Harry Potter, Scientology, and the Mysterious Realm of Copyright Infringement: Analyzing When Close is Too Close and When the Use is Fair

Rosalinde Casalini
Touro Law Center

Follow this and additional works at: https://digitalcommons.tourolaw.edu/lawreview

Part of the Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol26/iss1/10

This Intellectual Property Comments is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.
Harry Potter, Scientology, and the Mysterious Realm of Copyright Infringement: Analyzing When Close is Too Close and When the Use is Fair

Cover Page Footnote
26-1
HARRY POTTER, SCIENTOLOGY, AND THE MYSTERIOUS REALM OF COPYRIGHT INFRINGEMENT: ANALYZING WHEN CLOSE IS TOO CLOSE AND WHEN THE USE IS FAIR

Rosalinde Casalini*

After going to a theatre and watching a new movie, would it be possible to go home and write a book about it? What about after reading a novel? Would a reader be free to write a new book using the same characters? Would a teacher be able to write her own training manual using the exact techniques she had just learned in another author’s book? Is there any recourse for authors facing these types of situations? This Comment explores how two lower courts have recently addressed these questions. The first decision, Warner Bros. Entertainment Inc. v. RDR Books,¹ determined whether an unauthorized encyclopedia of the Harry Potter series infringed the original author’s copyright. The second case, Peter Letterese and Associates, Inc. v. World Institute of Scientology,² determined whether the scientology church infringed an author’s copyright protection when the church, without the author’s consent, used content from the author’s book in its materials.

This Comment will first analyze the two recent cases. It will address the scope of copyright protection that authors are granted, determine when the use of an author’s work constitutes copyright infringement, and ascertain when the copyright infringer is entitled to assert the fair use defense. Lastly, this Comment will address the

---

* Juris Doctor Candidate, May 2010, Touro College Jacob D. Fuchsberg Law Center. I would like to thank the wonderful people in my life who continually help me to succeed. First, my husband, Brian, and my children, Cody and Brett, for being so understanding of all of the family time that I missed during my law school career. Second, Professor Rena Seplowitz for her encouragement and advice throughout each stage of this paper. Third, the Touro Law Review for its assistance in publishing my Comment. Finally, my mother, Mary Flammer, and my very dear friends, Sarah Catalan and Jane Liehmann, who were incredibly supportive throughout my law school journey. I would also like to thank God, who has helped me at every stage of my life.

² 533 F.3d 1287 (11th Cir. 2008).
disparities in the cases, evaluate whether the cases should have been decided differently, and suggest if the tests used by either court should be modified.

I. Two Recent Cases on Copyright Infringement

A. Harry Potter

In Warner Bros., the famous author J.K. Rowling, along with Warner Bros., brought a copyright infringement suit against a publishing company that, without her consent, published an encyclopedia for Harry Potter fans, titled the Lexicon. According to the plaintiffs’ pleadings, the defendant, RDR Books, published a book which “compile[d] and repackage[d] Ms. Rowling’s fictional facts derived wholesale from the Harry Potter Works without adding any new creativity, commentary, insight, or criticism.” Rowling registered all of the books in the Harry Potter series and the two companion books with the United States Copyright Office. Copyrights are additionally held by Warner Bros., a business engaged in “creating . . . and marketing motion pictures and goods related to the Harry Potter books,” for each of the Harry Potter films, which it has produced. Rowling had already begun to write and sell companion books to the Harry Potter series and designated all profits generated by them to benefit charities. After repeatedly asking the defendant to refrain from publishing the encyclopedia, Rowling and Warner Bros. filed a lawsuit asserting that the defendant’s use of the plaintiffs’ “original copyrighted material as a basis for the Infringing Book, without permission.” The “[p]laintiffs allege[d] that the Lexicon not only violate[d] their right of reproduction, but also their right to control the production of derivative works.” The plaintiffs asked the “[c]ourt [to] find

4 Id.
5 Id. at 22.
6 Id. at 8.
7 Id. at 2.
8 Complaint, supra note 3, at 9-10(50).
9 Warner Bros., 575 F. Supp. 2d at 538.
that defendant has infringed plaintiffs’ copyrights in the *Harry Potter* Books, the Companion Books and the *Harry Potter* Films . . . [and to grant] a permanent injunction restraining defendant . . . from . . . sell[ing] . . . the Infringing Book or any works derived or copied from plaintiffs’ copyrighted works.”

The plaintiffs also sought damages and attorneys’ fees.

The defendants claimed that the *Lexicon* was “an original literary reference guide . . . [and] denie[d] that the book . . . infringed any right belonging to either [p]laintiff.” The defendants further argued that “[a]ny alleged use of copyrighted material is lawful based on the doctrine of fair use.” The court ultimately decided that the defendants were not protected by the fair use defense; it reasoned that the “fair-use factors, weighed together in light of the purposes of copyright law, fail[ed] to support the defense of fair use in this case.” However, surprisingly, the court determined that the *Lexicon* did not constitute a derivative work.

**B. The Scientology Case**

In another recent case, the Eleventh Circuit also dealt with a copyright infringement claim. The plaintiff, Peter Letterese, was “a principal of PL&A.” PL&A had acquired rights to Les Dane’s literary works, including an instructional book on how to close deals entitled *Big League Sales Closing Techniques* ("Big League Sales"), which was the focus of the litigation.

L. Ron Hubbard, who founded the Church of Scientology International ("CSI"), recommended the book as a training aid for “registrars”—members who sell scientology materials and advise members. The church made its own materials such as “'checksheets’

---

10 Complaint, *supra* note 3, at 12-13 (1,7).
11 *Id.* at 10 (52).
13 *Id.* at 6(50).
15 *Id.* at 539.
16 *Letterese*, 533 F.3d 1287.
17 *Id.* at 1295.
18 *Id.* at 1294.
19 *Id.*
and ‘drill sheets’” that were used in conjunction with assigned readings from *Big League Sales*. Members were not given a copy of the book but were required to obtain a copy on their own. Les Dane was aware of the CSI’s use of his book and used the book when giving seminars to the church.

The Church of Spiritual Technology (“CST”) was developed in 1982 to inherit Hubbard’s estate, “including his intellectual property rights.” There were two main types of CSI courses that included study of the book: the “Professional Registration Course” and the “Organization Executive Course.” CST obtained the copyrights to the materials written by Hubbard and licensed them to both CSI and the World Institute of Scientology Enterprises (“WISE”). WISE is a membership organization which sells materials and services on the application of Hubbard’s management techniques to secular organizations. CST held the right to review according to a license agreement.

Bridge Publications (“Bridge”), a company that publishes scientology materials, sought rights to the book. PL&A chose not to grant Bridge the rights. While PL&A and Dane were in litigation, Bridge sought the rights directly from Dane; however, it did not succeed. Although “PL&A and Bridge Publications resumed negotiations . . . to publish hard cover versions of the book for internal use of [c]hurch organizations,” the negotiations were unsuccessful. Despite PL&A’s refusal to grant use of Dane’s work, CSI and WISE continued to use checksheets and drill sheets similar to the ones found in *Big League Sales*. On September 10, 2004, PL&A sued CSI, CST, and WISE “for the alleged violation of its exclusive rights pursuant to the Copyright Act, 17 U.S.C. § 101 . . . within the three

---

20 Id.
21 *Letterese*, 533 F.3d at 1294.
22 Id.
23 Id. at 1295.
24 Id. at 1294-95.
25 Id. at 1295.
26 *Letterese*, 533 F.3d at 1295.
27 Id.
28 Id. at 1296.
29 Id.
30 Id.
31 *Letterese*, 533 F.3d at 1296.
32 Id. at 1297.
years prior to filing.”

PL&A alleged “that the WISE Sales Course’s checksheets and drill sheets constitute[d] unauthorized reproductions of *Big League Sales* in violation of 17 U.S.C. § 106(1).” PL&A further claimed “that the WISE Sales Course as a whole—which includes the checksheets, drill sheets, and *Big League Sales* itself—constitute[d] an infringing derivative work based upon the book in violation of 17 U.S.C. § 106(2).” PL&A also named CSI and CST as defendants and alleged that their “courses such as CSI’s Organization Executive Course and Professional Registration Course . . . . as a whole constitute[d] infringing derivative works based upon the book.”

The district court granted summary judgment for defendants on the defenses of laches and fair use. Therefore, the court did not fully analyze the copyright claim. On appeal, the defendants asked the Eleventh Circuit to affirm, stating that the copyright claim was properly excluded from the district court’s analysis because all four factors of the fair use defense were satisfied. However, in its decision, the Eleventh Circuit analyzed both the plaintiff’s copyright infringement claim as well as the defendant’s fair use defense. The court affirmed that the use of the materials by CSI was fair, reversed the lower court’s decision that the doctrine of laches prevented the plaintiff from recovering, and held that a genuine issue of material fact existed regarding the substantial similarities of the works and the use of the materials by WISE.

