CROSSING THE FAIR USE LINE:

THE DEMISE AND REVIVAL OF THE *HARRY POTTER LEXICON* AND ITS IMPLICATIONS FOR THE FAIR USE DOCTRINE IN THE REAL WORLD AND ON THE INTERNET♦

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INTRODUCTION

Imagine being an ardent fan of your favorite seven-book series. To express your enthusiasm, you create a website intended to act as a roadmap of the series to help other fans, like yourself, to

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more thoroughly enjoy the novels. You have been lauded for your website by the author of your favorite series as well as those associated with her, and you have recently been approached by a publisher offering you a book deal to put your online encyclopedia into print form. Sounds like a dream come true, right? Not quite. Now imagine that your favorite author sues you for copyright infringement. Undoubtedly, Steven Vander Ark, the defendant in the following case, must have felt like Harry in the final book of the *Harry Potter* series, when Harry, bewildered, asks, "Is this real? Or has this been happening inside my head?"[1] After the Southern District of New York's decision, Vander Ark surely must have been wishing that the following series of events was all just a bad dream.

In the recent decision *Warner Bros. Entertainment Inc. v. RDR Books*,[2] the scenario just described actually occurred. In 2000, Steven Vander Ark, an avid *Harry Potter* fan, created a website called *The Harry Potter Lexicon* in an effort to provide a reference guide for fellow fans to navigate the series.[3] Vander Ark organized his online encyclopedia into alphabetical order to make it easier for readers to locate various entries.[4] In 2007, RDR Books, a publishing company, contacted Vander Ark "about the possibility of publishing a *Harry Potter* encyclopedia based on some of the materials from the Lexicon website,"[5] an idea to which he ultimately agreed after initial reservations.[6] Vander Ark's preliminary hesitations stemmed from his knowledge that J.K. Rowling, the author of the *Harry Potter* series, intended to create an encyclopedia of this nature herself, which would "reflect all of the information in the . . . series."[7] He subsequently reconsidered after repeated assurances that the creation of his print encyclopedia would not violate Rowling's copyright rights.[8] Rowling and Warner Brothers became aware of the intended project and sent a letter requesting the cessation of the book's publication on the basis of copyright infringement.[9] They received limited or no response to their cease-

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[1] J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS 723 (2007).
[2] 575 F. Supp. 2d 513 (S.D.N.Y. 2008), *appeal withdrawn*.
[3] The Harry Potter Lexicon, http://www.hp-lexicon.org/index/master-index-intro.html (last visited Feb. 28, 2009).
[4] *Warner Bros.*, 575 F. Supp. 2d at 520.
[5] *Id.* at 522.
[6] *Id.*
[7] *Id.* at 519.
[8] *Id.* at 522. Additionally, it is possible that Vander Ark believed that he had Rowling's tacit approval to proceed with his project because of her seeming acclaim for his website, *The Harry Potter Lexicon*, when she awarded it with the Fan Site Award. ROBERT S. WANT, HARRY POTTER AND THE ORDER OF THE COURT: THE J.K. ROWLING COPYRIGHT CASE AND THE QUESTION OF FAIR USE 111 (2008). Rowling has since stated that she never believed that such an award "might subsequently be used by Mr. Vander Ark in an attempt to legitimize an attempt to profit financially from [her] work." *Id. See also id.* at 63.
[9] *Warner Bros.*, 575 F. Supp. 2d at 523.

and-desist letter and were eventually informed by RDR books that the encyclopedia's publication would continue.[10] As a result, Warner Brothers and J.K. Rowling filed a lawsuit in the Southern District of New York and moved for an order to show cause for a preliminary injunction.[11]

Judge Robert P. Patterson, Jr. held that Steven Vander Ark infringed on J.K. Rowling's copyright to the *Harry Potter* series, as well as her two companion books entitled *Fantastic Beasts and Where to Find Them* and *Quidditch Through the Ages*.[12] Although the court declared that the Lexicon was a transformative work, various factors, including verbatim copying from Rowling's works and a lack of appropriate citations to the sources used, diminished the transformative nature of Vander Ark's reference guide, and thus weighed against a finding of fair use for Steven Vander Ark and RDR Books.[13] Additionally, the court found that the Lexicon practically took "wholesale from the companion books,"[14] thus supplanting the need to purchase Rowling's books if one were to purchase Vander Ark's reference guide first.

Although this decision was a loss for the defendants in that Judge Patterson permanently enjoined RDR Books from publishing the Lexicon,[15] it has not caused the harm to the fair use doctrine that was initially feared.[16] Rather, this decision has provided insight into what individuals "'can do in the future as far as creating companion guides,'"[17] and has also helped individuals understand the appropriate application of fair use in this context.[18] An issue that remains unresolved is whether the Lexicon would have constituted a fair use if it had existed solely in its original electronic medium.[19]

Part I of this Recent Development provides a general background of the relevant copyright and fair use laws that were applicable in this case. Part II discusses each of the fair use factors in detail. Part III examines the Patterson decision in depth; and finally, Part IV will discuss the implications of this decision to fair

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[10] *Id.* at 524.
[11] *Id.*
[12] *Id.* at 554.
[13] *Id.* at 544.
[14] *Id.* at 532.
[15] *Id.* at 554.
[16] Joe Nocera, *A Tight Grip Can Choke Creativity*, N.Y. TIMES, Feb. 9, 2008, at C1 (fearing that allowing copyright holders to have an all-encompassing right to the reproduction of their work, in any form, would lead to a "chilling effect" with regard to creativity).
[17] John Eligon, *Rowling Wins Lawsuit Against Potter Lexicon*, N.Y. TIMES, Sept. 9, 2008, at B3.
[18] *See* Jonathan Band, *How Fair Use Prevailed in the Harry Potter Case*, ASS'N RES. LIBR., Sept. 29, 2008, http://www.arl.org/bm~doc/harrypotterrev2.pdf.
[19] *See* WANT, *supra* note 8, at 39. *See also* Karen S. Frank, *Fair Use: The Changing Balance*, 943 P.L.I. 469, 482 (2008).

