

## Control and the brand, using copyright to ward off unofficial tie-ins

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The highly publicized and long awaited judgment on the Harry Potter Lexicon has been announced, with the US court ruling in favor of JK Rowling and ceasing publication of the Lexicon.

The court held that the published Lexicon, which comprises a comprehensive list of all magical creatures and characters in the Harry Potter novels, together with spells and other material on the Potter universe, infringed upon Rowling's' copyright. The Lexicon author's argument that the guide was protected under the fair use provisions was dismissed.

Caroline Hilditch of Withers LLP discusses the repercussions of this case in the context of copyright actions, and examines how writers and brand owners are exploiting the law of copyright in order to protect their brand.

### Copyright as a tool for brand protection

The case of the Harry Potter Lexicon appeared, on the surface, to be a matter of determining whether the published encyclopedia constituted copyright infringement. In fact, it masked a wider agenda by Rowling, which significantly was supported by the Court, of using copyright to protect her multi million pound Harry Potter empire as well as hinder any capitalization of her brand by this third party.

Copyright is designed to protect artistic and creative labor. It aims to stop imitators and opportunists jumping on the bandwagon and profiting from another's work by lifting their material. Although it cannot protect ideas, characters, or plot lines, it is an essential safeguard for writers to protect the words and format of their work. The rule is that 'substantial' parts of text cannot be copied or adapted without the consent or licence of the copyright owner. The law of copyright is not designed to provide the creator with a monopoly, and there are legitimate ways other people can profit from an original work. However, more and more, the Courts seem to favor the author, placing particular import upon the author's fundamental right to capitalize upon their creation.

Stretching the meaning of 'substantial' from the classic 'word-for-word' replication, to a substantial reliance upon ideas or theories

In 2006, the authors of 'Holy Blood and The Holy Grail' tried to argue that "substantial copy" should include making extensive use of the hypotheses in their book. In this case, the authors failed to argue Brown's book was a substantial copy because of the degree of reliance upon their ideas and theories. The Court held Dan Brown's 'Da Vinci Code', as a fictional reproduction did not constitute a substantial copy as no entire passages were copied.

The result of the Harry Potter Lexicon case should come as no surprise; in the US, the original author has always been highly protected. In 1998, the US Court ruled that the Seinfeld Aptitude Test trivia quiz book, which comprised a selection of quizzes that aimed to test fans' recollection of scenes and quotes from the Seinfeld series, was an infringement of the author's copyright. Despite the fact no reader of the quiz book would be able to reproduce episodes or scenes, the Court held that material cited constituted replicating a 'substantial part' and so infringed the Seinfeld copyright.

The approach taken by a court in New Delhi contrasts with the rigorous author-protection seen in the UK and US. The court there held the producers of the Bollywood movie 'Hari Putta - a comedy of terrors' should have been permitted to make their film, despite the similarities to the Rowling creation.

A more economical approach?

What comes across, from the UK and US cases, is an awareness of the economical context, and a will, first and foremost, to facilitate the author's capitalization of their brand. Neither the Lexicon nor the Seinfeld quiz could ever replace the original work; instead, what is actually being protected and encouraged beneath the facade of a claim for copyright infringement is the original author's right to control their brand. It took Rowling mentioning that she might one day create her own encyclopedia, and the US Court were swayed. The danger, however, is that with this mentality, are we moving towards providing original authors with a monopoly? Surely we must be careful not to over-protect at the expense of crushing other people's creative enjoyment of the works?

### How to work with copyright rules

Writers of works to accompany other published works, (i.e. anything from a guide to books, films, or software programs) must now take extra caution. The courts seem to be approaching this from the side of the author, and so spin-off's authors must demonstrate more than ever that a substantial degree of independent creative work has been expended – see our tips below.

1. Avoid repetition and direct quotes from the original work;
2. Ensure there is independent creative work involved;
3. Make sure the color schemes, fonts, emblems, designs are different;
4. Avoid using images or marks without permission; and
5. Be careful to stress the unofficial status of the book on the cover.