II. WHAT IS COPYRIGHT PROTECTION?

Copyright protection is derived from the United States Constitution. Article 1, Section 8 grants Congress the authority “[t]o pro-

---

33 *Id.*
34 *Id.*
35 *Id.*
36 *Letterese*, 533 F.3d at 1297-98.
37 *Id.* at 1298.
38 *Id.* at 1298-99.
39 Brief of Appellees at 16, *Letterese*, 533 F.3d 1287 (No. 05-15129-II), 2006 WL 4121411 [hereinafter Brief]. “The trial court did not reach the question of whether Defendants’ use of BLS constitutes infringement because it viewed their use as clearly fair.” *Id.*
40 *Letterese*, 533 F.3d at 1293.
41 *Id.* at 1317-20.
mote the Progress of Science and the useful Arts, by securing for li-
mited Times to Authors and Inventors the exclusive Right to their re-
spective Writings and Discoveries."42 By allowing the author to have ex-
clusive control for a limited time period, the author is given incen-
tive to create.43 When the time period expires, the work enters the 
public domain, benefiting society.44

Copyright protection is given to original expressions mani-
fested in a tangible form.45 The current copyright law, found under 
the 1976 Copyright Act, provides a copyright holder with six exclu-
sive rights, including the right to reproduce and the right to create de-


 srv | 42 U.S. CONST. art. I, § 8, cl. 8.
 srv | 43 Naomi Jane Gray, Overview of Copyright Basics and Basics of the Copyright Office, 
in PRACTISING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY 
PROPERTY COURSE HANDBOOK SERIES 
PLI ORDER NO. 11270 25, 31 (2007).
 srv | 44 Id.
 srv | 45 Letterese, 533 F.3d at 1302; 17 U.S.C.A. § 102(a) (West 2009).
 srv | 46 17 U.S.C.A. § 106 (West 2009). The full text of the rights given under Section 106 of 
the 1976 Copyright Act are:
 srv | (1) to reproduce the copyrighted work in copies or phonorecords;
 srv | (2) to prepare derivative works based upon the copyrighted work;
 srv | (3) to distribute copies or phonorecords of the copyrighted work to the 
public by sale or other transfer of ownership, or by rental, lease, or lending;
 srv | (4) in the case of literary, musical, dramatic, and choreographic works,
pantomimes, and motion pictures and other audiovisual works, to per-
form the copyrighted work publicly;
 srv | (5) in the case of literary, musical, dramatic, and choreographic works,
pantomimes, and pictorial, graphic, or sculptural works, including the 
individual images of a motion picture or other audiovisual work, to dis-
play the copyrighted work publicly; and
 srv | (6) in the case of sound recordings, to perform the copyrighted work 
publicly by means of a digital audio transmission.
 srv | Id.
 srv | 47 Letterese, 533 F.3d at 1302; 17 U.S.C.A. § 102(b).
 srv | 48 Letterese, 533 F.3d at 1302 (citing Herzog v. Castle Rock Entm't, 193 F.3d 1241, 
1248 (11th Cir. 1999)).
elements of a particular topic, and are not copyrightable. 49

III. HOW IS COPYRIGHT INFRINGED? THE FEIST TEST

Feist Publications, Inc. v. Rural Telephone Service Co. 50 held that two prongs must be satisfied to establish copyright infringement: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." 51

A. What Constitutes Copying?

In Warner Bros., since ownership was not in dispute—the novels had valid copyrights—the court focused only on the second Feist prong. 52 To establish the second element, a plaintiff is required to prove "two components: first, . . . actual copying by either direct or indirect evidence; then, . . . that the copying amount[ed] to an improper or unlawful appropriation." 53 The test to determine whether the appropriation is actionable is whether the second work has a 'substantial similarity' to the protected work. 54 Since the defendants, RDR Books, admitted to copying and scanning the original work, the only question remaining was whether the works were substantially similar. 55

Similarly, the Letterese case looked to Feist in determining whether a prima facie case of copyright infringement occurred. 56 Just as in Warner Bros., the plaintiff owned a valid copyright, leaving only the second Feist element in dispute. 57 Here too, the defendants did not contest that as a factual matter copying had occurred. 58 There-

49 Id. (citing Herzog, 193 F.3d at 1248).
51 Id. at 361.
52 Warner Bros., 575 F. Supp. 2d at 533-34.
53 Id. at 533 (citing Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc. 150 F.3d 132, 137 (2d Cir. 1998); Laureysens v. Idea Group, Inc., 964 F.2d 131, 139-40 (2d Cir. 1992)).
54 Id. (quoting Castle Rock, 150 F.3d at 137); Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74-75 (2d Cir. 1997) (citing MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (Matthew Bender & Co. 2008) [hereinafter NIMMER]).
55 Warner Bros., 575 F. Supp. 2d at 533-34.
56 Letterese, 533 F.3d at 1300 (citing Feist, 499 U.S. at 361; Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1265-66 (11th Cir. 2001)).
57 Id.
58 Id. at 1301.
fore, analogous to the Warner Bros. case, the Letterese court was required to analyze the second component of the Feist test, whether appropriation was actionable.\textsuperscript{59} Applying the same test used in Warner Bros., the court focused on the question of “whether there [was a] ‘substantial similarity’ between the allegedly offending [works] and the protectable, original elements’ of the book.”\textsuperscript{60}

B. How do the Courts Analyze Whether There is a Substantial Similarity?

“[S]ubstantial similarity between the plaintiff’s and defendant’s works is an essential element of actionable copying.”\textsuperscript{61} To determine if the works are substantially similar, an “evaluation must occur in the context of each case, both qualitatively and quantitatively.”\textsuperscript{62} “The quantitative relation of the similar material to the total material contained in plaintiff’s work is certainly of importance.”\textsuperscript{63} However, substantial similarity may be found when “the similar material is quantitatively small,” but is nevertheless “qualitatively important.”\textsuperscript{64} Moreover, there are two different ways to find substantial similarity: by finding comprehensive non-literal similarity (the overall structure is the same—but not the language) or by finding fragmented literal similarity (when the second work consists of similar or paraphrased language of the first text).\textsuperscript{65} Thus, it is possible to find substantial similarity even when the text of the allegedly infringing work does not contain the exact text of the original work. In both of the cases discussed, the courts determined whether there was substantial similarity between the two works by analyzing the qualitative/quantitative and comprehensive non-literal/fragmented literal aspects.\textsuperscript{66}

\textsuperscript{59} \textit{id.}
\textsuperscript{60} \textit{id.} (citing Oravec v. Sunny Isles Luxury Ventures, L.C., 527 F.3d 1218, 1224 n.5 (11th Cir. 2008); Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 (11th Cir. 1996)).
\textsuperscript{61} \textit{NIMMER, supra note 50, § 13.03[A].}
\textsuperscript{62} \textit{id.} § 13.03[A][2][a].
\textsuperscript{63} \textit{id.}
\textsuperscript{64} \textit{id.}
\textsuperscript{65} \textit{NIMMER, supra note 50, § 13.03[A].}
\textsuperscript{66} \textit{See Letterese, 533 F.3d at 1307; Warner Bros., 575 F. Supp. 2d at 533-35.}
1. **Qualitative v. Quantitative**

The court in *Warner Bros.* used the qualitative/quantitative test outlined in *Ringgold v. Black Entertainment Television, Inc.* and *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.* to determine if the Lexicon was substantially similar to Rowling’s work.67 This test asks the question of whether “the copying is quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred.”68

In *Ringgold*, the Second Circuit was faced with the question of whether a television show that had an artist’s unauthorized work visible in several scenes had infringed the author’s copyright.69 In its analysis, the court stated that “substantial similarity[] requires that the copying is quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred.”70 *Ringgold* further explained that “the qualitative component concerns the copying of expression . . . . [and] [t]he quantitative component generally concerns the amount of the copyrighted work.”71 The defendants in *Ringgold* argued that “the nine instances in their television program in which portions of the poster were visible, individually and in the aggregate, were de minimis, in the sense that the quantity of copying . . . was below the threshold of actionable copying.”72 “[T]he defendants further contend[ed] that the segments showing any portion of the poster [were] de minimis from the standpoint of qualitative sufficiency” because the poster was not discernable by viewers.73 The court found that the “threshold for actionable copying of protected expression has been crossed” because the four to five seconds the painting was visible was reinforced by the scattered seconds in which the poster was partially displayed; additionally, it determined that the qualitative component had also been sufficient because a lay observer could recognize the painting.74

Therefore, the court held that substantial similarity was established

---

67 575 F. Supp. 2d at 534-35.
68 Id. at 534 (quoting *Ringgold*, 126 F.3d at 75).
69 *Ringgold*, 126 F.3d at 72-73.
70 Id. at 75.
71 Id.
72 Id. at 76.
73 *Ringgold*, 126 F.3d at 77.
74 Id. at 76-77.
and the copying was actionable.\footnote{Id. at 77.}

In \textit{Castle Rock}, the Second Circuit applied the qualitative/quantitative test it laid out in \textit{Ringgold}.\footnote{\textit{Castle Rock}, 150 F.3d at 138.} The court faced the issue of whether a book comprised of facts of the copyrighted television show, \textit{Seinfeld}, infringed the producer's copyright.\footnote{Id. at 135.} The court held that the defendant, by copying 643 fragments of the television series, had "crossed the quantitative copying threshold under \textit{Ringgold}."\footnote{Id. at 138.} The court further held that the qualitative aspect had been met because the trivia questions were, in reality, based not on facts, but rather on fictitious expression.\footnote{Id. at 138-39.} Therefore, the court, applying the \textit{Ringgold} test, found the materials were substantially similar.\footnote{Id. at 139.}

\textit{Warner Bros.}, following \textit{Ringgold} and \textit{Castle Rock}, addressed the quantitative component by investigating "the amount of the copyrighted work that [had been] copied."\footnote{\textit{Warner Bros.}, 575 F. Supp. 2d at 534 (citing \textit{Ringgold}, 126 F.3d at 75).} The court found that "[m]ost of the . . . entries contain[ed] direct quotations or paraphrases, plot details, or summaries of scenes" and that the "quantum of copying [was] sufficient to support a finding of substantial similarity."\footnote{Id. at 535.} The court then went on to evaluate the quantitative aspect by considering both the similar paraphrasing and verbatim language.\footnote{Id. at 536.} The court found that the plaintiffs sustained their burden by "show[ing] that the Lexicon draws its content from creative, original expression in the \textit{Harry Potter} series and companion books."\footnote{Id. at 536.} Similar to \textit{Castle Rock}, each \textit{Harry Potter} fact is, in reality, the author's expression of fiction.\footnote{\textit{Warner Bros.}, 575 F. Supp. 2d at 536 (citations omitted).}