use, specifically in the online context. In particular, although it was feared that the outcome of this case would have a stifling effect on creativity,[20] the Patterson decision instead will serve to further the understanding of fair use in the fan fiction context, and will encourage, rather than suppress, the creation of reference guides.[21]

I. BACKGROUND: RELEVANT COPYRIGHT LAW

Permitting authors, inventors, and other creative minds to copyright their material (i.e., providing them with an almost unlimited monopoly over their work for a specified period of time) creates an incentive for these individuals to produce and continue to produce creative works.[22] Copyright protection applies to "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated . . . . Works of authorship include the following categor[y]: (1) literary works."[23] An original work of authorship is one that has been created solely by the author, regardless of whether the author's work is similar to a preexisting work.[24] A "tangible medium of expression" is a work that exists in "some physical form for at least some period of time."[25]

In addition to protecting original works of authorship that are fixed in a tangible medium of expression, protection of copyrighted material also extends to derivative works.[26] Derivative works include those that are "based upon one or more preexisting works, such as a translation, musical arrangement . . . abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[27] Examples of derivative works include screenplays and translations.[28] However, a work does not become derivative just because it is based on a preexisting work.[29] In addition, "[t]he statutory language seeks to protect works that are 'recast, transformed, or adapted' into another medium, mode, lan-

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[20] Nocera, *supra* note 16.
[21] Band, *supra* note 18.
[22] Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 429 (1984). Rowling confirmed the truth of this statement by claiming that if the Lexicon were to be published, it would thoroughly "destroy her 'will or heart to continue with [writing her own] encyclopedia.'" Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 552 (S.D.N.Y. 2008) (alteration in original).
[23] 17 U.S.C. § 102 (2006).
[24] Stanford University Copyright and Fair Use Center, Copyright Basics FAQ, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter0/0-a.html#1 (last visited Jan. 8, 2009).
[25] *Id.*
[26] 17 U.S.C. § 103(a) (2006).
[27] 17 U.S.C. § 101 (2006).
[28] WANT, *supra* note 8, at 6.
[29] Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 538 (S.D.N.Y. 2008).

guage, or revised version, while still representing the 'original work of authorship.'"[30] In the present case, the court did not find a derivative work in Vander Ark's Lexicon despite his use of a considerable portion from the *Harry Potter* series.[31] The court reached this result because the encyclopedia was not "merely 'transformed from one medium to another.'"[32] Instead, Vander Ark took material from Rowling's works and "condens[ed], synthesiz[ed], and reorganize[ed] the preexisting material in an A-to-Z reference guide . . . giv[ing] the copyrighted material another purpose."[33] As such, his work could no longer be considered derivative and thus failed to be protected under Rowling's copyright.

A copyright holder's control of his creation is restricted by a fair use of the copyrighted material.[34] Therefore, if a copyrighted work is used in a "fair" manner, then that use does not constitute copyright infringement.[35] This means that the public is permitted to use portions of copyrighted material to comment upon, or to criticize, the specified copyrighted work without seeking the permission of the copyright holder.[36] The purpose of this statutory exception to copyright is to allow courts to "avoid rigid application of a copyright holder's exclusive rights, when, on occasion, it would undermine the primary purpose of the Copyright Act."[37] As

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[30] *Id.* (citation omitted).
[31] *Id.* at 539.
[32] *Id.*
[33] *Id.*
[34] Electronic Frontier Foundation, Fair Use Frequently Asked Questions (and Answers), http://w2.eff.org/IP/eff_fair_use_faq.php (last visited Jan. 8, 2009). The Foundation explains the concept of fair use as follows:

> The Copyright Act gives copyright holders the exclusive right to reproduce works for a limited time period. Fair use is a limitation on this right. . . . Fair use allows consumers to make a copy of part or all of a copyrighted work, even where the copyright holder has not given permission or objects to your use of the work.

Id. In responding to how fair use fits with Copyright law, the Foundation notes that:

> Copyright law embodies a bargain: Congress gave copyright holders a set of six exclusive rights for a limited time period, and gave to the public all remaining rights in creative works. The goals of the bargain are to give copyright holders an economic incentive to create works that ultimately benefit society as a whole, and by doing so, to promote the progress of science and learning in society. Congress never intended Copyright law to give copyright holders complete control of their works. The bargain also ensures that created works move into the "public domain" and are available for unlimited use by the public when the time period finishes.

Id.
[35] Stanford University Copyright and Fair Use Center, Fair Use, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/index.html (last visited Jan. 8, 2009).
[36] *Id.*
[37] CHRISTOPHER ALAN JENNINGS, FAIR USE ON THE INTERNET 2 (May 21, 2002), *available at* http://www.fas.org/irp/crs/RL31423.pdf. *See also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990) (stating that "[m]onopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process.").

stated in the U.S. Constitution, the purpose of the Copyright Act is to promote "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."[38] The doctrine of fair use, being elusive in nature, contained no working definition until its codification in 1976.[39] The purpose behind the enactment of the fair use doctrine, codified at 17 U.S.C. § 107, was to provide "some guidance to users in determining when the principles of the doctrine apply."[40] Although courts have found fair use when the use of the copyrighted work was beneficial to society,[41] there is still no clear definition, even today, of what constitutes fair use of a copyrighted material.[42] Instead, courts employ a balancing test to determine if fair use exists in a particular situation. The balancing test consists of the following four factors:

> (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.[43]

Despite the implementation of these various factors, whether something constitutes a fair use of a copyrighted work continues to remain very much in the hands of the individual court deciding the case.[44] Consequently, it is often rather difficult to determine whether a user has committed copyright infringement, or is merely making a fair use out of the copyrighted material.

