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IN THE RESTRICTED SECTION: HARRY POTTER AND  
UNAUTHORIZED SAGAS

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BY BABAK ZARIN\*

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## INTRODUCTION

J.K. Rowling's *Harry Potter* series has become a modern icon of pop culture. With that has come the need to defend her intellectual property in the work, but are there scenarios where it would be better for her not to defend it as strictly as she might otherwise? While the intuitive answer is "yes," if only because few things in life are absolutes, it is nevertheless instructive to look at specific situations in order to have case studies to justify such a response.

For example, take Rowling's challenge in engaging with instances of unauthorized publication for *Harry Potter*. While there are many to review, this essay will focus on five particular incidents. Rowling ultimately chose to settle or utilize alternative-resolution arrangements to resolve the matter instead of litigate in three of them, while in two she did not.<sup>1</sup> Looking at these five incidences together, it appears that there is an implied fair use analysis operating in the background of her decision to litigate; in particular, the social circumstances surrounding the cases seem to have impacted her legal team's evaluation of the first and fourth of the *Campbell* test factors (i.e. the character of the use and the effect of the use upon the potential market) such that what would have ordinarily been viewed as works with severe economic impact that would justify litigation were, instead, interpreted as having less impact and therefore not worth going into court to protect.<sup>2</sup>

This paper is divided into five parts. Part I will briefly discuss *Harry Potter* and offer information of both its economic value and, subsequently, Rowling's own financial status in order to help readers gain a sense of why and of what value the intellectual property rights in the work might be worth. Part II will discuss the current state of fair use, the types of derivative works the five cases examined likely are, and

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<sup>1</sup> See Chitra Subramanyam & Subrata Nagchoudhury, *Pirates Potter Around Kolkata*, THE INDIAN EXPRESS, (Apr. 20, 2003) <http://archive.indianexpress.com/oldStory/22323/>; *Fake Harry Potter Novel Hits China*, BBC NEWS, <http://news.bbc.co.uk/2/hi/entertainment/2092661.stm> (last visited Jan. 8, 2011) [hereinafter *Fake Harry Potter Novel Hits China*]; *Rowling Goes Potty over US Bid to Post Harry's Son's Story on Web*, THE SCOTSMAN (Nov. 19, 2007, 00:37AM), <http://www.scotsman.com/news/world/rowling-goes-potty-over-us-bid-to-post-harry-s-son-s-story-on-web-1-700445>; *The Harry Potter Lexicon*, HARRY POTTER LEXICON, <https://legacy.hp-lexicon.org/index-2-text.html> (last updated Oct. 1, 2007); Tim Wu, *Harry Potter and the International Order of Copyright: Should Tanya Grotter and the Magic Double Bass be Banned?*, SLATE (June 27, 2003, 12:42 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2003/06/harry\\_potter\\_and\\_the\\_international\\_order\\_of\\_copyright.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2003/06/harry_potter_and_the_international_order_of_copyright.html)

<sup>2</sup> See *Campbell v. ACUFF-Rose Music, Inc.*, 510 U.S. 569, 576 (1994).

some of the economic factors involved both in choosing to rely on fair use and in choosing to litigate a case. Parts III and IV will give an overview of the facts of the five cases in question before offering demonstrations of what fair use analyses of the five cases could have looked like. Finally, Part V will conclude by briefly reviewing these analyses, their implications on the opening hypothesis, i.e. that fair use influenced the decision to litigate, and ultimately argues that while multiple factors impact the legal decision to litigate, it is imperative that legal practitioners pay greater attention to the circumstances surrounding potential cases that might influence such a decision.

### PART I: SO WHAT IF YOU'RE A WIZARD, HARRY?

There is precious little need for an in-depth review of the entirety of the plot of the *Harry Potter* series. Harry Potter is an orphan who, at the age of eleven, discovers that he is a wizard and becomes a student at the Hogwarts School of Witchcraft and Wizardry, the wizarding school in Scotland, where he spends the next seven years developing, maturing, and learning to overcome both magical and ordinary problems such as family dynamics, friendships, infatuation, romantic relationships, schoolwork, exams, anxiety, depression, stress, and more.<sup>3</sup> The series has been a cultural success, and has since grown into a series of films, plays, theme parks, and a host of other merchandise.

Similarly, it is by no means a secret that the *Harry Potter* series has been a huge commercial success. Bloomsbury, the London publishing house that first published *Harry Potter*, went from having a children's book division that generated a little more than \$1 million in sales in 1996 to more than \$1 billion ten years later, causing rival publishers to gripe that there was no point in bidding against them for contracts.<sup>4</sup> The original seven books of the series have generated revenue of more than \$7.7 billion,<sup>5</sup> with the last book selling 11 million copies within the first 24 hours of its release.<sup>6</sup>

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<sup>3</sup> *Plot Summaries for the First Five Books*, EBOOKEE (Jan. 14, 2009), [http://www.ebookee.com/Harry-Potter-All-7-Novels-Deluxe-Editions\\_218867.html](http://www.ebookee.com/Harry-Potter-All-7-Novels-Deluxe-Editions_218867.html).

<sup>4</sup> *The Harry Potter Economy*, THE ECONOMIST (Dec. 17, 2009), <http://www.economist.com/node/15108711>.

<sup>5</sup> *Total Harry Potter Franchise Revenue*, STATISTIC BRAIN (Sept. 12, 2016), <http://www.statisticbrain.com/total-harry-potter-franchise-revenue/>.

<sup>6</sup> *Because It's His Birthday: Harry Potter, By the Numbers*, TIME (July 31, 2013), <http://entertainment.time.com/2013/07/31/because-its-his-birthday-harry-potter-by-the-numbers/>.

Yet the commercial success of *Harry Potter* is not only in its book sales. Consider the movie adaptations of the series. *Harry Potter* films have kept at least 800 people employed for over a decade.<sup>7</sup> The release of the first film helped Toymaker Mattel make about \$160 million in merchandise sales,<sup>8</sup> while the release of the second helped Mattel make roughly \$140 million and computer game maker Electronic Arts \$427 million in total sales.<sup>9</sup> The total revenue of all eight films is \$7.2 billion, with the last one pulling in over \$1.3 billion on its own.<sup>10</sup> Taken all together, the entire *Harry Potter* brand—including movies, books, merchandise, websites, and theme parks—totals around \$21 billion,<sup>11</sup> though more recent accounts have estimated an actual profit of about \$24.8 billion.<sup>12</sup>

In the case of Rowling herself, the financial success of the series has resulted in a completely different life than the one she had before the release of the first book. Rowling was in extremely poor straights in the seven years before publishing the first book, both economically and socially: her mother passed away;<sup>13</sup> she divorced (and ultimately got a restraining order against) her first husband;<sup>14</sup> lost her job while becoming a single mother;<sup>15</sup> and ultimately filed for welfare benefits.<sup>16</sup> Rowling's life was so bad that she describes this period of her life as her being "as poor as it is possible to be in modern Britain without actually being homeless."<sup>17</sup>

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<sup>7</sup> *The Harry Potter Economy*, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Olivia Schaefer, *Harry Potter*, PEWAUKEE ECON. (Sept. 17, 2015), <http://pewaukee.economics.blogspot.com/2015/09/harry-potter.html>.

<sup>11</sup> Madeleine Kruhly, *Harry Potter, Inc.: How the Boy Wizard Created a \$21 Billion Business*, THE ATLANTIC (July 15, 2011), <http://www.theatlantic.com/business/archive/2011/07/harry-potter-inc-how-the-boy-wizard-created-a-21-billion-business/241948/>.

<sup>12</sup> *Total Harry Potter Franchise Revenue*, *supra* note 5.