The defendants argued that the \textit{Lexicon} was not qualitative because, unlike \textit{Castle Rock}, "‘the Lexicon use[d] fictional facts primarily in their factual capacity’ " to instruct readers on where to find the \textit{Harry Potter} information.\footnote{Id. at 77.} The court agreed that the issue

\footnote{Id. at 77.}

\footnote{\textit{Castle Rock}, 150 F.3d at 138.}

\footnote{Id. at 135.}

\footnote{Id. at 138.}

\footnote{Id. at 138-39.}

\footnote{Id. at 139.}

\footnote{\textit{Warner Bros.}, 575 F. Supp. 2d at 534 (citing \textit{Ringgold}, 126 F.3d at 75).}

\footnote{Id. at 535.}

\footnote{Id.}

\footnote{Id. at 536.}

\footnote{Id.}

\footnote{\textit{Warner Bros.}, 575 F. Supp. 2d at 536 (citations omitted).}
was important, but stated that it was not relevant to the question of whether "on its face" the two works were substantially similar enough to cause infringement; instead, it should be addressed under the fair use defense.\(^\text{87}\) Analogous to *Castle Rock*, the *Warner Bros.* court concluded that, because the copied text was neither a fact nor an idea, it was the author's original expression and, therefore, protected under the copyright law.\(^\text{88}\)

The *Letterese* court also analyzed whether the works were substantially similar by assessing the quantitative and qualitative aspects.\(^\text{89}\) Analogous to the defendant in *Ringgold*, the defendant in *Letterese* argued that his works did not constitute infringement, because the amount of copying was *de minimis*.\(^\text{90}\) The defendant in *Letterese* further claimed that the alleged infringing works copied only a small amount of the original work and, relying on *Nimmer on Copyright*, stated that the amount was not enough to be considered actionable.\(^\text{91}\) Similar to *Warner Bros.*, the court applied the *Ringgold* test and explained that, even if the alleged infringing work only uses a small portion of the original work, it may still be actionable "because it is the relative portion of the copyrighted work—not the relative portion of the infringing work—that is the relevant comparison."\(^\text{92}\) The court held that the sections copied were so qualitatively important, especially the portions used in the sales drill materials, that summary judgment should not be granted in favor of the defendants.\(^\text{93}\)

2. **Comprehensive Non-Literal v. Fragmented Literal**

The defendant in *Warner Bros.*, knowing that a substantial amount of the *Lexicon* was similar to Rowling's work, argued that the

\(^{87}\) *Id.*

\(^{88}\) *Id.*

\(^{89}\) *Letterese*, 533 F.3d at 1307.

\(^{90}\) *Id.* at 1306.

\(^{91}\) See *id.* at 1306-07 (pointing out that the defendant was relying on Melville B. Nimmer & David Nimmer, *NIMMER ON COPYRIGHT*, § 8.01[G], which states "for similarity to be substantial, and hence actionable, it must apply to more than simply a *de minimus* fragment") (quoting *NIMMER, supra* note 50, § 8.01[G]).

\(^{92}\) *Letterese*, 533 F.3d at 1307.

\(^{93}\) *Id.*
court should only look at the order of the facts, not the similarity of the text, when determining whether two works were substantially similar. The defendant urged that, although the Lexicon and Rowling's work may have similar fictional facts, the order of the facts was different and, therefore, substantial similarity could not be established. However, the court disagreed with the defendant and stated that the standard to find substantial similarity did not rest with the order of the text.

According to Nimmer on Copyright, there are two different ways to find substantial similarity. The first is comprehensive non-literal similarity, which refers to the entire structure of plaintiff's work. "[C]omprehensive similarity [exists] between [] two works . . . where the fundamental essence or structure of one work is duplicated in another . . . but no word-for-word or other literal similarity [exists]." The second is fragmented literal similarity, which is when localized language in plaintiff's and defendant's works is similar or paraphrased. With fragmented literal similarity, "[t]he question in each case is whether the similarity relates to matter that constitutes a substantial portion of plaintiff's work—not whether such material constitutes a substantial portion of defendant's work[;]" thus, even if only a small amount of the defendant's work is similar to the plaintiff's work, "if it is qualitatively important, the trier of fact may properly find substantial similarity."  

The court in Warner Bros. clarified that the law in the Second Circuit has found substantial similarity to occur not only when there are "'global similarities in structure and sequence,' " but also when fragmented literal similarity occurs. Therefore, the court held that order does not preclude substantial similarity. Similar to Castle Rock, where statements from the show were used out of order, the

---

95 See id.
96 Id. at 537.
97 NIMMER, supra note 50, § 13.03[A].
98 Id.
99 Id. § 13.03[A][1].
100 Id. § 13.03[A][2].
101 Id. § 13.03[A][2][a].
102 Warner Bros., 575 F. Supp. 2d at 537 (quoting Twin Peaks Prods., Inc. v. Publ'n Intern., Ltd., 996 F.2d 1366, 1372 (2d Cir. 1993)).
103 Id.
statements, here, used in the *Lexicon*, though maybe out of order, consist of enough direct quotes and paraphrased material to be found substantially similar.  

Therefore, despite the difference in the way the material was ordered, the plaintiffs established a prima facie case of copyright infringement.

In *Letterese*, the court’s analysis revealed “both fragmented literal similarity and comprehensive nonliteral similarity of protected expression.” In contrast to *Warner Bros.*, the court in *Letterese* found the substantial similarity rested on the structure of the defendant’s work in comparison to the plaintiff’s work. The sales techniques in both the WISE and CSI materials were ordered similarly to the way the *Big League Sales* book was ordered, and the scientology materials also used Les Dane’s opinion on the most effective way to employ the sales techniques. The court noted that even the manner in which material was tracked and organized may evidence a “‘fundamental essence or structure of one work [which] is duplicated in another.’” Therefore, the court held that non-literal similarity of protected expression may be established by the organization of the content.

Next, the court in *Letterese* analyzed whether the amount of literal similarities between the two works alone was enough to establish substantial similarity. The court investigated the literal similarities, noting that fragmented literal similarity will “rise to the level of substantial similarity ‘[i]f this fragmented copy is important to the copyrighted work, and of sufficient quantity.’” The defendant argued that the copied text did not constitute infringement because almost all of the text that it copied from *Big League Sales* was of “short phrases, titles, unprotected methods or procedures, or concepts that Dane admittedly took from others.” However, the court held that, although Dane used some uncopyrightable short phrases, his “‘sequence of thoughts, choice of words, emphasis, and arrangement’”

---

104 Id.
105 See id. at 538.
106 *Letterese*, 533 F.3d at 1303.
107 See id.
108 Id. at 1302-03.
109 Id. at 1304 n.19 (quoting Palmer v. Braun, 287 F.3d 1325, 1330 (11th Cir. 2002)).
110 Id. at 1303.
111 *Letterese*, 533 F.3d at 1304 n.19 (quoting Palmer, 287 F.3d at 1330).
112 Id. at 1305.
were his expression and therefore copyrightable.\textsuperscript{113}

The court relied on the holding of \textit{Salinger v. Random House, Inc.}\textsuperscript{114} in making its decision.\textsuperscript{115} In \textit{Salinger}, the defendant wrote a biography consisting of unpublished letters.\textsuperscript{116} The defendant argued that only a small amount of the copyrighted expression was copied.\textsuperscript{117} However, the court in \textit{Salinger} held that when \textquoteright the ‘association, presentation and combination of the ideas and thought’ \textquoteright make up the structure, the structure and presentation become the author’s expression and are protected.\textsuperscript{118}

Thus, based on the holding in \textit{Salinger}, the \textit{Letterese} court reasoned that although Dane may have used text that originated from others, it was not determinative.\textsuperscript{119} However, the court did note that a relevant factor \textquoteleft for the purposes of copyright law is that an abstract idea is never eligible for copyright protection.\textquoteright\textsuperscript{120} While Dane could not protect the \textquoteleft underlying sales techniques,\textquoteright he could protect the presentation of ideas and his choice of structure because, just like in \textit{Salinger}, it became his original expression and was therefore protected.\textsuperscript{121}

Determining whether a work is an idea or expression is often a blurry line.\textsuperscript{122} However, the more the work consists of similar plots and characters, the more likely the work will be deemed to be expression.\textsuperscript{123} Therefore, even though the allegedly infringing text may have originally come from different authors or was in the public domain, it may nevertheless be infringing if the text is used or combined in the same manner or structure as was done by the original author.\textsuperscript{124} When a work contains an amount of paraphrasing and virtually identical examples of another author’s work substantial enough to establish a \textquoteleft finding of literal similarity,\textquoteright copyright has

\begin{itemize}
\item\textsuperscript{113} \textit{Id.} at 1306 (quoting \textit{Salinger v. Random House, Inc.}, 811 F.2d 90, 98 (2d Cir. 1987)).
\item\textsuperscript{114} 811 F.2d 90 (2d Cir. 1987).
\item\textsuperscript{115} \textit{Letterese}, 533 F.3d at 1306 (citing \textit{Salinger}, 811 F.2d at 92).
\item\textsuperscript{116} \textit{Id.}
\item\textsuperscript{117} \textit{Id.}
\item\textsuperscript{118} \textit{Id.} (quoting \textit{Salinger}, 811 F.2d at 98).
\item\textsuperscript{119} \textit{Id.} at 1305.
\item\textsuperscript{120} \textit{Letterese}, 533 F.3d at 1305 (emphasis omitted).
\item\textsuperscript{121} \textit{Id.} at 1305-06.
\item\textsuperscript{122} \textit{Suntrust}, 268 F.3d at 1266.
\item\textsuperscript{123} \textit{Id.} (citing \textit{Nimmer, supra} note 54, § 2.12).
\item\textsuperscript{124} \textit{See} \textit{Letterese}, 533 F.3d at 1306.
\end{itemize}
been infringed.\textsuperscript{125}

