

WARNER BROS. ENTM'T INC. v. RDR BOOKS

United States District Court for the Southern District of New York,
2008
575 F. Supp. 2d 513

OPINION & ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

On October 31, 2007, Plaintiffs Warner Bros. Entertainment Inc. and J.K. Rowling commenced this action against Defendant RDR Books, alleging copyright infringement pursuant to 17 U.S.C. §§ 101 *et seq.*, as well as several other federal and state claims, and seeking both injunctive relief and damages. By order dated March 5, 2008, the Court consolidated the scheduled evidentiary hearing on Plaintiffs' motion for a preliminary injunction with a trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). By their pretrial orders, the parties narrowed the claims and defenses to be tried: Plaintiffs pursued only their claims for copyright infringement and statutory damages under 17 U.S.C. §§ 101 *et seq.* of the Copyright Act; Defendant pursued only its defenses and affirmative defenses of copyright fair use under 17 U.S.C. § 107, copyright misuse, and unclean hands. The Court held a bench trial on the merits from April 14, 2008 to April 17, 2008. This opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

FINDINGS OF FACT

I. The Copyrighted Works

Plaintiff J.K. Rowling ("Rowling") is the author of the highly acclaimed *Harry Potter* book series. (Tr. (Rowling) at 43:6-7, 47:17-20; Pl. Ex. 25 (Rowling Decl.) at P1.) Written for children but enjoyed by children and adults alike, the *Harry Potter* series chronicles the lives and adventures of Harry Potter and his friends as they come of age at the Hogwarts School of Witchcraft and Wizardry and face the evil Lord Voldemort. (Pl. Ex. 25 (Rowling Decl.) at P 2.) It is a tale of a fictional world filled with magical spells, fantastical creatures, and imaginary places and things. (Tr. (Vander Ark) at 346:1-6; 371:1-22; *id.* (Sorensen) at 513:6-14.)

Rowling published the first of seven books in the series, *Harry Potter and the Philosopher's Stone*, in the United Kingdom in 1997. (Tr. (Rowling) at 46:12-16; *id.* (Vander Ark) at 363:19-20.) In 1998, the first book was published in the United States as *Harry Potter and the Sorcerer's Stone*. (Pl. Ex. 25 (Rowling Decl.)

at P 2.) Over the next ten years, Rowling wrote and published the remaining six books in the *Harry Potter* series (*Id.*): *Harry Potter and the Chamber of Secrets* (1998), *Harry Potter and the Prisoner of Azkaban* (1999), *Harry Potter and the Goblet of Fire* (2000), *Harry Potter and the Order of the Phoenix* (2003), and *Harry Potter and the Half-Blood Prince* (2005). (Pl. Exs. 5-9.) The seventh and final book, *Harry Potter and the Deathly Hallows* was released on July 21, 2007. (Pl. Ex. 10). Rowling owns a United States copyright in each of the *Harry Potter* books. (Pl. Ex. 12 (Blair Decl.) at P 4; Pl. Ex. 12A; Tr. (Rowling) at 43:8-9.)

The *Harry Potter* series has achieved enormous popularity and phenomenal sales. (Tr. (Murphy) at 432:20-433:3; *id.* (Harris) at 443:16-18). The books have won numerous awards, including children's literary awards and the British Book Award. (*Id.* (Rowling) at 47:17-20). Most gratifying to Rowling is that the *Harry Potter* series has been credited with encouraging readership among children. (*Id.* (Rowling) at 103:8-22.)

As a result of the success of the *Harry Potter* books, Plaintiff Warner Bros. Entertainment Inc. ("Warner Brothers") obtained from Rowling the exclusive film rights to the entire seven-book *Harry Potter* series. (Pl. Ex. 26 (Williams Decl.) at P 3.) Warner Brothers is the exclusive distributor for worldwide distribution of these films. (*Id.* at P 4.) To date, Warner Brothers has released five *Harry Potter* films, and the sixth is scheduled for a worldwide release in November 2008. (*Id.* at PP 3, 4.) Each of the *Harry Potter* films is the subject of a copyright registration. (*Id.* at P 3.) Warner Brothers licensed certain rights to Electronic Arts to create video games based on the *Harry Potter* books and films, which included a series of "Famous Wizard Cards" that Rowling created and which are the subject of U.S. copyright registrations jointly owned by Warner Brothers and Electronic Arts. (Tr. (Rowling) at 76:15-17; Pl. Post-trial Br., Ex. B.)

Early on in the publication of the *Harry Potter* series, Rowling wrote a short series of fictional newspapers entitled "The Daily Prophet," which were published and distributed to fans in the United Kingdom. (Tr. (Rowling) at 73:17-74:1.) Rowling owns a U.K. copyright in "The Daily Prophet" newsletters. (Tr. (Rowling) at 74:6-7; see Pl. Post-trial Br., Ex. A.)

In addition, Rowling wrote two short companion books to the *Harry Potter* series (the "companion books"), the royalties from which she donated to the charity Comic Relief. (Tr. (Rowling) at 49:12-50:10.) The first, *Quidditch Through the Ages* (2001), recounts the history and development of "quidditch," an imaginary sport featured in the *Harry Potter* series that involves teams of witches and wizards on flying broomsticks. (Pl. Ex. 2.) The second, *Fantastic Beasts & Where to Find Them* (2001), is an A-to-Z encyclopedia of the imaginary beasts and beings that exist in *Harry Potter's* fictional world. (Pl. Ex. 3.) Both appear in the *Harry Potter* series as textbooks that the students at Hogwarts use in their studies, and the companion books are marketed as such. Neither of the companion books is written in narrative form; instead each book chronicles and expands on the

fictional facts that unfold in the *Harry Potter* series. (Tr. (Vander Ark) at 396:21-25; see Pl. Exs. 2-3.) The companion books are both registered with the United States Copyright Office. (Pl. Ex. 12 (Blair Decl.) at P 4.) Although the market for the companion books is not nearly as large as the market for the *Harry Potter* series, Rowling's companion books have earned more than \$ 30 million to date. (Tr. (Rowling) at 49:25-50:10; Pl. Ex. 25 (Rowling Decl.) at P 6; Pl. Ex. 12 (Blair Decl.) at P 3.)

Rowling has stated on a number of occasions since 1998 that, in addition to the two companion books, she plans to publish a "*Harry Potter* encyclopedia" after the completion of the series and again donate the proceeds to charity. (Tr. (Rowling) at 50:25-51: 15, 55: 1-5; Pl. Ex. 25 (Rowling Decl.) at P 6; Pl. Ex. 12 (Blair Decl.) at P 17.) Rowling intends that her encyclopedia contain alphabetical entries for the various people, places and things from the *Harry Potter* novels. (Tr. (Rowling) at 53:11-13.) While she intends to add new material as well, her encyclopedia is expected to reflect all of the information in the *Harry Potter* series. (Tr. (Vander Ark) at 387:20-388:16; Pl. Ex. 25 (Rowling Decl.) at P 7; Pl. Ex. 32 (Suppl. Rowling Decl.) at P 5.)

Rowling already has begun preparations for work on the encyclopedia by assembling her materials and requesting from her U.K. publisher its "bible" of *Harry Potter* materials. (Tr. (Rowling) at 52:1-24.) The publisher's "bible" is a catalogue of the people, places, and things from the *Harry Potter* books. (Pl. Ex. 23 (Odedina Decl.) P 2; Pl. Ex. 23A.) Rowling's U.S. publisher has compiled a similar catalogue of elements from the *Harry Potter* books which Rowling has requested and intends to draw on in creating her encyclopedia. (Tr. (Rowling) at 52:25-53:10; Pl. Ex. 25 (Rowling Decl.) at P 7; Pl. Ex. 18 (Klein Decl.) at PP 2-3; Pl. Ex. 18A.) Rowling plans on using an A-to-Z format for her encyclopedia. (Tr. (Rowling) at 53:11-13.)

