

09-2878-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



J.D. SALINGER, individually and as Trustee of the J.D. Salinger Literary Trust,
Plaintiff-Appellee,
—against—

FREDRIK COLTING, writing under the name John David California,
WINDUPBIRD PUBLISHING LTD., NICOTEXT A.B., and ABP, INC.,
doing business as SCB Distributors, Inc.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

MARCIA BETH PAUL
DAVIS WRIGHT TREMAINE LLP
1633 Broadway, 27th Floor
New York, New York 10019
(212) 489-8230
Attorneys for Plaintiff-Appellee

CORPORATE DISCLOSURE STATEMENT

Appellee J.D. Salinger is an individual. No publicly held corporations have an interest in The J.D. Salinger Literary Trust.

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iv
PRELIMINARY STATEMENT	1
COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
COUNTER-STATEMENT OF THE CASE.....	3
COUNTER-STATEMENT OF FACTS	5
<i>The Catcher in the Rye</i> and Holden	5
Salinger’s Protection of His Intellectual Property	6
Comparison of the Works	6
The Decision Below	11
COUNTER-STATEMENT OF STANDARD OF REVIEW	15
SUMMARY OF ARGUMENT	16
ARGUMENT	20
I. THE DISTRICT COURT APPLIED THE PROPER STANDARD ON PRELIMINARY INJUNCTION	20
II. THERE IS NO REASON TO DISTURB THE FINDING BELOW THAT SALINGER IS LIKELY TO SUCCEED ON THE MERITS.....	20
A. The District Court Properly Found That <i>60 Years</i> Infringes Salinger’s Copyright in the Holden Character	21
1. The Scope of Character Protection	22
2. Substantial Similarity of the Characters	25
B. <i>60 Years</i> is an Unauthorized Derivative.....	26
III. THE DISTRICT COURT CORRECTLY FOUND THAT <i>60</i> YEARS IS NOT A FAIR USE	28

A.	The Purpose and Character of the Use	29
1.	Transformative Use Generally	29
2.	Parody is a Form of Transformative Use.....	30
3.	The Distinction Between Parody and Other Transformative Uses	31
4.	The Sequel is Not a Parody	32
a.	No “Joinder of Reference and Ridicule”	32
b.	The Salinger Character Does Not Render the Sequel a Parody	35
5.	The Sequel is Not Otherwise Transformative.....	36
6.	The Commercial Nature of the Sequel Cuts Against Fair Use	40
7.	Defendants’ Bad Faith Cuts Against Fair Use.....	40
B.	The Nature of the Copyrighted Work	42
C.	The Amount and Substantiality of the Taking	42
D.	The Impact On the Actual Or Potential Market	45
IV.	THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION	48
A.	Balancing the Harm to the Parties	48
B.	The First Amendment Does Not Compel an Overhaul of This Circuit’s Copyright Jurisprudence	52
	CONCLUSION	58

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>ABKCO Music, Inc. v. Stellar Records, Inc.</i> , 96 F.3d 60 (2d Cir. 1996).....	48
<i>American Geophysical Union v. Texaco</i> , 60 F.3d 913 (2d Cir. 1995).....	16, 45
<i>Anderson v. Stallone</i> , 1989 U.S. Dist. LEXIS 11109 (C.D. Cal. 1989).....	27
<i>Bach v. Forever Living Prods. U.S., Inc.</i> , 473 F. Supp. 2d 1127 (W.D. Wash. 2007).....	22, 23
<i>Bill Graham Archives v. Dorling Kindersley Limited</i> , 448 F.3d 605 (2d Cir. 2006).....	38, 39, 40
<i>Blanch v. Koons</i> , 467 F.3d 244 (2d Cir. 2008).....	31, 39
<i>Bronx Household of Faith v. Board of Education</i> , 331 F.3d 342 (2d Cir. 2003).....	20
<i>Burroughs v. Metro-Goldwyn-Mayer, Inc.</i> , 519 F. Supp. 388 (S.D.N.Y. 1981), <i>aff'd</i> , 683 F.2d 610 (2d Cir. 1982).....	22
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	<i>passim</i>
<i>Castle Rock Entm't, Inc. v. Carol Pub. Group, Inc.</i> , 150 F.3d 132 (2d Cir. 1998).....	<i>passim</i>
<i>D.C. Comics Inc. v. Leo Reel Fantasy, Inc.</i> , 696 F.2d 24 (2d Cir. 1982).....	22
<i>Dastar Corporation v. Twentieth Century Fox</i> , 593 U.S. 23 (2003).....	41, 55
<i>Detective Comics, Inc. v. Bruns Publications, Inc.</i> , 111 F.2d 432 (2d Cir. 1940).....	22, 23, 25, 26

<i>Detective Comics, Inc. v. Fox Publications, Inc.</i> , 46 F. Supp. 872 (S.D.N.Y. 1942).....	22
<i>Doninger v. Niehoff</i> , 527 F.3d 41 (2d Cir. 2008).....	51
<i>Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.</i> , 109 F.3d 1394 (9th Cir. 1997).....	34, 41
<i>E. Gluck Corp. v. Rothenhaus</i> , 585 F. Supp. 2d 505 (S.D.N.Y. 2008).....	49
<i>eBay Inc. v. MercExchange, LLC</i> , 547 U.S. 388 (2006).....	19, 48, 49
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003).....	53, 55
<i>Filmvideo Releasing Corp. v. Hastings</i> , 509 F. Supp. 60 (S.D.N.Y.), <i>aff'd</i> , 668 F.2d 91 (2d Cir. 1981).....	22, 26
<i>Harper & Row v. Nation Enterprises</i> , 471 U.S. 539 (1985).....	<i>passim</i>
<i>Infinity Broad. Corp. v. Kirkwood</i> , 150 F.3d 104 (2d Cir. 1998).....	28
<i>International Dairy Foods Ass'n v. Amestoy</i> , 92 F.3d 67 (2d Cir. 1996).....	50
<i>Jorgensen v. Epic/Sony Records</i> , 351 F.3d 46 (2d Cir. 2003).....	20
<i>King Features Syndicated v. Fleischer</i> , 299 F. 533 (2d Cir. 1924).....	22
<i>Leibovitz v. Paramount Pictures Corporation</i> , 137 F.3d 109 (2d Cir. 1998).....	31, 33, 43
<i>Lennon v. Premise Media Corp., L.P.</i> , 556 F. Supp. 2d 310 (S.D.N.Y. 2008).....	49, 50, 51
<i>New Era Publ'n Int'l ApS v. Carol Publ'g Group</i> , 904 F.2d 152 (2d Cir. 1990).....	42

<i>Nichols v. Universal Pictures Corp.</i> , 45 F.2d 119 (2d Cir. 1930).....	22
<i>Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.</i> , 166 F.3d 65 (2d Cir.1999).....	52
<i>Norton v. Sam’s Club</i> , 145 F.3d 114 (2d Cir.1998).....	23
<i>NXIVM Corporation v. The Ross Institute</i> , 364 F.3d 471 (2d Cir. 2004).....	15, 16, 41
<i>On Davis v. The Gap, Inc.</i> , 246 F.3d 152 (2d Cir. 2001).....	40
<i>Pacific & Southern Co. v. Duncan</i> , 744 F.2d 1490 (11th Cir. 1984).....	52
<i>Rice v. Fox Broad. Co.</i> , 330 F.3d 1170 (2003).....	24
<i>Ringgold v. Black Entertainment Television, Inc.</i> , 126 F.3d 70 (2d Cir. 1997).....	39
<i>Rogers v. Koons</i> , 960 F.2d 301 (2d Cir. 1992).....	34, 43
<i>Salinger v. Random House Inc.</i> , 811 F.2d 90 (2d Cir. 1987).....	<i>passim</i>
<i>Sony v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	28, 40
<i>SunTrust Bank v. Houghton Mifflin</i> , 268 F.3d 1257 (11 th Cir. 2001).....	12, 17, 31, 34
<i>Time Warner Cable, Inc. v. DIRECTV, Inc.</i> , 497 F.3d 144 (2d Cir. 2007).....	49
<i>Twin Peaks Prods. v. Publications Intern., Ltd.</i> , 996 F.2d 1366 (2d Cir. 1993).....	39
<i>U.S. ex rel. Drake v. Norden Systems, Inc.</i> , 375 F.3d 248 (2d Cir. 2004).....	51

<i>Walt Disney Prods. v. Air Pirates</i> , 581 F.2d 751 (9th Cir. 1978).....	22, 24
<i>Warner Bros. Entertainment, Inc. v. RDR Books</i> , 575 F. Supp. 2d 513 (S.D.N.Y. 2008).....	48, 49
<i>Warner Bros. Inc. v. ABC, Inc.</i> , 720 F.2d 231 (2d Cir. 1983).....	22
<i>Warner Bros. Pictures v. CBS</i> , 216 F.2d 945 (9 th Cir. 1954).....	24
<i>Warner Bros. v. ABC</i> , 530 F. Supp.1187 (S.D.N.Y. 1982).....	23
<i>Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.</i> , 354 F.3d 112 (2d Cir. 2003).....	26
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977).....	55
<i>Wright v. Warner Books, Inc.</i> , 953 F.2d 731 (2d Cir. 1991).....	42
<i>Yurman Design, Inc. v. PAJ, Inc.</i> , 262 F.3d 101 (2d Cir. 2001).....	21

STATUTES

17 U.S.C. § 106	26
17 U.S.C. § 107	21

OTHER AUTHORITIES

<i>Nimmer on Copyright</i>	21, 22, 26, 48
Brandeis, Louis & Samuel Warren, <i>The Right to Privacy</i> , 4 <i>Harv. L. Rev.</i> 193 (1890)	47

Appellee J.D. Salinger (“Salinger”) respectfully requests that this Court affirm the Memorandum & Order, dated July 1, 2009, (the “Order”) of the court below, preliminarily enjoining defendants Fredrik Colting, writing as “John David California”, Windupbird Publishing Ltd., Nicotext A.B. and ABP, Inc., d/b/a SCB Distributors, Inc. from manufacturing, distributing, shipping, advertising, promoting, selling or otherwise disseminating the book *60 Years Later: Coming Through the Rye* (the “Sequel”) in or to the United States.