IV. **ARE THE SCIENTOLOGY MATERIALS OR THE LEXICON DERIVATIVE WORKS?**

As stated in Section 106(2) of the 1976 Copyright Act, the copyright holder's rights include the right to make derivative works.\textsuperscript{126} The 1976 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."\textsuperscript{127} "A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'"\textsuperscript{128} Therefore, the copyright holder is the only person who can decide if her book will become a movie or if a sequel will be created.\textsuperscript{129}

In determining whether the *Lexicon* was a derivative work with respect to Rowling's planned encyclopedia, the *Warner Bros.* court relied on two Second Circuit cases, *Twin Peaks* and *Castle Rock*, as well as one Seventh Circuit case, *Ty, Inc. v. Publications International Ltd.*\textsuperscript{130}

In *Twin Peaks*, the defendant wrote an unauthorized guide book based on the first season of a television show named "Twin Peaks."\textsuperscript{131} The guide book described the episodes, had additional commentary on the show and the actors, and included a trivia game.\textsuperscript{132} After finding that the two works were substantially similar, the Second Circuit next addressed the question of whether the guide book was a derivative work of the television show.\textsuperscript{133} The court held

\textsuperscript{125} *Id.* at 1304-05.
\textsuperscript{126} 17 U.S.C.A. § 106(2).
\textsuperscript{127} 17 U.S.C.A. § 101.
\textsuperscript{128} *Id.*
\textsuperscript{130} See *Warner Bros.*, 575 F. Supp. 2d at 538.
\textsuperscript{131} *Twin Peaks*, 996 F.2d at 1370.
\textsuperscript{132} *Id.*
\textsuperscript{133} *Id.* at 1373.
that it was. It reasoned that “[t]he [b]ook contain[ed] a substantial amount of material from the teleplays, transformed from one medium into another.” The court additionally stated that, although

    [t]he author of “Twin Peaks” cannot preserve for itself the entire field of publishable works that wish to cash in on the “Twin Peaks” phenomenon[,] . . . it may rightfully claim a favorable weighting of the fourth fair use factor with respect to a book that reports the plot in such extraordinary detail as to risk impairment of the market for the copyrighted works themselves or derivative works that the author is entitled to li-

The court noted that a market for derivative works may exist when an author would likely have an interest in entering the field herself; thus, the market for guidebooks such as Twin Peaks was dissimilar to a market for parodies, because “[c]opyright holders rarely write paro-

dies of their own works.” Moreover, a derivative market for Twin Peaks guidebooks was evidenced by the fact that the plaintiff had already granted licenses for two books and foresaw licensing more.

In Castle Rock, the Second Circuit addressed the question of whether “The Seinfeld Aptitude Test, a trivia quiz book devoted ex-
clusively to testing its readers’ recollection of scenes and events from the fictional television series Seinfeld” infringed the copyright of Seinfeld, or whether it was a fair use. Although the court did not address whether the trivia book constituted a derivative work, the court did hold that it would harm the author’s market for derivative works. The court noted that the trivia book, referring to the Sein-
feld show, used only Seinfeld facts. Furthermore, the court, similar to Twin Peaks, reasoned, the market for trivia books was unlike a market for parodies, which a copyright holder was unlikely to enter,

134 id.
135 id.
136 Twin Peaks, 996 F.2d at 1377.
137 id.
138 id.
139 Castle Rock, 150 F.3d at 135.
140 id. at 145.
141 id. at 138-39.
but filled a niche that the copyright holder could conceivably fill or license to someone else to fill.\textsuperscript{142} The court further reasoned that even though \textit{Seinfeld} had not expressed an interest in filling that niche, it was nevertheless the copyright holder’s choice.\textsuperscript{143}

The Seventh Circuit has concluded that authors are free to write their evaluations on other pre-existing copyrighted works without constituting a derivative work.\textsuperscript{144} In a case about beanie babies, \textit{Ty, Inc.}, an author wrote a collector’s guide for beanie babies, which are a brand of stuffed animals that the author did not create.\textsuperscript{145} When \textit{Ty, Inc.}, the makers of the beanie babies, claimed the guide was a derivative work, the court disagreed.\textsuperscript{146} Although the court conceded that it “[could not] find a case on the point,” it nevertheless held that collectors’ guides are not derivative works, because they “don’t recast, transform, or adapt the things to which they are guides.”\textsuperscript{147}

The plaintiffs in \textit{Warner Bros.} argued that based on \textit{Twin Peaks}, companion guides can be considered derivative works if they contain a substantial amount of copyrighted material.\textsuperscript{148} The \textit{Warner Bros.} court claimed the argument was unpersuasive because it overlooked two differences in the current case.\textsuperscript{149} First, the \textit{Lexicon}’s use of plot elements was far from an “‘elaborate recounting of plot details’ ” and it did not follow the same plot structure as the book.\textsuperscript{150} On this point the court’s logic seems inconsistent with the \textit{Castle Rock} decision, which also relied on \textit{Twin Peaks}. In \textit{Castle Rock}, the facts copied were separate trivia questions, were far from recounting plot details, and were not in the same order as the television series; yet the court held it would harm the author’s market for derivative works.\textsuperscript{151} However, the court held it was the author’s choice to determine if she wanted to license out the right to create it as a deriva-

\textsuperscript{142} \textit{Id.} at 145. (“Unlike parody, criticism, scholarship, news reporting, or other transformative uses, \textit{The SAT} substitutes for a derivative market that a television program copyright owner such as \textit{Castle Rock} ‘would in general develop or license others to develop.’”) \textit{Id.} (quoting \textit{Campbell v. Acuff-Rose Music, Inc.}, 510 U.S. 569, 592 (1994)).

\textsuperscript{143} \textit{Castle Rock}, 150 F.3d at 145-46.

\textsuperscript{144} \textit{Ty, Inc. v. Publ'ns Int'l Ltd.}, 292 F.3d 512, 521 (7th Cir. 2002).

\textsuperscript{145} \textit{Id.} at 515.

\textsuperscript{146} \textit{Id.} at 518.

\textsuperscript{147} \textit{Id.} at 520.

\textsuperscript{148} \textit{Warner Bros.}, 575 F. Supp. 2d at 538-39.

\textsuperscript{149} \textit{Id.} at 539.

\textsuperscript{150} \textit{Id.} (quoting \textit{Twin Peaks}, 996 F.2d at 1373).

\textsuperscript{151} \textit{Castle Rock}, 150 F.3d at 145.
tive work.\textsuperscript{152} Although the court stated this while analyzing the fair use defense factors, by asserting that the trivia game would have interfered with the author’s right to create a derivative work, the court is acknowledging that recounting plot details and presenting the details in the same order as the original author’s work are not necessary elements for a work to be considered a derivative. Second, the \textit{Warner Bros.} court said that where the \textit{Twin Peaks} guide merely transformed an existing work from one media to another, here, the \textit{Lexicon} did not recast, but “instead [gave] the copyrighted material another purpose.”\textsuperscript{153} The court analogized the \textit{Lexicon} to the Ty, Inc. beanie baby guide and said both were not derivatives, because they gave readers an understanding of an existing work.\textsuperscript{154} The court in \textit{Warner Bros.} explained that the \textit{Lexicon} could not be considered a derivative work because imparted a deeper understanding of the \textit{Harry Potter} elements.\textsuperscript{155} This, too, seems to be faulty logic. Although the \textit{Twin Peaks} court did say “the Book contain[ed] a substantial amount of material from the teleplays, transformed from one medium into another,” the infringing work also had additional commentary on the cast, the plots, and essential people involved in making the show, as well as answered questions that the show left unanswered.\textsuperscript{156} The infringing book in \textit{Twin Peaks} was, like the \textit{Lexicon}, giving readers a deeper understanding of the author’s original work; in fact, the infringing book in \textit{Twin Peaks} went beyond the author’s work and gave insight into how the show was made.\textsuperscript{157} However, the \textit{Warner Bros.} court applied its faulty logic and held that the \textit{Lexicon} was dissimilar

\begin{itemize}
\item \textsuperscript{152} \textit{Id.} at 145-46.
\item \textsuperscript{153} \textit{Warner Bros.}, 575 F. Supp. 2d at 539.
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Twin Peaks}, 996 F.2d at 1370.
\item \textsuperscript{157} \textit{Id.}
\end{itemize}

The 128-page book has seven chapters, dealing with, respectively, (1) the popularity of the show; (2) the characters and the actors who play them; (3) the plots of the eight episodes, some commentary on the plots, and “unanswered questions”; (4) David Lynch, the creator of the show; (5) Mark Frost, the producer of the show, and Snoqualmie, Washington, the location of the show; (6) the music of the show; and (7) trivia questions and quotations constituting the “wit and wisdom of Agent Cooper,” one of the characters.

\textit{Id.}
to Twin Peaks.\textsuperscript{158} Furthermore, the Warner Bros. court held that because the Lexicon pulled work from other sources, it no longer represented the original work of Rowling.\textsuperscript{159} Thus, the court held that the Lexicon could not constitute a derivative work under 17 U.S.C.A. § 101.\textsuperscript{160}

This decision seems inconsistent with the Supreme Court's decision in Campbell.\textsuperscript{161} Although the Court in Campbell did not determine whether 2 Live Crew's song constituted a derivative work, while analyzing the factor for potential market harm, the Court made it clear that a work containing a transformative element, even when it substantially changes the original author's work, can still be considered a derivative.\textsuperscript{162} If the Supreme Court believed that works were derivatives only when the defendant's work was introduced directly into the plaintiff's underlying work, it would not have explored whether a song categorized by the Court as a 'ballad' had a market for derivative works in the rap field.\textsuperscript{163} Once the court found the rap song was a parody, it no longer represented the author's original work; it was transformative.\textsuperscript{164} However, the Court in Campbell did not stop there; instead, the Court stated that "[t]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."\textsuperscript{165} Therefore, the Court acknowledged that it must look to the "harm of market substitution."\textsuperscript{166} Although this analysis was done under the fair use discussion, the Court is implicitly stating that derivative works include works that expand beyond the scope of the original author's work, as long as it could be categorized as a type of work "that creators of original works would in general develop or license others to develop."\textsuperscript{167}

"[L]icensing of derivatives is an important economic incen-
tive to the creation of originals.”

