

## Harry Potter And The Case of the False Evidence The Times Tuesday 1<sup>st</sup> October 2002

A US federal judge sanctioned an author \$50,000 for submitting false evidence in proceedings against the publishers of the *Harry Potter* books by J.K Rowling. On 17 September 2002, Southern District of New York Judge Allen G Schwartz found 'by clear and convincing evidence' that the author Nancy Stouffer had perpetrated a fraud on the court by the submission of fraudulent documents as well as through untruthful testimony.

The action was unusual as the three plaintiffs - Scholastic (the US publishers,) Time Warner Entertainment (the film rights owner) and JK Rowling herself - were seeking a declaration that they had *not* infringed any of Stouffer's copyright or trademarks. Stouffer as defendant contended in a counterclaim that the plaintiffs were infringing her rights. Usually, it is the claimant who is actively alleging infringement against the defendant.

Nancy Stouffer had written a number of children's stories which she first attempted to publish in the 1980s. Stouffer claimed under the US Lanham Act that *Harry Potter* used various character names which she had created and this was likely to cause consumer confusion. The Lanham Act is the US trademark act that contains statutory provisions similar to the UK tort of passing off. As in the UK, an essential requirement for passing off is that the misrepresentation of the mark must cause confusion as to the origin of the goods.

A book by Stouffer entitled *The Legend of Rah and the Muggles* featured characters called 'muggles' who were tiny hairless creatures with elongated heads who live in a fictional post apocalyptic land. In *Harry Potter* a 'muggle' is simply a term used for ordinary humans with no magical powers. Whilst not deciding the point, the court expressed serious reservations as to

The judge concluded Stouffer had produced invoices for sales that had never occurred and an altered copy of an advertisement from the 1980s. Booklets produced by Stouffer titled 'Rah' had been altered after original printing to change the title to 'The Legend of Rah and the Muggles'. The

whether Stouffer had any trademark rights with respect to 'muggle' given the meager sales and business activities in respect of her work.

Further alleged confusion arose out of a colouring book version of a Stouffer story called *Larry Potter and His Best Friend Lily* which concerned a young boy who is sad because he has to wear glasses. In Rowling's books, Harry Potter's deceased mother is called Lilly. The court found that none of the evidence showed that Stouffer had ever used the name Lily Potter in her books and as the title indicated she was a friend of Larry Potter's and not a relative. Other than similar but non-identical names and the fact that both Harry Potter and Larry Potter were boys with glasses, Stouffer's booklet and Rowling's work had almost nothing in common.

Remaining claims of confusion included the name 'Nevils' (in Stouffer's work a group of muggles) and a Rowling character called Neville Longbottom; a character called Nimbus and Nimbus 2000 (a flying broomstick in Rowling's work); and a hawk that delivered food and an owl that delivered mail.

In granting summary judgment for the plaintiffs, the judge concluded that the similarities between Stouffer's books and the Harry Potter series were minimal and superficial. Even when considered together they could not give rise to a likelihood of confusion.

A copyright claim that the American cover illustrations for the Harry Potter books infringed Stouffer's rights in a Larry Potter illustration also failed. The court considered that the depiction of young boys with dark hair and glasses were generic elements which were not protectible. The original elements such as Larry Potter's facial features, the shape and colour of his glasses and the style and colour of his hair were not present in the Harry Potter illustrations.

plaintiffs adduced expert evidence that the additional words could not have appeared before 1991 because of the age of the printing technology used.

Litigation over rights in fictional characters is a fairly modern phenomenon borne out of developments in merchandising. The first

real success in the UK was as late as 1991 where an injunction was granted in respect of the Teenage Mutant Ninja Turtles. It is unsurprising that books successful as Harry Potter have been the target of allegations of trademark and copyright infringement. The value of intellectual property rights in such characters is enormous. More than a passing similarity is needed which protects authors from unfounded claims. However, this case stands as a warning to those who seek to adduce fabricated evidence. In the age of computer technology, it is much easier for experts to detect alterations to documents. Those who do so run the risk not only of being discovered but being found in contempt of court and being penalised accordingly.

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