II. The Allegedly Infringing Work

Defendant RDR Books is a Michigan-based publishing company that seeks to publish a book entitled "The Lexicon," the subject of this lawsuit. (Tr. (Rapoport) at 150:19-151:2.) Steven Vander Ark, a former library media specialist at a middle school in Michigan (Tr. (Vander Ark) at 248:4-6), is the attributed author of the Lexicon (Def. Ex. 502 (Vander Ark Decl.) at P 1). He is also the originator, owner, and operator of "The Harry Potter Lexicon" website (*id.*), a popular *Harry Potter* fan site from which the content of the Lexicon is drawn (*id.* at P 30).

A. The Origins of the Lexicon

An immediate fan of the *Harry Potter* novels, Vander Ark began taking personal notes to keep track of the details and elements that unfold in the *Harry Potter* world while reading the second book in the series in 1999. (Tr. (Vander Ark) at 335:2-17.) After joining an online discussion group about the *Harry Potter*

books, Vander Ark expanded his notes to include descriptive lists of the spells, characters, and fictional objects in *Harry Potter* to share with fellow fans. (*Id.* at 335:20-336:9.) These lists included brief descriptions or definitions of the terms. (*Id.* at 336:8-11.)

Vander Ark began work on his website, "The Harry Potter Lexicon" (the "website" or "Lexicon website"), in 1999 and opened the website in 2000. (*Id.* at 336:23.) His purpose in establishing the website was to create an encyclopedia that collected and organized information from the *Harry Potter* books in one central source for fans to use for reference. (*Id.* at 338:6-21; Def. Ex. 502 (Vander Ark Decl.) at P 13.) At its launch, the website featured Vander Ark's descriptive lists of spells, characters, creatures, and magical items from *Harry Potter* with hyperlinks to cross-referenced entries. (Tr. (Vander Ark) at 337:7-10, 336:4-7.) In response to feedback from users of the website, Vander Ark developed an A-to-Z index to each list to allow users to search for entries alphabetically. (*Id.* at 343:2-21.)

The website presently features several indexed lists of people, places, and things from *Harry Potter*, including the "Encyclopedia of Spells," "Encyclopedia of Potions," "Wizards, Witches, and Beings," "The Bestiary," and "Gazetteer of the Wizarding World." (Pl. Exs. 14 (Bradley Decl.) at P 5, 14C.) In addition to these reference features, the website contains a variety of supplemental material pertaining to *Harry Potter*, including fan art, commentary, essays, timelines, forums, and interactive data. (Pl. Exs. 14 (Bradley Decl.) at P 3, 14A.) The website is currently run by a staff of seven or eight volunteers, including four primary editors (Tr. (Vander Ark) at 340:14-16), all of whom were recruited to help update and expand the website's content after the publication of the fifth book in the *Harry Potter* series. (*Id.* at 339:18-340:24.) The website uses minimal advertising to offset the costs of operation. (*Id.* at 349:24-350:10.) Use of the website is free and unrestricted. (*Id.* at 293:8-12; 351:25-352:4.)

The content of the encyclopedia entries on the Lexicon website is drawn primarily from the *Harry Potter* series, the companion books, "The Daily Prophet" newsletters, the "Famous Wizard Cards," and published interviews of Rowling. (Tr. (Vander Ark) at 348:7-13; Def. Ex. 502 (Vander Ark Decl.) at P 14). According to Vander Ark, some additional content is drawn from outside reference sources, including Bullfinch's Mythology, Field Guide to Little People, New Shorter Oxford English Dictionary, and online encyclopedias such as Encyclopedia Mythica. (Tr. (Vander Ark) at 346:12-348:19; Def. Ex. 502 (Vander Ark Decl.) at P 14.) Frequently, these sources are not cited in the website's encyclopedia entries. Vander Ark's purpose in including additional information from outside sources or from his own knowledge was to enrich the experience of readers of the *Harry Potter* series by illuminating "the incredibly rich world and hidden meanings" contained within them. (Tr. (Vander Ark) at 345:21-346:6.)

Vander Ark has received positive feedback, including from Rowling and her publishers, about the value of the Lexicon website as a reference source. In May

2004, Vander Ark read a remark by Rowling posted on her website praising his Lexicon website as follows: "This is such a great site that I have been known to sneak into an internet cafe while out writing and check a fact rather than go into a bookshop and buy a copy of Harry Potter (which is embarrassing). A website for the dangerously obsessive; my natural home." (Tr. (Rowling) at 118:2-119:2). In July 2005, Vander Ark received a note from Cheryl Klein, a Senior Editor at Scholastic Inc., American publisher of the *Harry Potter* series, thanking him and his staff "for the wonderful resource [his] site provides for fans, students, and indeed editors & copyeditors of the Harry Potter series," who "referred to the Lexicon countless times during the editing of [the sixth book in the series], whether to verify a fact, check a timeline, or get a chapter & book reference for a particular event." (Def. Ex. 502 (Vander Ark Decl.) at P 39; Def. Ex. 502A.) In September 2006, Vander Ark was invited by Warner Brothers to the set of the film *The Order of the Phoenix*, where he met David Heyman, the producer of all the *Harry Potter* films. Heyman told Vander Ark that Warner Brothers used the Lexicon website almost every day. (Tr. 386:8-20; Def. Ex. 502 (Vander Ark Decl.) P 39.) Finally, in July 2007, Vander Ark visited the studios of Electronic Arts, the licensed producer of the *Harry Potter* video games, where he observed printed pages from the Lexicon covering the walls of the studio. (Tr. at 387:3-13; Def. Ex. 502 (Vander Ark Decl.) P 39.)

Prior to any discussions with RDR Books about publishing portions of the Lexicon website as a book, Vander Ark was aware of Rowling's public statements regarding her intention to write a *Harry Potter* encyclopedia upon completion of the seventh book in the series. (Tr. (Vander Ark) at 247:10-12, 250:21-251:13; Def. Ex. 502 at P 37.) In June 2007, just before the release of the seventh book, Vander Ark emailed Christopher Little Literary Agency, Rowling's literary agent in the United Kingdom, and suggested that he would be "a good candidate for work as an editor, given [his] work on the Lexicon," should Rowling start working on an encyclopedia or other reference to the *Harry Potter* series. (Pl. Ex. 12C.) The literary agency advised him that Rowling intended to work alone and did not require a collaborator. (Tr. (Vander Ark) at 250:14-20; Pl. Ex. 12 (Blair Decl.) at P 12; Pl. Ex. 12C.)

B. RDR Books' Acquisition and Marketing of the Lexicon

[The court described the acquisition and publishing of the Lexicon in book form, by RDR Books.]

C. Plaintiffs' Objections to Publication of the Lexicon

Rowling's literary agent, Neil Blair of the Christopher Little Literary Agency, first learned of the Lexicon book when he saw an advertisement on www.PublishersMarketplace.com announcing that RDR Books would be publishing the Lexicon, scheduled for release in late October 2007. (Pl. Exs. 12 (Blair Decl.) at P 14, 12D). On September 18, 2007, counsel for Rowling and Warner Brothers forwarded a letter to Vander Ark by email, copying Rapoport, notifying them that the Lexicon appeared to infringe Rowling's copyrights and requesting that RDR Books cease publication of the book. (Tr. at (Rapoport) 190:7-13; Pl. Ex. 15 at P 3). Rapoport replied to Plaintiffs' counsel that he intended to study the various issues with RDR Books' legal advisers (Pl. Ex. 15 (Cendali Decl.) at P 5) and that his work had been interrupted by personal circumstances (*id.* P 7). Meanwhile he continued to market the Lexicon book domestically and abroad. (Tr. (Rapoport) at 193:2-25, 194:4-14, 208:3-17; Pl. Exs. 110-130, 133-140.)