In *Campbell*, the Supreme Court determined that there was an existing market for rap and then said the appropriate question was whether the alleged infringement interfered with the plaintiff’s reasonable chance to enter that market or license out the right to someone else for that market. If it did, the Court concluded, the infringing work acted as a substitute and could, therefore, be a derivative work. Thus, although the Supreme Court discussed this aspect under its market harm analysis, it nevertheless recognized that a work could be considered a derivative even if it consisted of more than the original author’s work. In fact, applying the Supreme Court’s analysis, the relevant inquiry to determine whether the *Lexicon* constituted a derivative work would be whether a market for a *Harry Potter* encyclopedia existed, and if it did, the allegedly infringing work could constitute a derivative work.

It seems that that the collector’s book in *Ty, Inc.*, consisting of color pictures of the copyrighted collector items, and the *Lexicon* encyclopedia, consisting of material from a copyrighted book series, both fall into that category. Thus, the decisions in *Warner Bros.* and *Ty, Inc.* do not appear to be consistent with *Campbell*.

In *Letterese*, the court stated that a “derivative work [must] ‘recast, transform[], or adapt[]’ ” the preexisting work, and, “ ‘as a whole, represent [the] original work of authorship.’ ” PL&A argued that the infringing works of both CSI and WISE constituted derivative works, because the defendants used the drill sheets and checksheets in a similar way to the *Mirage Editions v. Albuquerque A.R.T.* case. In *Mirage*, the Ninth Circuit held that a piece of artwork cut out and pasted to a tile constituted a derivative work. The court in *Mirage* reasoned that, although the purchaser may have a right to sell his copy of the work, once he “remov[ed] the . . . images from the book and plac[ed] them on the tiles . . . [he] ha[d] certainly

---

168 Id.; see also 17 U.S.C.A. § 106(2) (stating that a copyright owner also has the right to “prepare derivative works”).

169 *Campbell*, 510 U.S. at 589-93.

170 Id. at 593.

171 Id.


173 Id. (citing *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988)).

174 *Mirage*, 856 F.2d at 1344.
recast or transformed [the work] . . . by incorporating them." \(^{175}\) Furthermore, the court in *Mirage* held that, because Congress had intended derivative work violations to occur when a defendant "incorporate[s] a portion of the copyrighted work in some form," the defendant had, in fact, recast the work as prohibited by the statute. \(^{176}\)

The Eleventh Circuit, in *Letterese*, was not persuaded and stated that *Mirage* was decided incorrectly. \(^{177}\) It reasoned that, even if it chose to follow the Ninth Circuit's rationale, the two cases were completely dissimilar. \(^{178}\) Where the *Mirage* case was on the outer limits and dealt with exact copies, here, the defendants did not photocopy. \(^{179}\) The lithograms in *Mirage* were not transformed in the slightest and, in the case at bar, the defendants had entirely different materials, which used the drill sheets and checksheets in conjunction with lawfully acquired copies of the original book. \(^{180}\) The court pointed out that the *Mirage* case has been frowned upon by many circuits because it did not take into account the possibility of "recast[ing], transform[ing], or adapt[ing] the preexisting work." \(^{181}\)

The court in *Letterese*, looked to 17 U.S.C.A. § 101, and found "the book [was] not a part of defendants' courses in the sense that the checksheets, drill sheets, and book 'as a whole, represent[ed] an original work of authorship.'" \(^{182}\) The court in *Letterese* found the logic the Seventh Circuit applied in *Lee* to be more sound than that of the Ninth Circuit in *Mirage*. \(^{183}\) In *Lee*, the court found that when an original work is unchanged yet affixed to a new work, it is not a derivative. \(^{184}\) The original work had remained untouched and, because it had not been "recast, transformed, or adapted," it had not violated the copyright holder's protection. \(^{185}\)

The *Letterese* Court held that the scientology materials did

\(^{175}\) *Id.*


\(^{177}\) *Letterese*, 533 F.3d at 1299.

\(^{178}\) *Id.* at 1300.

\(^{179}\) *Id.*

\(^{180}\) *Id.*

\(^{181}\) *Id.*

\(^{182}\) *Letterese*, 533 F.3d at 1300 (citing 17 U.S.C.A. § 101).

\(^{183}\) *Id.* (citing Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997)).

\(^{184}\) *Lee*, 125 F.3d at 581.

\(^{185}\) *Id.* at 582.
not constitute derivative works.\textsuperscript{186} The court reasoned that "PL&A’s argument reduce[d] simply to the flightless claim that selling the course materials (specifically, selling the checksheets and drill sheets to be used with lawfully acquired copies of the book) facilitates a 'remounting' of Big League Sales."\textsuperscript{187}

V. BUT WAS THERE INFRINGEMENT? THE FAIR USE DEFENSE

The analysis for copyright infringement does not end simply because a prima facie case has been established.\textsuperscript{188} The next part of the inquiry is whether the infringer has a valid defense. In both cases, the defendants asserted the fair use defense.\textsuperscript{189} The fair use defense is designed to "fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts.'"\textsuperscript{190} It is usually asserted "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research."\textsuperscript{191} "The ultimate test of fair use, therefore, is whether the copyright law’s goal of 'promoting the Progress of Science and useful Arts' . . . 'would be better served by allowing the use than by preventing it.'"\textsuperscript{192} Thus, under 17 U.S.C.A. § 107, an unauthorized work may not be deemed to be infringing if it satisfies the elements of the fair use defense.\textsuperscript{193}

In Campbell, the Supreme Court faced the question of whether a rap group under the moniker 2 Live Crew, who used the work of another artist, Roy Orbison, in producing a parody could be a fair use under Section 107 of the Copyright Act.\textsuperscript{194} The Court noted that there was enough substantial similarity between the two works to constitute a prima facie case of infringement, and, depending on the application of the fair use factors, the defendant’s infringement may be actionable.\textsuperscript{195} The Court stated that 2 Live Crew had created a pa-

\textsuperscript{186} Letterese, 533 F.3d at 1300.
\textsuperscript{187} Id.
\textsuperscript{188} Warner Bros., 575 F. Supp. 2d at 538.
\textsuperscript{189} See id. at 539; Letterese, 533 F.3d at 1298.
\textsuperscript{190} Campbell, 510 U.S. at 575 (quoting U.S. Const., art. I, § 8, cl. 8).
\textsuperscript{191} 17 U.S.C.A. § 107 (West 2009).
\textsuperscript{192} Castle Rock, 150 F.3d at 141 (quoting U.S. Const., art. I, § 8, cl. 8; Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1077 (2d. Cir. 1992)); see also 17 U.S.C.A. § 107.
\textsuperscript{193} 17 U.S.C.A. § 107.
\textsuperscript{194} Campbell, 510 U.S. at 571-72.
\textsuperscript{195} Id. at 572. (acknowledging that a prima facie case of infringement exists).
rody, which is a form of criticism entitled to the defense. The fact that the song was a parody did not end the analysis of fair use, but began the application of the fair use factors to determine if the original artist's copyright had indeed been infringed.

The fair use defense requires the analysis of four factors: "the purpose and character of the use"; "the nature of the copyrighted work"; "the amount and substantiality of the portion [taken]"; and "the effect of the use upon the potential market."

A. The Purpose and Character of the Use

The first factor, purpose and character of the use, is a question of "whether the use is non-commercial or for non-profit educational purposes and whether the use is consumptive or transformative." To determine if the work is transformative, a court determines if it adds value to the original. Although all four factors are considered, the more transformative the work is, the less significant the other factors will be. To be transformative, the "new work [must] take[] copyrighted elements and say[] something new about them." New authors are prevented from creating sequels; however, if the alleged infringing work adds a significant amount of new expression, it may be considered to be so different from the original that it is transformative, and this factor may tip in the defendant's direction. This is illustrated by Suntrust Bank v. Houghton Mifflin Co., a case discussed by the Eleventh Circuit.

In Suntrust, an author created a book using the same characters as "Gone with the Wind." The alleged infringing book was

---

196 Id. at 583, 594 ("[T]his joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.").
197 Id. at 574.
200 Campbell, 510 U.S. at 579.
201 Id.
202 Dejaco, supra note 124, at 15.
203 Id. at 14.
204 268 F.3d 1257 (11th Cir. 2001).
205 Id. at 1259.
written from a different perspective—from the slave’s point of view.\textsuperscript{206} The court said that, although it was necessary to rely on “Gone with the Wind,” the second book was from an entirely different viewpoint and contained enough new expression to be considered transformative; as a result, the scales tipped in the defendant’s favor.\textsuperscript{207} In contrast, when a defendant simply copies the original author’s expression, it is unlikely that a court will make a finding that the work is transformative. In \textit{Castle Rock}, the Second Circuit held that copying fictional facts from a television show to create a game, which is based on that show, falls short of being transformative.\textsuperscript{208} The court rejected the defendant’s assertion of the fair use defense and disagreed with the claim that the infringing work transformed the \textit{Seinfeld} television series into an unauthorized trivia book of \textit{Seinfeld} facts.\textsuperscript{209}

The Court in \textit{Campbell} held that the infringing rap song was a parody.\textsuperscript{210} The Court reasoned that, since a parody is criticism of the author’s original work, it has transformative value.\textsuperscript{211} The petitioner argued that any parodic use should be presumed fair.\textsuperscript{212} However, the Court held that a work may have both parodic and non-parodic uses.\textsuperscript{213} Thus, when the work goes beyond parody, a court must look “to the work’s other elements.”\textsuperscript{214} In addition, the Court stated that although 2 Live Crew’s song had commercial value, that was only one part of the first factor and was not determinative.\textsuperscript{215}