<sup>13</sup> Stephen McGinty, *The JK Rowling Story*, THE SCOTSMAN (June 16, 2003, 1:00 PM), <http://www.scotsman.com/lifestyle/culture/books/the-jk-rowling-story-1-652114>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Ian Parker, *Mugglemarch: J.K. Rowling Writes A Realistic Novel for Adults*, THE NEW YORKER (Oct. 1, 2012), <http://www.newyorker.com/magazine/2012/10/01/mugglemarch>.

This is no longer the case today. Rowling is among the richest authors in the world, becoming the first author billionaire in 2004,<sup>18</sup> a status she kept until 2012 when Forbes removed her after she had given \$160 million in charitable donations.<sup>19</sup> Rowling's net worth is now calculated to be closer to \$910 million,<sup>20</sup> and her assets include a 19th-century estate house on the banks of the River Tay in Perth,<sup>21</sup> and a £4.5 million house in Kensington.<sup>22</sup> Her high net worth allows Rowling to have a high philanthropic profile through her fund, Volant Charitable Trust, which donates roughly \$5 million a year to combat poverty and social inequality, as well as through her support of other charities such as Gingerbread<sup>23</sup> and Lumos.<sup>24</sup>

It goes without saying that all of Rowling's charitable activity has led to her strong reputation as a philanthropist. These endeavors and the continued success of *Harry Potter* have both generated a great deal of goodwill from its fans. To give just one example of how dearly fans value the series, Rowling was recently able to sell one of the four "mismatched dining room chairs" that she wrote the first two of the *Harry Potter* books on for \$394,000, with 10% percent going to charity; this was the second time the chair had been sold, with the first time being in 2002 where Rowling donated it to charity and it sold for \$21,000.<sup>25</sup>

The *Harry Potter* series then has a clear and strong valuation: it has generated economic wealth for its author, financially supported all those involved in its licensed adaptations as films and theme parks, and culturally has influenced many, while generating a strong level of

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<sup>18</sup> Julie Watson and Tomas Kellner, *J.K. Rowling and the Billion-Dollar Empire*, FORBES (Feb. 26, 2004, 3:31 PM), [http://www.forbes.com/maserati/billionaires2004/cx\\_jw\\_0226\\_rowlingbill04.html](http://www.forbes.com/maserati/billionaires2004/cx_jw_0226_rowlingbill04.html).

<sup>19</sup> *J.K. Rowling: Billionaire to Millionaire*, THE NEW ZEALAND HERALD (Mar. 12, 2012, 10:42 AM), [http://www.nzherald.co.nz/lifestyle/news/article.cfm?c\\_id=6&objectid=10791515](http://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=10791515).

<sup>20</sup> Schaefer, *supra* note 10.

<sup>21</sup> *Hogwarts Hideaway for Potter Author*, THE SCOTSMAN (Nov. 22, 2001), <http://www.scotsman.com/news/hogwarts-hideaway-for-potter-author-1-585780>.

<sup>22</sup> Alison Boshoff, *What Does JK Rowling Do with Her Money?*, DAILY MAIL (Aug. 24, 2006), <http://www.dailymail.co.uk/femail/article-402027/What-does-JK-Rowling-money.html>.

<sup>23</sup> *See J.K. Rowling Named President of One Parent Families*, THE-LEAKY-CAULDRON (Nov. 24, 2004), <http://www.the-leaky-cauldron.org/2004/11/24/j-k-rowling-named-president-of-one-parent-families/>.

<sup>24</sup> *See About Founder and Life President*, LUMOS, <http://wearelumos.org/about/our-founder> (last visited May 3, 2016).

<sup>25</sup> Madison Park, *Someone paid \$394,000 for J.K. Rowling's chair*, CNN (Apr. 7, 2016, 3:21 PM), <http://www.cnn.com/2016/04/07/entertainment/harry-potter-chair/index.html>.

goodwill. Consequently, there is a great deal of value at stake in *Harry Potter*. While the temptation is now to shift gears and begin reviewing the five cases where works were made that Rowling viewed as unauthorized publications, it is necessary to have a better sense of the kind of laws that would govern these publications. Given that these unauthorized publications are derived from *Harry Potter*, they could be viewed as derivative works, or as works potentially exempted under fair use.

## PART II: THE RULES OF TRANSMOGRIFYING A WORK

### *What is a derivative work?*

According to the United States Code, a derivative work is:

[A] work based upon one or more preexisting 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 consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.<sup>26</sup>

These are different from compilations, which are defined as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship” and which include collective works like encyclopedias.<sup>27</sup> Compilations and derivative works are treated mostly the same, and while works are categorized according to commonsense,<sup>28</sup> copyright of derivative works only covers material “contributed by the author of such work, as distinguished from preexisting material employed in the work.”<sup>29</sup> Finally, derivative works are also works covered by Section 106 of the 1976 Copyright Act, which grants the owner of a copyright of a work several exclusive rights, including the right to reproduce or distribute copies of copyrighted works, prepare derivative works, and to perform or display copyrighted works, within certain limitations.<sup>30</sup> Therefore, an author can write a sequel to his own novel, or a poet can give a reading of his poetry.

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<sup>26</sup> 17 U.S.C. § 101 (2012).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.08 (2016).

<sup>29</sup> §103(b).

<sup>30</sup> §106.

Originality of a work is important in granting copyright protection to a derivative work.<sup>31</sup> The Copyright Act of 1909 did not clearly state this, but implicitly incorporated it instead.<sup>32</sup> While most courts understood that originality was required, some misunderstood the statute, leading to the creation of the “Sweat of the Brow” doctrine.<sup>33</sup> Classically formulated in *Jeweler’s Circular Publishing Co. v. Keystone Publishing Co.*,<sup>34</sup> this doctrine stated that:

The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author.<sup>35</sup>

This meant that both the author’s work and the facts included in it received copyright protection due to the author’s labor in assembling it. This view was struck down in *Feist Publications Inc., v. Rural Telephone Service Co.*,<sup>36</sup> where the Supreme Court—in answering whether or not a book company that published telephone books infringed on copyright when it began to use the data contained in another company’s white pages without a licensing agreement—unanimously ruled that “the names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright.”<sup>37</sup> The Court ruled this way even though Rural employees had personally gathered all the phone numbers themselves.<sup>38</sup>

Most courts have limited the holding in *Feist* regarding the compilation of facts to “the most banal of works,” such as charts of horse racing statistics or a table listing rentable space in a building.<sup>39</sup> However, *Feist* has been used to validate copyright for computer manuals and reference guides, suggesting that “a selection or

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<sup>31</sup> *Feist Publ’ns Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351 (1991).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 353.

<sup>34</sup> 281 F. 83 (2d Cir. 1922).

<sup>35</sup> *Id.* at 88.

<sup>36</sup> 499 U.S. 340 (1991).

<sup>37</sup> *Id.* at 364.

<sup>38</sup> *Id.* at 361.

<sup>39</sup> NIMMER & NIMMER, *supra* note 28, §3.04(B)(2)(b).

arrangement of underlying materials that are themselves unoriginal, if originally combined, may support copyright protection.”<sup>40</sup>

### *Fair Use and Transformativeness*

Fair use is a “case-specific analysis” first applied in *Folsom v. Marsh*.<sup>41</sup> Courts used this doctrine to look “to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use prejudiced the sale, diminished the profits, or superseded the objects, of the original work.”<sup>42</sup> Fair use was then codified in the Copyright Act of 1976, which split the test into 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.<sup>43</sup>

However, courts often took the language intended as guidance as limitations on their power, erroneously creating “presumptions” in favor of particular factors, such as the fourth factor.<sup>44</sup>

This doctrine, often connected with derivative works, underwent a change three years after *Feist in Campbell v Acuff-Rose Music, Inc.*<sup>45</sup> In *Campbell*, the Supreme Court dealt with the question of whether or not the group 2 Live Crew infringed on singer Roy Orbison copyright when they sampled his “Oh, Pretty Woman” for their song “Pretty Woman.”<sup>46</sup> In a unanimous decision, the Court stated that all four factors were “to be explored, and the results weighed together, in light of the purposes of copyright,” and in doing so held that 2 Live Crew had not infringed on the copyright.<sup>47</sup> Yet the Court’s analysis changed the weight of each factor: noting that the fourth factor was not dispositive and also raised

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<sup>40</sup> *Id.*

<sup>41</sup> 9 F. Cas. 342 (C.C.D. Mass. 1841).