II. FAIR USE CASE LAW: THE FOUR FACTORS

A. *Purpose and Character of the Use*

The four fair use factors are not mutually exclusive.[45] Rather, the factors must be considered collectively to determine the existence of a fair use.[46] Therefore, a finding in favor of one party with regard to one of the fair use factors is not dispositive of an ul-

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[38] U.S. CONST. art. I, § 8, cl. 8.
[39] H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678-79.
[40] *Id.* at 66.
[41] Electronic Frontier Foundation, *supra* note 34.
[42] Leval, *supra* note 37, at 1105-06 (remarking that many people, including judges, are often confused about the appropriate application of the fair use doctrine, and that "[w]riters, historians, publishers, and their legal advisers can only guess and pray as to how courts will resolve copyright disputes."). *Id.* at 1107.
[43] 17 U.S.C. § 107 (2006).
[44] Stanford University Copyright and Fair Use Center, *supra* note 35.
[45] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).
[46] *Id.*

timate finding of fair use. Courts consider all of the factors together and then determine "how powerfully[] a finding of fair use would serve or disserve the objectives of the copyright."[47] Pursuant to 17 U.S.C. § 107, a work is considered a fair use, and not an infringement of copyright, when it is created for "purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research."[48]

In the seminal case *Campbell v. Acuff-Rose Music, Inc.*,[49] the Supreme Court considered whether a parody of the song, "Oh, Pretty Woman," constituted copyright infringement, or was instead a fair use of the copyrighted material.[50] The *Campbell* Court placed the transformative nature of a work at the forefront of the fair use inquiry and made this question one of "crucial importance to the fair use analysis."[51] Throughout its decision, the Court made clear that the primary inquiry regarding the first fair use factor is "whether and to what extent the new work is 'transformative.'"[52] Additionally, "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[53] Therefore, if a secondary work is deemed transformative, then the other factors retain lesser importance. If, on the other hand, the secondary work acts as a substitute for the original work and lacks the necessary transformative qualities, then the other fair use factors tend to "loom larger."[54]

However, the mere fact that a secondary work possesses transformative characteristics will not necessarily tip the scales in favor of fair use under the first factor.[55] The *Campbell* Court concluded that since the parody could be viewed as a comment or a criticism on the original song, the first factor weighed in favor of the defendants.[56] If the secondary use is likely to generate a substantial profit, then the first factor is more likely to tilt in favor of the

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[47] Leval, *supra* note 37, at 1111. *See also* Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 141 (2d Cir. 1998). "The ultimate test of fair use, therefore, is whether the copyright law's goal of 'promot[ing] the Progress of Science and Useful Arts, . . . would be better served by allowing the use than by preventing it.'" *Id.* (alternation in original) (internal citation omitted) (quoting Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1077 (2d Cir. 1992)).

[48] 17 U.S.C. § 107 (2006).

[49] *Campbell*, 510 U.S. at 569.

[50] *Id.* at 571-72.

[51] 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 [A][1][b] (2008).

[52] *Campbell*, 510 U.S. at 579 (citing Leval, *supra* note 37, at 1111).

[53] *Id.*

[54] *See id.* at 580.

[55] NIMMER & NIMMER, *supra* note 51 (implying that some Second Circuit decisions were incorrectly determined when the court used the term "'not transformative' as a shorthand for 'not fair,' and correlatively 'transformative' for 'fair.'").

[56] *Campbell*, 510 U.S. at 580-83.

original author.[57] The Supreme Court also rejected the court of appeals' treatment of the commercial nature of the parody as decisive against a finding of fair use and instead made it clear that the commercial nature of a work is merely one consideration under the first fair use factor.[58] Finally, while courts continue to consider whether a defendant acted in good or bad faith, such behavior is not of the utmost importance.[59]

B. *Nature of the Copyrighted Work*

When determining the nature of the copyrighted work, courts analyze two issues:

> (1) whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.[60]

If the secondary work uses portions of a creative work, (i.e., one with invented facts, worlds, etc.) then fair use is less often found.[61] Second, if the original work remains unpublished, then a finding of fair use is also less likely.[62] However,

> [t]he fact that a document is unpublished should be of small relevance unless it was created for or is on its way to publication. If, on the other hand, the writing is on its way to publication, and premature secondary use would interfere significantly with the author's incentives, its as yet unpublished status may argue powerfully against fair use.[63]

In *Lennon v. Premise Media Corp.*,[64] Yoko Ono sued the defendants for using a fifteen-second clip of John Lennon's song "Imagine" in their film about intelligent design and evolution.[65] The court in *Lennon* succinctly summarized the second fair use factor as one that "'calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the

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[57] Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006).
[58] *Campbell*, 510 U.S. at 584-85.
[59] Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 545 (S.D.N.Y. 2008).
[60] *Blanch*, 467 F.3d at 256.
[61] NIMMER & NIMMER, *supra* note 51, § 13.05 [A][2][a].
[62] *Blanch*, 467 F.3d at 256. *Cf.* NIMMER & NIMMER, *supra* note 51, § 13.05 [A][2][b] ("'The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.'") (citing Pub. L. No. 102-492, 106 Stat. 3145) (footnotes omitted).
[63] Leval, *supra* note 37, at 1122.
[64] 556 F. Supp. 2d 310, 325 (S.D.N.Y. 2008).
[65] *Id.* at 316-17.

former works are copied.'"[66] In *Lennon*, the court concluded that since the song "Imagine" constituted a creative work, it was intended to be included under copyright protection, and consequently weighed against a finding of fair use.[67]

C. *Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole*

The maxim "the larger the volume . . . of what is taken, the greater the affront to the interests of the copyright owner,"[68] is the essence of this factor. However, as is true with any rule of law, there are always exceptions. For example, if the secondary user avails himself of a large portion of the copyrighted work, or even the entire work, such a use may still be justifiable and considered a fair use, provided that the market impact does not negatively affect the profitability of the copyright owner's work.[69] In *Blanch v. Koons*,[70] the court described the third fair use factor in terms of how much of the copyrighted material was used "'in relation to the . . . work as a whole,'"[71] and whether the amount taken was excessive.[72] In that case, the court encountered the issue of whether an artist, Jeff Koons, had used a copyrighted image (a photograph entitled "Silk Sandals") in a collage he had created in violation of Andrea Blanch's (the photographer) copyright.[73] The court found that the copying of the photograph was reasonable when considering the "quantity, quality, and importance of the material used."[74] The key to the court's ruling in favor of Koons was that, in using Blanch's photograph, Koons did not use the "heart" of Blanch's image; rather, he used portions of it as a commentary on mass media[75] and thus did not invade the sphere of copyright protection that was afforded to her image.[76]