Applying the transformative analysis to the \textit{Warner Bros.} case, the court held that the alleged infringing work did add value.\textsuperscript{216} It reasoned that since the \textit{Lexicon} was a reference guide for \textit{Harry Potter} readers, it “demonstrate[d] a productive use for a different purpose than the original works.”\textsuperscript{217} Unlike \textit{Castle Rock} and \textit{Twin

\textsuperscript{206} Id. at 1267.
\textsuperscript{207} Id. at 1269.
\textsuperscript{208} \textit{Castle Rock}, 150 F.3d at 141.
\textsuperscript{209} Id.
\textsuperscript{210} \textit{Campbell}, 510 U.S. at 583.
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 581.
\textsuperscript{213} Id.
\textsuperscript{214} Id. at 571.
\textsuperscript{215} \textit{Campbell}, 510 U.S. at 584.
\textsuperscript{216} \textit{Warner Bros.}, 575 F. Supp. 2d at 543.
\textsuperscript{217} Id. at 542.
Peaks, the court stated, the Lexicon was not just an abridged version of the original work.\(^{218}\) Despite the plaintiff’s claim that the second work was not transformative because there was no analysis or commentary, the court said that “is not determinative of whether or not its purpose is transformative.”\(^ {219}\) Instead, the court must look at the chief contribution.\(^ {220}\) Here, although there was a contribution, “[t]he transformative character . . . [was] diminished . . . because the . . . work[] [was] not consistently transformative.”\(^ {221}\) The defendant argued that the purpose of the book was transformative because it was a useful reference to the Harry Potter books.\(^ {222}\) However, the court found the transformative purpose was not achieved because the Lexicon often did not cite sources and the excessive verbatim copying exceeded what was “reasonably necessary [and] diminish[ed] a finding of a transformative use.”\(^ {223}\) Therefore, the Lexicon’s transformative purpose as a useful reference was not achieved.\(^ {224}\)

The court found that although the commercial/nonprofit inquiry is a fundamental aspect under this factor, because the case at hand involved profit, it was not of significant importance.\(^ {225}\) Instead, the court determined “[t]he real concern behind the commercial nature inquiry is ‘the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying original work.’ ”\(^ {226}\) This is more likely to be found if the work is for the public good, but because here there is a commercial nature, the court determined it “only weigh[ed] slightly against a finding of fair use.”\(^ {227}\)

Applying this factor to Letterese, the court first addressed the question of whether the work was educational or commercial.\(^ {228}\) The court held that although the work had educational aspects, the defen-

\(^{218}\) Id. at 538.
\(^{219}\) Id. at 543.
\(^{220}\) Id.
\(^{221}\) Warner Bros., 575 F. Supp. 2d at 544.
\(^{222}\) Id. at 542-44.
\(^{223}\) Id. at 544.
\(^{224}\) Id.
\(^{225}\) Id. at 545.
\(^{226}\) Warner Bros., 575 F. Supp. 2d at 545. (quoting Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006)).
\(^{227}\) Id.
\(^{228}\) Letterese, 533 F.3d at 1309.
dants, nevertheless, were in a position to profit commercially.\textsuperscript{229} WISE charged seventy-five dollars per course pack, and CSI obtained a promissory note in the event that the course was not completed.\textsuperscript{230} Therefore, the sale of defendants' work produced commercial profit.\textsuperscript{231}

In determining the purpose and character of the use, the \textit{Letterese} court stated that the proper question was whether the work was transformative or superseding.\textsuperscript{232} If the work was transformative, as in \textit{Suntrust}, where the second book inverted the race roles portrayed in the original, then the factor would more likely benefit the defendant.\textsuperscript{233} However, if the work had some original aspects but merely superseded the original by fulfilling the same "'overall function,'" the plaintiffs would have the stronger argument.\textsuperscript{234}

The court determined, in \textit{Letterese}, that although the two works were in different formats and the second work had additional tools, they both used the same instructional techniques on how to close a deal, and, therefore, fulfilled the same educational purpose.\textsuperscript{235} Because the educational character had not changed, the second work merely emphasized the original, but did not transform "the overall purpose and function of the book."\textsuperscript{236} Thus, this factor favored PL&A.\textsuperscript{237}

\textbf{B. Nature of the Copyrighted Work}

This factor looks at the "'hierarchy of copyright protections.'"\textsuperscript{238} The "‘law . . . recognizes a greater need to disseminate factual works than works of fiction or fantasy.’"\textsuperscript{239} The appropriate question to consider is whether the original work is creative and high-

\textsuperscript{229} Id. at 1310.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id. at 1309.
\textsuperscript{233} \textit{Letterese}, 533 F.3d at 1310-12.
\textsuperscript{234} Id. at 1310-11 (quoting Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop Prods., Inc., 479 F. Supp. 351, 361 (N.D. Ga. 1979)).
\textsuperscript{235} Id. at 1311.
\textsuperscript{236} Id.
\textsuperscript{237} Id. at 1312.
\textsuperscript{238} \textit{Letterese}, 533 F.3d at 1312 (quoting \textit{Suntrust Bank}, 268 F.3d at 1271).
ly protected or factual and less protected.\textsuperscript{240}

In \textit{Campbell}, the Court stated that some works are “closer to
the core of intended copyright protection than others.”\textsuperscript{241} The Court
further stated that Orbison’s original song had creative expression,
which was protected.\textsuperscript{242} However, the Court found that applying this
factor to the case was not very helpful, because parodies almost al-
ways copy the expressive work.\textsuperscript{243}

In \textit{Warner Bros.}, the court concluded that the \textit{Harry Potter}
works were fictional works and, as a result, were afforded a high lev-
el of protection.\textsuperscript{244} Thus, the balance of this factor was tipped in the
plaintiff’s direction.\textsuperscript{245}

In contrast, the court in \textit{Letterese} found the \textit{Big League Sales}
book fell under the category of factual works.\textsuperscript{246} Although the court
noted the book had some fanciful elements, there were not enough to
result in the higher level of protection granted to fictional works.\textsuperscript{247}
The court further noted that the status of the work—whether pub-
lished or unpublished and in print or withdrawn—also afforded dif-
f erent levels of protection.\textsuperscript{248} Although the sales book was out of
print, it was entitled to the fair use defense because it was intention-
ally withdrawn as part of the author’s strategy.\textsuperscript{249} Thus, the court in
\textit{Letterese} concluded this factor was neutral to both parties.\textsuperscript{250}

\textbf{C. Amount of Work Used}

The third factor is “the amount and substantiality of the por-
tion used in relation to the copyrighted work as a whole.”\textsuperscript{251} This fac-
tor asks the question “whether the amount used, even if small, con-

\begin{flushright}
\textsuperscript{240} \textit{Warner Bros.}, 575 F. Supp. 2d at 549 (citing \textit{Harper \& Row}, 471 U.S. at 563; \textit{Castle
Rock}, 150 F.3d at 144; \textit{Twin Peaks}, 996 F.2d at 1376; \textit{Ty, Inc.}, 333 F. Supp. 2d at 713).
\textsuperscript{242} \textit{Id.}
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} \textit{Warner Bros.}, 575 F. Supp. 2d at 549.
\textsuperscript{245} \textit{Id.}
\textsuperscript{246} \textit{Letterese}, 533 F.3d at 1312.
\textsuperscript{247} \textit{Id.}
\textsuperscript{248} \textit{Id.} at 1313.
\textsuperscript{249} \textit{Id.}
\textsuperscript{250} \textit{Id.} at 1314.
\textsuperscript{251} 17 U.S.C.A. § 107.
\end{flushright}
sists of the essence of the protected work.”

In *Campbell*, the Court analyzed the quantitative and qualitative aspects. The Court stated that with a parody there is a need to copy the heart of the work and take enough of the original work to make “its critical wit recognizable.” The Court also stated the context of the copying must be analyzed. In *Campbell*, there were additional sounds and new lyrics. Therefore, the Court found that 2 Live Crew did not take more than what was needed.

Applying this analysis to *Warner Bros.*, the plaintiffs “argue[d] . . . that the Lexicon takes too much original expression . . . to be fair use.” However, the question is “whether the amount and value of Plaintiffs’ original expression used are reasonable in relation to the Lexicon’s transformative purpose.” Answering this question, the court said the defendants did take more than was reasonable. The heaviest factor weighing against the defendant was the “verbatim copying and close paraphrasing of language from the *Harry Potter* works.”

When the text that is copied is central to the entertainment factor, even small amounts can be considered too much. In *Craft v. Kobler*, the court found that three percent exceeded a reasonable limit because it was the “most entertaining part.” And in *Salinger*, the court held that the “copier [was] not entitled to copy the vividness of author’s description for the sake of accuracy.” Moreover, the amount of copied text needed to constitute infringement may be satisfied by a lesser requirement in the case of a fictional work as opposed to a factual work. As a result, because the *Harry Potter* series is under the umbrella of creative works, the plaintiffs were entitled to

---

252 Frank, *supra* note 199, at 474.
253 *Campbell*, 510 U.S. at 587.
254 *Id.* at 588.
255 *Id.* at 589.
256 *Id.*
257 *Id.*
258 *Warner Bros.*, 575 F. Supp. 2d at 546.
259 *Id.*
260 *Id.*
261 *Id.* at 547.
262 *Id.*
264 *Warner Bros.*, 575 F. Supp. 2d at 547 (citing *Salinger*, 811 F.2d at 96).
265 *Id.* at 549.
more weight under this factor.\textsuperscript{266}

In analyzing \textit{Letterese}, the court used the same test as in \textit{Warner Bros.} and stated that the amount of work used must be reasonable "in light of the purpose and character of the use."\textsuperscript{267} The court reasoned that the assessment is to be based on "‘the portion used’ . . . with respect to the ‘copyrighted work as a whole,’ not to the putatively infringing work."\textsuperscript{268} In determining "the amount and substantiality of portion used," the court, relying on \textit{Campbell}, noted that both quality and quantity must be evaluated.\textsuperscript{269} If verbatim copying—which captures the essence of the book—is found, even if it is small quantitatively, it may be deemed to have qualitative significance and result in favor of the plaintiff.\textsuperscript{270}

The court in \textit{Letterese} found that "the incorporation of the sales drills, . . . explanations of the sales techniques," and organizational aspects of the defendants’ copying may be substantial enough to reduce the demand for plaintiff's derivative works.\textsuperscript{271} Therefore, this factor was found to favor PL&A.