<sup>42</sup> *Id.* at 348.

<sup>43</sup> 17 U.S.C. § 107 (2012).

<sup>44</sup> Christina Z. Ranon, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 429–30 (2006).

<sup>45</sup> 510 U.S. 569 (1994).

<sup>46</sup> *Id.* at 572.

<sup>47</sup> *Id.*



the weight of the first factor.<sup>48</sup> In particular, the Court held that 2 Live Crew's "Pretty Woman" was "a transformative parody," that "add[ed] something new, with a further purpose or different character, altering the first with new expression, meaning, or message," going on to say that "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."<sup>49</sup> This has subsequently raised the importance of the first factor in the fair use analysis, often resulting in the first and fourth factors being weighed against each other.<sup>50</sup> Having now described the analysis involved in derivative works and fair use broadly, it is necessary to identify what type of derivative work best represents the unauthorized publications of *Harry Potter* that will be in question. As will be discussed below, all five incidences in question are regarding the unauthorized publication of books or texts based on the series. Therefore, should they be covered/viewed as a derivative work potentially covered by fair use, they would most likely be what scholars call fanfiction.<sup>51</sup>

### *What is fanfiction?*

Fanfiction can be defined as "unauthorized, not-for-profit fiction about copyrighted characters, or the use of original characters in a copyrighted universe" or "original fiction by fans of a show, movie, book, or video game. The fiction involves characters and the location of the show from [sic] which the person is a fan."<sup>52</sup> Held to have begun in 1967 with the start of the second season of *Star Trek*,<sup>53</sup> fanfiction is written for many reasons, including wanting "to explore themes and ideas that the creators of a show, movie, book or video game do not explore."<sup>54</sup>

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<sup>48</sup> *Id.* at 578.

<sup>49</sup> *Id.*

<sup>50</sup> See generally *Authors Guild v. Google, Inc.*, 804 F.3d 202, 219 (2d Cir. 2015) (providing an example of how the first factor has become something of a dispositive factor in the case of fanfiction; that is, if a court finds a work to be sufficiently transformative, then it will excuse the fourth factor by saying that the work is sufficiently different from the original and thus has a lower economic impact).

<sup>51</sup> Ranon, *supra* note 44, at 425–26 (providing the definition of what is considered fanfiction).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 426.

<sup>54</sup> *Id.* at 425.

One common feature of fanfiction today—at least, in amateur pieces found online—is the presence of a disclaimer at the top of a work, admitting that the authors do not own the copyright to the work they are deriving from and that they are not receiving any financial benefit.<sup>55</sup> A general format for such fanfiction is a header—which will normally include information such as the work’s title, author name, fandom, characters, rating of work, spoilers, warnings of potential triggers, notes from the author, disclaimers, the length of the work, and possibly a mention of whether the work is completed or in-progress—followed by the text of the work, leaving any additional author notes and links for readers to leave comments at the bottom.<sup>56</sup>

Fanfiction can be divided into two kinds. The first type, referential works, are works created by fans to keep track of information such as characters, creatures, objects, and locations.<sup>57</sup> The second type, participatory works, are works created by fans who “tak[e] familiar characters [from the original work] into new and often startling situations,” such as an alternative sequence of events; this type often results in readings of characters that “may not even have crossed the author’s mind.”<sup>58</sup>

Fanfiction has had a mixed reception from authors. Some have expressed support as long as it is not attributed to them or exploited for a commercial purpose.<sup>59</sup> However, many others have expressed outrage at it, raising arguments such as fanfiction not being aesthetically pleasing, not being “real” writing, and being an affront to characters that the authors consider their children.<sup>60</sup> This reception is reflected in how courts have dealt with fanfiction, as referential works are viewed somewhat differently from participatory works.

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<sup>55</sup> Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 664 (1997).

<sup>56</sup> An example of this general structure can be found on Fanfiction.net (the largest collection of fanfiction online) or archiveofourown.org (another popular site for fanfiction) by selecting any work posted there. See generally, Potterthe93, *Cunning and Ambition*, FANFICTION.NET, (Feb. 3, 2017), <https://www.fanfiction.net/s/12349368/1/Cunning-and-Ambition> (illustrating a fan fiction article).

<sup>57</sup> See Rachel L. Stroude, *Complimentary Creation: Protecting Fan Fiction as Fair Use*, 14 MARQ. INTELL. PROP. L. REV., 191, 194–95 (2010).

<sup>58</sup> *Id.* at 196.

<sup>59</sup> Ranon, *supra* note 44, at 441.

<sup>60</sup> Stacey M. Lantagne, *The Better Angels of our Fanfiction: The Need for True and Logical Precedent*, 33 HASTINGS COMM. & ENT L.J. 159, 173–75 (2010).

*Referential Works*

Courts have generally found referential works to be copyright infringement.<sup>61</sup> The trend began with *Twin Peaks Productions, Inc. v. Publications International Ltd.*<sup>62</sup> In *Twin Peaks*, an author was sued by the production company of the TV series *Twin Peaks* when he created a 128-page reference work based on the first eight episodes of the show.<sup>63</sup> The Second Circuit analyzed the work under the fair use test, finding that fair use did not cover the reference book as it was primarily plot summary with very little transformative material.<sup>64</sup> Five years after *Twin Peaks* came *Paramount Pictures Corp. v. Carol Publishing Group*.<sup>65</sup> This time, fanfiction authors were sued after publishing *The Joy of Trek: How to Enhance your Relations with a STAR TREK fan*, a reference work that described the series and gave advice on how to relate to a typical Star Trek fan.<sup>66</sup> Comparing it with *Twin Peaks*, the court found that only a third of the book was infringing, but that the sheer amount of storytelling compared to commentary could make the book a substitute for the original series and thus the book could not be protected by fair use.<sup>67</sup>

Finally, the most recent example of a court holding against exempting referential works from fair use would be *Warner Bros. Entertainment, Inc. v. RDR Books*,<sup>68</sup> also known as the “Harry Potter Lexicon case.”<sup>69</sup> This case will be discussed in greater detail in Part IV.

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<sup>61</sup> See *Twin Peaks Prods., Inc. v. Publ'ns Int'l Ltd.*, 996 F.2d 1366 (2d Cir. 1993); *Paramount Pictures Corp. v. Carol Publ'g Grp.*, 11 F. Supp. 2d 329 (S.D.N.Y. 1998); *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d. 513 (S.D.N.Y. 2008).

<sup>62</sup> 996 F.2d at 1366.

<sup>63</sup> Stroude, *supra* note 57, at 199–200 (citing *Twin Peaks*, 996 F.2d at 1370–71).

<sup>64</sup> *Id.* at 200 (citing *Twin Peaks*, 996 F.2d at 1371–76).

<sup>65</sup> 11 F. Supp. 2d at 329.

<sup>66</sup> Stroude, *supra* note 57, at 201 (citing *Paramount Pictures*, 11 F. Supp. 2d at 332).

<sup>67</sup> *Id.* at 201–202 (citing *Paramount Pictures*, 11 F. Supp. 2d at 332–37).