PRELIMINARY STATEMENT

Despite the media coverage, this is a straightforward case of copyright infringement arising from the upcoming U.S. publication of a book promoted, labeled and sold in England as an unabashed sequel to Salinger’s iconic work *The Catcher In The Rye* (“*Catcher*”). Defendants and *amici*¹ run roughshod over the facts and the existing law as articulated by the Supreme Court and this Circuit, proposing sweeping changes in the law and entirely new standards for granting a preliminary injunction in the circumstances posed here. But this is a case about two books, posing the question of whether one is substantially similar to the other and to its main character, and whether Salinger has carried his burden on preliminary injunction such that the *status quo* should be maintained pending trial.

¹ “*Times Br.*” refers to the *amicus* brief of *The New York Times*, The Associated Press, Tribune and Gannett. “*Stanford Br.*” refers to the *amicus* brief of the American Library Association, *et al.*; “*PC Br.*” refers to the *amicus* brief of Public Citizen.

This case is not a proper vehicle, particularly at this preliminary stage, to request wholesale changes in governing law that should be addressed to Congress. Reading the two books demonstrates beyond cavil that the court below was entirely correct in finding that this is not a case of fair use and in exercising discretion to grant the injunction. Consequently, this Court should affirm.

COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in issuing a preliminary injunction enjoining defendants from publishing a book they labeled as, and that is, a sequel to *Catcher*, based on findings that Salinger was likely to succeed on his claims that: that book infringed the fully delineated character of Holden Caulfield, the narrator of and the story being told in *Catcher*; the Sequel is an unauthorized derivative work; and Salinger would suffer irreparable injury unless the injunction issued?

2. Did the court below properly apply governing law to determine that a fully delineated character is entitled to protection under the copyright laws?

3. Given defendants' concessions that *Catcher* is protected by copyright, they had access, and the protagonist of the Sequel is Holden, is the finding of the court below that Salinger is likely to succeed in proving substantial similarity of those characters clearly erroneous?

4. Given copyright validity and access, is the finding of the court below

that Salinger is likely to succeed in proving that the Sequel is an unauthorized derivative clearly erroneous?

5. Did the court below properly conclude that defendants failed to carry their burden of proving that the Sequel was a fair use of either the Holden character or *Catcher*?

6. Did Salinger carry his burden of establishing irreparable injury?

7. Is there any reason to overturn longstanding law that a court may exercise discretion to preliminarily enjoin an as-yet-unpublished book in copyright infringement cases?

COUNTER-STATEMENT OF THE CASE

Salinger commenced this action on June 1, 2009, two weeks after learning that defendants planned to publish, on September 15, a self-styled “sequel” to *Catcher*. Plaintiff’s complaint alleges copyright infringement of both the character Holden and the novel, as well as common law unfair competition. A-26-29.² Plaintiff simultaneously moved, by order to show cause, for a preliminary injunction on its copyright claims preventing U.S. distribution of the Sequel. A-45-47. Defendants argued that the fair use defense precluded the grant of preliminary injunctive relief. They submitted six declarations, four of purported experts, addressing that defense. They did not request an evidentiary hearing. The

² “A-xxx” refers to pages of the Joint Appendix. “SPA-xxx” refers to pages of the Special Appendix.

Court denied plaintiff any reply on fair use, considered the parties' submissions, and heard argument on June 17.

At the hearing (SPA-3-18), Judge Batts held that plaintiff had made a *prima facie* showing of likelihood of success on his copyright claims, subject to the fair use defense. She found that the Holden character was sufficiently delineated to warrant copyright protection, the "Mr. C" character in the Sequel was substantially similar to Holden, and the Sequel itself was substantially similar to *Catcher* and therefore an unauthorized derivative work. SPA-8-9.

The Court issued a temporary restraining order (SPA-18) and on July 1 issued its comprehensive Order finding defendants had not sustained their burden of proving they were likely to prevail on fair use (SPA-27; SPA-62), and that Salinger would be irreparably harmed absent injunctive relief. The Court preliminarily enjoined distribution of the Sequel in the U.S. SPA-27; SPA-63. Defendants appeal from the Order,³ requesting that this Court overturn the well-reasoned decision of the court below.

³ By letter, defendants sought a \$500,000 bond as security against damages caused by an improvidently granted injunction. A-647-48. Defendants did not seek a hearing, introduced no admissible evidence, and did not specify any prospective monetary injury. *Id.* Plaintiff opposed this request. A-649-651. Finding no harm could flow from an improvident grant in this case, the Court declined to issue a bond. SPA-64. Defendants appeal the denial of a bond (App. Br. 6), but do not substantively address that decision in their brief.

COUNTER-STATEMENT OF FACTS

The Catcher in the Rye and Holden

Catcher is the story of Holden Caulfield, a disaffected 16-year old who, expelled from his prep school prior to Christmas, impulsively decides to hang out in New York City for a few days before returning to his parents' home. He meets people both new and old, wandering from encounter to encounter, never sure what to do with himself, constantly drawn back to Central Park. His adventures end when he finally encounters the one person he trusts and enjoys being with: his sister Phoebe. *Catcher* is narrated by Holden in the first-person, using, as *The New York Times* explained, his "own strange, wonderful language...". A-206.

Catcher became a commercial and critical success soon after its 1951 release, and has sold over 35 million copies worldwide. A-116-17. In a category with only few other books, it is a perennial presence on required reading lists. A-116-17. Praise for the novel has been extraordinary and sustained. A-117. Holden has his own place in American culture as the prototype of the angst-filled, cynical teen coming into his own. A-240; A-243; A-245; A-247. *Catcher* and Holden have been the subject of literally reams of criticism and comment. A-187-221; A-516-75. Salinger registered and duly renewed *Catcher* with the U.S. Copyright Office. A-21.

Salinger's Protection of His Intellectual Property

After *Catcher*, Salinger published four more books, the last in 1965. Salinger has not, however, published a new work since 1965, nor created or authorized any new narrative for Holden or works derivative of *Catcher*, since *Catcher*'s release. A-119. This is no accident: for over fifty years, Salinger has been fiercely protective of his intellectual property and privacy and has litigated when necessary to protect those rights. A-119-20. Other than a 1949 film of an early short story, Salinger has never permitted adaptations of his works. Numerous filmmakers – including Steven Spielberg – have sought to make a film version of *Catcher*; Salinger has always declined. *Id.* As he said in 1980:

There's no more to Holden Caulfield. Read the book again. It's all there. Holden Caulfield is only a frozen moment in time.

A-249.

Comparison of the Works

Defendants expressly labeled *60 Years* as a “sequel to one of our most beloved classics”. Sequel, back cover.⁴ The cover identifies “John David California” as author, and every other page features the name “JD California” on top. The protagonist is “Mr. C.” Its subtitle is “Coming Through the Rye”. Nonetheless, Colting did not seek or obtain Salinger's permission before

⁴ Page numbers of *Catcher* and the Sequel cited herein refer to actual page numbers therein.

publishing. A-115. *The Sequel*, first published in England on May 9, can be purchased in the U.K. through stores and online. Copies are available in the U.S. on eBay and, prior to this action, could be pre-ordered for a September 15 on-sale date from Amazon.com and defendant SCB. A-124.

Defendant Colting has unabashedly promoted *60 Years* as a sequel: “Just like the first novel, he leaves, but this time he’s not at a prep school, he’s at a retirement home in upstate New York” (A-250); “It’s pretty much like the first book in that he roams around the city, inside himself and his past” (A-250-51). *See also* A-267 (“[Colting] has said in various statements to the media that he was inspired to create a second half of the story, because he’d ‘always wondered what happened’”).

The Sequel, like *Catcher*, is told as a first-person narrative from Holden’s point of view; Holden is omnipresent. It makes use of every aspect of Holden’s character. “Mr. C” has *memories* of the events from *Catcher* and explicitly references them:

- “I close my eyes and try to think about the last time I left for New York”. *Sequel*, 60.
- “It was a chilly day. I remember because someone had swiped my brand new leather gloves directly from my coat pocket, and I was freezing my goddamned fingers off”. 60.
- “I just wanted Stradlater to be the way I remembered him, an arrogant shit just for a minute or so, to make the world seem familiar again”. 93.

- “Remember? I used to be on the fencing team”. 96.
- “There was this one time I ran into this bloody gorilla called Maurice at this crummy hotel...”. 106.
- “Remember when you gave me your Christmas money so I could run away to California?” 251.
- “It’s all the same horses, the same ones they had 60 years ago. I even remember the one Phoebe was on that day I was watching from the ground below,...”. 266.

A multitude of other elements appropriated from *Catcher* are listed at A-52-110.

Holden in the Sequel has the same acquaintances as *Catcher*’s Holden. He has a sister Phoebe (Sequel, 22, 49, *et al.*), a deceased brother Allie (126, 127, *et al.*) and a brother D.B. (13-14, 130). His high school roommate is still Stradlater (90-93, *et al.*), and his history teacher is Mr. Spencer (28-29, *et al.*). Their defining details are the same: Holden’s mother is always nervous (*Catcher*, 107, 158; Sequel, 127-128) and he still thinks D.B. was a sellout. *Catcher*, 2, 80; Sequel, 13-14.

Holden is out of shape, as in *Catcher* (*Catcher*, 5, 29; Sequel, 11-12); he speaks in the “Holdenese” described by *The New York Times* – or an imitation of it. He may have aged but neither his tone nor vocabulary has changed: there are constant uses of words like “phony” (*Catcher*, 3, 9, *et al.*; Sequel, 55, 56, 75), “crummy/crumby” (*Catcher*, 23, 24, *et al.*; Sequel, 24, 25, *et al.*), “lousy” (*Catcher*, 1, 9, *et al.*; Sequel, 24, 68, *et al.*), “hell” (*Catcher*, 2, 4, *et al.*; Sequel, 17, 19, *et al.*), and “bastard” (*Catcher*, 13-14, 17, *et al.*; Sequel, 44, 67, *et al.*). Things that Holden

likes still “kill” him, especially his sister. (*Catcher*, 2, 17, 47, *et al.*; *Sequel*, 57, 69, *et al.*) He speaks in short, choppy sentences and thinks/narrates in stream of consciousness. Just as in *Catcher* (16, 56, *et al.*), he often lies, noting in the *Sequel* that “I don’t really know why I lie, it’s been that way all my life. *Sequel*, 244.