\textbf{D. Effect of Market Harm}

The fourth factor determines "the effect of the use upon the potential market for" the underlying works.\textsuperscript{272} To determine the effect, a court examines whether the alleged infringer's work could have a "‘substantially adverse impact on the potential market for . . . the original.’"\textsuperscript{273}

Although the Court in \textit{Campbell} analyzed all four factors of the fair use defense, particularly relevant to the analysis of \textit{Warner Bros.} is its discussion pertaining to the fourth factor.\textsuperscript{274} The Court stated that the harm a parody may cause the market is not actionable under copyright, because that may be the exact goal of the parody.\textsuperscript{275}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{266}] \textit{Id.}
\item[\textsuperscript{267}] \textit{Letterese}, 533 F.3d at 1314 (citing \textit{Campbell}, 510 U.S. at 586-87).
\item[\textsuperscript{268}] \textit{Id.} at 1314-15.
\item[\textsuperscript{269}] \textit{Id.} at 1315 (quoting \textit{Campbell}, 510 U.S. at 587).
\item[\textsuperscript{270}] \textit{Id.}
\item[\textsuperscript{271}] \textit{Id.}
\item[\textsuperscript{272}] 17 U.S.C.A. \S\ 107(4).
\item[\textsuperscript{273}] \textit{Ringgold}, 126 F.3d at 81 (quoting \textit{Campbell}, 510 U.S. at 590).
\item[\textsuperscript{274}] \textit{Campbell}, 510 U.S. at 590.
\item[\textsuperscript{275}] \textit{Id.} at 591-92.
\end{enumerate}
\end{footnotesize}
Furthermore, the Court stated it is unlikely a plaintiff will license critical reviews; therefore, since there is no market for an author’s critical reviews of her own work, this factor will tip in the defendant’s favor when the alleged infringing work is merely a critical review of the author’s work.\textsuperscript{276} However, the Court went on to say that when the case goes beyond the purpose recognized by the fair use defense, it must look “to the other elements of the work.”\textsuperscript{277} Since 2 Live Crew’s song was not just a parody, but also rap music, “the derivative market for rap music is a proper...enquiry.”\textsuperscript{278}

Similarly, in \textit{Ringgold}, the court stated that if the author can demonstrate there is a likelihood of a potential market to license her work, the balance of this factor will weigh in her favor.\textsuperscript{279} Relying on \textit{Nimmer on Copyright}, the court in \textit{Ringgold} pointed out that the claimant is not required to prove damages in relation to her current market, but that it may negatively impact possible sales in a future market.\textsuperscript{280}

Applying the fourth factor, the court in \textit{Warner Bros.} determined that if the defendants were permitted to publish the \textit{Lexicon}, it could have an adverse impact on Rowling’s future market.\textsuperscript{281} Although it would not have an adverse impact on her current novels, it could prevent fans from purchasing companion books because most of the text would be printed in the \textit{Lexicon}.\textsuperscript{282} Furthermore, the court found that because the \textit{Lexicon} would be printing plaintiff’s material without obtaining a license, plaintiff’s market to license out the same material would be weakened.\textsuperscript{283} Although the court found that the balance of the fourth factor weighed in plaintiff’s favor, it nonetheless did not agree with all of the plaintiff’s arguments.

The court determined that even though the \textit{Lexicon} would be in direct competition with an encyclopedia that Rowling was planning on creating, it was not of consequence under the market harm

\textsuperscript{276} \textit{Id.} at 592.
\textsuperscript{277} \textit{Id.}
\textsuperscript{278} \textit{Id.} at 592-93.
\textsuperscript{279} \textit{Ringgold}, 126 F.3d at 81.
\textsuperscript{280} \textit{Id.}; see also \textit{Campbell}, 510 U.S. at 590 (quoting \textit{Nimmer, supra} note 50, § 13.05[A][4]).
\textsuperscript{281} \textit{Warner Bros.}, 575 F. Supp. 2d at 549.
\textsuperscript{282} \textit{Id.} at 550.
\textsuperscript{283} \textit{Id.} at 551.
factor. In Twin Peaks, the court held "[t]he author of 'Twin Peaks' cannot preserve for itself the entire field of publishable works that wish to cash in on the 'Twin Peaks' phenomenon." Relying on Twin Peaks, the court in Warner Bros. stated that "by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyrighted owner plainly cannot prevent others from entering those fair use markets." Similarly, the court in Ty, Inc., held that the market harm did not weigh against a defendant who wrote an unauthorized collector's book for items that he did not create. Although Warner Bros. places support of its decision on the Ty, Inc. decision, it is arguably inconsistent with the Supreme Court's decision in Campbell. The Court stated that when the case goes beyond the purpose recognized by the fair use defense, it must look "to the other elements of the work." Since the 2 Live Crew song was not just a parody, but also rap music, "the derivative market for rap music [was the] proper . . . enquiry."

In comparing the fourth factor of the fair use analysis, Warner Bros., as well as Ty, Inc., on which it relied, once again seems at odds with the Campbell decision. The finding of the Warner Bros. court that "the market for reference guides to the Harry Potter works [was] not exclusively [Rowling's] to exploit or license, no matter the commercial success attributable to the popularity of the original works," is simply inconsistent with the Campbell case. Although the Supreme Court said Orbison had never entered the rap sector, it continued its analysis. It held that the existing market for rap music was the proper inquiry. If the alleged infringement acted as a substitute and interfered with Orbison's reasonable chance to enter that market,

---

284 Id. at 550.
285 Id.
286 Twin Peaks, 996 F.2d at 1377.
287 Warner Bros., F. Supp. 2d at 550 (quoting Castle Rock, 150 F.3d at 145 n.11).
288 Ty, Inc., 292 F.3d at 522.
289 Campbell, 510 U.S. at 592.
290 Id. at 592-93.
292 Campbell, 510 U.S. at 593 (noting the paradoxical nature of the song).
293 Id.
directly or by licensing, then it would cause market harm.\(^\text{294}\)

In both cases, Warner Bros. and Ty, Inc., the alleged infringing work would have been a substitute for a work that the plaintiff could have reasonably created or licensed. Although pure comment on the subject may not tip the factor of market harm in favor of the plaintiff, when coupling the text with pictures of copyrighted items, as occurred in Ty, Inc., it could act as a substitute for a collector’s book that the copyright holder may wish to sell. In essence, the infringing work would act as a substitute and the holder would lose the advantage of his copyrighted work. Similarly, the Lexicon was not just commentary but an encyclopedia painting pictures with Rowling’s copyrighted words. If the Lexicon had entered the market, it would act as a substitute to an encyclopedia that Rowling could have produced, for which a market not only existed, but that Rowling had already expressed an intention of entering.\(^\text{295}\) Just as in Ty, Inc., Rowling would lose the advantage of her copyrighted protection and her incentive to create would be reduced.\(^\text{296}\)

Therefore, the court’s determination that the Lexicon’s adverse impact on Rowling’s own encyclopedia sales could not constitute market harm under the fair use analysis is inconsistent with Campbell. It is also inconsistent with the copyright law because it diminishes the “important economic incentive” for the original creator.\(^\text{297}\) Even if the “overriding purpose and character is” one which is recognized by the fair use defense, it may still cause cognizable harm, especially if there is a large amount of copying.\(^\text{298}\) In the Warner Bros. case, although the purpose of the Lexicon may have been transformative, the transformative content was slight in relation to the quantity of the copying, and as the Court in Campbell stated, it could cause cognizable harm.\(^\text{299}\) Hence, the Lexicon acted as a substitute for a work Rowling could have licensed. Therefore, with regard to the Lexicon’s harming Rowling’s opportunity to enter the market for Harry Potter encyclopedias, the fourth factor should have tipped even further in the plaintiff’s favor.

\(^\text{294}\) Id.

\(^\text{295}\) Warner Bros., 575 F. Supp. 2d at 519.

\(^\text{296}\) Id. at 552.

\(^\text{297}\) Campbell, 510 U.S. at 593.

\(^\text{298}\) Id. at 588.