On October 3, 2007, after receiving no substantive response from RDR Books, Plaintiffs' counsel wrote again to Rapoport emphasizing their clients' concerns and asking for a prompt substantive response. (Pl. Ex. 15 (Cendali Decl.) at P 6.) On October 5, 2007, when pitching the Lexicon to a Brazilian publisher, Rapoport asked for confirmation that the agent would not speak with the local publisher of the *Harry Potter* novels about the Lexicon. (Pl. Ex. 120.) On October 8, 2007, despite having received a cease-and-desist letter and a subsequent letter from Plaintiffs' counsel, Rapoport told a German publisher who raised copyright concerns that a lawsuit was unlikely. (Tr. (Rapoport) at 198:6-19; Pl. Ex. 121.)

On October 11, 2007, RDR Books sent the chairman of Warner Brothers a cease-and-desist letter claiming that Warner Brothers had violated Vander Ark's rights in the "Hogwarts Timeline" of events from the *Harry Potter* novels that was featured on the Lexicon website. (Pl. Ex. 14 (Bradley Decl.) at P 12; Pl. Ex. 14H). RDR Books also stated that it was seeking "tangible rewards" for Vander Ark in exchange for Warner Brothers' purported use of the timeline as an extra feature of the DVD versions of the first three *Harry Potter* films. (*Id.*) On October 19, 2007, Warner Brothers responded to RDR Books' letter regarding the timeline with a request for a copy of the "print version" of the Lexicon website referred to by RDR Books to aid its evaluation of any potential claims. (Pl. Ex. 15 (Cendali Decl.) at PP 8-9). RDR Books refused, stating that Warner Brothers could print the material from the Lexicon website. (Tr. (Rapoport) at 205:21-206:13; Pl. Ex. 15 (Cendali Decl.) at P 9.)

On October 19 and 24, 2007, Plaintiffs' counsel sent two more letters to RDR Books, asking for a substantive response to their clients' concerns regarding the Lexicon and for confirmation that RDR Books would not publish the Lexicon until it attempted to resolve the matter in good faith. (Pl. Ex. 15 (Cendali Decl.) at PP 9, 11.) RDR Books' responses deflected the inquiries (*id.* P 10) and stated that Plaintiffs' objections were "unwarranted" (*id.* P 12). On October 31, 2007, Plaintiffs

called Rapoport to offer a last chance to agree to cease publication, or at least delay publication, and to provide Plaintiffs with a copy of the manuscript and proposed cover, in effort to resolve the matter. (*Id.* P 13.) RDR refused to delay publication and refused to provide a copy of the manuscript. (*Id.*) Plaintiffs filed suit on October 31, 2007, at which time they also moved by order to show cause for a preliminary injunction. (*Id.* P 13; Compl.)

Since the filing of this lawsuit, RDR Books has revised the front and back covers of the Lexicon. Specifically, RDR Books removed the quotation of Rowling's 2004 statement about her use of the Lexicon website from the back cover of the Lexicon after Plaintiffs presented a survey in this litigation demonstrating that 38% of respondents believed that the appearance of the quote on the proposed book cover meant that Rowling endorsed the book. (Tr. (Rapoport) at 237:6-13; Pl. Ex. 13C (Blumsack Decl.); Pl. Ex. 16 (Helfgott Decl.) at P 2). RDR Books changed the title from "The Harry Potter Lexicon" to "The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Materials." Additionally, the final revision of the front cover of the Lexicon displays the following disclaimer:

Harry Potter and the names of fictitious people and places in the Harry Potter novels are trademarks of Warner Bros. Entertainment, Inc. This book is not written, prepared, approved, or licensed by Warner Bros. Entertainment, Inc., Scholastic Corporation, Raincoast Books, Bloomsbury Publishing Plc, or J.K. Rowling, nor is the author, his staff members, www.HP-Lexicon.org or the publisher in any way affiliated with Warner Bros. Entertainment, Inc., Scholastic Corporation, Raincoast Books, Bloomsbury Publishing Plc, J.K. Rowling, or any other person or company claiming an interest in the Harry Potter works.

(Def. Ex. 501 a.) RDR Books maintains, however, that the original cover was truthful and did not infringe any rights of Plaintiffs. (Def. Ex. 501 (Rapoport Decl.) at P 6.)

D. The Content of the Lexicon

The Lexicon is an A-to-Z guide to the creatures, characters, objects, events, and places that exist in the world of *Harry Potter*. As received by the Court in evidence, the Lexicon manuscript is more than 400 type-written pages long and contains 2,437 entries organized alphabetically. The first few pages contain a list of abbreviations used throughout the Lexicon to cite to the original sources of the material.

The Lexicon manuscript was created using the encyclopedia entries from the Lexicon website. (Tr. (Vander Ark) at 365:1-5; Def. Ex. 502 (Vander Ark Decl.) P30.) Because of space limitations for the printed work, which seeks to be complete but also easy to use, about half of the material from the website was not included

in the Lexicon manuscript. (Tr. 365:1-11, 366:9-18; Def. Ex. 502 (Vander Ark Decl.) PP 30, 31, 33.) The Lexicon itself makes clear that the only source of its content is the work of J.K. Rowling. The first page of the Lexicon manuscript states: "All the information in the Harry Potter Lexicon comes from J.K. Rowling, either in the novels, the 'schoolbooks,' from her interviews, or from material which she developed or wrote herself." (Pl. Ex. 1 at 1). While Vander Ark claims that the Lexicon uses material from outside reference sources, such as Bullfinch's Mythology, Field Guide to Little People, New Shorter Oxford English Dictionary, and online encyclopedias (Tr. (Vander Ark) at 346:12-348:19; Def. Ex. 502 (Vander Ark Decl.) at P 14), it is not possible to confirm this claim because, aside from four dictionary citations, no other citations to third-party works appear in the Lexicon. (Tr. (Vander Ark) at 295:13-296:13).

The Lexicon entries cull every item and character that appears in the *Harry Potter* works, no matter if it plays a significant or insignificant role in the story. The entries cover every spell (e.g., Expecto Patronum, Expelliarmus, and Incendio), potion (e.g., Love Potion, Felix Felicis, and Draught of Living Death), magical item or device (e.g., Deathly Hallows, Horcrux, Cloak of Invisibility), form of magic (e.g., Legilimency, Occlumency, and the Dark Arts), creature (e.g., Blast-Ended Skrewt, Dementors, and Blood-Sucking Bugbears), character (e.g., Harry Potter, Hagrid, and Lord Voldemort), group or force (e.g., Aurors, Dumbledore's Army, Death Eaters), invented game (e.g., Quidditch), and imaginary place (e.g., Hogwarts School of Witchcraft and Wizardry, Diagon Alley, and the Ministry of Magic) that appear in the *Harry Potter* works. The Lexicon also contains entries for items that are not explicitly named in the *Harry Potter* works but which Vander Ark has identified, such as medical magic, candle magic, wizard space, wizard clothing, and remorse. Some of the entries describe places or things that exist in the real world but also have a place in the *Harry Potter* works, such as moors, Greece, and Cornwall.

