WINTER 2004 WINNER

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INSTRUCTOR'S FOREWORD

THE GREATEST CHALLENGE of writing about globalization is finding a way to manage a topic that is always in danger of becoming either uncontrollably broad or else too narrowly focused. In his essay, "Harry Potter and the Battle of the International Copyright Law," Andrew strikes the perfect balance. He situates the very broad and relevant discussion of copyright within an entertaining and accessible set of concrete examples drawn from popular culture, namely the story of how the beloved Harry Potter has been at the center of lawsuits brought by J.K. Rowling and Time Warner against several authors for copyright infringement. He is neither too attentive to the entertainment value of these "faux Potters," as he calls them, nor to the potentially dry discussion of law. Rather, he deftly moves between the two, and uses the Potter reference as a springboard into a clear and illuminating discussion of legalese.

Andy's research for the project was ambitious, particularly considering that he'd written not on copyright law, but on the debate over headscarves in France for his other writing assignments. Nonetheless, he managed to pull together an impressive array of both primary and secondary sources in a short time, and, as the essay shows, he incorporates them very effectively into his argument. In addition, he also sought out interviews from legal experts and representatives of Time Warner, something that went above and beyond what one might expect in a freshman writing course.

In the end, he argues very convincingly that TRIPS—the current WTO framework for copyright law—tips the balance too heavily in favor of copyright holders at the expense of non-copyright holders. The danger of this precedent, as he points out, is that local forms of knowledge and storytelling are in danger of being marginalized in the face of global mass culture.

—TOMAS MATZA

Harry Potter and the Battle of the International Copyright Law

Andrew Leifer

The series of *Harry Potter* novels is a worldwide success. J.K. Rowling's novels of magic adventures and coming of age have sold over 250 million copies in 55 languages (Watson and Kellner). What most readers do not realize is that Harry Potter thrives through a complicated set of international legal structures designed to protect intellectual property rights, unfairly so according to some experts. The story of *Harry Potter*'s unparalleled success demonstrates the faults of this new international framework.

When *Harry Potter* arrived on the world market, it was quickly followed by foreign-made *Harry Potter* look-alikes. These copies or adaptations sought to capitalize on the original novel's success, but they also added local traditions and customs to the all-white British novel. In response, J.K. Rowling exercised her international copyrights to systematically shut down these unauthorized *Harry*s.

Only in the past decade has it become possible to effectively assert copyrights on an international scale. This change is due to a new trade agreement called TRIPS, mandated by the World Trade Organization (WTO), which imposes binding legal standards for intellectual property legislation in countries across the globe. Unfortunately, agreements such as these treat intellectual property simply as a bargaining chip in global efforts to reduce tariffs and maximize free trade. They sometimes overlook commonly held values concerning intellectual property. For example, copyrights were originally designed to be temporary and very limited in scope, with explicit rights granted to non-copyright holders. The current status quo vests too much power in individual copyright holders. Worse, this non-uniform system can now be enforced on a global scale. In the end, this new framework impedes local creativity from adopting international characters and ideas. Regardless of whether Rowling was justified in pursuing the faux Potters, her legal

actions demonstrate a threat to local traditions inherent in today's international legal system.

POTTER'S MAGIC

Harry Potter was not always the focus of international law. The unassuming Harry starts out in Rowling's first novel as a ten-year-old outcast at school. His classmates tease him, his brother pesters him, and his parents force him to live in a closet under the staircase. When Potter suddenly learns that he is in fact a famous wizard, capable of all sorts of magic and mischief, he heads to Hogwarts School of Wizardry, where he fights evil with fellow classmates and captivates readers with his adventures.