<sup>68</sup> 575 F. Supp. 2d. 513 (S.D.N.Y. 2008).

<sup>69</sup> See generally Dan Slater, *Harry Potter Lexicon Case: An FAQ*, WALL ST. J. (Apr. 14, 2008, 9:00 AM), <http://blogs.wsj.com/law/2008/04/14/harry-potter-lexicon-case-an-faq/> (calling the *RDR Books* case the *Harry Potter Lexicon Case*).

*Participatory Works*

In contrast to referential works, courts seem more willing to allow participatory works to be covered under fair use.<sup>70</sup> While there has yet to be a case that deals specifically with participatory fanfiction, there are two cases that strongly suggest how this type might be treated. The first case would be *Suntrust Bank v. Houghton Mifflin Co.*<sup>71</sup> This case involved *The Wind Done Gone*, a retelling of *Gone with the Wind* from the perspective of a newly-created character inserted into the original story (a common fanfiction technique).<sup>72</sup> While the lower court had found that it was not sufficiently transformative and would harm the market for *Gone with the Wind*, the Court of Appeals took a broader view, holding that it was a transformative parody whose commentary and criticism of the original work outweighed any commercial impact it could have on the market.<sup>73</sup> Consequently, the Court of Appeals reversed the decision of the lower court and the work was protected under fair use.<sup>74</sup>

*Suntrust* stands in contrast to *Salinger v. Colting*,<sup>75</sup> where J.D. Salinger sued Colting for the novel *60 Years Later: Coming Through the Rye*, whose protagonist was a 76-year-old Holden Caulfield.<sup>76</sup> This type of re-imagining of a character is another typical example of fanfiction.<sup>77</sup> Applying the fair use test, the court held that this work was not protected, saying that merely aging Holden and altering the setting was not sufficiently transformative and that it could harm the market for any sequels that Salinger may create; in particular, the court felt that use of Holden and the similarity in structure between the books outweighed what little transformative purpose the court found.<sup>78</sup> Thus, while there has been no case specifically regarding participatory fanfiction, *Suntrust* and *Salinger* suggest that some of these works could be protected under

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<sup>70</sup> See generally *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (demonstrating why a participatory fanfiction was protected under fair use).

<sup>71</sup> *Id.*

<sup>72</sup> Lantagne, *supra* note 60, at 171.

<sup>73</sup> *Id.* at 171–72.

<sup>74</sup> *Id.* at 172.

<sup>75</sup> 641 F. Supp. 2d 250 (S.D.N.Y. 2009).

<sup>76</sup> Lantagne, *supra* note 60, at 169.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 170.

fair use as long as they were sufficiently transformative and did not harm the market of the original works from which the fanfiction was derived.<sup>79</sup>

### *Economic Factors Involved in Fair Use*

Economically, fair use can be viewed as “a type of compulsory licensing system . . . in which the cost of the ‘license’ is zero.”<sup>80</sup> This results in two instances where exempting a work under fair use makes theoretic sense: (1) wherever a compulsory license would result in allocable social costs exceeding the value of the work to the individual user, and (2) where an individual user’s use gives rise to some spillover or positive externality to the great benefit of third parties (e.g. severely reducing the transaction costs involved in finding authors of works).<sup>81</sup>

Put more practically, a potential fair user has to evaluate (1) whether the cost of getting authorization from the author of the work they wish to use is too high; (2) how much the possible work they will use is actually of value to them; and (3) how much the costs of being found to have used the work without or against authorization would be to them.<sup>82</sup>

Consequently, it is often the case that explicitly citing fair use is an under-utilized approach since both the copyright owner and the potential fair user generally wish to avoid litigation and have differing levels of knowledge regarding the use itself (e.g. awareness of the desire to use the work).<sup>83</sup> Nevertheless, there are certain scenarios where it has been demonstrated that a party is more likely to have their work exempted under fair use. These scenarios include: (1) where there is a finding of a “creativity shift” or transformative use; (2) where the work was not being used for a commercial product; (3) where only a part of the work was used; and (4) where the likely plaintiff is a natural person and not a corporation.<sup>84</sup>

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<sup>79</sup> *Id.* at 170–71.

<sup>80</sup> Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1279 (2008).

<sup>81</sup> *Id.* at 1279–83.

<sup>82</sup> *See id.* at 1284–85.

<sup>83</sup> *See id.* at 1288–91.

<sup>84</sup> Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L. J. 47, 76–78 (2012).

*Economic Factors Involved in Choosing to Litigate*

With this view of fair use and fanfiction in mind, it is now necessary to go over which economic factors might go into choosing to litigate over fanfiction. That there is a vast amount of literature on the economics involved in litigation should come as no surprise, yet a basic principle in such literature is the “simple logic” view of litigation, which holds that—from the standpoint of the parties—it is almost always wiser to settle than litigate as litigation is risky and private settlement can spare parties both the time and out-of-pocket costs of litigation.<sup>85</sup> More specifically, it is held that based on (1) the cost of litigation, (2) the parties’ risk preference, (3) the parties’ relative bargaining power, and (4) the allocation between lawyer and client of control in negotiations,<sup>86</sup> a party will be likely to settle unless they have overly optimistic views as to their likelihood of success, differing or asymmetric levels of information, or are not risk-averse.<sup>87</sup>

Studies have proven this view to be true by demonstrating that the inverse scenario (that is, where parties are equally optimistic, have closely aligned information, or are risk-averse) increases the likelihood of settlement.<sup>88</sup> Similarly, it has been demonstrated that the differing incentives for lawyers and clients can impact the choice to litigate. For example, scenarios where the fee arrangement between lawyer and client incentivizing lawyers to go to trial in order to receive a higher fee, or client and lawyer having differing concerns regarding the level of risk being taken and their reputation for possible future settlement negotiations.<sup>89</sup>

As a consequence of this, an atmosphere has arisen in the United States where over 95% of all lawsuits filed in the United States settle before trial.<sup>90</sup>

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<sup>85</sup> Bruce Hay & K. Spier, *Litigation and Settlement*, 218 HARV. L. SCH. JOHN M. OLIN CENTER FOR L., ECON. & BUS. DISCUSSION PAPER SERIES 1, 3–4 (1997).

<sup>86</sup> *Id.* at 14.

<sup>87</sup> *Id.* at 5–6.

<sup>88</sup> *Id.* at 10–11.

<sup>89</sup> *Id.* at 13, 19–20.

<sup>90</sup> *Id.* at 4.

PART III: THREE TIMES ROWLING WITHDREW SUIT FOR  
UNAUTHORIZED PUBLICATION

Given all of the above, it is now time to turn to the unauthorized publications themselves, beginning with those Rowling decided to withdraw suit. For the sake of clarity, the “facts” of the three cases will be stated first.

