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# Licensing Markets

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## Copyright Licensing

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### Court Holds That Unlicensed Children's "Kinderguides" of Classic Novels Violate Copyright Act

A US district court in New York recently held that child-focused literary guides infringed the copyrights in four famous novels, ruled that the guides did not qualify as fair use, and granted summary judgment in favor of the owners and exclusive licensees of the copyrights in the novels. In *Penguin Random House LLC v. Frederick Colting*, [2017 U.S. Dist. LEXIS 145852 (S.D.N.Y. Sept. 7, 2017)] the copyright owners and exclusive licensees of the copyrights in the renowned novels *Breakfast at Tiffany's*, *The Old Man and the Sea*, *On the Road*, and *2001: A Space Odyssey* sued Frederick Colting and Melissa Medina (d/b/a Moppet Books) over their publication of a series of children's books, called "Kinderguides," which contained—according to defendants—"condensed" and "simplified" versions of classic novels. Defendants' guides prominently displayed the name of the referenced novel, along with the word "Kinderguide" in large print on the covers. They contained a few dozen pages of "story summaries" in addition to a few pages

of story and character analysis and quiz questions. Defendants admitted that they relied on plaintiffs' works in preparing the guides. An established market exists for children's books based on popular adult novels, although plaintiffs had never licensed adaptations of novels at issue as children's books.

Plaintiffs claimed defendants' "guides" infringed both their right to reproduce and to create derivative works of their novels. In an initial decision dated July 28, 2017, and as more fully explained in a published order issued September 8, 2017, Judge Jed Rakoff of the US District Court for the Southern District of New York agreed with the plaintiffs, holding that the defendants' "adaptations" infringed plaintiffs' copyrights in the novels. In doing so, the court found that the abbreviation of plotlines were substantially similar to plaintiffs' novels, and that the addition of minimal supplemental material did not protect defendants' guides as fair use.

### Defendants' "Kinderguides" Were Substantially Similar to Plaintiffs' Novels

The court first held that the guides infringed plaintiffs' rights to reproduce and to exploit derivatives of their novels. After discussing various tests used to assess whether two works are substantially similar, the court found that

none were necessary in light of the fact that defendants explicitly based their guides on plaintiffs' novels. The court rejected as an "exercise in sophistry" defendants' argument that they had copied only unprotectable "fictional facts," that is, the characters and storylines within the novels. In doing so, the court observed that copyright protection is not limited to the literal text contained in the novels, but extends to the "made-up facts" about characters and events therein. The "facts" that defendants copied were protectable creative expression.

The court also rejected defendants' argument that the characters in plaintiffs' novels were unprotectable, finding that the characters at issue were sufficiently delineated so as to be original, and thus subject to protection. Defendants had copied not just the stock aspect of these characters, the court found, but also their distinctive features, further supporting a finding of infringement. Defendants' argument that the events described in the novels were unprotectable *scènes à faire* was similarly rejected as "absurd." The court noted that a defendant need not reproduce the same "feel" or effect as the original work, or include every plot twist or character, in order to be infringing, citing cases where unauthorized movie and television "guides" were held to infringe on the original work.

Turning to plaintiffs' claim that the guides infringed their right to create derivative works, the court identified the issue as whether the guides changed the copyrighted material in such a way that they no longer represent the original work of authorship. A subsequent work that merely recasts the original in a different medium is a derivative work that must be licensed from the copyright owner. Given that the majority of the guides merely

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retold the stories contained in the novels, albeit in an abridged, child-friendly format, the court held that the addition of a few pages of original analysis, quiz material, and author information did not change the purpose of the material. The guides were therefore unauthorized derivative works.

### **Defendants' Abridgement of Plots and Addition of Supplemental Material Was Not Sufficiently Transformative to Constitute Fair Use**

The court next addressed defendants' arguments that their guides constituted fair use of plaintiffs' novels. After observing that fair use does not protect the right of others to produce works that the original authors might choose to produce themselves, and that Congress granted to copyright holders and authors the exclusive right to produce and license derivative works, the court cast the question as whether defendants' children's guides more closely approximated the kind of use reserved by Congress to copyright holders or the sort of use Congress intended to allow others to exploit, that is, criticism or parody.

Defendants' argument that their abridgement of the stories told in the novels, removal of adult themes and addition of brief analysis was sufficiently transformative did not sway the court on the first fair-use factor; the purpose and character of the use. Rather, the court noted that abridgements typically were considered non-transformative derivative works. Nor did defendants' adaptations of the novels for a younger audience add any "new insights or

understandings" to make them sufficiently transformative. The court likewise rejected defendants' argument that the guides qualified as educational criticism or commentary, given that the extensive plot summaries simply retold the novels without any original insight. The addition of a few pages of quiz questions and analysis would not provide a "safe harbor" for an otherwise infringing work. As the court succinctly stated, "[f]air use is not a jacket to be worn over an otherwise infringing outfit."

Turning to the second fair use factor—the nature of the original work—the court observed that plaintiffs' fictional novels are entitled to strong protection under the Copyright Act, which weighs against a finding of fair use. Further, the third factor—the amount and substantiality of the portion of the copyrighted work used—likewise tilted in plaintiffs' favor; given that nearly the entirety of defendants' guides were devoted to retelling plaintiffs' copyrighted stories.

The court finally addressed the fourth fair-use factor—the effect of the use on the potential market for the copyrighted work. Although a market exists for child adaptations of literary works, plaintiffs had chosen not to market such adaptations of the novels at issue. That fact did not weigh in favor of fair use, the court explained, as "Congress did not provide a use-it-or-lose-it mechanism for copyright protection." In so holding, the court expressly rejected defendants' argument that, given plaintiffs' failure to license similar derivative works, the application of copyright protection served only to stifle the creation of new works that reference plaintiffs' novels. Likewise, the court declined defendants' invitation to apply one

standard when the plaintiff has licensed similar derivative works and another when it has not. Rather, the court reiterated the principle that the Copyright Act grants the same bundle of rights to copyright holders regardless of whether or not they have chosen to exploit those rights.

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