Mr. C also constantly digresses, so, as in *Catcher*, many of the incidents described take place in flashback. As in *Catcher*, he speaks directly to and “levels” with the reader: “To tell you the truth, I’m not really too keen on this voice of mine...”. *Sequel*, 33. (Cf. “If you want to know the truth,...”. *Catcher*, 92.) Holden has the same fixations he had in *Catcher*, such as wondering where the ducks in Central Park go when the water freezes (*Catcher*, 13, *et al.*; *Sequel*, 252). As another example:

<u><i>Catcher</i></u>	<u><i>Sequel</i></u>
[O]ld Spencer had on this very sad, ratty old bathrobe I don’t much like to see old guys in their pajamas and bathrobes anyway. Their bumpy old chests are always showing. (7.)	Even so, when I get as old as Mr. Spencer, I will still never walk around in nothing but a crummy robe showing the whole goddamned world my wrinkled chest. (29.)

Holden also has many of the same adventures as his younger self. As in *Catcher*, Mr. C spends a few days roaming New York, trying to find himself before finally ending up institutionalized. As in *Catcher*, he goes from encounter to encounter with no explicit goal, reconnecting with people from his past until finally finding happiness with Phoebe. His first stop is a phone booth (*Catcher*,

59; Sequel, 86); goes to Central Park many times (*Catcher*, 116, 118, 153, 208; Sequel, 74-75, 99, 155, 189, 263); takes a bus to midtown (120); takes a cab to Battery Park (125); takes long walks (*Catcher*, 113; Sequel, 145, 174); goes ice skating (*Catcher*, 128; Sequel, 264); gets punched on the shoulder by Stradlater (*Catcher*, 43; Sequel, 95); combs his hair with his hand (*Catcher*, 6, 9; Sequel, 31); has a red hunting cap (*Catcher*, 17, 21, *et al.*; Sequel, 130, 153); chickens out of having sex with a woman (*Catcher*, 96; Sequel, 180) who comes back with another man (*Catcher*, 100-101; Sequel, 181); Phoebe worries her parents will be angry Holden was expelled (*Catcher*, 165; Sequel, 251); and in the final scene, Phoebe rides the carousel in Central Park (*Catcher*, 210-211; Sequel, 266-267).

As in *Catcher*, Holden is in over his head, risking physical harm twice. (*Catcher*, 43, 103; Sequel, 107.) Even in such mundane detail as not being able to find a light switch at night and stepping on things, the Sequel copies *Catcher*. (*Catcher*, 46; Sequel, 12.)

And even in its literal expression, the Sequel copies *Catcher*. *E.g.*, Salinger wrote:

I'll just tell you about this madman stuff that happened to me around last Christmas just before I got pretty run-down and had to come out here and take it easy.

Catcher, 1. The Sequel states:

I ... think about all the madcap stuff that happened to me around last Christmas, before I got so run down I had to come out to this place to rest.

Sequel, 24.

The Decision Below

The court below found that both *Catcher* and the Holden character are protected by copyright, and that defendants had access. SPA-1-9; SPA-28. Recognizing that the proper test for protectability of characters is whether a character is “sufficiently... delineated” (SPA-6), it found:

Holden Caulfield is quite delineated by word. It is a portrait by words. It is something that is obviously seen to be of value since the effort is made [by defendants] to recall everything that the character in the book does.... It is difficult, in fact, to separate Holden Caulfield from the book.

SPA-8. The Court noted many similarities in copyrightable expression between Holden and “Mr. C” (SPA-7) and that defendants admitted Mr. C “is Holden Caulfield or based on Holden Caulfield...”. SPA-6-7. It concluded that “there is substantial similarity between *Catcher* and *60 Years*, as well as between the character Holden from *Catcher*, and the character Mr. C from *60 Years*, such that it was an unauthorized infringement of plaintiff’s copyright”. SPA-28. The Court thereafter rejected defendants’ fair use defense after considering expert submissions (SPA-29), considering each of the four fair use factors, and finding that individually and in the aggregate, they weighed against fair use (SPA-30-62).

The court rejected defendants' claim that *60 Years* is a parody. It acknowledged the right of a parodist to "quote from existing material", and correctly identified the standard as whether the work's "parodic character may reasonably be perceived". SPA-35. Contrasting the facts here with those in *SunTrust Bank v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001), it found that:

the factual finding of parody is what truly sets *TWDG* apart from *60 Years* because the Court here cannot make the same factual finding.... *60 Years*, however, contains no reasonably discernable rejoinder or specific criticism of any character or theme of *Catcher*.

SPA-37. Noting that much of the supposed parodic nature of the Sequel stemmed from Holden aging, the Court noted "[i]t is hardly parodic to repeat that same exercise in contrast, just because society and the characters have aged". SPA-40. And the points the Sequel was supposedly making (*e.g.*, that Holden is "miserable" and "unconnected") were the very points already made in *Catcher*. SPA-38-42. The Court also rejected defendants' contention that the Sequel is a parody of Salinger and his supposed idiosyncrasies, noting that any such criticism is not directed toward *Catcher* or Holden. SPA-43-45.

The court recognized *Campbell's* admonition that "an artist or author need not label their whole work... a parody in order to claim fair use protection", but also recognized that "courts must take care to ensure that not just any commercial takeoff is rationalized *post hoc* as a parody" and found the Sequel falls into

precisely this latter category. SPA-42. Colting’s alleged critical purpose in writing it “is problematic and lacking in credibility”. SPA-38.

The court considered whether the Sequel was otherwise transformative (SPA-45-49), rejecting the argument that it “accentuate[s] and comment[s] upon Holden Caulfield’s naïveté, depression, loneliness, absurdity, and inability to grow and mature as a person”, since this simply repeats what *Catcher* does, without critique. SPA-46. Also unavailing was the fact that Holden is older: “just because a work ‘recast[s], transform[s], or adapt[s]... an original work into a new mode of presentation,’... does not make the work ‘transformative’ in the sense of the first fair use factor...”. *Id.* (citing *Castle Rock Entm’t, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132 (2d Cir. 1998)). As to inserting Salinger as a character, although a “minor or supporting character may... add transformative value to a work” (SPA-47), the Sequel took far more than it transformed:

60 Years borrows quite extensively from *Catcher*, both substantively and stylistically, such that, when combined with the inconsistent use of the transformative element of the character of Salinger, the ratio of the borrowed to the novel elements is quite high, and its transformative character is diminished.

SPA-48. The Court also found the Sequel served a commercial purpose, which weighed against fair use. SPA-49.

The second factor also weighs against fair use because “there is no question that... [*Catcher*] is a “creative expression ... [that] falls within the core of the copyright’s protective purposes...”. SPA-49-50.

The court carefully parsed the third factor:

Defendants have taken well more from *Catcher*, in both substance and style, than is necessary for the alleged transformative purpose of criticizing Salinger and his attitudes and behavior.

SPA-50-51. With respect to the character, it found that:

Mr. C has similar or identical thoughts, memories, and personality traits to Caulfield, often using precisely the same or only slightly modified language from that used by Caulfield in *Catcher*, and has the same friends and family as Caulfield.

SPA-51. While a parodist might be permitted to use these details to “conjure up” Holden, for the transformative purpose of commenting on Salinger, Colting took far too much. SPA-51-52. Comparing the novels, the Sequel “depends upon similar and sometimes nearly identical supporting characters, settings, tone, and plot devices to create a narrative that largely mirrors that of *Catcher*”. SPA-52. The Court catalogues detail after detail, borrowed from *Catcher* by the Sequel, for six full pages of the Order (SPA-52-57), concluding:

While some allusion and reference to *Catcher* would certainly have been necessary for Colting’s purpose of critiquing Salinger,... the ratio of the “borrowed to the new elements” in 60 Years is unnecessarily high.

SPA-56-57. Thus, “the third factor weighs heavily against a finding of fair use”. SPA-58.

Turning to the fourth factor analysis, while defendants indicated they will not label their novel a “sequel” in the U.S., it is nonetheless “a novel that continues the story of *Catcher* and its protagonist...” and thus “is the kind of work that an author would ‘in general’ develop or license others to develop....” SPA-59. That Salinger has not demonstrated any interest in publishing a sequel matters not, as “it is the ‘potential market’ for the copyrighted work and its derivatives that must be examined”. SPA-60-61. The court considered “whether unrestricted and widespread conduct of the sort engaged in by the defendant... would result in a substantially adverse impact on the potential market for the original”. SPA-58-60. Since publication could harm the potential market for derivatives, the fourth factor weighed slightly against fair use. SPA-61.

As Salinger established a *prima facie* case, the court, applying Second Circuit precedent, found a presumption of irreparable harm, and issued the injunction. SPA-62.

COUNTER-STATEMENT OF STANDARD OF REVIEW

Appellants are correct that “[a]n appeal from the issuance of a preliminary injunction is reviewed for abuse of discretion”. App. Br. 22; *See, e.g., NXIVM Corporation v. The Ross Institute*, 364 F.3d 471, 476 (2d Cir. 2004); *Salinger v.*

Random House Inc., 811 F.2d 90, 94 (2d Cir. 1987). The district court’s finding of substantial similarity and conclusions on fair use are, on the other hand, reviewed *de novo*. Yet as appellants concede, *de novo* review is appropriate only to the extent comparison of the works does not rely on “credibility of witnesses or other evidence only for the fact finder”. App. Br. 22-23. Similarly, in the fair use context, “this Court accept[s] [the district court’s] subsidiary findings of fact unless clearly erroneous”. *American Geophysical Union v. Texaco*, 60 F.3d 913, 918 (2d Cir. 1995). Consequently, findings regarding Mr. Colting’s credibility and defendants’ experts’ declarations should be given deference.

Defendants suggest this Court should “make an independent examination of the whole record” because “of the unique First Amendment freedoms at stake”. App. Br. 22. None of the cases they cite arise under copyright law. Rather, this Court’s decisions, including *NXIVM* and *Salinger v. Random House*, have applied the “clearly erroneous” standard in copyright cases exactly like this one.