D. *Market Effects*

The fourth factor of the fair use doctrine was once considered the most important.[77] Underlying this factor is the concept

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[66] *Id.* at 325 (citation omitted). *See also* Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1374 (2d Cir. 1993) (stating that since the "teleplays were creative works," they were "entitled to heightened protection . . . .").
[67] *Lennon*, 556 F. Supp. 2d at 325.
[68] Leval, *supra* note 37, at 1122.
[69] *See id.* at 1123. *See also* NIMMER & NIMMER, *supra* note 51.
[70] 467 F.3d 244 (2d Cir. 2006).
[71] *Id.* at 257 (citation omitted).
[72] *Id.* (citation omitted).
[73] *Id.* at 244.
[74] *Id.* at 257.
[75] *Id.* at 253.
[76] *See id.* at 257-58.
[77] Twin Peaks Prods, Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1377 (2d Cir. 1993). Follow-

that one should be rewarded for one's own creative contributions.[78] If a person infringes on a copyright holder's rights, and, in so doing, negatively impinges on the copyright holder's profits, the author is likely to be discouraged from creating imaginative works that will benefit society.[79] However, although this is an important consideration, market harm occurs only when the secondary work "serves . . . as a substitute"[80] for the original and results in harm to the original work's potential market.[81] The potential market of an original work includes the current and prospective markets for the yet-to-be created derivative works of the copyrighted original.[82] While the copyright holder does not possess infinite authority over all "publishable works . . . . the market for the copyrighted works themselves or derivative works that the author is entitled to license"[83] are within the copyright holder's domain.[84]

III. ROWLING VS. RDR BOOKS

In *Warner Bros. Entertainment Inc. v. RDR Books*, the court ultimately ruled in favor of the plaintiff, J.K. Rowling, finding that the creation of the Lexicon in this context was not a fair use of her works.[85] The first inquiry that Judge Patterson considered was whether Rowling put forth a prima facie claim of copyright infringement.[86] The court found that she did with regard to the seven *Harry Potter* novels and the two companion guides;[87] the court relied, at least in part, on the fact that the text Vander Ark copied into the Lexicon constituted Rowling's original expression, including invented facts,[88] protected by copyright law.[89] Addition-

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ing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), however, the nature of the inquiry shifted to whether the use was transformative. *Id.* at 579. *See* discussion *supra* Part II.A.

[78] Leval, *supra* note 37, at 1124.

[79] *Id.* ("When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily against the secondary user."). *Id.* at 1125.

[80] *Id.*

[81] *Id.*

[82] Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 549 (S.D.N.Y. 2008).

[83] Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1377 (2d Cir. 1993).

[84] Jeannine M. Marques, Note, *Fair Use in the 21st Century: Bill Graham and Blanch v. Koons*, 22 BERKELEY TECH. L.J. 331, 340 (2007).

[85] *Warner Bros.*, 575 F. Supp. 2d at 554.

[86] *Id.* at 533 (stating that the plaintiff must prove "'(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original,'" (citation omitted) in order to make out a prima facie claim of copyright infringement). The court noted that copying requires a showing of two elements. First, the plaintiff must show "actual copying," and second, the amount of copying must be "an improper or unlawful appropriation." *Id.* Finally, the plaintiff has an actionable copyright claim if the new work is substantially similar to "'protected expression in the earlier work.'" *Id.* (citation omitted).

[87] *Id.* at 554. Although the claim of copyright infringement arose with respect to Rowling's "The Daily Prophet" newsletters and the "Famous Wizard Cards" that she authored, because she failed to enter these works into evidence, the court refused to consider them as part of Warner Brothers' and Rowling's claim of copyright infringement. *Id.* at 534.

[88] "Invented facts" are viewed as "creative expression," which is protected by copyright. *Id.*

ally, the court found that Vander Ark's secondary work was "substantially similar,"[90] so as to create a presumption of infringement.[91] The judge noted that Vander Ark's use was substantially similar because he appropriated Rowling's work by creating a 450-page encyclopedia that consisted primarily of "direct quotations or paraphrases, [and] plot details, or summaries of scenes" from the series.[92] "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 where the copied expression is entirely the product of the original author's imagination and creation."[93]

Vander Ark claimed that he did not copy Rowling's works because he was simply using "facts" from Rowling's novels and presenting them in their "'factual capacity . . . .'"[94] However, the court found that "each 'fact' reported by the Lexicon is actually expression invented by Rowling," which constitutes copyrightable material.[95] Finally, the plaintiffs argued that the Lexicon was a violation of "their right to control the production of derivative works."[96] This contention failed to compel the court to conclude that the Lexicon was a derivative work;[97] instead of simply narrating the *Harry Potter* series in a different format, the Lexicon gave Rowling's copyrighted expression a new purpose.[98] To rebut the presumption of copyright infringement, the defendant argued that the Lexicon's use of the *Harry Potter* works amounted to a fair use.[99] In determining whether the Lexicon was in fact a fair use of Rowling's works, the court looked at the four factors as provided in 17 U.S.C. § 107.[100]

A. *The Purpose and Character of Vander Ark's Lexicon*

The court first considered the "purpose and character of the use . . . ,"[101] and began by focusing on the transformative nature[102]