*Harry Potter and Bao Zoulong*

In 2002, Chinese publishing house Bashu Publishing published a work titled *Harry Potter and Bao Zoulong* (translated as *Harry Potter and the Leopard-Walk-Up-To-Dragon* by news sources).<sup>91</sup> In the book, whose author remains unknown as they had listed Rowling’s image along with her publishing house’s translators’ and editors’ names instead of their own, Harry battles a dragon while stripped of his magic after having been transformed into a fat, hairy dwarf by a mysterious rain.<sup>92</sup> Although this drastic change—along with the text’s incredibly different style of writing—resulted in the book being immediately recognized as a fake,<sup>93</sup> *Bao Zoulong* nevertheless was sold at a rate of £1 per book and quickly sold out, a success that prompted Rowling’s attorneys to reach out to the firm and begin conducting investigations on her behalf.<sup>94</sup> The investigations turned up the presses where the book had been printed, and when informed of this discovery, Bashu Publishing very quickly settled, paying both a £1,600 payment to Rowling and offering an apology to Rowling on the grounds that they had been ignorant of the law and had made a mistake.<sup>95</sup> The result was considered satisfying given the current state of widespread piracy in China.<sup>96</sup>

*Harry Potter in Kolkatia*

In 2003, publisher Mehsabuddin Ahmed—who had recently gained the rights to translate *Harry Potter and the Philosopher’s Stone* into

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<sup>91</sup> *Fake Harry Potter Novel Hits China*, *supra* note 1.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Oliver August & Jack Malvern, *Harry Potter Wins an Easy Battle Against Chinese Parties*, BERKELEY IP WEBLOG (Nov. 2, 2002), <http://journalism.berkeley.edu/projects/biplog/archive/000145.html>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

Bengali after two years of discussions—discovered *Harry Potter in Kolkatia* on display at the Calcutta Book Fair.<sup>97</sup>

*Harry Potter in Kolkatia* was “not entirely a translation.”<sup>98</sup> Sold at a mere Rs 30, the book was about an ordinary Bengali boy named Jhontu who engages with the “romantic mysticism” of Professor Shonku, H. G. Wells, and the poet/playwright Sukumar Ray.<sup>99</sup> Jhontu’s connection with Harry Potter is literally in his dreams, as Harry is among several characters that Jhontu engages with as he daydreams and fantasizes his way through the novel.<sup>100</sup> Beyond this, *In Kolkatia*’s main connection to the *Harry Potter* phenomenon was (1) that it included a selection of stills and movie trivia from the first *Harry Potter* film, and (2) that the author, Uttam Gosh, explicitly referred to Rowling and directed readers to her website.<sup>101</sup>

Nevertheless, the display was sufficient enough to cause Ahmed to reach out to Rowling’s attorneys, who promptly sent cease-and-desist letters to *In Kolkatia*’s publisher Sahitya Tirtho.<sup>102</sup> Although Sahitya Tirtho initially tried to argue that their work was not a translation but a compilation, they ultimately agreed to stop publication and withdraw the ~5,000-10,000 run of the work after being told by Rowling’s attorneys that *Harry Potter*’s “brand equity” meant that the character could not be reprinted without authorization.<sup>103</sup>

### *The James Potter Series*

In 2007, a digital artist named George Lippet began writing a series regarding James Sirius Potter, Harry Potter’s elder son who first appears at the very end of the last Harry Potter novel, *Harry Potter and the Deathly Hallows*.<sup>104</sup> The first book in the series, *James Potter and the*

<sup>97</sup> Subramanyam & Nagchoudhury, *supra* note 1.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Rowling Goes Potty over US Bid to Post Harry’s Son’s Story on Web*, THE SCOTSMAN (Nov. 19, 2007, 12:37 AM), <http://www.scotsman.com/news/world/rowling-goes-potty-over-us-bid-to-post-harry-s-son-s-story-on-web-1-700445> [hereinafter *Rowling goes Potty*].



*Hall of Elders' Crossing*, eventually ran 360 pages, and when Lippert read it to his wife, she suggested creating a website and putting it up online.<sup>105</sup> He did, causing massive fan interest as readers began to wonder if Rowling was announcing a sequel series that might also become a film series.<sup>106</sup> The interest and confusion was strong enough to cause Rowling's attorneys to reach out to Lippert, who in response sent Rowling an advance copy of the text, along with a promise that as he "respect[ed] her desire to control [her world]," he would take down the website and the work if she disapproved of it.<sup>107</sup> Instead, Rowling said she approved of the work and others like it, and removed the threat of legal action, opting instead to simply clarify that it was Lippert's project and not hers.<sup>108</sup>

### Sample Fair Use Analysis

As noted, all three of the above cases—hereafter referred to as "*Bao*," "*Kolkatia*," and "*James*"—were never litigated. Instead, Rowling and her legal team opted to either settle or clarify that Rowling was not involved with the work in question. Consequently, it would be a misnomer to say that any of these three cases were prevented from litigation due to the works being formally exempted from traditional protection under fair use. However, could fair use have been operating in the background of the decision not to litigate?

To examine this question, consider the following tables, which list what a potential fair use analysis might have looked like given the economic factors involved in the decision to utilize both fair use and litigation reviewed in Part II, as well as the four-factor *Campbell test*:

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<sup>105</sup> George Lippert, *On Eve of James Potter Sequel, Harry Potter Fan Fiction Heats Up: Unlikely Author Poised to Keep the Story Alive*, PRWEB (July 15, 2008), <http://www.prweb.com/releases/2008/07/prweb1080574.htm>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *See id.*

|                 | <b>Cost of litigation</b>   | <b>Risk preference</b>   | <b>Bargaining power</b>  | <b>Balance of negotiation control</b>  |
|-----------------|---|--|--|--|
| <b>Bao</b>      | Rowling's wealth makes it less costly for her to bear litigation costs compared with defendant parties. | Risk-averse: defendant parties cannot easily bear costs, and Rowling dislikes litigating fanworks <sup>109</sup> | Rowling has the greater power due to having the stronger brand and greater ability to bear burden of settlement not occurring. | No information given to establish the balance of this between lawyers and clients and thus is unknown. |
| <b>Kolkatia</b> |   |  |  |  |
| <b>James</b>    |   |  |  |  |

**Table I: Economic Factors involved in Litigation**

|                 | <b>Cost of contacting author of original work</b>          | <b>Value of original work to user</b>                   | <b>Cost of unauthorized use being discovered</b>                     |
|-----------------|--|---|--|
| <b>Bao</b>      | Low as Rowling is easy to contact, but they <i>did not</i> | High: grants access to a pre-established brand audience | Cost of litigation as well as lost profits from stopping publication |
| <b>Kolkatia</b> |  |   |  |
| <b>James</b>    | Low as Rowling is easy to contact, <i>and did</i>          | High: Lippet respects Rowling's work                    | Cost of litigation   |

**Table II: Economic Factors involved in choosing to use fair use**

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<sup>109</sup> See *supra* text accompanying notes 104–107 (showing approval of fanworks); see also discussion *infra* Part IV on *The Harry Potter Lexicon* (depicting Rowling's displeasure at entering litigation in *Lexicon*).

|                 | <b>Purpose and Character of Use, including transformativeness</b>  | <b>Nature of copyrighted work</b>   | <b>Amount or substantiality of portion used from copyrighted work</b>                    | <b>Effect of use on potential market for copyrighted work</b>  |
|-----------------|--|---|--|--|
| <b>Bao</b>      | Commercial use; not a comment or a criticism; but highly transformative-character and writing style vastly different | <i>Harry Potter</i> was a published fiction, though <i>Bao</i> came out as audiences were awaiting the unpublished fifth entry into the series <sup>110</sup> | Little beyond brand name of <i>Harry Potter</i>  | Made profit and attempted to utilize both Rowling's and editor's brand recognition, but easily identified as a fake <sup>111</sup> |
| <b>Kolkatia</b> | Commercial use; not a comment or a criticism; not very transformative- <i>Harry Potter</i> remains the same          | <i>Harry Potter</i> was a published fiction   | Still shots from <i>Harry Potter</i> films; <i>Harry Potter</i> character <sup>112</sup> | Attempted to build off <i>Harry Potter</i> brand recognition, but directed readers to Rowling's website <sup>113</sup>             |
| <b>James</b>    | Non-commercial use; not a comment or criticism, but transformative-strongly developed a minor character              | <i>Harry Potter</i> was a published fiction and series had tentatively concluded  | Minor character and general "world-build" of <i>Harry Potter</i> <sup>114</sup>          | High impact, as consumers thought it could be a new sequel series from Rowling <sup>115</sup>                                      |

**Table III: Four-factor *Campbell* test**

<sup>110</sup> *Fake Harry Potter Novel Hits China*, *supra* note 1.