Each entry, with the exception of the shortest ones, gathers and synthesizes pieces of information relating to its subject that appear scattered across the *Harry Potter* novels, the companion books, The Daily Prophet newsletters, Famous Wizard Cards, and published interviews of Rowling. The types of information contained in the entries include descriptions of the subject's attributes, role in the story, relationship to other characters or things, and events involving the subject. Repositories of such information, the entries seek to give as complete a picture as possible of each item or character in the *Harry Potter* world, many of which appear only sporadically throughout the series or in various sources of *Harry Potter* material.

The snippets of information in the entries are generally followed by citations in parentheses that indicate where they were found within the corpus of the *Harry Potter* works. The thoroughness of the Lexicon's citation, however, is not consistent; some entries contain very few citations in relation to the amount material provided. (See, e.g., Pl. Ex. 1, entry for "Dumbledore, Albus Percival

Wulfric Brian" (containing no citations in a five-page entry); entry for "Granger, Hermione Jean" (containing no citations in a three-page entry); entry for "Chamber of Secrets" (containing one citation for nearly two pages of material); entry for "Crouch, Bartemius 'Barty', Sr." (containing one citation for nearly a full page of material).) When the Lexicon cites to one of the seven *Harry Potter* novels, the citation provides only the book and chapter number. Vander Ark explained that page numbers were excluded from the citations because the various editions of the *Harry Potter* books have different pagination, but the chapter numbers remain consistent. (Tr. (Vander Ark) at 277:19-278:1.) The Lexicon neither assigns a letter to each edition nor specifies a standard edition while providing a conversion table for other editions, practices which Plaintiffs' expert Jeri Johnson testified were common for reference guides. (Tr. (Johnson) at 594:11-16, 594:20-595:3.)

While not its primary purpose, the Lexicon includes commentary and background information from outside knowledge on occasion. For example, the Lexicon contains sporadic etymological references, (*e.g.*, Pl. Ex. 1, entries for "Colloportus," "Lupin, Remus," "Alohamora," "Fidelius Charm"), analogies to characters outside the *Harry Potter* world such as Merlin, and observations of Rowling's allusions to other works of literature such as "the weird sisters" from Shakespeare's *Macbeth*. The Lexicon also points to the very few "flints," or errors in the continuity of the story, that appear in the *Harry Potter* series. (*See* Tr. (Vander Ark) at 297:15-298:4.)

While there was considerable opining at trial as to the type of reference work the Lexicon purports to be and whether it qualifies as such (no doubt in part due to its title), the Lexicon fits in the narrow genre of non-fiction reference guides to fictional works. As Defendant's expert testified, the *Harry Potter* series is a multi-volume work of fantasy literature, similar to the works of J.R.R. Tolkien and C.S. Lewis. Such works lend themselves to companion guides or reference works because they reveal an elaborate imaginary world over thousands of pages, involving many characters, creatures, and magical objects that appear and reappear across thousands of pages. (Tr. (Sorensen) at 504:16-23; *id.* at 507:1-5 (testifying that she found 19 or 20 companion guides to J.R.R. Tolkien's works, and about 15 guides to C.S. Lewis's works).) Fantasy literature spawns books having a wide variety of purposes and formats, as demonstrated by the books about *Harry Potter* that Plaintiffs entered into evidence. (Pl. Exs. 73, 74, 75, 192; 13E-13G.) The Lexicon, an A-to-Z guide which synthesizes information from the series and generally provides citations for location of that information rather than offering commentary, is most comparable to the comprehensive work of Paul F. Ford, *Companion to Narnia: A Complete Guide to the Magical World of C.S. Lewis's The Chronicles of Narnia* (Pl. Ex. 62), or the unauthorized A-to-Z guide by George W. Beahm, *Fact, Fiction, and Folklore in Harry Potter's World: An Unofficial Guide* (Pl. Ex. 192).

At trial, Rowling testified that the Lexicon took "all the highlights of [her] work, in other words [her] characters' secret history, the jokes certainly, certain

exciting narrative twists, all the things that are the highlights of [her] stories." (Tr. (Rowling) at 647:6-10). She compared this taking of her work to plundering all of the "plums in [her] cake." (Tr. (Rowling) at 647:3-6). At trial, the testimony of Rowling and the expert opinion of Johnson focused at length on the Lexicon's verbatim copying of language from the *Harry Potter* works. Johnson testified that in particular, entries that deal with invented terms, creatures, places and things from the *Harry Potter* books use "again and again the specific, very colorful, idiosyncratic . . . nouns and phrases of Ms. Rowling." (Tr. (Johnson) at 619:7-9.)

Although it is difficult to quantify how much of the language in the Lexicon is directly lifted from the *Harry Potter* novels and companion books, the Lexicon indeed contains at least a troubling amount of direct quotation or close paraphrasing of Rowling's original language.

The Lexicon occasionally uses quotation marks to indicate Rowling's language, but more often the original language is copied without quotation marks, often making it difficult to know which words are Rowling's and which are Vander Ark's. (Tr. (Rowling) at 57:6-15, 58:24-59:12, 59:19-60:2; Tr. (Johnson) at 619:3-12.)

For example, in the entry for "armor, goblin made," the Lexicon uses Rowling's poetic language nearly verbatim without quotation marks. The original language from *Harry Potter and the Deathly Hallows* reads:

"Muggle-borns," he said. "Goblin-made armour does not require cleaning, simple girl. Goblins' silver repels mundane dirt, imbibing only that which strengthens it."

(Pl. Ex. 10 at 303.) The Lexicon entry for "armor, goblin made" reads in its entirety:

Some armor in the wizarding world is made by goblins, and it is quite valuable. (e.g., HBP20) According to Phineas Nigellus, goblin-made armor does not require cleaning, because goblins' silver repels mundane dirt, imbibing only that which strengthens it, such as basilisk venom. In this context, "armor" also includes blades such as swords.

Although the Lexicon entry introduces Rowling's language with the phrase, "According to Phineas Nigellus," it does not use quotation marks.

The Lexicon entry for "Dementors" reproduces Rowling's vivid description of this creature sometimes using quotation marks and sometimes quoting or closely paraphrasing without indicating which language is original expression. The original language appears in Chapters 5 and 10 of *Harry Potter and the Prisoner of Azkaban* as follows:

. . . Its face was completely hidden beneath its hood. . . . There was a hand protruding from the cloak and it was glistening, grayish, slimy-looking, and scabbed, like something dead that had decayed in water. . . .

And then the thing beneath the hood, whatever it was, drew a long, slow, rattling breath, as though it were trying to suck something more than air from its surroundings.

* * *

"Dementors are among the foulest creatures to walk this earth. They infest the darkest, filthiest places, they glory in decay and despair, they drain peace, hope, and happiness out of the air around them. Even Muggles feel their presence, though they can't see them. Get too near a dementor and every good feeling, every happy memory will be sucked out of you. If it can, the dementor will feed on you long enough to reduce you to something like itself . . . soulless and evil. . . ."

(Pl. Ex. 6 at 83, 187.) The Lexicon entry for "Dementors" reads in its entirety:

Dementors are some of the most terrible creatures on earth, flying tall black spectral humanoid things with flowing robes. They "infest the darkest, filthiest places, they glory in decay and despair, they drain peace, hope, and happiness out of the air around them," according to Lupin (PA10). Dementors affect even Muggles, although Muggles can't see the foul, black creatures. Dementors feed on positive human emotions; a large crowd is like a feast to them. They drain a wizard of his power if left with them too long. They were the guards at Azkaban and made that place horrible indeed. The Ministry used Dementors as guards in its courtrooms as well (GF30, DH13). There are certain defenses one can use against Dementors, specifically the Patronus Charm. A Dementor's breath sounds rattling and like it's trying to suck more than air out of a room. Its hands are "glistening, grayish, slimy-looking, and scabbed". It exudes a biting, soul-freezing cold (PA5).

