

# INTELLECTUAL ASSETS

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## STRATEGIES TO PROTECT YOUR INTELLECTUAL PROPERTY



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## Harry Potter Casts a Spell on Copyright Infringer

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This past April, Harry Potter's magical powers left the world of fantasy and fiction for the drab confines of a federal courtroom. The result? A court decision that will surely send cold shivers down the collective spines of fan-based websites, blogs and movie aficionados everywhere.

The case involved a copyright infringement suit brought by Warner Brothers and J.K. Rowling against RDR Books, the publisher of an "unauthorized" encyclopedia devoted to all things Harry Potter. The aptly named "Harry Potter Lexicon" was written by Steve Van Ark, a devoted and ardent Harry Potter fan. Mr. Ark took obvious delight in cataloging the vast number of invented elements of Harry Potter's world, resulting in the most extensive reference book on the subject. While Mr. Ark's attention to detail was clearly appreciated by Harry Potter-heads worldwide, in the end it was doom and gloom for RDR's legal defense team. (Cue the mysterious music soundtrack here....)

It appeared to be a classic case of good versus evil, right versus wrong. The only problem, of

course, was that public opinion was split as to which party was "good" and which was "evil". Could it be that RDR and Mr. Van Ark violated the law by creating the definitive encyclopedic text on Harry Potter? Should Warner Brothers and Rowling be permitted to monopolize Harry Potter for all purposes—even to the detriment of well intentioned fans, bloggers, and movie aficionados? Wouldn't that spell the end for fan-based websites and blogs everywhere?

The case boiled down to a single issue: was the Lexicon a "fair use" of Harry Potter content under United States copyright law, or did the Lexicon borrow too many facts about the people (that is, if you can call wizards and warlocks "people"), places, spells and creatures from Harry Potter's world?

Fair use is an essential piece of copyright law, because it promotes the useful arts by allowing people to build on other authors' works. It is fair use that allows us to borrow phrases from books or other works of authorship without fear of getting sued for doing so. It's the reason why

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newspapers can quote from other publications without getting sued; it's the reason why I can use the name "Harry Potter" in this article without incurring the wrath of Warner Brothers or Rowling.

Critical to the question of fair use is whether the accused work is "transformative"; in other words, does the use serve a purpose different than the original work. If the accused work serves a different purpose than the original work, then the accused work is said to be "transformative" and protected by the doctrine of fair use. However, an accused work can lose its transformative character when it borrows too heavily from the original expression.

In its 68 page ruling, the Court went through a detailed analysis of whether the Lexicon was a transformative work. The Court began by noting that the purpose of the seven Harry Potter books was to entertain readers, while the Lexicon was intended to serve as a reference guide. This, of course, indicated a transformative work. However, the Lexicon also competed against two companion works written by Rowling, *Quidditch Through the Ages*, and *Fantastic Beasts and Where to Find Them*—fictional reference books

that draw from inventive elements of the Harry Potter series. The Court found that the Lexicon's purpose was virtually identical to the purpose served by these companion reference books. Moreover, the Court noted that the Lexicon contained large portions of all of Rowling's works, word-for-word in many cases, which weighed heavily against a finding of fair use. The verdict: a victory for Warner Brothers and Rowling.

It did not have to turn out that way. A reference guide, by its nature, offers ample protection from accusation of copyright infringement. But here, the Lexicon contained verbatim language from Rowling's works, far beyond what was necessary to serve its informational purpose. Because the Lexicon lacked restraint in its use of Rowling's original expression, Harry prevailed.

In light of the Harry Potter lawsuit, does your site or blog cross the line between reverence and infringement? If it does, you could be facing a penalty up to a \$150,000 fine per act of infringement. To be on the safe side, call an intellectual property attorney before you post your site or blog, or put pen to paper.

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