SUMMARY OF ARGUMENT

In apparent recognition that the court below applied governing law and exercised its discretion appropriately to issue the injunction, appellants and *amici* advocate for changes in that law.

Given copyright validity and access, the burden Salinger carried below was to prove substantial similarity on claims for character infringement and creation of

an unauthorized derivative. Despite conceding below that Mr. C is Holden and notwithstanding multiple expressive similarities between the characters, defendants maintain, without supporting authority, that protection can only exist for visually depicted characters who appear in more than one work. One *amicus* even argues there should be no copyright protection for characters at all. But the very law defendants cite establishes such protection exists and that defendants' proffered limitations have no basis under law or policy. They also posit that although Mr. C and Holden are the same, the many similarities between them are not in protectible expression. As detailed above, that is not the case. These expressive similarities constitute the requisite substantial similarity to render the Sequel an unauthorized derivative.

The only real issue in this case is whether the literary conceit of injecting the Salinger character, who plays a role in approximately 6% of what is otherwise a retelling of *Catcher*, is enough to render the Sequel a parody or otherwise transformative, such that the statutory fair use factors justify the vast amount of taking here both quantitatively and qualitatively.

As the court below found, in stark contrast to *The Wind Done Gone* (analyzed in *SunTrust*), the Sequel is not a parody. Defendants advocate adopting the position that all parody is criticism and all criticism parody. That is not the law in this Circuit, or as the Supreme Court expounded it in *Campbell*. *Campbell*

makes clear that to be a parody, there must be a “joinder of reference and ridicule”. Neither the Salinger character, nor anything in the narrative he provides, ridicules either Holden or *Catcher* or, for that matter, in the context of the “transformative use” analysis, comments upon either of them. If that character criticizes anything, it is Salinger.

In this case, the statutory fair use factors overlap a good deal. Even assuming *arguendo* the injection of the Salinger character serves some limited transformative purpose (the first factor), defendants bear the burden of establishing that they have transformed what they have taken, or, assuming *arguendo* some parodic character, that they have not taken more than necessary to serve the parodic purpose (the third factor). Given how little if anything has been transformed, the Sequel takes far too much under either standard. Although no plagiarist can escape a charge of copying by pointing to how much of his work does not copy expression from the original (the third factor), the qualitative and quantitative role of the pirated expression in the secondary work is relevant to the question of whether it is transformative (the first factor). To read appellants brief, one would think that this Sequel is about Salinger, not about Mr. C, but reading it demonstrates otherwise. Next, while *Catcher* is clearly at the core of copyright protection (the second factor), the more transformative the allegedly infringing work (the first factor), the less that factor matters. Again, given minimal if any

transformation, the second factor favors Salinger. And finally, the more transformative (the first factor), the less likely an impact on the actual or potential markets (the fourth factor). Here, Colting's book is not remotely parody or literary criticism, but is a sequel, the very kind of derivative work Salinger could write or license.

Courts in this Circuit have long presumed irreparable injury in copyright cases and, notwithstanding *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006), abolishing that presumption in patent cases, have continued to do so. Patent cases are distinguishable because the patent statute mandates issuance of an injunction if irreparable harm is established. The copyright statute expressly gives courts discretion whether to issue injunctions, even in the face of irreparable harm. And Salinger did not rest on the presumption of irreparable harm: the right *not* to authorize derivatives implicates exactly the kind of harm that courts have long characterized as irreparable.

Defendants below offered no evidence whatsoever, just vague generalizations, of any harm that could befall them if the injunction were granted. Attempting to fill that gap, appellants and *amici* warn of the consequences of “banning” books, and seek a complete overhaul of copyright jurisprudence to prevent that. The idea/expression dichotomy and fair use defense have long been considered, and are, ample protection for First Amendment interests in copyright

cases. Particularly at a preliminary injunction stage, where the record is not fully developed; potential harm to plaintiff is irreparable; and an injunction would do no more than preserve the *status quo*; this argument is misplaced.

For all of the above reasons and as explained more fully below, the judgment of the court below should be affirmed.

ARGUMENT

I.

THE DISTRICT COURT APPLIED THE PROPER STANDARD ON PRELIMINARY INJUNCTION

As the district court properly held (SPA-29), to obtain preliminary injunctive relief under F.R.C.P. Rule 65, plaintiff must demonstrate either a likelihood of success on the merits and irreparable injury or, alternatively, serious questions going to the merits sufficient to make them fair ground for litigation, irreparable injury, and a balance of hardships tipping decidedly in plaintiff's favor. *Bronx Household of Faith v. Board of Education*, 331 F.3d 342, 348-49 (2d Cir. 2003). While the preliminary injunction was issued under the first prong (SPA-62-63), Salinger has carried his burden under *either* prong.

II.

THERE IS NO REASON TO DISTURB THE FINDING BELOW THAT SALINGER IS LIKELY TO SUCCEED ON THE MERITS

To state a claim for copyright infringement, Salinger must show (i) "ownership of a valid copyright" and (ii) "unauthorized copying of the copyrighted work". *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003). To show

unauthorized copying, plaintiff must demonstrate, usually under the “ordinary observer” test, that (a) “defendant has actually copied the plaintiff’s work”, and (b) “copying is illegal because substantial similarity exists between the defendant’s work and the protectable elements of plaintiff’s”. *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 110 (2d Cir. 2001). Courts in this Circuit also compare the “total concept and feel” of the works, which, in the context of literary works, largely mirrors what *Nimmer* refers to as “comprehensive non-literal similarity”. 4 *Nimmer on Copyright* (“*Nimmer*”), § 13.03[A][1] at 13-36.

Appellants admit Salinger owns a valid copyright in *Catcher*, and access. SPA-28; A-31-34. Salinger’s burden below was to demonstrate likelihood of success on his claim that Holden has been infringed by the character of Mr. C *or* that the Sequel is an unauthorized derivative. Defendants bore the burden of proof on the fair use defense. 17 U.S.C. § 107.

A. The District Court Properly Found That *60 Years* Infringes Salinger’s Copyright in the Holden Character

By using Holden, appellants infringe Salinger’s copyright in that character, independent of infringement of the novel. So long as the character appropriated was distinctively delineated in plaintiff’s work, and that delineation has been

copied, a claim for infringement will lie. 1 *Nimmer*, § 2.12, p. 2-178.25; *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).⁵

1. The Scope of Character Protection

As noted in *Warner Bros. Inc. v. ABC, Inc.*, 720 F.2d 231 (2d Cir. 1983), in deciding whether one character is substantially similar to another, courts consider the totality of the characters' attributes and traits, examining the extent to which the allegedly infringing character captures the "total concept and feel" of the copyrighted character. "The character is an aggregation of the particular talents and traits his creator selected for him. That each one may be an idea does not diminish the expressive aspect of the combination". *Id.* at 243.

Holden is extremely well delineated in *Catcher*; as the district court said, Salinger painted "a portrait by words". SPA-8. Holden is far from a stock character; Salinger's portrait is lush with detail about Holden's home, schooling, family, friends, attire, mannerisms, vocabulary, propensity to lie, preoccupations, *etc.* As noted below, it is this very delineation that made appellants want to use Holden in the first place. SPA-6.

⁵ See also *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (Mickey Mouse); *Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1127, 1136 (W.D. Wash. 2007) (Jonathan Livingston Seagull); *D.C. Comics Inc. v. Leo Reel Fantasy, Inc.*, 696 F.2d 24 (2d Cir. 1982) (Batman); *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F.2d 432 (2d Cir. 1940) (Superman); *King Features Syndicated v. Fleischer*, 299 F. 533 (2d Cir. 1924) (Barney Google); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982) (Tarzan); *Filmvideo Releasing Corp. v. Hastings*, 509 F. Supp. 60 (S.D.N.Y.), *aff'd*, 668 F.2d 91 (2d Cir. 1981) (Hopalong Cassidy); *Detective Comics, Inc. v. Fox Publications, Inc.*, 46 F. Supp. 872 (S.D.N.Y. 1942) (Superman).

Appellants claim that no case in this Circuit has extended copyright protection to “a literary character appearing in only a single work” (App. Br. 33-34), but do not develop any argument based on this. *Norton v. Sam’s Club*, 145 F.3d 114, 117 (2d Cir. 1998) (waiving “issues not sufficiently argued in the briefs”). They quote *Warner Bros. v. ABC*, 530 F. Supp. 1187, 1193 (S.D.N.Y. 1982), as saying that because of visual depictions, “Superman is more readily protectible than he would be had he been merely a word portrait”. App. Br. 34. But this makes clear that word portraits are protectible, if less “readily” so. In fact, in *Detective Comics*, this Court found Superman to be protected with reference to his descriptive characteristics only. 111 F.2d at 433. *See also Bach*, 473 F. Supp. 2d at 1136 (copyright protection for literary character Jonathan Livingston Seagull). Similarly, while the number of works a character appears in may influence how delineated a character is, it is not a line in the sand demarking the scope of protection. In any event, Holden appears in several Salinger works. A-118.

Amicus PC poses far more sweeping arguments. While acknowledging precedents according copyright protection to characters (PC Br. 6-9), it urges this Court to change the law and refuse to accord any such protection, principally based upon a tortured construction of the idea/expression dichotomy. PC argues defendants have taken only the “idea” of Holden, but, as detailed above, it is the

particular expression of that character that they have appropriated. Without saying they have even read the Sequel, PC complains that Judge Batts impermissibly compared the “idea” of Holden in the two books (*id.* 10), but her opinion shows that she detailed and compared the expressive elements of the characters as they appear in the works (SPA-6-7; SPA-50-58).

Amicus PC cites the 1954 Ninth Circuit decision in *Warner Bros. Pictures v. CBS*, 216 F.2d 945, 950, holding that a literary character (there, Sam Spade) cannot be the subject of independent copyright protection unless he is “the story being told”. First, the Ninth Circuit no longer follows that rule. *Walt Disney*, 581 F.2d at 755-57; *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175-76 (2003). Ironically, even under the Sam Spade rationale, since Holden *is* “the story being told” in *Catcher*, he qualifies.