Another example of verbatim copying and close paraphrase can be found in the Lexicon entry for "Mirror of Erised." The original language from *Harry Potter and the Sorcerer's Stone* reads:

It was a magnificent mirror, as high as the ceiling, with an ornate 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."

(Pl. Ex. 4 at 207, 213). The first paragraph of the Lexicon entry reads:

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 (PS1 2).

The Lexicon entry for "Boggart" takes strands of dialogue from *Harry Potter and the Prisoner of Azkaban* and closely paraphrases it in the third person. The original work contains the following bits of dialogue:

"Boggarts like dark, enclosed spaces."

"It's a shape-shifter. . . . It can take the shape of whatever it thinks will frighten us most."

"Nobody knows what a boggart looks like when he is alone, but when I let him out, he will immediately become whatever each of us most fears."

(Pl. Ex. 6 at 133.) The Lexicon entry begins as follows:

A shape shifter that prefers to live in dark, confined spaces, taking the form of the thing most feared by the person it encounters; nobody knows what a boggart looks like in its natural state.

An example of particularly extensive direct quotation is found in the Lexicon entry for "Trelawney, Sibyll Patricia," the professor of Divination at the Hogwarts School who tells two important prophecies in the story. The Lexicon not

only reproduces her prophecies word-for-word in their entirety, but in doing so, reveals dramatic plot twists and how they are resolved in the series. For example, the first prophecy reads:

"The one with the power to vanquish the Dark Lord approaches. . .
. Born to those who have thrice defied him, born as the seventh
month dies . . . and the Dark Lord will mark him as his equal, but
he will have power the Dark Lord knows not . . . and either must die
at the hand of the other for neither can live while the other survives.
. . . The one with the power to vanquish the Dark Lord will be born
as the seventh month dies. . . ."

(Pl. Ex. 8 at 841 (ellipses in original).) The Lexicon entry reproduces this prophecy exactly but in italics and indented. (Pl. Ex. 1, entry for "Trelawney, Sibyll Patricia.") The Lexicon entry continues by discussing what happens as a result of this prophecy: "Severus Snape was eavesdropping on this conversation and he reported the first part of the Prophecy to the Dark Lord. Voldemort immediately began searching for this threat, and centered his attention on the child of Lily and James Potter. (OP 37)." The entry then quotes the second prophecy, but without a citation to where it appears in the *Harry Potter* series.

A number of Lexicon entries copy Rowling's artistic literary devices that contribute to her distinctive craft as a writer. For example, the Lexicon entry for "brain room," uses Rowling's evocative literary device in a very close paraphrase. The original language from *Harry Potter and the Order of the Phoenix* reads:

For a moment it seemed suspended in midair, then it soared toward Ron, spinning as it came, and what looked like ribbons of moving images flew from it, unraveling like rolls of film.

(Pl. Ex. 8 at 798.) The Lexicon entry reads in part:

. . . When Summoned, the brains fly out of the tank, unspooling ribbons of thought like strips of film, which wrap themselves around the Summoner and cause quite a bit of damage (OP35). . . .

The Lexicon entry for "Clankers" copies a vivid simile created by Rowling and reproduces a thought in the mind of Harry Potter as a factual statement using nearly identical wording. The original language from *Harry Potter and the Deathly Hallows* reads:

Ron passed the bag to Griphook, and the goblin pulled out a number of small metal instruments that when shaken made a loud, ringing noise like miniature hammers on anvils. . . .

... Harry could see [the dragon] trembling, and as they drew nearer he saw the scars made by vicious slashes across its face, and guessed that it had been taught to fear hot swords when it heard the sound of the Clankers.

(Pl. Ex. 10 at 536). The Lexicon entry reads:

A number of small metal instruments, which when shaken make a loud, ringing noise like tiny hammers on anvil [sic]. Anyone visiting one of the high-security vaults at Gringotts must carry one of these, shaking it to make noise. The dragon guarding those vaults has been conditioned to back away at the sound, apparently by being taught to fear hot swords whenever it hears the Clankers (DH26).

Similarly, the Lexicon entry for "Marchbanks, Madam Griselda" uses an artful simile from the original works to describe this character. Rowling's language in *Harry Potter and the Order of the Phoenix* reads:

... Harry thought Professor Marchbanks must be the tiny, stooped witch with a face so lined it looked as though it had been draped in cobwebs; Umbridge was speaking to her very deferentially. ...

(Pl. Ex. 8 at 710.) The Lexicon entry reads in part:

... Madam Marchbanks in June 1996 was tiny and stooped, her face so lined it appeared draped in cobwebs. ...

The Lexicon's close paraphrasing is not limited to the seven *Harry Potter* novels, but can be found in entries drawn from the companion books as well. For example, the entry for "Montrose Magpies" uses language from *Quidditch Through the Ages*. The original language reads:

The Magpies are the most successful team in the history of the British and Irish League, which they have won thirty-two times. Twice European Champions The Magpies wear black and white robes with one magpie on the chest and another on the back.

(Pl. Ex. 2 at 35-36.) The Lexicon entry reads:

The most successful Quidditch team in history, which has won the British and Irish league thirty-two times and the European Cup twice. Their robes are black and white, with one magpie on the chest and another on the back (QA7).

(See also Pl. Ex. 1, entry for "Woollongong Shimmy.")

The same close paraphrasing takes place in the Lexicon entries drawing from Rowling's other companion book, *Fantastic Beasts & Where to Find Them*. For example, the entry for "Chinese Fireball" closely tracks the original language, which reads:

The only Oriental dragon. Scarlet and smooth-scaled, it has a fringe of golden spikes around its snub-snouted face and extremely protuberant eyes. The Fireball gained its name for the mushroom-shaped flame that bursts from its nostrils when it is angered. . . . Eggs are a vivid crimson speckled with gold. . . .

(Pl. Ex. 3 at 11.) The Lexicon entry reads:

A species of dragon native to China. The Fireball is a scarlet dragon with golden spikes around its face and protruding eyes. The blast of flame from a fireball forms a distinctive mushroom shape. Eggs of a Fireball are vivid crimson, flecked with gold (FB).

(See also Pl. Ex. 1, entry for "Fire Crab.")

Instances of such verbatim copying or close paraphrasing of language in the *Harry Potter* works occur throughout the Lexicon. (See, e.g., Pl. Ex. 1, entries for "Apparition," "Bubtotuber," "Pince, Madam Irma," "Twycross, Wilkie," "Lovegood, Luna," "third-floor corridor," "Slytherin common room.") Rowling provides numerous examples in Plaintiffs' Exhibit 47, "a chart [she] made to show what [she] felt was the constant pilfering of [her] work." (Tr. (Rowling) at 57:23-24.)

Aside from verbatim copying, another factual issue of contention at trial was the Lexicon entries that contain summaries of certain scenes or key events in the *Harry Potter* series. Most frequently, these are the longer entries that describe important objects, such as the "Deathly Hallows," or momentous events, such as the "Triwizard Tournament," or that trace the development of an important character, such as Harry Potter, Lord Voldemort, Severus Snape, and Albus Dumbledore. Plaintiffs' expert testified at length that in her opinion these entries constitute "plot summaries," (Tr. (Johnson) at 592:14-22, 611:13-22, 623:4-624:11), while Defendant's expert characterized them as character studies or analysis.