The success of *Harry Potter* the novel came from equally humble beginnings. J.K. Rowling was a single mother on welfare when she was inspired to write the *Potter* novels on a train ride from Manchester to King's Cross (McAllistor 67; "Harry Potter Books from Bloomsbury"). She published her first *Potter* novel, *Harry Potter and the Philosopher's Stone* (a.k.a. *Sorcerer's Stone* in the US) in 1997. It was received with worldwide acclaim, and when she released her second novel it instantly hit number one on bestseller lists in the US and Britain. Time Warner purchased film rights to Rowling's first two novels for a seven-figure sum. Rowling wrote three more *Potters*, and a sixth is just around the corner. As of the printing of her fifth book, Rowling had amassed an estimated $450 million, making her richer than the Queen of England by some $50 million (McAllistor 67). In 2004, J.K. Rowling made the cover of *Forbes Magazine*'s "Billionaire List." With just over a billion dollars, she is now the wealthiest woman in Britain and the richest author of all time (Kellner 125; Watson and Kellner). The entire *Potter* franchise, including novels, toys from Mattel, video games from Electronic Arts, and the two Time Warner films, have netted over two billion British pounds (BBC News; Watson and Kellner).

Part of *Potter's* success appears to derive from its universal appeal. While waiting in line on opening day to purchase the fifth *Potter* book, fourteen-year-old Zhao Nan of Beijing told an Associated Press reporter, "The [*Harry Potter*] story is exciting no matter where you come from" (Anthony). By far the largest testament to *Potter*'s cultural influence is the widespread creation of locally adapted faux *Potter* novels.

SQUELCHING THE COPYCATS

In the wake of *Harry Potter*'s widespread success, a number of copycat novels have sprung up. First came the Chinese novel *Harry Potter and the Leopard-Walk-Up-to-Dragon* in 2001, followed in quick succession by *Harry Potter and the Golden Turtle* and *Harry Potter and the Crystal Vase.* All of these novels were falsely attributed to Rowling (Pomfret A20). In Russia, Dmitry Yemets wrote *Tanya Grotter and the Magic Double Bass* followed by three sequels, which cumulatively sold over 500,000 copies in six months (Jury 13; Kisileva). In the first novel, the main character is a girl with glasses and a mole named Tanya Grotter who flies a large double bass and also goes to a boarding school for learning magic. Authors Ivan Mytko and Andrei Zhalevsky joined in with their Russian novel *Porri Grotter and the Stone Philosopher* (O'Flynn).

News of these novels' success was not received kindly back in Britain. Rowling responded to these upstarts with a vigorous legal campaign. Backed by lawyers from Time Warner, she sought to shut down the publishers of these books, which she claimed infringed upon her intellectual property rights. Rowling's legal team made considerable progress towards thwarting the faux *Potters.* Her first success came on October 29, 2002, when the Bashu Publishing House agreed to pay a local fine of $2,500 and immediately cease publication of the *Leopard-Walk-Up-to-Dragon* series (Pomfret A20). Rowling won her most decisive legal victory in April 2003, when a court in Amsterdam agreed to block the publication of 7,000 copies of Yemets' *Tanya Grotter,* claiming that the novels were an "infringement of Rowling's copyrights" (BBC News). Her success in these legal battles rested entirely upon local copyright legislation in these foreign countries. It is this dependence upon local legislation that originally prompted efforts to standardized copyrights on a global scale. As we will see, these efforts leave much to be desired.

FROM LOCAL COPYRIGHTS TO PROTECTING FREE TRADE

Local government provides the most basic level of intellectual property rights. In the United States, the Constitution explicitly makes provisions for intellectual property rights: "The Congress shall have the power … to promote the Progress for Science and useful Arts, by securing for a limited Times [sic] to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (US Const., art 1, sec. 8). The founding fathers intended to create an environment whereby artists and scientists could flourish without

worry of their work being immediately stolen. This is the foundation of all forms of intellectual property rights in the US, the most significant of which are comprised of patents and copyrights. Patents protect ideas, systems, concepts, and inventions, while copyrights protect specifically the expression of an idea in some artistic medium, such as books, films, or plays (Watal 207). Trademarks offer another, slightly different, form of legal protection. These are geared towards businesses and corporations and aim to secure names, logos, and labels for use only on their own products (Watal 1). For example, only Nike is allowed to sell T-shirts with swooshes on them. So for a novel, trademark law would regulate only the novel's covers, while copyright law would regulate everything in between.