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at 536.
[89] 17 U.S.C. § 102 (2006).
[90] *Warner Bros.*, 575 F. Supp. 2d at 534. A work is "substantially similar" if the copying that took place was such that it was qualitatively (i.e., whether the copied portion was "protected expression, as opposed to unprotected ideas or facts") and quantitatively (i.e., the amount copied) sufficient to support a finding of copyright infringement. *Id.* (citation omitted).
[91] *Id.* at 538.
[92] *Id.* at 535.
[93] *Id.*
[94] *Id.* at 536.
[95] *Id.*
[96] *Id.* at 538.
[97] *Id.* at 549.
[98] *Id.*
[99] *Id.* at 540. The fair use doctrine is intended "'to protect copyrighted material and to allow others to build upon it.'" *Id.* (citation omitted).
[100] *See supra* text accompanying note 43.
[101] 17 U.S.C. § 107 (2006).

of the secondary work, as well as whether its purpose was commercial;[103] specifically, the court inquired as to whether the Lexicon supplanted "'the original creation, or instead add[ed] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'"[104] The fair use doctrine will act as a defense to the claim of copyright infringement only if the secondary work in question "'adds value to the original' . . . because such a work contributes to the enrichment of society."[105] This is true because the purpose of copyright law is to promote "'science and the arts . . . ,'" which can be "'furthered by the creation of transformative works.'"[106] After deliberation, the court found that the Lexicon was a transformative work that did not displace the *Harry Potter* series.[107] Rather, the purpose of Vander Ark's Lexicon was "not to entertain but to aid the reader or student of *Harry Potter* by providing references about the elements encountered in the series."[108] Although the court found that the Lexicon had not superseded the purpose of the series, it did find that the Lexicon supplanted the "informational purpose" of Rowling's companion guides "by seeking to relate the same fictional facts in the same way."[109] This factor alone did not destroy the court's finding that the Lexicon was a transformative secondary work, but it weighed against a finding of fair use.

Another aspect that undermined the defendant's argument that the secondary work was transformative was the Lexicon's use of "verbatim copying in excess of what [was] reasonably necessary . . . ."[110] While quoting another person's work "can be vital to the fulfillment of the public-enriching goals of copyright law[,]"[111] one of the troubling aspects of Vander Ark's Lexicon arose from the

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[102] Vander Ark's reference guide was considered transformative because the Lexicon made "information from the series available for reference purposes rather than for the purely entertainment or aesthetic purposes of the original works." Lewis R. Clayton, *Harry Potter Lexicon*, NAT'L L.J., Nov. 10, 2008. The court deemed the transformative nature of the secondary work the most significant element of this factor. *Warner Bros.*, 575 F. Supp. 2d at 540.

[103] *Warner Bros.*, 575 F. Supp. 2d at 545.

[104] *Id.* at 541 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

[105] *Id.* (citation omitted).

[106] Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 142 (2d Cir. 1998) (citing *Campbell*, 510 U.S. at 579).

[107] *Warner Bros.*, 575 F. Supp. 2d at 541. As the court noted:

> Presumably, Rowling created the *Harry Potter* series for the expressive purpose of telling an entertaining and thought provoking story centered on the character Harry Potter and set in a magical world. The Lexicon, on the other hand, uses material from the series for the practical purpose of making information about the intricate world of *Harry Potter* readily accessible to readers in a reference guide.

Id.

[108] *Id.* at 542.

[109] *Id.*

[110] *Id.* at 544.

[111] Leval, *supra* note 37, at 1116.

fact that he appropriated far too much of Rowling's masterpieces. "The first fair use factor calls for a careful evaluation whether the particular quotation is of the transformative type that advances knowledge and the progress of the arts or whether it merely repackages, free riding on another's creations."[112] Since Vander Ark's guide did the latter, and there were instances when the Lexicon's "value as a reference guide lapse[d,]"[113] its transformative nature was weakened.[114]

B. *The Nature of Rowling's Works*[115]

The court next considered the nature of the copyrighted work. When a secondary work makes use of published material, a finding of fair use is more probable than if the material had remained unpublished.[116] The combination of various factors, including the fact that Vander Ark's secondary use was not completely transformative, that the *Harry Potter* series and Rowling's companion guides were "highly imaginative and creative,"[117] and were thus closer "to the core of copyright protection,"[118] all led the court to hold that this factor favored the plaintiffs.[119]

C. *Amount and Substantiality of Vander Ark's Use of Rowling's Works*

Applying the third fair use factor, the court explained the necessity of considering it in conjunction with the transformative purpose of Vander Ark's use.[120] The question, then, was "whether the amount and value of Plaintiffs' original expression used [were] 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."[121] In other words, the question is whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole 'are reasonable in relation to the

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[112] *Id.*
[113] *Warner Bros.*, 575 F. Supp. 2d at 544.
[114] *Id.* (noting that when the Lexicon failed to direct readers to information in the *Harry Potter* works, it failed to achieve its intended purpose). The court found that,

> [a]lthough the Lexicon is generally useful, it cannot claim consistency in serving its purpose of pointing readers to information in the *Harry Potter* works. Some of the longest entries contain few or no citations to the *Harry Potter* works from which the material is taken. . . . In these instances, the Lexicon's reference purposes are diminished.

Id.
[115] Although in the actual case, the court next considered the third factor, for the sake of clarity, the second factor will be discussed first in this Recent Development.
[116] JENNINGS, *supra* note 37, at 6. *See also* Salinger v. Random House, Inc. 811 F.2d 90, 96 (2d Cir. 1987).
[117] *Warner Bros.*, 575 F. Supp. 2d at 549.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 545.
[121] *Id.* (citation omitted).

purpose of the copying.'"[122]

While the court conceded that it was necessary to take a considerable share of Rowling's works for the Lexicon to serve a productive purpose, the verbatim copying of Rowling's language was excessive.[123] When considering the amount of the copyrighted work used in relation to Vander Ark's work as a whole,[124] the court found that the amount taken was too extreme, especially in light of the "expressive value of the language."[125] Here, there was a substantial amount of copying from the original work, taking the "'heart' of the *Harry Potter* Books;"[126] the amount copied, therefore, was more than "reasonably necessary to create a reference guide."[127] Additionally, since the Lexicon usurped the majority of the content contained in Rowling's companion guides, the court weighed this against a finding of fair use.[128] Consequently, this factor, too, weighed against the defendants.[129]