Amicus PC sees no countervailing benefit to according protection to literary characters because “[i]t is implausible that any author would forego writing the work of literature out of fear that ... it might become a point of departure for other works”. PC Br. 20. Calling defendants’ use of Holden here merely a “point of departure” is an understatement indeed. The real issue is not fear that an author would forego *writing*, but *publication*, as it is, after all, the public interest in *dissemination* of copyrighted works that PC aims to serve. As to “implausibility”, one need look no further than plaintiff, who has not *published* since 1965 out of

just such fear (as defendants would have it). Accepting PC's position would grant a compulsory license to use copyrightable expression in the form of fully delineated characters in totally distinct plots (unlike the situation here) without even paying the customary price. That is not and cannot be the law.

2. Substantial Similarity of the Characters

There should be no real issue here with regard to substantial similarity because Colting, defendants' experts, and their attorneys have all acknowledged that Mr. C *is* Holden. A-340 (Spoo); A-362 (Woodmansee); A-251 (Colting); SPA-6-7 (counsel). Nonetheless, defendants maintain that “[w]ith the exception of certain common words, phrases, and mannerisms (‘phony’, ‘crumby’ ‘I really don’t’), the portrait of Mr. C in *60YL* does not draw upon any physical characteristics, particular speeches or thoughts of Holden in *CITR*”. App. Br. 34-35. That there are significant similarities of expression between Mr. C and Holden is clear from the findings below and defendants' admissions.

Almost 70 years ago, in *Detective Comics*, this Court found that “Wonderman” infringed on the character rights of “Superman” because the “attributes and antics” of both were similar: they could stop bullets; leap long distances; and had super strength. 111 F.2d at 433. The Court rejected the argument that these attributes were too generic for protection: “[w]e think it plain that the defendants have used more than general types and ideas and have

appropriated the pictorial and literary details embodied in the complainant's copyrights" (*id.*) and found infringement without reference to the stories in which Wonderman was featured. *Id.* at 432. *See also Filmvideo Releasing*, 509 F. Supp. at 66 ("use of Hopalong Cassidy characters would constitute infringement "irrespective and independent of the similarity of the story line").

B. 60 Years is an Unauthorized Derivative

The right to make and authorize others to make derivative works is one of the exclusive § 106 rights. A derivative is defined as "a work based upon one or more pre-existing works... [including] any... form in which a work may be recast or adapted." In this Circuit, a work is derivative if it substantially copies expression from a prior work. 1 *Nimmer*, § 3.01, p. 3-3; *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 354 F.3d 112, 117 (2d Cir. 2003). While there is some fragmented literal similarity and close paraphrase here (A-76-110),⁶ Salinger's derivative work claim rests principally on the omnipresence of the central character; on *Nimmer's* "comprehensive non-literal similarity" test, which examines whether there has been a taking of the fundamental essence or structure

⁶ *E.g.*, "I remember around three o'clock that afternoon I was standing way the hell up on top of Thomsen Hill, right next to this crazy cannon that was in the Revolutionary War and all... The other reason I *wasn't* down at the game was because I was on my way to say good-bye to old Spencer, my history teacher" (*Catcher*, 3) became "I was standing on a hill watching the soccer game being played below. Next to me stood an old cannon, massive and black as tar, and ^{the} players looked tiny from where I was standing. I was really on my way to say goodbye to an old acquaintance, but I stopped on the way to smoke a cigarette and watch the players for a minute" (*Sequel*, 60).

of a work; and/or the “total concept and feel” test, which, in the context of literary works, collapses into the same analysis, *i.e.*, a comparison of characters, narrative, plot, tone, setting, and the like.

Given that *Catcher* is really the story of Holden, the taking of his character alone renders the Sequel derivative. That conclusion is illustrated by *Anderson v. Stallone*, 1989 U.S. Dist. LEXIS 11109 (C.D. Cal. 1989), where characters in the *Rocky* movies were held sufficiently delineated for protection, and the treatment for a sequel was a derivative work because main characters from prior *Rocky* films were in it, and it built upon their experiences and relationships in those films.

But Salinger’s derivative work claim does not rest solely on use of the Holden character. Defendants have also: (i) taken other characters; (ii) adopted the tone, including word choice, sentence structure, voice and use of digressions; (iii) copied the overall plot structure; (iv) repeated specific incidents; and (v) appropriated events from *Catcher* as expressed by Salinger. In the face of these similarities, appellants focus on particular aspects of the two books (“Holden ‘leaves home suddenly...’ ‘arrives in New York...’ ‘lies a lot...’” etc.), claiming that Salinger should not have a “monopoly” on such commonplace themes (App. Br. 35-36), but they ignore the litany of similarities pointed out by plaintiff (A-52-110) and Judge Batts (SPA-50-58).

Comparing all of the requisite elements in the two books, whether with respect to comprehensive non-literal similarity or total concept and feel, the Sequel is an unauthorized derivative, as the court below held.

III.
THE DISTRICT COURT CORRECTLY
FOUND THAT *60 YEARS* IS NOT A FAIR USE

Defendants strain mightily to retrofit the Sequel to fall within the fair use defense, but that safe harbor cannot be stretched to save their book. Because fair use is an affirmative defense, defendants bear and failed to carry the burden of proving they are likely to prevail (*Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 107 (2d Cir. 1998)) under the non-exclusive statutory factors.

The fair use defense strikes the balance between the author’s constitutional right to control his or her expression – to speak or not to speak – and the right of the public to speak freely. Justice Blackmun observed that the determination depends “on whether, under the circumstances, it is reasonable to expect the user to bargain with the copyright owner for use of the work”. *Sony v. Universal City Studios*, 464 U.S. 417, 479 (1984) (dissent, cited with approval in *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985)). Reasonableness is therefore inherent in the fair use analysis, but rarely framed as such. The question here is whether it is reasonable for Colting to have taken Holden and the essence and structure of his story, to tell another story, later in the life of that same character and addressed to

the same audience, purportedly in order to criticize Salinger. Analysis under the statutory fair use factors demonstrates the contrary, as the court below concluded.

A. The Purpose and Character of the Use

There are three relevant aspects to the first factor analysis: is the use transformative; is it commercial; and did defendants act in bad faith. On each, the first factor weighs heavily in favor of Salinger.

1. Transformative Use Generally

Since *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994), courts examining fair use determine whether the new work is “transformative”, asking whether it “adds something new, with further purpose or different character, altering the first with new expression, meaning or message”, rather than merely superseding the object of the original creation. While eschewing labels and criticizing the courts for applying them (App. Br. 39-40), defendants – in an effort to cast the Sequel as transformative – variously label it literary criticism of *Catcher* (A-363, A-344), *or* a parody (A-363), *or* a “post-modern” novel (App. Br. 38; A-363), *or* “meta-commentary” (A-363), *or* commentary on Holden (App. Br. 47, A-340), *or* critique of Salinger (A-362-63), *or* an analysis of the interplay between Salinger as author and Holden as his creation (A-324-26). Review of the Sequel reveals these academic perusings to be merely post-hoc rationalizations for publishing this book in lieu of the derivative Salinger expressly declines to pen.

2. Parody is a Form of Transformative Use

One form of transformative work which enjoys a fair but not unlimited latitude of protection is parody. The parodist bears the burden of establishing transformation: “it is more incumbent on one claiming fair use to establish the extent of transformation and the parody’s critical relationship to the original”.

Campbell, 510 U.S. at 580 n.14. *Campbell* defined parody as follows:

For the purposes of copyright law, *the nub of the definitions*, and the heart of any parody’s claim to quote from existing material, *is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works. If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition*, which the alleged infringer merely uses to get attention or 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), and other factors, like the extent of its commerciality loom larger....

Id. at 580-581 (citations omitted) (emphasis added). That Court concluded that the rap version of the song *Pretty Woman* was “somewhat” parodic because the juxtaposition of romantic musings in the original against contemporary street life demand for bawdy sex in the rap version “comment[s] on the naïveté of the original” and “[i]t is *this joinder of reference and ridicule that marks off the author’s choice of parody* from other types of comment and criticism that

traditionally have had a claim to fair use protection as transformative works”. *Id.* at 583 (emphasis added).

3. The Distinction Between Parody and Other Transformative Uses

As this Circuit has recognized: “[t]he secondary work in *Campbell* was a parody, and some of the language in the opinion, and some of the cases following it are specifically about parody”. *Blanch v. Koons*, 467 F.3d 244, 254 (2d Cir. 2008) (citations omitted). While the broad principles of *Campbell* are not limited to parody cases, the satire/parody distinction “may nevertheless be relevant to the application of these principles”. *Id.* at 255. In *Leibovitz v. Paramount Pictures Corporation*, 137 F.3d 109, 112 (2d Cir. 1998), this Court assessed *Campbell*’s clarification of the fair use doctrine “in general and its particular application to parodies”, distinguishing between the two.

Defendants ignore this Circuit’s careful delineation of this distinction, adopting instead the Eleventh Circuit’s obliteration of it in *SunTrust*, 268 F.3d at 1268-69. That Court found the *Campbell* Court’s definition of parody to be “somewhat vague” and therefore concluded that anything that is “commentary” upon the original is a parody: “we will treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work”. *Id.* at

1268-69. By defendants' lights, all criticism is parody and all parody criticism. That is not the law in this Circuit.

By conflating these concepts, defendants mix and match applicable law, arguing that whether a particular use is transformative need only be "easily ... perceived" (App. Br. 41), but that is the standard for parody; as explained below, to deem a work transformative, the court must objectively determine whether what has been taken has been transformed. Likewise, defendants argue they can take more than is necessary to "conjure up" the original (*id.* 42), but that too is a parody concept; the question for other transformative works is whether the particular expression taken has been transformed in the secondary work.