Neither of these characterizations is exactly apt. Without endorsing one characterization or another, such entries in the Lexicon do encapsulate elements of the very elaborate and wide ranging plot (sometimes in chronological order, sometimes not) confined to the subject of the entry. In the entries for significant characters, these plot elements are occasionally used to support an observation about the character's nature or development. For instance, the three-and-a-half page entry for "Lovegood, Luna" contains the following paragraph:

Luna came into her own during her sixth year at Hogwarts. With Harry, Ron, and Hermione gone from school, she joined Ginny and Neville to revive the D.A. and resist the Death Eaters' influence at Hogwarts. She was kidnapped on the Hogwarts Express on her way home for the Christmas holidays (DH25) because of what Mr. Lovegood had been writing in *The Quibbler*, and imprisoned in the cellar at the Malfoy Mansion along with Ollivander. She was helpful in their efforts to escape the Malfoy Mansion, and then fought bravely, again, at the Battle of Hogwarts (DH31).

(*See also, e.g.,* Pl. Ex. 1, entry for "Malfoy, Draco," PP 5, 6, 7.) But other times, the presentation of plot details, in effect, summarizes a vignette or portion of a scene. In the same entry for "Lovegood, Luna," the Lexicon summarizes a scene on the Hogwarts Express found on pages 185 to 188 of Chapter 10 of *Harry Potter and the Order of the Phoenix*:

Harry met Luna for the first time aboard the Hogwarts Express on September 1, 1995. He, Ginny, and Neville shared a compartment with her on the train (OP 10). She was reading a copy of *The Quibbler* magazine upside down. She informed the others that her father is the editor of *The Quibbler*, a magazine which most in the Wizarding World consider a joke. She laughed a little too loud; she stared at the other kids, and generally made an odd traveling companion. Harry privately thought, when Cho happened by their compartment to say hello, that he would much rather have been sitting with "cooler" kids than Luna and Neville.

(*Compare* Pl. Ex. 8 at 185-88.)

The entries for the hero and the villain of the *Harry Potter* series (Harry Potter and Lord Voldemort) present the closest thing to "plot summaries," but are more aptly characterized as synopses or outlines of the narrative revolving around those characters. Because Harry Potter and Lord Voldemort drive the narrative and because they appear in nearly every chapter of the series, an encapsulation of the events surrounding them ultimately yields a synopsis of the primary narrative thread in the *Harry Potter* series. The Lexicon entry for "Potter, Harry James" is eleven pages long and chronicles each year of Harry Potter's life at the fictional Hogwarts School, providing the reader with all of the main events of the story through all seven of Rowling's novels, leading up to Harry Potter's final battle with Lord Voldemort. (Pl. Ex. 11 (Birchall Decl.) at P 5). The nine-page entry for "Voldemort, Lord" begins by providing the pre-story for the character, which is included in the sixth *Harry Potter* novel, giving background into the character as a child. (Tr. (Rowling) at 146:10-13). The entry then proceeds to describe chronologically all of the events surrounding this character in the *Harry Potter* story from books one through seven, and also gives an account of this character's

death in the last *Harry Potter* novel. (Tr. (Rowling) at 62: 12-20; Tr. (Johnson) at 623:6-624:11). Although the entries proceed chronologically and do not use the same plot structure as do the *Harry Potter* novels (which structure the plot so as to create an interesting drama), the entries do provide a skeleton of the plot elements that hold the story together.

Finally, Plaintiffs established the Lexicon's extensive copying from Rowling's companion books, *Quidditch Through the Ages* and *Fantastic Beasts & Where to Find Them*, the schoolbooks used by the students attending the Hogwarts School. These two books are very short, fifty-six and fifty-nine pages, respectively. They are written in non-narrative form (Tr. (Vander Ark) at 396:21-25) and present fictional facts without commentary (*id.* (Rowling) at 63:18-20), in a similar way to the Lexicon. When questioned about his use of these books in creating the Lexicon, Vander Ark testified:

... *Fantastic Beasts* and *Quidditch [Through] the Ages* had sections of them which were essentially encyclopedias already which presented quite a problem. We wanted to be complete, but we certainly didn't want to replace Ms. Rowling's encyclopedia content which presented us with quite a challenge of how to do that, how to include information, but not to include all of it. And that was what we decided to do. We said we'll intentionally leave things out and put a very clear note, Please go read her books, which is what we did.

(*Id.* (Vander Ark) 287:20-288:4.) Although the Lexicon sporadically leaves out material, such as some material from the introductory chapters of *Quidditch Through the Ages*, it essentially takes wholesale from the companion books. (Tr. (Rowling) at 65:3-8, 62:25-63:1.) When questioned about the Lexicon entry for "Chudley Cannons" and whether there was anything about this quidditch team in *Quidditch Through the Ages* that he did not put in the Lexicon, Vander Ark admitted, "In that particular case, it looks like we pretty much caught it all." (*Id.* at 288:15-22.) Vander Ark later admitted that although he left out some of the first half of *Quidditch Through the Ages*, "[w]hen it comes to descriptions of specific things, a Quidditch f[oul], for example, there's not a lot of information there to condense, and so there would be more of that included and referenced." (*Id.* at 290:3-6.) Similarly, the Lexicon copies a large part of the descriptions of each beast in the A-to-Z section of *Fantastic Beasts & Where to Find Them*.

CONCLUSIONS OF LAW

I. Copyright Infringement

To establish a prima facie case of copyright infringement, a plaintiff must demonstrate "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*,

499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991); *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir. 1992). The element of copying has two components: first, the plaintiff must establish actual copying by either direct or indirect evidence; then, the plaintiff must establish that the copying amounts to an improper or unlawful appropriation. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 137 (2d Cir. 1998); *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139-140 (2d Cir. 1992). The plaintiff demonstrates that the copying is actionable "by showing that the second work bears a 'substantial similarity' to protected expression in the earlier work." *Castle Rock*, 150 F.3d at 137 (citing *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997)); see *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74-75 (explaining the distinction between actionable copying and factual copying); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[A] (2007) [hereinafter *Nimmer*].

A. Ownership

There is no dispute regarding Plaintiff Rowling's ownership of valid copyrights in the seven *Harry Potter* novels and two companion books, *Quidditch Through the Ages* and *Fantastic Beasts & Where to Find Them*. With respect to those works, Plaintiffs introduced evidence of copyright ownership in the form of registration certificates from the U.S. Copyright Office (Pl. Ex. 12-A), which constitute prima facie evidence of the works' copyrightability and the validity of the copyrights. 17 U.S.C. § 410(c). Plaintiffs also introduced the declarations and testimony of Rowling concerning her creation of the works and ownership of the copyrights in them. (Pl. Exs. 25, 32; Tr. (Rowling) at 43:8-9.)

Defendant disputes, however, that Plaintiffs have established Rowling's ownership of copyrights in "The Daily Prophet" newsletters and Warner Brothers' beneficial ownership of copyrights in the *Harry Potter* video games that contain the allegedly infringed "Famous Wizard Cards." The only evidence offered at trial to establish Plaintiffs' ownership of these copyrights was Rowling's testimony. Plaintiffs attached to their post-trial brief documents demonstrating Rowling's U.K. copyright in the "The Daily Prophet" (Pl. Post-Trial Br., Ex. A) and Warner Brothers' joint ownership with Electronic Arts Inc. of U.S. copyrights in *Harry Potter* videogames (*id.*, Ex. B). Having taken judicial notice of these documents as public records as permitted by the Federal Rules of Evidence, see Fed. R. Evid. 201(b)(2); *Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 261 (2d Cir. 2005), the Court concludes that Plaintiffs have established ownership of copyrights in "The Daily Prophet" and the "Famous Wizard Cards." Plaintiffs cannot establish infringement of these works, however, because neither work was entered into evidence, and they are not before the Court. Accordingly, Plaintiffs' claims of copyright infringement will be addressed only with respect to the seven *Harry Potter* novels and two companion guides.