D. *Market Harm to Rowling's Works*

Under this final factor, the court determined that a reference guide to the *Harry Potter* series was not a derivative work and was thus allowed to compete with Rowling's planned encyclopedia.[130] Additionally, since the court had earlier decided that the Lexicon was transformative in nature (at least with respect to the seven books in the series), it was unlikely that the Lexicon would cause market harm by acting as a replacement for those novels.[131] However, the court found that the Lexicon could cause potential harm to Rowling's companion books because of Vander Ark's "almost wholesale" use of these guides.[132] Lastly, the court determined that the purpose of Vander Ark's use of the copyrighted material was for commercial gain and that he attempted to capitalize on the "'inherent entertainment value' of the original works . . . ."[133] As

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[122] *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78 (1994)).
[123] *Warner Bros.*, 575 F. Supp. 2d at 548.
[124] *Id.* at 546.
[125] *Id.* (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564-66 (1985)).
[126] WANT, *supra* note 8, at 54.
[127] *Warner Bros.*, 575 F. Supp. 2d at 548.
[128] *Id.* at 548-49. It is interesting to note that in the Lexicon that Vander Ark actually published, he refers his readers to Rowling's companion guides rather than reproducing the material found in those guides in his own encyclopedia, which was essentially what he was guilty of in his first proposed encyclopedia, and of which the court disapproved. Presumably, this was in an effort to comply with Judge Patterson's standards. *See* STEVEN VANDER ARK, THE LEXICON: AN UNAUTHORIZED GUIDE TO HARRY POTTER FICTION AND RELATED MATERIALS xiv (2009).
[129] *Warner Bros.*, 575 F. Supp. 2d at 549.
[130] *Id.* at 551.
[131] *Id.*
[132] *Id.* at 550.
[133] *Id.* at 545.

such, because of the potential for market harm to Rowling's companion guides, the court found that the fourth factor also favored the plaintiffs.[134]

Based on the foregoing, the court declined to find fair use in this instance. However, though the court ultimately found that the defense of fair use failed in this specific case, the court's overall support for the creation of reference guides should have left fans of their favorite series hopeful.[135] Tellingly, Judge Patterson declared that a reference guide that competes with Rowling's future encyclopedia was permitted,[136] and that the reference guide market for the series did not belong solely to Rowling.[137] Rather, it was the circumstances surrounding this case that would not allow for a finding of fair use.[138]

IV. THE FAIR USE INQUIRY IN THE ONLINE CONTEXT AND THE IMPLICATIONS OF THE HARRY POTTER CASE FOR FAN FICTION

A. *Fair Use Inquiry in the Online Context*

Whether Vander Ark's online encyclopedia would have remained sufficiently transformative in nature, enough to constitute a fair use of Rowling's works, remains open for debate. However, though the answer to this query may not be at all certain, it seems at least plausible that Vander Ark's online Lexicon would have been a fair use had it remained in cyberspace. First, Rowling seemed to harbor no qualms regarding the encyclopedia's existence on the Internet, which in effect contained much of the same content as the proposed print encyclopedia.[139] In fact, some of the very language that the court, and Rowling herself, took issue with appears in full force on Vander Ark's website, *The Harry Potter Lexicon*. For example, the various entries for the "Mirror of Erised" are as follows: In *Harry Potter and the Sorcerer's Stone*, Rowling describes the mirror as:

> [A] magnificent mirror, as high as the ceiling, with an ornate

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[134] *Id.* at 551.
[135] *See id.* at 553 ("'reference works that share the Lexicon's purpose of aiding readers of literature generally should be encouraged rather than stifled.'") (citation omitted). *See, e.g.*, Band, *supra* note 18; Marjorie Kehe, *Harry Potter Encyclopedia Finally Goes on Sale*, CHRISTIAN SCI. MONITOR, Jan. 2, 2009, *available at* http://features.csmonitor.com/books/2009/01/02/harry-potter-encyclopedia-finally-goes-on-sale/. In January 2009, just four months after Judge Patterson's decision, *The Lexicon*, authored by Steven Vander Ark, went on sale in Great Britain and the United States, following revisions made to the text according to the requirements of the district court.
[136] *Warner Bros.*, 575 F. Supp. 2d at 550.
[137] *Id.*
[138] *Id.* at 552.
[139] WANT, *supra* note 8, at 39.

> gold frame, standing on two clawed feet. There was an inscription carved around the top: *Erised stra ehru oyt ube cafru oyt on wohsi*. . . . It shows us nothing more or less than the deepest desire of our hearts. You [Harry Potter], who have never known your family, see them standing around you. Ronald Weasley, who has always been overshadowed by his brothers, sees himself standing alone, the best of all of them. However, this mirror will give us neither knowledge or truth. Men have wasted away before it, entranced by what they have seen, or been driven mad, not knowing if what it shows is real or even possible.[140]

In comparison, the proposed Lexicon contained (and *The Harry Potter Lexicon* website still contains) the following language to describe the same mirror:

> A magnificent mirror, as high as a classroom ceiling, with an ornate gold frame, standing on two clawed feet. The inscription carved around the top reads "Erised stra ehru oyt ube cafru oyt on wohsi," which is "I show you not your face but your heart's desire" written backwards (that is, in what is called 'mirror writing'). When you look into the mirror you see the deepest, most desperate desire of your heart. The mirror has trapped people who can't bear to stop staring into it, unsure if what they see is going to actually happen. Harry sees his family in the Mirror; Ron sees himself as Head Boy and Quidditch champion (PS12).[141]

Finally, contrast the two preceding entries with the "Mirror of Erised" description that is found in Vander Ark's Lexicon that was published in January 2009:

> A large magical mirror with a gold frame and two clawed feet. The inscription carved around the top reads "Erised stra ehru oyt ube cafru oyt on wohsi," which is "I show not your face but your heart's desire" written backwards (that is, in what is called "mirror writing"). When a person looks into the Mirror, they see the "deepest, most desperate desire of their heart" (PS12). Dumbledore used the power at one point to keep something safely hidden (PS17, HBP23).[142]

It is clear that, pursuant to the district court's decision, Vander Ark, in his published encyclopedia, intentionally omitted some of the verbatim copying of words and original expression that, interestingly, can still be found on his website.