4. The Sequel is Not a Parody

a. No "Joinder of Reference and Ridicule"

Defendants label the Sequel "parody", but it "contains no reasonably discernible rejoinder or specific criticism of any character or theme of *Catcher*". SPA-43. Rather than ridiculing the original, the Sequel uses *Catcher* and Holden as building blocks for a sequential work, featuring the same characters and settings, placed later in time. Colting does not juxtapose Holden's "musings" with anything: he simply repeats them, failing to comment upon them at all. The Sequel imitates Salinger's characteristic style, but not for critical effect. In Justice Souter's words, it "has no critical bearing on the substance or style of" *Catcher*,

but “merely use[s] [it] to get attention or to avoid the drudgery in working up something fresh”. 510 U.S. at 580. Justice Kennedy, concurring in *Campbell*, specifically admonished that courts must “ensure that not just any commercial take off is rationalized post hoc as a parody”. *Id.* at 600. That is precisely the case here, as Judge Batts found.

The point is illustrated by contrast. In *Leibovitz*, this Court considered whether a poster featuring a pregnant Leslie Nielsen, styled much the same as an iconic photograph of a pregnant Demi Moore, was a parody under *Campbell*. Because Nielsen’s smirking face contrasts strikingly with Moore’s expression, and because the poster challenges the photo’s message extolling the beauty of a pregnant female body, “the ad may reasonably be perceived as commenting on the seriousness, even the pretentiousness, of the original. The contrast achieves the effect of ridicule that the Court recognized in *Campbell*....” 137 F.3d at 114. The Court cautioned however:

[W]e have some concern about the ease with which every purported parodist could win on the first factor simply by pointing out some feature that contrasts with the original. Being different from an original does not inevitably “comment” on the original. Nevertheless, the ad is not merely different; ***it differs in a way that may reasonably be perceived as commenting, through ridicule,*** on what a viewer might reasonably think is the undue self-importance conveyed by the subject of the *Leibovitz* photograph”.

Id. at 114 (emphasis added).

For this very reason, in *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), the Court concluded Koons’s work was *not* a parody because:

the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.... We think this is a necessary rule, as were it otherwise, there would be no real limitation on the copier’s use of another’s copyrighted work to make a statement on some aspect of society at large....

960 F.2d at 310 (emphasis added). *See also Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997) (“Although *The Cat NOT in the Hat!* does broadly mimic Dr. Seuss’ characteristic style, it does not hold his style up to ridicule. The stanzas have ‘no critical bearing on the substance or style of’ *The Cat in the Hat*”).

Defendants rely extensively upon *SunTrust*, which held that *The Wind Done Gone* (“*TWDG*”) was a parody of *Gone with the Wind* (“*GWTW*”) because it “is principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of *Gone with the Wind*” (268 F.3d at 1270) and is written from a different perspective: *GWTW* is a third-person epic, whereas *TWDG* is a first-person account in diary form of a slave in the original, “invert[ing] *Gone With the Wind*’s portrait of race relations of the place and era”. *Id.* at 1279. As the court below held, comparing the books here with *TWDG* only underscores the lack of parodic character in the Sequel.

b. The Salinger Character Does Not Render the Sequel a Parody

Defendants put all their stock in the conceit of injecting the Salinger character into the Sequel. But simply injecting a new character does not render the Sequel a parody. As with any other character or plot element, the question is whether there is joinder of reference to the original with ridicule of that work. As the court below said, “while the addition of Salinger as a character in *60 Years* is indeed novel, the Court is unconvinced by Defendants’ attempts to shoehorn Defendants’ commentary and criticism of Salinger into the parodic framework of *Campbell*, which requires critique or commentary of the work”. SPA-44.

Examining the narrative and plot elements injected into the Sequel by virtue of the Salinger “voice” makes clear that that narration does not ridicule either Holden or *Catcher* itself. Defendants say the Sequel is about the Salinger character but, in truth, his role is quite limited. All he says is that he decided to bring Holden back to kill him, so Holden will stop bothering him; but when he confronts Holden, he cannot follow through because Holden is part of Salinger himself. While this might be an interesting – if completely hypothetical – analysis of how Salinger purportedly feels about the character he created, it is not a parody of Holden or of *Catcher*.

5. The Sequel is Not Otherwise Transformative

The “transformative” inquiry looks at the level of transformation of the copyrightable expression in the original work in three respects: Has it added something new? Does it alter the original with new meaning, expression or message? Is what has been taken used for a further or different purpose?

First, the Salinger character is “something new”, but that cannot, alone, be sufficient to render the Sequel transformative, else the mere injection of a new character into any work would qualify. That character is not a tool Colting uses to critique either Holden or *Catcher*. Certainly Colting may write literary criticism of *Catcher* comparing its events to biographical material about Salinger; he may write criticism about Holden drawing parallels between Salinger’s life and Holden’s; but that is not what he did. Rather, Colting recounts and embroiders upon the “biography” of a fictional character. Taking fictional “facts” or characters and placing them in another context is not “transformative”, as illustrated by *Castle Rock*, where the Court rejected a fair use defense for a trivia book detailing “facts” about fictional characters in the *Seinfeld* television series.

Second, the secondary work must “alter[] *the first* with new expression, meaning or message”. *Campbell*, 510 U.S. at 579 (emphasis added). Defendants say the Sequel casts new meaning on Salinger’s original by helping readers

understand both Holden and *Catcher* (App. Br. 42), but never explain how.⁷ They posit that characteristics Holden exhibited as a 16-year old are seen as absurd in a 76-year-old man, and lead both Holden and Salinger to supposedly miserable lives. But that is not comment upon those characteristics as exhibited in the 16-year old Salinger created; further, as Judge Batts found, Salinger acknowledged those same absurdities in *Catcher*. SPA-38-43.

Defendants' argument hinges on post-lawsuit characterizations of Mr. C as leading a "lonely and miserable life" and "unable to have a healthy relationship", and on their conclusion that Salinger blames Holden for his own writer's block. App. Br. 10. But Mr. C is not depicted by Colting in the Sequel as miserable or unconnected: he got married, lived in an Upper East Side doorman apartment building, loved his wife and went on treasure hunts and cuddled in bed with her, and had a much-beloved son. As for Salinger, he wrote and published best-selling works for 15 years after *Catcher*, and defendants also have absolutely no basis for knowing whether or not Salinger has written since 1965 – only that he has not published.

⁷ The *only* scene defendants even try to explain how they "transformed" is the carousel scene (App. Br. 17, 53-54), but their explanation betrays their misunderstanding of what "transformation" means. They claim the scene in the Sequel demonstrates "personal growth Mr. C has undergone" (*id.*), but that is not a comment about Holden as he appears in *Catcher*. By defendants' account, anyone could write an unauthorized Harry Potter sequel, so long as it "demonstrates the personal growth [the protagonist] has undergone".

The factual flaws in defendants’ transformative argument are not flaws in their purported criticism; they are hallmarks of post-hoc justifications, conjured after the fact and contrary to their own book. The *Seinfeld* Court rejected the proffered fair use defense over like claims of “transformative” qualities, stating:

[a]ny transformative purpose possessed by *The SAT* is slight to non-existent.... *The SAT*’s purpose, as evidenced definitively by the statements of the book’s creators and by the book itself, is to repackage *Seinfeld* to entertain *Seinfeld* viewers.... [The back cover] urges *SAT* readers to “open this book to satisfy [their] between-episode [*Seinfeld*] cravings”.... *The SAT*’s author[] described the trivia quiz book not as a commentary or a *Seinfeld* research tool, but as an effort to “capture *Seinfeld*’s flavor in quiz book fashion.

150 F.3d at 142.

Third, there has been no transformation here of “purpose”. Even assuming some minimal amount of transformation due to the injection of the Salinger character, it is far too little to overcome the fact that this work tries to serve the exact same purpose and is addressed to the same market as the original. That difference in purpose was the core of the finding of fair use in *Bill Graham Archives v. Dorling Kindersley Limited*, 448 F.3d 605 (2d Cir. 2006) (use of chronologically arranged thumbnail images of concert posters in biographical book was transformative where used for a *different* expressive purpose than originals). Here, defendants have done no more than find a new way to exploit the creative virtues of the original to serve the same intrinsic entertainment value. *See also*

Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 79 (2d Cir. 1997) (“[W]here, as here, the purpose of the challenged use is, at a minimum, the same decorative purpose ... defendants’ use has indeed ‘superseded the *objects*’ of the original”); *Contrast Blanch*, 467 F.3d at 252 (use transformative as Koons had totally different objective in using plaintiff’s work).

Fourth, defendants argue that because *Catcher* is so widely read and Salinger so famous, they have wider latitude to borrow his copyrighted expression. App. Br. 8-9. But the *Harper & Row* Court rejected the idea of a “public figure exception to copyright”. 471 U.S. at 560. *See also Twin Peaks Prods. v. Publications Intern., Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993) (rejecting argument that *Twin Peaks*’s popularity justified the taking).

Fifth, while the third-factor analysis focuses upon the amount taken from the original, how much of the secondary work consists of copyrightable expression from the original is relevant to first-factor analysis. *See Bill Graham Archives*, 448 F.3d at 611 (finding percentage of the allegedly infringing work that includes the copyrighted work relevant to the first-factor analysis). Defendants grossly exaggerate the importance and the presence of the Salinger character in the Sequel, arguing that the “dramatic arc” of the Sequel does not focus on Holden, but on Salinger. App Br. 41-42. That claim is belied by reading the book. Indeed, their own experts concede that the principal narrator is Holden (A-340) and that the

“strand” narrated by Mr. C “constitutes the bulk of the novel” (A-363). Only 6.2% of the novel (including all of Chapter 20) includes anything that includes or references the Salinger character. Defendants ignore that “Salinger” could readily be removed from the Sequel and it would remain intact, a freestanding (although infringing) novel. On the other hand, if the Holden character were removed from the Sequel, not a single page would remain.

6. The Commercial Nature of the Sequel Cuts Against Fair Use

That the Sequel is to be published for commercial gain also cuts against fair use. *Sony*, 464 U.S. at 449. *See also On Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001) (fair use statute states that courts must consider “whether such use is of commercial nature or is for non-profit educational purposes”). In addition to the profit motive, defendants have used plaintiff’s original expression to promote sales of their book in a blatantly commercial manner. *Cf. Bill Graham Archives*, 448 F.3d at 612 (defendant did not use plaintiff’s poster images in its commercial advertising “or in any other way to promote the sale of the book”.)