Copyrights are much less powerful than often perceived. Copyrights protect only an author's creative expression, not his or her ideas (Watal 214). In other words, only the author's specific arrangement of words, musical notes, shapes, etc. is protected against unauthorized copying (WIPO 44). Furthermore, a copyright does not grant any monopoly over commercially viable ideas (Watal 207). Neither slogans nor titles are protected by copyrights (Wincor 10). Many are surprised to learn that copyrights require no formal registration. Although documenting the date of creation may be helpful in case of a legal battle, copyrights are automatically conferred to an author upon creation of a work (Wincor 10). This is the basic system of copyrights within the United States, but it is not necessarily the same in the rest of the world.

For much of history, copyright standards varied from country to country. For example, US and British copyright law included the concept of fair use, or as the British call it fair dealing, which allowed others to use copyrighted material for academic and certain other non-commercial uses (Wincor 11). Other nations had no concept of fair use. The length of copyright protection was and still is non-uniform. The US grants a copyright for the lifetime of an author plus fifty years, whereas Germany grants life plus seventy years (Wincor 10). Furthermore, for much of history there has been no uniform system for recognizing foreign copyrights.

Nations, particularly developing ones, have often relaxed or simply ignored foreign copyrights. Tim Wu, an international law professor at the University of Virginia, points out that the US refused to acknowledge foreign copyrights during its early years (Wu). At the time, the US had no literary industry of its own, and imported mostly British works without paying licensing fees. Conversely, more developed countries have worked hard to see that their own copyrights are upheld in foreign nations. In the late nineteenth century, nations began forming bilateral copyright treaties to uphold each

other's intellectual property rights (Wincor 12). This had the effect of opening up new markets for both parties. The bottom line is that as early as a century ago, copyrights were already being treated in terms of the economics of markets and trade agreements.

Bilateral treaties were cumbersome because a country needed a separate treaty with every other country with which it did business. Instead, countries began to form multilateral copyright agreements. The first such agreement was the Paris Convention for the Protection of Industrial Property of 1883; however, the most important treaty was the Berne Convention for the Protection of Literary and Artistic Works created three years later in 1886, and revised through 1971 (Watal 15). Berne mandates that member countries maintain a set of minimum standards regarding intellectual property legislation. Each country must enact legislation to protect all other countries' copyrights, for example (Berne, art. 5, sec. 1). These countries must maintain laws granting exclusive rights to copyright holders for a minimum of the life of the author plus fifty years (Berne, art. 7, sec. 1). The Berne convention still plays a major role today. In 1994, the General Agreement on Tariffs and Trade (GATT, soon to become the WTO) adopted the "Agreement on Trade-Related Aspects of Intellectual Property Rights," or TRIPS, which strictly enforces the first twenty articles of the Berne Convention (Watal 4; Arup 185; TRIPS, art. 9, sec. 1).

ONE TREATY TO RULE THEM ALL

TRIPS represents the most comprehensive effort to date to standardize copyright law across national boundaries. First, TRIPS is mandatory for all 146 member countries of the WTO and can be enforced through the WTO's dispute mechanisms (Watal 4). This is significant because, unlike the original Berne Convention, membership in the WTO has become a near-necessity for any modern nation. TRIPS dramatically increases minimum standards for intellectual property right legislation in as many as seven areas: copyright and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuits, and undisclosed information (Watal 3). In this new era of internationally regulated intellectual property rights, virtually all countries are bound to abide by the same minimum standards. Unfortunately, TRIPS *only* unifies the minimum standard.

Rowling reaped the benefits of this new landscape because TRIPS mandates uniformity for only the laws that work in Rowling's favor. The aforementioned Chinese novels committed blatant fraud and a clear violation of