In another effort to distinguish his work from Rowling's,

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[140] J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 207, 213 (1997).
[141] *Warner Bros.*, 575 F. Supp. 2d at 547. *See also* The Harry Potter Lexicon, http://www.hp-lexicon.org/magic/devices/devices-m.html#mirror_of_erised (last visited Feb. 11, 2009).
[142] VANDER ARK, *supra* note 128, at 206.

Vander Ark has included more analysis and commentary throughout the Lexicon.[143] While it may seem inconsistent for Rowling to object to this language in the proposed print Lexicon, yet not oppose such similar language on Vander Ark's website, it is not. When there was no possibility for market harm (i.e., when the encyclopedia remained a mere Internet website), she had no cause for concern. Additionally, Rowling encouraged the continued existence of the website specifically because it did not copy large portions from her companion guides. Rather, the site directed readers to purchase her guides for a more thorough explanation of each entry so as not to hinder sales of those guides.[144] However, upon the possibility of competition with her planned encyclopedia, as well as the sales of her companion guides, she found cause for alarm and decided to act.[145]

If this case were presented to Judge Patterson as one addressing fair use online, he arguably may have reached the same conclusion and found no fair use; this, however, seems unlikely. Although fair use could not be found when the possibility of Vander Ark's print encyclopedia loomed, it could consistently be found online. This is because of the commercial nature of the website.[146] Fan websites, like Vander Ark's Lexicon, generally do not exist to yield a profit; rather, the purpose of the Lexicon was to serve solely as a reference guide.[147] As the *Harry Potter* court explained, "[c]ourts will not find fair use when the secondary use 'can fairly be characterized as a form of commercial exploitation,' but [courts] 'are more willing to find a secondary use fair when it produces a value that benefits the broader public interest.'"[148] A website, acting as a reference guide to a popular book series simply for the enjoyment of fans, and which does not supersede the original copyright holder's works, would surely serve the purpose of benefiting the "broader public interest."[149] The major distinction, then, is that Vander Ark intended to profit from publishing the Lexicon (which had taken too much from Rowling's works), while with re-

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[143] *Id.* at 2.
[144] *See generally* The Harry Potter Lexicon, *supra* note 3. *See also* E-mail from Steven Vander Ark, Webmaster, The Harry Potter Lexicon (Feb. 10, 2009, 01:37:00 EST) (on file with author) (asserting that the Lexicon "intentionally included only a small part of the companion books' information on the website . . . because we were trying very hard not to supplant Rowling's books").
[145] Clayton, *supra* note 102. *See also* Transcript of Record at 92-93, Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d, 513, 528-29 (2008) (No. 07 Civ. 9667) (explaining that the reason Rowling did not mind the Lexicon in its online medium was that it was not in book form).
[146] WANT, *supra* note 8, at 39.
[147] Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 520 (S.D.N.Y. 2008).
[148] *Id.* at 545 (quoting Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006)).
[149] *Id.*

gard to his online encyclopedia, he did not.

B. *Implications of the Harry Potter Case to Fan Fiction*

Sufficiently analogous and relevant to the set of circumstances presented by the issues surrounding the *Harry Potter* decision are the implications that this judgment will have on other forms of fan fiction. Fan fiction involves "writings in which book, movie or TV characters are imagined by fans in all sorts of stories that go beyond those of their original creators."[150] Fan fiction tends to foster creativity[151] by "'taking someone else's ideas, bringing them into your own head and trying to make sense of them through your own interpretation . . . .'"[152] Further, it helps "turn[] fans from passive acolytes [in]to active participants . . . ."[153] Inherent in furnishing copyright holders with the power to destroy fan fiction websites is the fear that this seeming unfettered control could amount to the stifling of creativity and free speech.[154] Briefly stated, one of the main difficulties presented by publication of fan fiction on the Internet is that these fictitious materials often constitute derivative works, which are works that the copyright holder alone has the authority to either create (or permit others to create) or let fall by the wayside.[155] At the same time, courts are confronted with the powerful argument of fostering creativity and promoting free speech.[156] Because of this conflict, "threats of litigation carrying potentially massive costs . . . cause many people to relinquish their rights."[157]

While fans tend to relinquish their rights perhaps more often than they should, many copyright holders, including J.K. Rowling,[158] are not troubled by fan fiction (and thus the anxiety over the competing interests of the copyright holder and the fan's First

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[150] *Fan Fiction Writers Face Nonfiction Legal Hurdles*, NAT'L PUB. RADIO, July 16, 2008, *available at* http://www.npr.org/templates/story/story.php?storyId=92577677.

[151] Amy Harmon, *In TV's Dull Summer Days, Plots Take Wing on the Net*, N.Y. TIMES, Aug. 18, 1997, at A1.

[152] Matthew Mirapaul, *Why Just Listen to Pop When You Can Mix Your Own?*, N.Y. TIMES, Aug. 20, 2001, at E2.

[153] *Id.*

[154] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1263 (11th Cir. 2001).

[155] Chilling Effects Clearinghouse, Notices: Fan Fiction, http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=669#QID310 (last visited Feb. 14, 2009).

[156] *Suntrust Bank*, 268 F.3d at 1263 (stating that the Copyright Clause and the First Amendment conflict with each other, and, as such, a balance must be struck).

[157] MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 4 (2005), *available at* http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf.

[158] David B. Caruso, *Harry Potter Case Illustrates Muddled Web Copyright Laws*, USA TODAY, Apr. 20, 2008, http://www.usatoday.com/tech/news/techpolicy/2008-04-20-harry-potter-lawsuit_n.htm?loc=interstitialskip (citing Rowling, who "once said there is nothing wrong with people writing new stories for her characters, to share with friends").