\(^\text{299}\) Id. at 591 (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).
In contrast to Warner Bros., the court in Letterese accurately applied the reasoning set forth in Campbell, and stated that under the fourth factor "the adverse effect [is] . . . primarily concerned [with] market substitution."\textsuperscript{300} While complementary materials may be deemed a fair use, "copying that is a substitute for the copyrighted work . . . or for derivative works from the copyrighted work, is not fair use."\textsuperscript{301}

The court in Letterese noted, with respect to WISE, that there was a potential for adverse market harm because WISE captured "the heart" of the book's expression by using "the selection and structure of sales techniques and distinctive descriptions thereof, and may well usurp the potential for 'Big League Sales' and derivative works."\textsuperscript{302} However, with regard to CSI, the court determined that market harm would not occur.\textsuperscript{303} The court reasoned that all versions bear the "imprimatur of Hubbard's pen . . . . [Therefore], PL&A's derivative works would not be market substitutes for CSI's courses, and vice versa."\textsuperscript{304} Additionally, the court reasoned that because the only harm that fair use is concerned with is market substitution for derivative works, when analyzing the CSI claim, this factor strongly favors the defendants.\textsuperscript{305} Consistent with the Campbell decision, the court in Letterese stated that, even though no current market for Big League Sales or for its derivative works existed, market harm may still occur.\textsuperscript{306} The court stated that "the relevant consideration [is] the 'potential market.' "\textsuperscript{307}

In contrast, the Warner Bros. court stated that "because a reference guide to the Harry Potter works is not a derivative work; competing with Rowling's planned encyclopedia is therefore permissible."\textsuperscript{308} The Warner Bros. court relied on the Twin Peaks decision, which stated that "by developing or licensing a market for parody, news reporting, educational or other transformative uses of its

\textsuperscript{300} Letterese, 533 F.3d at 1315.
\textsuperscript{301} Id. at 1315-16 n.31 (quoting Ty, Inc., 292 F.3d at 517).
\textsuperscript{302} Id. at 1318.
\textsuperscript{303} Id. at 1319.
\textsuperscript{304} Id. at 1318-19.
\textsuperscript{305} Letterese, 533 F.3d at 1319.
\textsuperscript{306} Id. at 1317.
\textsuperscript{307} Id. (citing Worldwide Church of God v. Philadelphia Church of God, 227 F.3d 1110, 1119 (9th Cir. 2000) (quoting Salinger, 811 F.2d at 99)).
\textsuperscript{308} Warner Bros., 575 F. Supp. 2d at 550.
own creative work, a copyrighted owner plainly cannot prevent others from entering those fair use markets.” However, the Warner Bros. court failed to mention that Twin Peaks also stated, “[i]n the cases where we have found the fourth factor to favor a defendant, the defendant’s work filled a market niche that the plaintiff simply had no interest in occupying.” Additionally, although the Twin Peaks court stated that an author may not “preserve for itself the entire field of publishable works,” the court followed up the sentence by saying, “[b]ut it may rightfully claim a favorable weighting of the fourth fair use factor with respect to a book that . . . risk[s] impairment of the market for the copyrighted works themselves or derivative works that the author is entitled to license.” In the Warner Bros. case, Rowling was planning to enter the niche of encyclopedias, and, as Rowling’s expert testified, the sale of the Lexicon would impair her Harry Potter encyclopedia sales. Therefore, the Warner Bros. court should have tipped the “favorable weighting of the fourth fair use factor” even further in the direction of the plaintiffs.

VI. CONCLUSION

A. Were the Cases Decided Correctly?

The substantially similar test, applied by both the Eleventh Circuit and the Second Circuit, seems to work well at determining if two works are, indeed, substantially similar. In fact, it takes into account both fictional and fact-based works. The test analyzes the alleged infringing work based on the overall structure and similarities in language; therefore, regardless of the type of text that the original work was comprised of, the amount of substantially similar work can be determined. The difference in the amount of weight that the court placed on the structure in the Letterese case, as opposed to the focus on the similarities of the text in the Warner Bros. case, is evidence of the flexibility of the test.

309 Id. (quoting Castle Rock, 150 F.3d at 145 n.11).
310 Twin Peaks, 996 F.2d at 1377.
311 Id.
312 Warner Bros., 575 F. Supp. 2d at 549.
313 Twin Peaks, 996 F.2d at 1377.
Beyond the determination of whether the works were substantially similar, the two cases seemed to be analyzed quite differently. First, the court in Warner Bros. approached the issue of whether the infringing work constituted a derivative work differently than the court in Letterese did. Second, each court evaluated the harm to the market factor under fair use differently.

In discussing the derivative aspect, the Letterese Court noted that PL&A’s argument was not that it transformed but remounted, and, therefore, the court held it did not fall under the definition of a derivative work under § 101. In contrast, the plaintiffs in Warner Bros. argued “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.’ ” Unfortunately, as discussed above, the court in Warner Bros. relied on Ty, Inc., which was arguably decided incorrectly, and held that the Lexicon did not constitute a derivative work.

In analyzing the market harm factor under the fair use defense, the Letterese court correctly analyzed the market harm for future derivatives. However, the Warner Bros. court erroneously found that the impact of the Lexicon on Rowling’s future encyclopedia sales was irrelevant under the market harm analysis. Therefore, although the Letterese case was decided correctly, the Warner Bros. case was not.

B. How Should the Current Tests Change?

1. Market Harm Analysis

To resolve inconsistencies with the circuits’ approaches in determining the market harm factor analysis, a simple two-prong test should be applied: first, is there a market, either current or potential, for the defendant’s alleged infringing work; second, could the alleged infringing work act as a substitute for a work plaintiff could reasonably license out or fulfill herself?

Applying this test to Warner Bros., there is not only a market

314 Letterese, 533 F.3d at 1299-1300 (citing Mirage, 856 F.2d at 1342).
315 Warner Bros., 575 F. Supp. 2d at 539 (citations omitted).
316 Id. See discussion infra Part IV.
for encyclopedias corresponding to the *Harry Potter* series, but one that Rowling had already expressed intention of entering. Next, because the *Lexicon* used Rowling’s essence by taking her expression, the *Lexicon* would be a substitute for plaintiff’s work. Rowling would lose the advantage of her copyrighted work and the two works would be on an even ground. Therefore, applying this test, the fourth factor would have tipped in favor of the plaintiffs, even if only a potential market for *Harry Potter* encyclopedias existed, because it was the copyright holder’s choice to enter that market or license the right out to another party.

2. *Derivative Works Analysis*

The court in *Warner Bros.* held that collectors’ guides were not derivative works because they did not “recast, transform, or adapt the things to which they are guides.” However, this test only partially encompasses the text of 17 U.S.C.A. § 101. Section 101 also says, “A work consisting of . . . modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” The *Lexicon* used Rowling’s words to paint pictures, and the entire purpose of the *Lexicon* was to give readers a deeper understanding of Rowling’s work; therefore, similar to a sequel, although it has additional elements beyond the original work, the *Lexicon* still, “as a whole,” represented Rowling’s work. To limit the derivative test as *Warner Bros.* did, ignores the fact that § 101 is speaking about works “based upon [a] . . . preexisting work[]” and misses the point of why the copyright law protects derivative works. The right was given to authors “because the licensing of derivatives is an important economic incentive to the creation of originals.” In fact, the *Warner Bros.* court’s rationale overlooks the scenario that occurs when two works have been found to be substantially similar: although the infringing work may not “recast, transform, or adapt the things to which they are guides,” it nevertheless would not exist but for the original work, and thus may represent the original creator’s work.

317 *Ty, Inc.*, 292 F.3d at 520.
319 *Id.*
320 *Campbell*, 510 U.S. at 593.
321 *Warner Bros.*, 575 F. Supp. 2d at 539.
When this occurs, a new test should be applied, which more accurately reflects the goal of copyright as articulated by the Supreme Court in *Campbell*. If a finding of substantial similarity is found then a two prong test should occur: first, determine whether the second work captures an audience primarily due to the second author’s use of the original copyrighted material; if so, the second step should be to determine if the original author would have any reasonable prospect of licensing out the right to create a work that fills the same niche as the alleged infringing work. If these prongs are answered in the affirmative, then the work constitutes a derivative. Thus, the same analysis used under the fourth prong of the fair use test, effect of market harm, should be incorporated into the test for determining if a work is a derivative.

Applying this new test to the *Warner Bros.* case would result in a holding that the *Lexicon* was a derivative work. After concluding that the works were substantially similar, the next question would be: does the second work capture an audience primarily due to the second author’s use of the original copyrighted material? This answer would have to be yes. First, the encyclopedia would not exist unless Rowling’s copyrighted novels first existed. Second, the elements described in the *Lexicon* would not have the same advantage in the market of one created by Rowling if it did not use her copyrighted detailed expressions. The final inquiry is: could Rowling reasonably expect to license this right out or use it herself? Here, there is no room for doubt that she could have. She had already expressed her intentions to do so. Therefore, under this test, the *Lexicon* would be a derivative work.

C. Public Policy Furthered by the Tests

The central theme of copyright law is “[t]o promote the Progress of Science and useful Arts.” The way the Second Circuit is currently applying the copyright law actually hinders the constitutional objective by limiting the exclusive rights granted to an author and thereby reducing the incentive for an author to create. It may even cause a new author to refrain from publishing. In the *Warner Bros.* case, Rowling said if the *Lexicon* was released, she would lose

322 *Warner Bros.*, 575 F. Supp. 2d at 549.
323 U.S. CONST. art. I, § 8, cl. 8.
incentive to publish her own work.\textsuperscript{324} Furthermore, if it is easy for someone to copy an author’s work, instead of providing an incentive for new original work, it can cause authors not to publish until each possible variation of the book has been released.

At first glance, it may seem like reducing the author’s control of her derivative works would benefit the public by allowing more works to be created. It may also seem that by broadening the fair use analysis, more people can create works that would “promote the Progress of . . . useful Art.”\textsuperscript{325} However, by allowing anyone to substantially copy from another’s work and then enter the work into the market by simply stamping it with a transformative aspect, it would likely promote un-useful art production. This is inconsistent with the Court’s reasoning in \textit{Campbell}, which stated that when the “alleged infringer merely . . . [uses the work] to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish).”\textsuperscript{326}

Additionally, in the \textit{Campbell} concurrence, Justice Kennedy pointed out that it should not be easy for alleged infringers “to exploit existing works and then later claim that their rendition was a valuable commentary on the original.”\textsuperscript{327} He further noted that “underprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create.”\textsuperscript{328}

Although ultimately the Second Circuit decided the \textit{Warner Bros.} case correctly, if its tests do not change, it will be easy for copiers to enter their ‘art’ into the public domain. Therefore, the goal of copyright law—to promote useful art—will not be achieved.

\begin{footnotesize}
\textsuperscript{324} \textit{Warner Bros.}, 575 F. Supp. 2d at 552.
\textsuperscript{325} U.S. \textit{CONST.} art. I, § 8, cl. 8.
\textsuperscript{326} \textit{Campbell}, 510 U.S. at 580.
\textsuperscript{327} \textit{id.} at 599 (Kennedy, J., concurring).
\textsuperscript{328} \textit{id.}
\end{footnotesize}