7. Defendants’ Bad Faith Cuts Against Fair Use

The *Harper & Row* Court relied upon defendants’ bad faith, stating: “[a]lso relevant to the ‘character’ of the use ‘is the propriety of the defendants’

conduct’.... ‘Fair use presupposes “good faith” and “fair dealing”’. 471 U.S. at 562.⁸

It is difficult to square defendants’ post-lawsuit descriptions of their book with the content of it, and with what they have said in the past, as detailed above. Colting’s claim that “I decided to use the pseudonym J.D. California as part of my extended commentary on *Catcher*. Just as Holden and Salinger are the same person, Mr. C and Mr. California may be the same person” (A-331) is yet another post-hoc justification. See *Castle Rock*, 150 F.3d at 142-43; *Dr. Seuss Enterprises*, 109 F.3d at 1403 (“we completely agree with the District Court that Penguin and Dove’s fair use defense is ‘pure shtick’ and that their post-hoc characterization of the work is ‘completely unconvincing’”).

Now that the Supreme Court has ruled that books are not “goods or services” subject to the Lanham Act, because it is the copyright laws that govern the scope of their protection (*Dastar Corporation v. Twentieth Century Fox*, 593 U.S. 23 (2003)), the kind of misrepresentations made here must be taken into account in the fair use analysis. Is it *fair* for Colting to have taken as much as he took of Salinger’s expression and presented it to the public in a way that associates Salinger with an unauthorized derivative? Is it reasonable for defendants to now

⁸ To the extent courts such as *NXIVM*, 364 F.3d at 478-49 have questioned the relevance of bad faith, they have focused on spurned permission requests or duplicitously obtaining plaintiff’s work. Here, the nature of the bad faith is quite different: it stems from defendants’ efforts to mislead the public as to the nature and origin of the Sequel.

disavow public statements that their book is about Holden and is a sequel to *Catcher*?

B. The Nature of the Copyrighted Work

There is no question but that *Catcher* is a highly creative original work. Salinger's voice, writing style and choice of words were unique in their time and remain unique. As Judge Batts properly found, Salinger's novel is "closer to the core of intended copyright protection than [other works], with a consequence that fair use is more difficult to establish when the former works are copied". *Campbell*, 510 U.S. at 586. *See also* SPA-49-50. Therefore, this factor weighs heavily in favor of plaintiff.

C. The Amount and Substantiality of the Taking

Substantiality for purposes of the third statutory factor is measured by considering how much copyright-protected material has been taken from the entirety of the original work. *New Era Publ'n Int'l ApS v. Carol Publ'g Group*, 904 F.2d 152, 158 (2d Cir. 1990). The amount of taking is measured qualitatively and quantitatively; the court considers whether "the portion used formed a significant percentage of the copyrighted work", and whether it is the "heart" of that work. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 738 (2d Cir. 1991). A sliding scale balances the first and third factors, such that the more transformative a use is under the first, the greater the extent of permissible copying under the

third. *Campbell*, 510 U.S. at 586. Stated otherwise, the underlying question is not only how much has been taken, but also whether what has been taken is “necessary to further the purpose of the use”. *Castle Rock*, 150 F.3d at 144.

Defendants failed to carry their burden of demonstrating they have transformed either the Holden character or anything else they have taken from *Catcher*.⁹ Colting self-servingly claims: “I took only what was needed to further my examination of the unique relationship between Salinger and his most famous character, to point out flaws in that character, and to explore the themes that I have outlined above”. A-330-31. That is hardly the case. That defendants have taken the entirety of this character is evident from reading the two books; they have done nothing other than age him. Defendants also maintain that copyright protection for a literary character is “thin” (App. Br. 25), but cite no case law or reason that might be so.

Defendants have taken the “heart” of Salinger’s work by taking the Holden character, who narrates an entire book revolving around four days of his life, as the court below found. *See Harper & Row*, 471 U.S. at 564-5; SPA-50-51. In

⁹ This is not parody so the standard is not how much has been taken to “conjure” the original, and even if it were, parody is not a free pass to unbridled taking. *Rogers*, 960 F.2d at 311 (“[t]he essence of Rogers’ photograph was copied nearly *in toto*, much more than what would have been necessary even if the sculpture had been a parody of plaintiff’s work. In short, it is not really the parody flag that appellants are sailing under but rather the flag of piracy”); *Leibovitz*, 137 F.3d at 113-114. Here, given how widely read *Catcher* is, and how well-known Holden is, very little taking would be necessary to “conjure” the original.

addition, the instances of excessive, non-transformative takings are many. By way of example only: Why must Mr. C and Charlie see *The 39 Steps*, Phoebe's favorite movie in *Catcher*? Why must Mr. C purchase a red hunting cap exactly like the one he wore throughout *Catcher*? Why reference the bathrobe Mr. Spencer wore when Holden visited him before leaving Pencey? None of these have been in any way "transformed" by Colting; they are simply repeated. Defendants may want to make a point about Salinger but, as Judge Batts said, they need not mention that Holden hates the word "grand" to do so. SPA-8.

Defendants claim the *only* similarities that exist here are in clichés not entitled to protection, and that only "protected elements" matter for these purposes. App. Br. 50. But it is not the words "phony", "grand", or "crummy" in a vacuum plaintiff seeks to protect; rather, it is the use of the many words that pepper Holden's vocabulary, combined with all the other elements of defendants' taking (see A-52-110), that constitute the infringement. As this Court said in *Salinger v. Random House*, 811 F.2d at 98:

[A]lthough a cliché or an "ordinary" word-combination by itself frequently fails to demonstrate even the minimum level of creativity necessary for copyright protection, ... such protection is available for the "association, presentation and combination of the ideas and thought which go to make up the [author's] literary composition"....

In sum, from both qualitative and quantitative standpoints, the amount of the taking here is very high and serves little if any transformative purpose. This factor weighs heavily in Salinger's favor as well.

D. The Impact On the Actual Or Potential Market

Courts expressly recognize that the market to be considered under the fourth factor includes the market for potential authorized derivatives that creators of original works would in general develop or license others to develop. *Campbell*, 510 U.S. at 593; *American Geophysical*, 60 F.3d at 930 (the “traditional, reasonable, or likely to be developed markets”). Concomitantly, the markets for parody or literary criticism are excluded from relevant consideration. Thus, if *60 Years Later* could properly be classed as either a parody or some other form of literary criticism, that would place the Sequel in an irrelevant transformative market. Defendants' arguments rest entirely on the erroneous assumption that the Sequel is a parody.

A sequel is a quintessential example of a market creators would “generally develop or license”. SPA-59. Here, there is clearly a potential market for such derivatives: Salinger's agent attested to the fact that offers have been made to make derivatives. A-119-20. That Colting marketed his book as a sequel to appeal to the same market says volumes about the existence of that market and his intent to usurp it. Since there are no derivatives on the market, defendants seek to be first

to market in this sphere. The first derivative of an acclaimed original generally garners more commercial success than successive derivatives. Granted, a derivative penned by Salinger might defy those odds, but at the preliminary injunction stage (particularly where plaintiff did not have the opportunity to submit contrary evidence to rebut defendants' submissions on market harm), the court below did not abuse its discretion in concluding "it is quite likely that the publishing of *60 Years* and similar works could substantially harm the market for a *Catcher* sequel or other derivative works...." SPA-60.

The court below also concluded there would be no harm to the market for the original novel. SPA-60. But the two books here serve similar market functions. In the earlier *Salinger* case, 811 F.2d at 99, Judge Newman said that because defendant's biography often introduced defendant's paraphrasing with phrases such as "he wrote" and "Salinger declares", this might suggest to some readers "that they have read Salinger's words" and consequently "diminish interest in purchasing the originals". The same may be said of the Sequel; upon reading it, a reader may see less of a need to read *Catcher* or, upon not liking the Sequel, might be less inclined to read *Catcher*.

As the district court properly found, Salinger's disavowal of any interest in writing or authorizing a sequel to *Catcher* and desire to keep Holden "frozen in time" is of no moment in this analysis. SPA-60-61. *Salinger*, 811 F.2d at 99

(“First, the proper inquiry concerns the ‘potential market’ for the copyrighted work.... Second, Salinger has the right to change his mind. He is entitled to protect his opportunity to sell his letters,”); *Castle Rock*, 150 F.3d at 146. Defendants never so much as acknowledge the existence of Salinger’s right **not** to publish or his right **not** to authorize derivatives. Both the right of first publication and the adaptation right stem from one of the constitutional underpinnings of copyright law, namely the right of privacy, *i.e.*, the right not to publish. *Harper & Row*, 471 U.S. at 554, *citing* Brandeis & Warren, *The Right to Privacy*, 4 *Harv. L. Rev.* 193, 198-99 (1890). As the court below noted, for some writers, the ability to *refuse* the making of sequels and derivative works might be a more powerful creative incentive than the financial rewards available from the market:

This might be the case if, for instance, an author’s artistic vision includes leaving certain portions or aspects of his character’s story to the varied imaginations of his readers, or if he hopes that his readers will engage in discussion and speculation as to what happened subsequently. Just as licensing of derivatives is an important economic incentive to the creation of originals, so too will the right *not* to license derivatives sometimes act as an incentive to the creation of originals.

SPA-61.

Finally, as Judge Batts noted, the court is charged with looking to see “whether unrestricted and widespread conduct of the sort engaged in by the defendant... would result in a substantially adverse impact on the potential market”

for the original. *Campbell*, 510 U.S. at 590, *citing* 4 *Nimmer*, § 13.05[A][4], p. 193-13-202.1. If Salinger does not succeed here, then he will have difficulty stopping others from following suit. Unless the preliminary injunction is affirmed, the lack of any transformative quality in the Sequel will be a powerful statement to others that they can lift Salinger's copyrighted creations with impunity.

* * *

Thus, none of the fair use factors, alone or in combination, weigh in defendants' favor and, as the court below found, defendants can find no succor in the fair use defense. SPA-62.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION

A. Balancing the Harm to the Parties

Below, Salinger bore the burden of demonstrating he would be irreparably injured. It remains the law in this Circuit that, as a general matter, when a copyright plaintiff makes a *prima facie* showing, irreparable harm may be presumed. *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 66 (2d Cir. 1996); *Warner Bros. Entertainment, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 552 (S.D.N.Y. 2008). Nothing in the Supreme Court's decision in *eBay*, 547 U.S. at 392-93, changes the fact that Salinger is entitled to that presumption here. *See Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 162 (2d Cir. 2007)

(presuming irreparable harm post-*eBay* on preliminary injunction in analogous false advertising case).