<sup>111</sup> *Id.*

<sup>112</sup> Subramanyam & Nagchoudhury, *supra* note 1.

<sup>113</sup> *Id.*

<sup>114</sup> *See Rowling Goes Potty*, *supra* note 104.

<sup>115</sup> *See Id.*

|                 | <b>Finding of transformativ-<br/>eness</b> | <b>Non-<br/>commercial<br/>use of<br/>copyrighted<br/>work</b> | <b>An<br/>insubstantial<br/>or small<br/>portion of<br/>copyrighted<br/>work used</b> | <b>Plaintiff is a<br/>corporation</b>                                 |
|-----------------|--|--|---|---|
| <b>Bao</b>      | Yes - vastly<br>different                  | No   | Yes   | No; but,<br>Rowling's<br>resources are<br><i>equivalent</i> to<br>one |
| <b>Kolkatia</b> | No   | No   | Yes   |   |
| <b>James</b>    | Yes - developed<br>minor character         | Yes  | No  |   |

**Table IV: Trends leading to a likely finding of fair use**

Review of these four tables demonstrates several possible reasons why the defendant parties might have chosen not to force Rowling into litigation.

Tables I and II demonstrate that, in all three cases, the parties had strong incentives to settle. Rowling's wealth and brand recognition have granted her both a stronger financial ability to withstand litigation and a stronger bargaining position for negotiated settlements, neither of which the defendant parties have. When this is combined with the ease of contacting Rowling to gain authorization to make a licensed works in the first place, defendant parties would have been statistically unlikely to establish fair use as a defense at trial, making litigation too costly as they would likely lose resources both in litigating and paying the award determined by the court. This poor position for litigation on the defendants' side, coupled with Rowling's above-noted dislike of litigating fanworks that she generally approves of, means that it made precious little sense for any of the parties to attempt to force litigation and thus very likely for them to choose to enter alternative arrangements, like a settlement.

Yet what if they *had* chosen to litigate? As demonstrated by Tables III and IV, the results would likely have varied between the parties, despite the plaintiff Rowling having the greater resources for litigation and therefore a likely greater ability to prevent a finding of fair use. Both *Bao* and *Kolkatia* were commercial works that turned a profit through attempting to capitalize on the brand recognition of *Harry Potter*, suggesting that they would likely have been found to have failed

the fourth factor of *Campbell*.<sup>116</sup> Both would also likely have failed the first factor of *Campbell*, as both offer no commentary or criticism and are either unlikely to be found transformative (*Kolkatia*), or so transformative that reference to *Harry Potter* would appear to be only for the sake of utilizing its brand recognition (*Bao*). This makes them unlikely to have been able to establish fair use as a defense.

In contrast, *James* was not a commercial work; neither had nor was intended to have an economic effect; and easily fits the *Wind Done Gone* pattern of participatory works building off of a minor or original character in a pre-existing work.<sup>117</sup> This suggests that Lippert might have been able to claim a fair use defense if he had either the resources or desire to do so, which he did not.

Therefore, because (1) none of the defendant parties had the resources to enter into lengthy litigation, (2) two of the defendant parties would be unlikely to have mounted a successful fair use attempt, and (3) one party actively did not wish to offend Rowling, all three parties had reason to avoid litigation by entering into settlements or other arrangements, a result whose likeliness was only increased by Rowling's own desire to avoid litigation. This means that, from Rowling's perspective, her stronger ability to withstand litigation, her likelihood of success in litigation, and her general positive reputation have enabled her to avoid the cost of litigation if she wished while still receiving the likely benefits of litigation. This makes Rowling's decision to withdraw suit sensible: why take on excessive costs for a benefit when the same benefit can be gained for significantly less and with greater personal comfort?

#### PART IV: AND TWO TIMES ROWLING DIDN'T WITHDRAW SUIT

As noted in Part II, the overwhelming majority of cases settle.<sup>118</sup> For Rowling, as Part III indicates, this likelihood of settlement is also high because she is better positioned than potential defendant parties to endure and succeed in litigation. What then must have happened the two

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<sup>116</sup> See *Campbell v. ACUFF-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (stating that in evaluating the likelihood of significant market harm, the Court of Appeals held that there is a presumption of a likelihood of significant harm if the intended use is for commercial purpose); See *Fake Harry Potter Novel Hits China*, *supra* note 1; See *Subramanyam & Nagchoudhury*, *supra* note 1.

<sup>117</sup> See *Lantagne*, *supra* note 60, at 171–72; See *Rowling Goes Potty*, *supra* note 104.

<sup>118</sup> *Hay & Spier*, *supra* note 85, at 4.

times Rowling did not take alternative measures, but chose to litigate? Again, for the sake of clarity, the facts of each of case will be presented first prior to the discussion.

*Tanya Grotter*

Written by Dimitri Yemets beginning in 2002, *Tanya* has been called Harry's "Slavic Twin" because she rides a double bass, sports a mole instead of a bolt of lightning, and attends the Tibidokhs School of Magic.<sup>119</sup> Yemets has described the series as a Russian cultural reply to *Harry Potter*,<sup>120</sup> with the first book, *Tanya Grotter and the Magic Double Bass*, selling 600,000 copies in nine months at \$2.50, which was half the listed price of *Harry Potter* at the time.<sup>121</sup> Since then, *Tanya* has been both incredibly popular and financially successful in Russia, with fourteen entries in the series itself, leading to the creation of a quote-book, a fan-written novel compilation, and two additional spin-off series: *Methodius Buslaev* and *the Hooligan* series.<sup>122</sup>

The success, and future potential for success, was recognized early on as Rowling's attorneys swiftly moved to block translation of the series into English by seeking an injunction against Dutch publisher Byblos.<sup>123</sup> Byblos's attorneys argued against the injunction, claiming that Rowling's own work could be held to be a derivative work since it drew from works in the public commons, making Yemets at best a parody and at worst a derivative of a derivative.<sup>124</sup> The Dutch court was not sympathetic to this argument and simply noted that since Yemets could also have based his work on earlier literature, the choice to base it on *Harry Potter* was not enough to make it a parody.<sup>125</sup> The Dutch court granted Rowling the injunction, and prevented the series from being

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<sup>119</sup> Wu, *supra* note 1.

<sup>120</sup> *Legal Threat for 'Russian Potter'*, BBC NEWS (Feb. 10, 2003, 6:52 PM), <http://news.bbc.co.uk/2/hi/entertainment/2414045.stm>.

<sup>121</sup> *The Curse of Tanya Grotter*, THE PIRACY YEARS (Feb. 9, 2013), <http://piracy.americanassembly.org/the-curse-of-tanya-grotter/>.

<sup>122</sup> See listing of Yemets' novels at Ozon, <http://www.ozon.ru/person/239874/>.

<sup>123</sup> *Dutch Court Says 'Tanja Grotter' Too Much Like 'Harry Potter'*, CHICAGO TRIBUNE (Apr. 4, 2003), [http://articles.chicagotribune.com/2003-04-04/news/0304050030\\_1\\_harry-potter-harry-rides-rowling](http://articles.chicagotribune.com/2003-04-04/news/0304050030_1_harry-potter-harry-rides-rowling) [hereinafter *Dutch Court Says 'Tanja Grotter'*].

<sup>124</sup> *Rowling Blocks Grotter Release*, BBC NEWS (Apr. 3, 2003, 2:29 PM), <http://news.bbc.co.uk/2/hi/entertainment/2914111.stm>.