trademark law as prescribed by TRIPS because they were falsely attributed to Rowling (Wu, personal communication). Her case against Dmitri Yemet's *Tanya Grotter* was more complicated. *Grotter* was not a trademark violation, did not claim Rowling's authorship, and avoided any direct mention of *Harry Potter.* At best, this was a copyright issue. Rowling sued the Russian Eksmo Company in a court in the Netherlands claiming violation of Dutch copyright law and infringement on one of the thirty-five formal copyrights she had filed with the Library of Congress (LOC). In an article in *Slate,* Tim Wu shows that, as members of the WTO, the Dutch are required to maintain legislation in accordance with Article 12 of the Berne Treaty. This article grants authors "the exclusive right of authorizing adaptations, arrangements and other alterations of their work" (Berne art. 12). Wu claims that this phrase has been interpreted to ban what he dubs "secondary authorship" (Slate; Wu, personal communication). *Tanya Grotter* is an instance of secondary authorship because, according to Wu, it borrows ideas but no actual content from *Harry Potter.* However, in a strict sense Article 12 does not appear to ban *Grotter* at all, since *Grotter* is neither an adaptation, a translation, an arrangement, nor an alteration. Those terms all imply using the original text. According to the World Intellectual Property Organization (WIPO), a branch of the United Nations, an "adaptation" results from moving a work from one medium to another, as when a film is made from a novel (WIPO 47). This all suggests that Rowling chose to file suit in the Netherlands because its laws exceed the minimum standards required by the TRIPS treaty. Indeed, TRIPS explicitly grants countries the right to make copyrights as powerful as they would like, and it appears that the Netherlands did just that. So while TRIPS purports to bring uniformity to international copyright law, in this case it specifically sanctions large discrepancies among countries.

TRIPS AN UNBALANCE

The first criticism of TRIPS is that it is a burden on member countries, especially developing nations. TRIPS forces member countries to enact legislation that grants minimum rights to copyright holders, regardless of the cost to the country (Watal 5). This may be a burden to developing countries, but more significant on a global scale is the degree to which TRIPS explicitly opens the door for countries to vest greater power in copyrights without limit. Article 19 of the Berne Convention, enforced by TRIPS, states: "The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of

the Union" (Berne art. 19). Translated into simple English, nothing in the treaty should ever deter a member country from vesting more power in copyright patents or trademark holders. In his article in *Slate,* Wu speaks critically of TRIPS as providing a minimum but no maximum. This is not only confusing because different countries can continue to maintain drastically different standards, it also sets the stage for powerful copyright holders to abuse the rights of non-copyright holders.

In US copyright law, there is an explicit declaration of rights for both copyright holders and non-copyright holders. Under Article 1 of the Constitution, Copyright holders are granted rights to exclusive control of their intellectual property, but after some period of time those rights are explicitly granted to non-copyright holders. The US goes one step further with the concept of fair use (United States Copyright Act, 17 USC 107) and provides that each non-copyright holder has the right to duplicate copyrighted material for certain activities, such as scholarly pursuits, VCR backups of TV recordings (United States Supreme Court, 464, US 417 1984), or parodies that significantly transform or add to the work (Stanford University, Ch. 9, sec. C). Under TRIPS, however, there is no such balance. In fact, Article 19 removes any cap on the rights of copyright holders. TRIPS raises the level of protection for copyright holders around the globe but does nothing to protect those copyrights from infringing upon others.

A cap on the rights of copyright holders is absolutely necessary, both to insure uniformity and to protect precedents from being set too far in favor of copyright holders. Even if it runs against a country's best interest, non-copyright holders should have some rights to copyrighted material, whether it is after a certain length of time or for certain specific uses. The idea is good enough for the US Constitution; it should be good enough for TRIPS.

FROM PLAYBOY TO POTTER

TRIPS also poses a serious threat to local cultures. In her article, *Extraterritoriality and Multiterritoriality in Copyright Infringement,* Columbia law professor Jane C. Ginsburg writes about how the current judicial system faces a new "Age of Globalism" (Ginsburg 599). Although she does not specifically address TRIPS, she does discuss international copyright cases that historically have pushed the envelope regarding international copyright law. Ginsburg presents a case study about trademark infringement; however, she points out that it may as well have been copyright infringement (Ginsburg 589). Furthermore, like the Harry Potter case, it is another instance of cul-

ture clash. She writes of an Italian publishing company owned by Enrico Tatillio that published an Italian magazine, *Playmen,* with content similar to the American magazine *Playboy*. *Playmen* only differs from *Playboy* in that it is written in Italian, features articles on Italian culture and images of Italian women, and was geared towards an Italian public. In 1981, *Playboy* sued the rogue *Playmen* in a number of countries within Europe, including Italy, to block its publication. *Playboy* won its case in several courts, but not within Italy. At that time, the Italian courts had laws in place which favored local content.