B. Copying

There is no dispute that the Lexicon actually copied from Rowling's copyrighted works. Vander Ark openly admitted that he created and updated the content of the Lexicon by taking notes while reading the *Harry Potter* books and by using without authorization scanned, electronic copies of the *Harry Potter* novels and companion books. (Tr. (Vander Ark) at 335:9-17, 259:5-9, 16-23.) While acknowledging actual copying, Defendant disputes that the copying amounts to an improper or unlawful appropriation of Rowling's works. Defendant argues that Plaintiffs fail to establish a prima facie case of infringement because they have not shown that the Lexicon is substantially similar to the *Harry Potter* works.

The appropriate inquiry under the substantial similarity test is whether "the copying is quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred." *Ringgold*, 126 F.3d at 75; *accord Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 70 (2d Cir. 1999); *Castle Rock*, 150 F.3d at 138. The quantitative component addresses the amount of the copyrighted work that is copied, while the qualitative component addresses the copying of protected expression, as opposed to unprotected ideas or facts. *Ringgold*, 126 F.3d at 75.

In evaluating the quantitative extent of copying in the substantial similarity analysis, the Court "considers the amount of copying not only of direct quotations and close paraphrasing, but also of all other protectable expression in the original work." *Castle Rock*, 150 F.3d at 140 n.6. As the Second Circuit has instructed, "[i]t is not possible to determine infringement through a simple word count," which in this case would be an insuperable task; "the quantitative analysis of two works must always occur in the shadow of their qualitative nature." *Nihon Keizai*, 166 F.3d at 71. Where, as here, the copyrighted work is "wholly original," rather than mixed with unprotected elements, a lower quantity of copying will support a finding of substantial similarity. *Nihon Keizai*, 166 F.3d at 71.

Plaintiffs have shown that the Lexicon copies a sufficient quantity of the *Harry Potter* series to support a finding of substantial similarity between the Lexicon and Rowling's novels. The Lexicon draws 450 manuscript pages worth of material primarily from the 4,100-page *Harry Potter* series. Most of the Lexicon's 2,437 entries contain direct quotations or paraphrases, plot details, or summaries of scenes from one or more of the *Harry Potter* novels. As Defendant admits, "the Lexicon reports thousands of fictional facts from the Harry Potter works." (Def.'s Post-trial Br. at 35). Although hundreds 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. *See Castle Rock*, 150 F.3d at 138 (concluding that a *Seinfeld* trivia book that copied 643 fragments from 84 copyrighted *Seinfeld* episodes "plainly crossed the quantitative copying threshold under *Ringgold*"); *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993) (upholding the district court's conclusion that "the identity of 89 lines of dialogue" between *Twin Peaks* teleplays and a guide to

the television series constituted substantial similarity); *see also Harper & Row*, 471 U.S. at 548-49 (stating that "lifting verbatim quotes of the author's original language totaling between 300 and 400 words and constituting some 13% of [the defendant's] article" was sufficient to constitute copyright infringement).

The quantitative extent of the Lexicon's copying is even more substantial with respect to *Fantastic Beasts* and *Quidditch Through the Ages*. Rowling's companion books are only fifty-nine and fifty-six pages long, respectively. The Lexicon reproduces a substantial portion of their content, with only sporadic omissions, across hundreds of entries. (Tr. (Vander Ark) at 287:20-288:4 (testifying that to overcome the problem of copying the companion books, "which were essentially encyclopedias already," in their entirety, the Lexicon intentionally leaves some things out).

As to the qualitative component of the substantial similarity analysis, Plaintiffs have shown that the Lexicon draws its content from creative, original expression in the *Harry Potter* series and companion books. Each of the 2,437 entries in the Lexicon contains "fictional facts" created by Rowling, such as the attributes of imaginary creatures and objects, the traits and undertakings of major and minor characters, and the events surrounding them. The entry for "Boggart," for example, contains the fictional facts that a boggart is "[a] shape shifter that prefers to live in dark, confined spaces, taking the form of the thing most feared by the person it encounters; nobody knows what a boggart looks like in its natural state," and that "Lupin taught his third year Defence Against the Dark Arts class to fight [a boggart] with the Riddikulus spell (PA7), and used a boggart as a substitute for a Dementor in tutoring Harry (PA 12)." (Pl. Ex. 1.) In *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, the Second Circuit explained that such invented facts constitute creative expression protected by copyright because "characters and events spring from the imagination of [the original] authors." 150 F.3d at 139; *see also Paramount Pictures Corp. v. Carol Publ'g Group*, 11 F. Supp. 2d 329, 333 (S.D.N.Y. 1998) (stating that "[t]he characters, plots and dramatic episodes" that comprise the story of the "fictitious history of Star Trek" are the story's "original elements," protected by copyright). The *Castle Rock* court held that a trivia book which tested the reader's knowledge of "facts" from the *Seinfeld* series copied protected expression because "each 'fact' tested by [the trivia book] is in reality fictitious expression created by *Seinfeld's* authors." *Id.* It follows that the same qualitative conclusion should be drawn here, where each "fact" reported by the Lexicon is actually expression invented by Rowling.

Seeking to distinguish *Castle Rock*, Defendant argues that the qualitative similarity between the Lexicon and the *Harry Potter* works is significantly diminished because "the Lexicon uses fictional facts primarily in their factual capacity" to "report information and where to find it," unlike the *Seinfeld* trivia book, which used fictional facts "primarily in their fictional capacity to entertain and 'satisfy' the reader's 'craving' for the *Seinfeld* television series." (Def. Post-trial Br. at 36 (quoting *Castle Rock*, 150 F.3d at 142-43).) While this distinction is

important, Defendant's argument goes to the fair use question of whether the Lexicon's use has a transformative purpose, not to the infringement question of whether the Lexicon, on its face, bears a substantial similarity to the *Harry Potter* works. The court in *Castle Rock* addressed these two inquires separately and found that the *Seinfeld* trivia book not only bore a substantial similarity to the *Seinfeld* series but also lacked a transformative purpose. *See Castle Rock*, 150 F.3d at 138-39, 141-43. What matters at the infringement stage of this case is that the copied text is expression original to Rowling, not fact or idea, and therefore is presumptively entitled to copyright protection. *See Harper & Row*, 471 U.S. at 547; *Feist*, 499 U.S. at 344-46. Even if expression is or can be used in its "factual capacity," it does not follow that expression thereby takes on the status of fact and loses its copyrightability.

Defendant also argues that while a substantial similarity may be found where invented facts are "reported and arranged in such a way as to tell essentially the same story" as the original, "the order in which the fictional facts are presented in the Lexicon bears almost no resemblance to the order in which the fictional facts are arranged to create the story of Harry Potter and the universe he inhabits." (Def. Post-trial Br. at 34, 36). Reproducing original expression in fragments or in a different order, however, does not preclude a finding of substantial similarity. *See Castle Rock*, 150 F.3d at 139 (finding a substantial similarity even though the allegedly infringing trivia book rearranged fragments of expression from *Seinfeld* in question-and-answer format); *Paramount Pictures*, 11 F. Supp. 2d at 333-34 (finding that a book containing brief synopses of major plot lines, histories of major characters, and descriptions of fictional alien species in *Star Trek* was substantially similar to the *Star Trek* series even though "the fictitious history is presented in a different order than that in which it appeared in the [original works]"). Regardless of how the original expression is copied, "the standard for determining copyright infringement is not whether the original could be recreated from the allegedly infringing copy, but whether the latter is "substantially similar" to the former." *Castle Rock*, 150 F.3d at 141 (quoting *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 162 (2d Cir. 1986)). Here, the Lexicon's rearrangement of Rowling's fictional facts does not alter the protected expression such that the Lexicon ceases to be substantially similar to the original works.

