefore on occasion failed to accomplish its mission.

Comment

The reasoning in Warner Bros. Entertainment v RDR Books is a bit too much like 'length of the nose of the Chancellor' jurisprudence to be at all helpful in the planning and ordering of the creative process. Because it throws all questions into the subjective and undefined melting pot of a trial, and leaves the outcome to the trier of fact's subjective evaluation of the work's quality, it leaves the bar at a loss as to how to advise their clients. In its wake, were a practitioner asked for advice by a client working on a reference guide to a fictional book, the only advice he could give would be, 'try not to make your quotations too long, try to make sure your quotations are clearly marked, try not to write in a style similar to the author of the fictional work, and maybe - just maybe - after you spend a few hundred thousand dollars defending yourself, you won't lose'. Judge Patterson should have held: 'the work was by and large a permissible fair use, a reference guide to a work of fiction; on occasion the author deviated from what was reasonably necessary to accomplish that purpose, but on balance the work was a classical fair use; motion denied; case dismissed'.

Theoretically, the Fair Use defense, a judge-made rule of law, ultimately codified in the 1976 revision of the Copyright Act, is a shining beacon, a bright light in United States copyright law, born of our country's professed reverence for freedom of expression.

In practice, however, no creator of a project which will require substantial investment of time and/or money can safely take it into account, much less rely upon it, and the primary effect of the 'defense' is its tendency to generate reams of fascinating case-law and scholarship; and wheel barrows full of attorneys fees.

Historically, the advice a United States practitioner can give to a client contemplating such a project consists of two parts. The first is 'the use which you are contemplating probably (is/is not) a fair use'. The second consists of the caveat 'but we will never actually know until the jury comes in with its verdict.... i.e. until you have spent hundreds of thousands of dollars in litigation fees, and until you have taken an enormous risk that might bankrupt you'.

My learned colleague, Alan Hartnick, has observed, for example, in a landmark article published in the *New York Law Journal* several years ago, that in the world of film making, it has become impossible for a film maker to obtain insurance for his project if he relies on 'fair use', so that if she is using any content from any source whatsoever, she must either obtain clearance or forego insurance. Recognizing the plight of film makers, the Center for Social Media at American University formulated the 'Documentary Film Makers' Statement of Best Practices in Fair Use' in an attempt to inject some much needed predictability into the process[3].

Judge Patterson, with the eyes of the world upon him, had an opportunity to inject some clarity into this murky area, and to help establish a 'safe harbor'. We respectfully submit that he let that opportunity get away.

In view of his having let the defendants off so lightly in terms of damages, with a mere $6,750.00, it is hardly likely that Vander Ark and RDR Books will choose the avenue of appeal, so it is likely that Judge Patterson's decision will be the final word.

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1. http://beckermanlegal.com/Documents/warnerbros_rdrbooks_080908Decision.pdf
2. We have a problem seeing the relevance of the Judge's aesthetic preference.
3. http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use

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