Amendment rights are not implicated) "as long as somebody's not out there trying to make money with it . . . ."[159] This was the view of at least one large broadcasting company, 20th Century Fox, which produced the television series, *The X-Files*.[160] The company was apparently accepting of fan fiction websites, as were several other networks.[161] The complacent and often supportive attitude toward fan fiction is anything but strange.[162]

For example, on the social-networking site *Twitter*, fans of the AMC series *Mad Men* created profiles for the characters of the show in which the characters discussed their daily activities.[163] Undoubtedly, the fans maintaining these profiles did so in an effort to entertain themselves, as well as other devoted fans.[164] However, when AMC was notified about the "role playing"[165] on *Twitter*, the company forced the creators of these profiles to remove them.[166] Interestingly, the profiles were up and running again within a week after the takedown[167] because the "marketing department . . . [realized] that, whatever the legal standing, it was insane to stop this outpouring of (completely free, you fools) fan-promotion."[168] So, while certain aspects of fan fiction may technically constitute copyright infringement, many copyright holders will excuse this illegality in favor of maintaining their dedicated fans.[169] And this seems to be the crux of what many current copyright holders are realizing: there is no reason to suppress the creation of fan fiction unless it causes significant harm[170] to the copyright holder's work; silencing these individuals means risking the loss of the copyright holder's most loyal fan base.[171] It would be unwise to alienate one's most devoted followers by initiating a lawsuit.[172]

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[159] Harmon, *supra* note 151.
[160] *Id.*
[161] *Id.*
[162] *See Fan Fiction Writers Face Nonfiction Legal Hurdles*, *supra* note 150.
[163] Anna Pickard, *I wanna be your blog*, GUARDIAN (UK), Feb. 7, 2009, Features, at 6.
[164] *Id.*
[165] Organization for Transformative Works, http://transformativeworks.org/ (last visited Feb. 15, 2009).
[166] Pickard, *supra* note 163.
[167] *Id.*
[168] *Id. See also* HEINS & BECKLES, *supra* note 157, at 28.
[169] Pickard, *supra* note 163.
[170] *See* Mike Masnick, *Another Author Shows JK Rowling How to Embrace Fans*, TECHDIRT, Aug. 6, 2008, http://www.techdirt.com/blog.php?tag=fan+fiction (stating that author Stephanie Meyer of the *Twilight* series decided to embrace, rather than shun, fan fiction writers).
[171] Pickard, *supra* note 163. The people who create fan fiction are generally the most dedicated fans, which a copyright holder would be foolish to lose. *See* Organization for Transformative Works, *supra* note 165.
[172] "By empathizing with enthusiasts instead of antagonizing them, savvy online capitalists have found they can benefit from the energy that fans generate. . . . Fans can publicize events, share information and even help distribute merchandise through their Web sites." Ann Powers, *Fans Go Interactive, and Popular Culture Feels the Tremors*, N.Y. TIMES, Sept. 20, 2000, at H25.

In contrast, consider the website www.sincereamore.com,[173] which posted transcripts and plot summaries from the show *Caroline in the City*.[174] In 2004, CBS wrote a cease-and-desist letter to this site's webmaster, claiming a violation of CBS's copyright and trademark rights.[175] Considering the fair use factors, this case could theoretically be distinguished from the *Mad Men* case described above, because the *Mad Men* profiles did not threaten to cause any market harm to the show, whereas posting episode transcripts could have supplanted the need to watch the television series. In actuality, these two instances of fan-related content were not all that different, as it was found that the *Caroline in the City* transcripts were posted for commentary purposes and were not for profit.[176] However, had the transcripts simply been posted on the website, with no other purpose, it is possible that a court may have found copyright infringement because of the market harm and superseding qualities of the transcripts as posted online.[177] As evidenced by these examples, the *Harry Potter* decision does not dramatically change anything in the fair use analysis, even when applied to online situations. When the defense of fair use arises, the four factors are still considered in the same manner and weighed collectively.

CONCLUSION

It is clear from the *Harry Potter* decision that reference guides can, and should be, a fair use of copyrighted material under the appropriate circumstances. While the decision should serve as a warning of the consequences of appropriating too much from a copyrighted work, it should also function as a guidepost for writers and fans alike who wish to construct their own reference guides both online and in print. Therefore, prior to writing a reference guide, the shrewd fan would do well to consider how her actions measure up to the four factors courts use to determine fair use: the purpose and character of the use, the nature of the copy-

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[173] This website is no longer in existence; it can be assumed that the operator dismantled it upon receiving the cease-and-desist letter.

[174] Chilling Effects Clearinghouse, *supra* note 155. The *Caroline in the City* series aired from September 1995 through April 1999. *See* Caroline and the City a Titles and Air Dates Guide, http://epguides.com/CarolineintheCity/ (last visited Mar. 9, 2009).

[175] Chilling Effects Clearinghouse, *supra* note 155.

[176] HEINS & BECKLES, *supra* note 157, at 35.

[177] *See* NIMMER & NIMMER, *supra* note 51, § 13.05 [G]. In *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191 (3d Cir. 2003), Disney had given the plaintiff permission to display trailers of its movies. *Id.* Following a contract dispute, the plaintiff created its equivalent of trailers and posted them online, which was in direct competition with Disney's works, including derivative works. *Id.* The court found no fair use, concluding that, although the "clips" created by the plaintiff were transformative and educational in nature, they would probably supersede the need for Disney's derivative works. *Id.*

righted work, the amount and substantiality of the portion used, and the market effects. This way, a court need not evaluate the situation at all.

Although temporarily deterred, Vander Ark quickly rebounded and published the reference guide that he toiled with for so long.[178] After the defeat of Lord Voldemort in the final book of the *Harry Potter* series, Harry summed up by saying, "I've had enough trouble for a lifetime."[179] With the nightmare of litigation behind him and his Lexicon in circulation, Vander Ark, too, has left his troubles behind; his dream of creating a *Harry Potter* reference guide has finally wandered into reality.

Shira Siskind[*]

[178] Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 520 (S.D.N.Y. 2008).
[179] ROWLING, *supra* note 1, at 749.

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