Furthermore, the law in this Circuit is clear that "the concept of similarity embraces not only global similarities in structure and sequence, but localized similarity in language." *Twin Peaks*, 996 F.2d at 1372 (endorsing the taxonomy of "comprehensive nonliteral similarity" and "fragmented literal similarity" from the *Nimmer* treatise, 4 *Nimmer* § 13.03[A][2]); *see also Ringgold*, 126 F.3d at 75 n.3; *Arica Institute*, 970 F.2d at 1073. In evaluating fragmented literal similarity, or "localized similarity in language," the Court examines the copying of direct quotations or close paraphrasing of the original work. *Castle Rock*, 150 F.3d at 140; *Paramount Pictures*, 11 F. Supp. 2d at 333 ("Fragmented similarity refers to exact copying of a portion of a work."). As determined in the Findings of Fact, the Lexicon contains a considerable number of direct quotations (often without

quotation marks) and close paraphrases of vivid passages in the *Harry Potter* works. Although in these instances, the Lexicon often changes a few words from the original or rewrites original dialogue in the third person, the language is nonetheless substantially similar. See *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987) (indicating that protected expression is infringed whether it is "quoted verbatim or only paraphrased"); *Craft v. Kobler*, 667 F. Supp. 120, 124 (S.D.N.Y. 1987) (stating that protected writing is infringed by "direct quotation" or "by paraphrase which remains sufficiently close that, in spite of changes, it appropriates the craft of authorship of the original"); see also 4 *Nimmer* § 13.03 [A] [1] ("The mere fact that the defendant has paraphrased rather than literally copied will not preclude a finding of substantial similarity. Copyright 'cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.'" (footnote omitted) (quoting *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (2d Cir. 1930))).

Notwithstanding the dissimilarity in the overall structure of the Lexicon and the original works, some of the Lexicon entries contain summaries of certain scenes or key events in the *Harry Potter* series, as stated in the Findings of Fact. These passages, in effect, retell small portions of the novels, though without the same dramatic effect. In addition, the entries for Harry Potter and Lord Voldemort give a skeleton of the major plot elements of the *Harry Potter* series, again without the same dramatic effect or structure. Together these portions of the Lexicon support a finding of substantial similarity. To be sure, this case is different from *Twin Peaks*, where forty-six pages of the third chapter of a guidebook to the *Twin Peaks* television series were found to constitute "essentially a detailed recounting of the first eight episodes of the series. Every intricate plot twist and element of character development appear[ed] in the Book in the same sequence as in the teleplays." 996 F.2d at 1372-73 (supporting the Second Circuit's finding of comprehensive nonliteral similarity). Those "plot summaries" were far more detailed, comprehensive, and parallel to the original episodes than the so-called "plot summaries" in this case. Nonetheless, it is clear that the plotlines and scenes encapsulated in the Lexicon are appropriated from the original copyrighted works. See *Paramount Pictures*, 11 F. Supp. 2d at 334 (noting that *Twin Peaks* was distinguishable but nonetheless applying its broader holding that "a book which tells the story of a copyrighted television series infringes on its copyright"). Under these circumstances, Plaintiffs have established a prima facie case of infringement.

C. Derivative Work

Plaintiffs allege that the Lexicon not only violates their right of reproduction, but also their right to control the production of derivative works. The Copyright Act defines a "derivative work" as "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.*" 17 U.S.C. § 101 (emphasis added). A work "consisting

of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represents an original work of authorship" is also a derivative work. *Id.*

A work is not derivative, however, simply because it is "based upon" the preexisting works. If that were the standard, then parodies and book reviews would fall under the definition, and certainly "ownership of copyright does not confer a legal right to control public evaluation of the copyrighted work." *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 521 (7th Cir. 2002). The statutory language seeks to protect works that are "recast, transformed, or adapted" into another medium, mode, language, or revised version, while still representing the "original work of authorship." See *Castle Rock*, 150 F.3d at 143 n.9 (stating that "derivative works that are subject to the author's copyright transform an original work into a new mode of presentation"); *Twin Peaks*, 996 F.2d at 1373 (finding a derivative work where a guidebook based on the *Twin Peaks* television series "contain[ed] a substantial amount of material from the teleplays, transformed from one medium to another"). Thus in *Ty, Inc. v. Publications International Ltd.*, Judge Posner concluded, as the parties had stipulated, that a collectors' guide to Beanie Babies was not a derivative work because "guides don't *recast, transform, or adapt* the things to which they are guides." 292 F.3d at 520 (emphasis added).

Plaintiffs argue that based on the *Twin Peaks* decision "companion guides constitute derivative works where, as is the case here, they 'contain a substantial amount of material from [the underlying work.'" (Pl. Post-trial Br. P 288, at 88-89.) This argument inaccurately states the holding of *Twin Peaks* and overlooks two important distinctions between the Lexicon and the guidebook in *Twin Peaks*. First, as mentioned earlier, the portions of the Lexicon that encapsulate plot elements or sketch plotlines bear no comparison with the guidebook in *Twin Peaks*, whose plot summaries giving "elaborate recounting of plot details" were found to constitute an "abridgement" of the original work. See *Twin Peaks*, 996 F.2d at 1373 n.2 (reproducing an excerpt of the infringing book containing a high degree of detail). Given that the Lexicon's use of plot elements is far from an "elaborate recounting" and does not follow the same plot structure as the *Harry Potter* novels, Plaintiffs' suggestion that these portions of the Lexicon are "unauthorized abridgements" is unpersuasive. Second, and more importantly, although the Lexicon "contain[s] a substantial amount of material" from the *Harry Potter* works, the material is not merely "transformed from one medium to another," as was the case in *Twin Peaks*. *Id.* at 1373. By condensing, synthesizing, and reorganizing the preexisting material in an A-to-Z reference guide, the Lexicon does not recast the material in another medium to retell the story of *Harry Potter*, but instead gives the copyrighted material another purpose. That purpose is to give the reader a ready understanding of individual elements in the elaborate world of *Harry Potter* that appear in voluminous and diverse sources. As a result, the Lexicon no longer "represents [the] original work[s] of authorship." 17 U.S.C. § 101. Under these circumstances, and because the Lexicon does not fall under any example of derivative works listed in the statute, Plaintiffs have failed to show that the Lexicon is a derivative work.

II. Fair Use

[The court held that the Lexicon is not a fair use of the Harry Potter works.]

III. Injunctive and Statutory Relief

[The court's discussion of remedies is omitted.]

CONCLUSION

For the foregoing reasons, Plaintiffs have established copyright infringement of the *Harry Potter* series, *Fantastic Beasts & Where to Find Them*, and *Quidditch Through the Ages* by J.K. Rowling. Defendant has failed to establish its affirmative defense of fair use. Defendant's publication of the Lexicon (Doc. No. 22) is hereby permanently enjoined, and Plaintiffs are awarded statutory damages of \$ 6,750.00.

IT IS SO ORDERED.