In this case, local governments were able to maintain laws that successfully protected local content. If *Playmen vs. Playboy* were to be tried today, TRIPS would require legislation that would almost certainly put *Playmen* out of business. *Potter* and *Playboy* taken together demonstrate the potential consequences of TRIPS' half-baked standards, which uniformly deprive countries of a local voice without granting them uniform rights.

The imbalance inherent in TRIPS is caused by its emphasis on free trade at the expense of other considerations. Businesses benefit from strong and restrictive copyright laws without limits. But as in many other areas regarding the expansion of markets, free trade comes at the cost of tradition and national heritage. For instance, Yemets views himself as an expert in Russian folklore and argues that *Tanya Grotter* is "a sort of Russian answer to Harry Potter" (Guttman A11). Viewed in this way, his novel adds a local voice to a wildly popular foreign trend. *Playmen* is likewise a local voice in response to another wildly popular foreign trend, namely American pornography. Taken in this context, the struggle between Tanya and Harry can be viewed as that of local voice fighting to adapt and counteract the large and powerful influence of Western culture.

COPYRIGHTS AND COPY CULTURES

Faced with the influx of foreign cultures and traditions, local groups are often forced to adapt and adopt what they can, making these new themes work within existing cultural frameworks. Local adaptations to homogenizing forces are one of the few ways for local traditions to prosper. *Tanya Grotter* was a success because it brought this local perspective to its readers. As nine-year-old Sasha told one reporter, "Tanya Grotter is a thousand times better than Harry Potter. Not only a thousand times, but a billion times because everything is so much more Russian" ("Harry Potter Creator Threatens to Sue Russian Publisher for Plagiarism").

Author George Ritzer coined the term McDonaldization to describe a growing trend towards Western consumerism (Ritzer 1). The *Harry Potter* franchise of books, films, and toys exhibits many of the characteristics that Ritzer identifies as traits of McDonaldization, namely marketing efficiency, identification with Western culture, and predictability. Like the fast-food giant, *Harry Potter* is a ubiquitous, immensely popular product universally identified with Western culture that carries with it Western social norms, which, in turn, have social implications. *Harry Potter,* like McDonald's, is also predictable. Regardless of which *Potter* book you chose, which country you are in, or through which medium you choose to experience Harry Potter (book, film, toy, or video game), you can always expect the same G-rated, wholesome entertainment with an added twist of good triumphing over evil. On the other hand, just as McDonald's is perceived as a threat to local culinary tradition, so too must Potter be perceived as a threat to other local children's tales.

When McDonald's enters a new country, however, there is often an exchange that takes place. McDonald's obviously must translate its menus and make its stores readable and accessible to a new audience. More importantly, local restaurants and cultures often adopt some aspects of McDonald's while still retaining traditional elements. In Moscow, there is a new fast-food chain in the McDonald's style that serves blini and salo—traditional lumps of pork fat and vodka. This is not unlike *Playmen*'s use of Italian culture or *Tanya Grotter*'s use of traditional Russian culture. To extend the metaphor, TRIPS rolls out the welcome mat for McDonald's while prohibiting local restaurants from adapting the fast-food style. Giving additional legal advantages to already powerful multinational enterprises simply does not seem fair.

CONCLUSION

The case for balance in international copyright law goes beyond just *Harry Potter;* local traditions need protection, too. *Tanya Grotter* abides by a strict interpretation of both TRIPS and Berne. The Dutch court that ruled in favor of Rowling went above and beyond what TRIPS required. The Netherlands should not be allowed to arbitrarily vest power in copyrights unchecked. It is up to the WTO to implement an upper limit on copyright protection. Without it, the pendulum of power swings too far in favor of the copyright holder at the expense of free expression and local traditions. At the very least, TRIPS needs to protect the rights of non-copyright holders to utilize common themes and trends infiltrating outward from the West. Implementing

the United States' or the British concept of fair use and fair dealing at the international level would be a good place to start. To protect local traditions and provide a voice to all, even TRIPS could benefit from a little Harry Potter wizardry. ◆

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