<sup>125</sup> See *Dutch Court Says 'Tanja Grotter'*, *supra* note 123.

published internationally in English, although the series and its spinoffs continue to be published in Russia.<sup>126</sup>

### *The Harry Potter Lexicon*

In 2000, then school librarian Steve Vander Ark created *The Harry Potter Lexicon* website, an unofficial fan encyclopedia of all things within the “Harry Potter Universe.”<sup>127</sup> The website was considered a major fan resource from 2000 to 2008, the time during which the site was actively updated, with even Rowling herself admitting 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.”<sup>128</sup> In August of 2007, Vander Ark was approached by then President of RDR Books, Roger Rapoport, about publishing a for-profit, print version of *The Lexicon*. While Vander Ark was initially hesitant, claiming that he had no interest in doing so and that he was concerned about the legality, Rapoport was able to reassure him and Vander Ark agreed to do so.<sup>129</sup>

What followed for the next six months was a back-and-forth between RDR and Rowling’s attorneys, with Rowling’s attorneys saying that the book would violate Rowling’s copyright as it would have to print verbatim passages and use movie stills, while RDR responded that the work was transformative and Rowling was trying to claim an overly-expansive monopoly on her work.<sup>130</sup> The debate also spilled over into Rowling’s relationship with Vander Ark: Rowling claiming to feel frustrated, betrayed, and prevented from writing her own encyclopedia due to the proceedings,<sup>131</sup> while Vander Ark insisted that he had not

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<sup>126</sup> David Klufft, *Harry Potter Lawsuits and Where to Find Them*, TRADEMARK AND COPYRIGHT LAW (July 27, 2015), <http://www.trademarkandcopyrightlawblog.com/2015/07/harry-potter-lawsuits-and-where-to-find-them/>.

<sup>127</sup> See *The Harry Potter Lexicon*, HARRY POTTER LEXICON, <https://legacy.hp-lexicon.org/index-2-text.html> (last updated Oct. 1, 2007).

<sup>128</sup> Warner Bros. Entm’t, Inc. v. RDR Books, 575 F. Supp. 2d 513, 521 (S.D.N.Y. 2008).

<sup>129</sup> *Id.* at 521–22.

<sup>130</sup> For a full, and lengthy, discussion of the exchange, see *Id.* at 523–25. See also, *JKR/WB vs. RDR Books Trial: JKR Wins Copyright Case*, THE LEAKY CAULDRON (Sept. 8, 2008), <http://www.the-leaky-cauldron.org/2008/09/08/jkr-wb-vs-rdr-books-trial-settlement-ruling/> (showing the archive of coverage on the case at The-Leaky-Cauldron fan website).

<sup>131</sup> Declaration of J.K. Rowling in Support of Plaintiffs’ Motion for Preliminary Injunction at 1–6, Warner Bros. Entm’t, Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

significantly copied Rowling verbatim and had been reassured by multiple intellectual property experts that the book was legal.<sup>132</sup>

The parties went to trial.<sup>133</sup> Both parties and their expert witnesses testified regarding their view as to whether the work was protected under fair use or not.<sup>134</sup> While testimony was long and emotionally charged, there was one moment that—for this paper—is of particular interest. After the second day of trial, Judge Robert Patterson called on the parties to settle:

I'm concerned that this case is more lawyer-driven than it is client-driven . . . . The fair use people are on one side, and a large company is on the other side . . . . The parties ought to see if there's not a way to work this out, because there are strong issues in this case and it could come out one way or the other. The fair use doctrine is not clear . . . I'm bringing it up now so you can think about it before you get into the rest of the case. . . . Maybe it's too late; maybe we've gone too far down the road. But a settlement is better than a lawsuit.<sup>135</sup>

This seems to have led the parties to create a partial settlement, wherein all the claims but the copyright concern were settled out, which they then argued out over the third day.<sup>136</sup>

Ultimately, the case was resolved in Rowling's favor.<sup>137</sup> Granting Rowling an injunction and the minimum award possible—\$750 for each of the nine books infringed, for a total of \$6,750—<sup>138</sup> Judge Patterson held that although reference books are transformative and that “the market for reference guides to the Harry Potter works [are] not exclusively hers to exploit or license,” the *Lexicon* book itself had such a high level of verbatim copying that it raised “a significant question as to whether it was reasonably necessary for the purpose of creating a useful

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<sup>132</sup> Dave Langsford, *The Terminal Beach*, ANSIBLE 247 (Feb. 2008), <http://news.ansible.uk/a247.html>.

<sup>133</sup> See *Warner Bros.*, 575 F. Supp. at 517–18.

<sup>134</sup> *Id.*

<sup>135</sup> Dan Slater, *Judge in Potter Trial Calls on Parties to Settle*, WALL ST. J. (Apr. 15, 2008), <http://blogs.wsj.com/law/2008/04/15/judge-in-potter-trial-calls-on-parties-to-settle/?mod=WSJBlog#comment-18647>.

<sup>136</sup> Ashby Jones, *Notes from the Potter Trial: After a Partial Settlement, the Defense Digs In*, WALL ST. J. (Apr. 16, 2008), <http://blogs.wsj.com/law/2008/04/16/notes-from-the-potter-trial-after-a-partial-settlement-the-defense-digs-in/?mod=WSJBlog>.

<sup>137</sup> Grant McCool, *U.S. Judge Halts Unofficial Harry Potter Lexicon*, REUTERS (Sept. 9, 2008), <http://ca.reuters.com/article/entertainmentNews/idCAN0845394920080908>.

<sup>138</sup> *Id.*



and complete reference guide.”<sup>139</sup> The holding was viewed favorably by both parties, with RDR feeling the holding approved the genre as transformative and Rowling feeling delighted.<sup>140</sup>

### Sample Fair Use Analysis

Both cases—hereafter referred to as “*Tanya*,” and “*Lexicon*”—were litigated, and in both cases the defendant parties were not able to claim fair use.<sup>141</sup> This is in line with the analysis and conclusions of Parts II and III, which suggests that in general potential defendants are better off settling rather than forcing Rowling into litigation due to the costs and demands of litigation. What, then, interfered to cause the rarer outcome to occur? The answer is readily apparent from an analysis of the factors from Part II, which are again depicted in the following four tables:

|                | <b>Cost of litigation</b>   | <b>Risk preference</b>  | <b>Bargaining power</b>  | <b>Balance of negotiation control</b>   |
|----------------|---|---|--|---|
| <b>Tanya</b>   | Rowling’s wealth makes it less costly for her to bear litigation costs compared with defendant parties. | Not risk-averse; although the parties can’t easily bear litigation costs, and Rowling prefers not to litigate, the publishers of each were willing to bear the burden anyway. | Rowling has the greater power due to having a stronger brand and greater ability to bear burdens if settlement does not occur. | No information given to find this.  |
| <b>Lexicon</b> |   |   |  | No information given to establish this, but see Judge Patterson’s concerns about lawyers’ influence. <sup>142</sup> |

**Table V: Economic Factors involved in Litigation**

<sup>139</sup> *Why JK Rowling Won the Harry Potter Lexicon Lawsuit*, OUT-LAW.COM (Sept. 9, 2008), <http://www.out-law.com/page-9413>.

<sup>140</sup> See McCool, *supra* note 137.

<sup>141</sup> *Rowling Blocks Grotter Release*, *supra* note 124; *Why JK Rowling won the Harry Potter Lexicon Lawsuit*, *supra* note 139.

<sup>142</sup> Slater, *supra* note 135.

|                | <b>Cost of contacting author of original work</b>    | <b>Value of original work to user</b>                 | <b>Cost of unauthorized use being discovered</b>                                     |
|----------------|--|---|--|
| <b>Tanya</b>   | Low as Rowling is easy to contact, but <i>didn't</i> | High: allows access to pre-established brand audience | Cost of litigation, as well as lost profits from stopping publication <sup>143</sup> |
| <b>Lexicon</b> | Low as Rowling is easy to contact, <i>and did</i>    | High: respected Rowling's work                        |  |

**Table VI: Economic Factors involved in choosing to use fair use**

|                | <b>Purpose and Character of Use, including transformative-ness</b>   | <b>Nature of copyrighted work</b>           | <b>Amount or substantiality of portion used from copyrighted work</b>             | <b>Effect of use on potential market for copyrighted work</b>                       |
|----------------|--|---|---|---|
| <b>Tanya</b>   | Commercial use; not a comment or a criticism; not highly transformative-could easily have based off other series | <i>Harry Potter</i> was a published fiction | Enough to clearly parallel <i>Harry Potter</i> general world-build <sup>144</sup> | Made (and continues to make) significant amounts of profit in Russia <sup>145</sup> |
| <b>Lexicon</b> | Commercial use; not a comment or a criticism; not very transformative (a referential fanfiction)                 | <i>Harry Potter</i> was a published fiction | Severely high amounts, with little interpretation <sup>146</sup>                  | Was deemed unlikely to interfere with her economically <sup>147</sup>               |

**Table VII: Four-factor *Campbell* test**

<sup>143</sup> See *supra* notes 85–86 and accompanying text.

<sup>144</sup> *Legal Threat for 'Russian Potter'*, *supra* note 120.

<sup>145</sup> *Id.*

<sup>146</sup> *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 527 (S.D.N.Y. 2008).

<sup>147</sup> *Id.* at 550.

|                | Finding of transformativeness | Non-commercial use of copyrighted work | An insubstantial or small portion of copyrighted work used | Plaintiff is a corporation                                |
|----------------|-------------------------------|--|--|---|
| <b>Tanya</b>   | No                            | No                                     | Yes  | No; but, Rowling's resources are <i>equivalent</i> to one |
| <b>Lexicon</b> | No                            | Yes                                    | No   |   |

**Table VIII: Trends leading to a likely finding of fair use**

As the tables show, it is clear that it was not in the advantage of either party to go to litigation. *Tanya's* strong commercial presence and admitted unauthorized use of *Harry Potter* imagery was likely to make it fail a fair use test. While Vander Ark's contact with Rowling might have helped increase his likelihood of mounting a successful claim, the *Lexicon's* commercial nature and its substantial use of the series with little additional commentary, joined with the court's general dislike of covering referential fanfiction under fair use, also made it likely to fail a fair use test.<sup>148</sup>

Why then would either enter litigation? What apparently made the difference for both *Tanya* and *Lexicon* were their publishers' willingness to commit their legal teams to litigation. *Lexicon's* publisher apparently viewed entering litigation as necessary in order to defend the entire genre of referential works, while *Tanya's* Russian publisher was willing to lose profit from an English market so long as it could publish in Russia.<sup>149</sup> These personal motivations combined with both publishers apparently feeling confident in their abilities to get what they want, which—as *Lexicon* confirmed referential works as possibly protected under fair use and *Tanya* remains published in Russia—turned out to be a level of justified optimism.<sup>150</sup> Consequently, as both parties were not risk-averse to litigation and were willing to bear the costs even of failed litigation, Rowling was not able to use her stronger position to pressure them into settlement and was forced into litigation despite her strong dislike of it. This suggests that—for Rowling—the choice to litigate was more likely

<sup>148</sup> *Id.* at 527, 541, 545.

<sup>149</sup> *Id.* at 540; *Rowling seeks 'Grotter' ban*, BBC NEWS (Mar. 13, 2003, 10:05 GMT), <http://news.bbc.co.uk/2/hi/entertainment/2846105.stm>.

<sup>150</sup> *See Warner Bros.*, 575 F. Supp. at 553; *Legal Threat for 'Russian Potter'*, *supra* note 120.

to be made for her by others being unwilling to settle, rather than being a fully affirmative choice on her part.

#### PART V: CONCLUSION: LESSONS LEARNED AND COPYRIGHT MISCHIEF MANAGED

This paper attempted to analyze what factors might influence a decision to litigate in order to defend an intellectual property right—and, in particular, when an author of a work might choose not to litigate to defend their work,—through using five cases of J. K. Rowling engaging with incidences of unauthorized publication.<sup>151</sup> In particular, this paper theorized that an evaluation of the first and fourth factors of the *Campbell* four-factor test might have caused Rowling to opt not to litigate in some circumstances when she should have.

As noted in Part II, the analysis involved in choosing to litigate is a complex one, especially given the current state of fair use regulation, the economics involved in choosing to rely on it for litigation, and the emerging level of protection granted to fanfiction overall. Authors of works have to weigh, among other factors, (1) how much they value their work, (2) how much other parties might value their work, (3) how much of their work other parties might want to use, (4) whether allowing use of their work will be transformative or not, (5) whether allowing use of their work has positive spillover effects, (6) who other parties might be and what resources are available to them, (7) whether the other parties can be incentivized into settling or making other arrangements instead of litigating, (8) how much the costs and benefits of lengthy litigation might be, and (9) whether they are comfortable with the demands of litigation, especially with regards to time and monetary concerns. Even after consideration of all these factors, it goes without saying that authors and their legal teams will likely also have to engage in a host of measures to help keep up the emotional desire and momentum for such actions. Such an analysis and measure-taking is both psychologically daunting and draining, let alone financially expensive, and it is not surprising that often litigants will choose to settle instead of litigating. This remained true in the cases examined in Parts III and IV, where it was generally in the interest of the parties to avoid litigation as Rowling had both the desire to avoid litigation when possible and the stronger resources to endure the costs of it occurring, making litigation too costly for other potential defendant parties who were not as well situated. Put another

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<sup>151</sup> See *supra* Parts III & IV.

way, Rowling does not have to strictly enforce her intellectual property rights through litigation because she is positioned strongly enough to make litigation generally unnecessary as a protective measure.

Yet the analysis of Parts III and IV also indicate that there are other factors, somewhat unrelated to the nine listed above, that can also play a critical role in the decision to litigate.<sup>152</sup> The personal incentives of publishers with regard to profit can result in a swift settlement (the *Bao* case), protracted litigation (the *Lexicon* case), or even ongoing infringement (the *Tanya* case).<sup>153</sup> The personal incentives of other individuals can also incentivize otherwise reluctant individuals towards infringement, whether by reassuring them their actions are not infringement (the *Lexicon* case), that their work should be shared even if it does infringe because it would be well received (the *James* case), or even by appealing to personal values of the individual such as a sense of culture (the *Tanya* and *Kolkatia* cases).<sup>154</sup> These incentives can be strong enough to cause parties that, under a fair use analysis, would be better off not litigating, to enter into litigation anyway, suggesting that while the paper's original hypothesis—i.e. that a fair use analysis influenced the decision to litigate—is true, it is not the conclusive factor. Rather, it is the personalized incentives and resources available to the parties involved that is the decisive factor.

Consequently, it is important that legal practitioners in the field be mindful of other outside factors and influences—including their own personal incentives—in advising their clients since while their clients may personally be very willing to settle or avoid litigation, they may be swayed or prevented from doing so by others. If such mindfulness is done, then it is likely that practitioners will be better able to guide clients through the complex analysis behind fair use reliance and the decision to litigate in ways that would make both personal and financial sense to the client, and consequently better their ability to defend the client's work by using less extreme measures in less extreme cases, resulting in an overall benefit to everyone involved.

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<sup>152</sup> See *supra* Parts III & IV.

<sup>153</sup> See *supra* Parts III & IV.

<sup>154</sup> See *supra* Parts III & IV.