Appellants and *amici* argue that although *eBay* was a patent case, since it relied upon copyright cases, its conclusions should be extended to copyright cases. App. Br. 30; Stanford Br. 11-12. But the section of the opinion appellants quote is *dicta*. They do not cite a single post-*eBay* copyright case in this Circuit where a court has found a likelihood of success on the merits, but failed to issue a preliminary injunction. Rather, courts continue to apply the presumption in the copyright context. *See, e.g., Warner Bros. v. RDR, supra; E. Gluck Corp. v. Rothenhaus*, 585 F. Supp. 2d 505, 519 (S.D.N.Y. 2008); *Lennon v. Premise Media Corp., L.P.*, 556 F. Supp. 2d 310, 319 n. 1 (S.D.N.Y. 2008).

In *Lennon*, Judge Stein explained why *eBay* should not disturb the prevailing rule. Noting that in the patent context a finding of irreparable harm *automatically* triggers an injunction, he stated:

The presumption of irreparable harm in copyright infringement actions, unlike the rule addressed in *eBay*, does not require courts to impose an injunction following a determination of infringement. ... Notwithstanding the presumption of irreparable harm, the decision whether to impose a preliminary injunction in a copyright infringement action remains within the sound discretion of the district courts....

556 F. Supp. 2d at 320 n.1. Section 502 of the Copyright Act provides that “Any court ... *may* ... grant temporary and final injunctions...” (emphasis added), so the

presumption of irreparable harm does not have the same potentially deleterious effect.

Regardless, appellants are incorrect that the irreparable harm to Salinger rests on the presumption alone. That there is a market for and value in sequel rights to Salinger's novel and his Holden character, and that he has consistently and vocally refused to write or authorize any such work, are not subject to challenge. A-119-20. While the value of a first derivative could perhaps be quantified and redressed by monetary damages, Salinger's constitutionally based right *not* to publish derivatives is not the type of injury that can adequately be remedied by monetary damages; it is exactly the kind of damage that courts traditionally find irreparable. Indeed, this Court has reversed a lower court for *failing* to issue a preliminary injunction in a case involving the right **not** to speak, citing the many cases to that effect. *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996) (the wrong done to "constitutional right *not* to speak is a serious one that was not given proper weight by the district court").

Once the Sequel is publicly available in this country, the harm will have already occurred and Salinger's intangible right will be completely destroyed. What plaintiff asked the court below to do was only to maintain the *status quo* pending ultimate trial. That is the very aim and purpose of preliminary injunctive

relief. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008) (noting “rigorous standard” for a preliminary injunction that *changes* the status quo).

Contrary to the arguments of some of the *amici* (*Times* Br. 21-24; Stanford Br. 11), it is particularly appropriate to grant injunctive relief at the preliminary injunction stage in copyright infringement cases. “A presumption temporarily removing the need to prove irreparable harm may serve the ends of equity at this early stage of the litigation even if it would be inappropriate where the record is complete”. *Lennon*, 556 F. Supp. 2d at 319 n.1. It is the *amici*, **not** appellants, who complain that the preliminary injunction was issued after only a two-hour oral argument without an evidentiary hearing or the opportunity to cross-examine witnesses. Stanford Br. 1; *Times* Br. 22. This is hardly surprising, as defendants below *never requested* an evidentiary hearing, and waived the right to object on this basis. *U.S. ex rel. Drake v. Norden Systems, Inc.*, 375 F.3d 248, 256 (2d Cir. 2004).

Defendants claim they submitted evidence below of the harm that would be caused to their marketing and promotion plans. App. Br. 32. Yet they fail to articulate just what evidence that was, or what specific harm they would suffer as a consequence. The release of this book is not tied to a particular holiday or event, or indeed anything that is time-sensitive. If, after trial, defendants prevail, they can release the book at that time. As to the argument that somehow the public interest

is harmed by not being able to read this unauthorized Sequel, *any* copyright infringer could make this exact same argument. *Harper & Row*, 471 U.S. at 568, citing *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1499-1500 (11th Cir. 1984).

B. The First Amendment Does Not Compel an Overhaul of This Circuit’s Copyright Jurisprudence

To fill the void below as to any harm to them, defendants and *amici* wax eloquent about the irreparable harm that flows from the deprivation of First Amendment rights and warn against “banning” a book. There are several major flaws in their arguments.

Both the Supreme Court and this Court have long held that the Copyright Clause and Copyright Act on the one hand, and the First Amendment on the other, coexist and conform by virtue of the idea/expression dichotomy and the fair use defense. The very case appellants cite, *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 74 (2d Cir.1999), succinctly makes the point:

We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine.

The Supreme Court has squarely held that “copyright’s idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s

expression””. *Harper & Row*, 471 U.S. at 556. As further explained in *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) “in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles”; “[i]n addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations”, namely the idea/expression dichotomy and fair use. *Id.* at 219-20; *see* PC Br. 1, 13. While the *Campbell* Court noted in *dicta* that it may not always be appropriate to issue injunctive relief in copyright cases, as noted above, the Copyright Act expressly provides for discretion to take into account all the equitable factors traditionally considered in deciding whether to accord such relief.

The First Amendment protects the right to speak, but does not give anyone the right to speak in someone else’s expression. Therein lies the heart of the idea/expression dichotomy. Anyone may take any “idea” in *Catcher* and use it to write a different story. But what defendants cannot do is use Salinger’s copyrightable expression to tell that story. The *Times amici* pose the question of why, although copyright laws are speech restrictions, to many they lack that flavor: “is there some specific reason underlying [that reaction], some reason that can justify setting aside the normal First Amendment Procedural guarantees?” *Times* Br. 14, quoting Volokh at 182. They say the answer is a “resounding” no. *Id.* But

they are wrong: a copyright injunction is not directed against speech generally or even content-directed at all,¹⁰ but rather against speaking in someone else's words.

The *amici* maintain that “readers have a right to *receive* information”. Stanford Br. 6. They are right, but they italicize “*receive*” in their brief; they should italicize “*information*”. The First Amendment protects the right to receive information, not to receive it couched in particular expression. There is a fundamental public interest in the free and open exchange of ideas and information (*id.* 7), but nothing about enjoining infringing expression prevents such an exchange.

Given the longstanding, clearly articulated law that First Amendment protections are encompassed within fair use and the idea/expression dichotomy in copyright cases, there is no reason to change the law to abolish the courts' power to issue injunctions in such cases, and certainly no reason to do so in this case, involving the right *not* to publish and at this preliminary stage where the only effect is to preserve the *status quo*. Appellants and *amici* focus myopically on the right to speak, but the First Amendment also includes the right *not* to speak. As the *Harper & Row* Court stated, “freedom of thought and expression ‘includes both the right to speak freely and the right to refrain from speaking at all’”. 471 U.S. at

¹⁰ Volokh characterizes intellectual property rights as “a form of content-based, government-imposed speech restrictions”. *Times* Br. 15, quoting Volokh at 206. But the restrictions in the copyright law do not go to the “content”, *i.e.*, the ideas, information, and the like in the speech, but to the particular way they have been expressed.

559, citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). While an injunction may not be appropriate in every copyright case, in one like this, injunctions are all the more appropriate.

Amici also argue that if courts have refused to issue injunctions in cases where there was a risk of a deleterious effect on national security, prejudice to a fair trial, libel, or obscenity, surely an injunction should not issue where the only potential harm is “to the pride of a reclusive author”. *Times* Br. 1, 12.

Not one of the cases they cite implicates the constitutional and statutory requirements of the Copyright Clause and Copyright Act, which already take the First Amendment into account. The *Eldred* Court specifically warned against precisely this argument, *i.e.*, analogizing the interplay between copyright and the First Amendment to cases that do not involve copyright. 537 U.S. at 220.

Further, the harm to Salinger here is not solely (if at all) to his “pride”, but rather to his copyright interests, economic as well as “reputational”. The economic injury to the potential market for derivatives, discussed above, is an interest Salinger is entitled to protect. *Amici* characterize the nature of that injury as a “moral right”, and discount it because U.S. copyright laws do not take moral rights into account. It is specious to argue that U.S. copyright laws and particularly the equitable fair use defense are not flexible enough to encompass some consideration of moral rights, when the Supreme Court in *Dastar* has expressly relegated any

such claim to the realm of copyright. In any event, there are two separate aspects to the moral right: the right of integrity and of attribution. While the right of attribution (formerly recognized under the Lanham Act) is a species of reputational harm, the right of integrity includes a significant economic component.

The lines the *amici* draw are suspect and arbitrary. On the one hand, they say prior restraints are our “most disfavored remedy” and there is a heavy presumption against the constitutional validity of them (*Times* Br. 4), but on the other hand – presumably because they seek and enforce copyright protection for their own intellectual property – they would permit such prior restraints for particular copyright infringements. Specifically, they would rewrite copyright law to permit “prior restraints” only in the case of “pure copying” (*Times* Br. 18), apparently defined as word-for-word copying. *Amici* would draw the line as follows:

Defendants accused of selling photocopies of the *Catcher in the Rye* or videotaping a film in a movie theatre and selling bootleg copies on the street ***can and should be enjoined***. Importantly, such piracy is not truly the infringer’s speech, and may justify an injunctive remedy.

Id. (emphasis added). But this begs the omnipresent question in copyright cases of whether what is being enjoined is “truly the infringer’s speech”, or rather the copyright owner’s speech or something substantially similar to it, or whether it is only unprotectible information or ideas, or whether it is a fair use of that

expression. Courts have always drawn such lines in copyright cases: lines as to whether there is substantial similarity, whether there is fair use, and whether injunctive relief is appropriate. *Amici* would remove from the province of the Court the right to issue injunctive relief in anything other than counterfeit cases. That is not what the statute says and not what is required by the First Amendment.

Drawing the line limiting injunctive relief to cases of word-for-word copying is an extreme position; it would be tantamount to a compulsory license such that anyone could create a derivative from a copyrighted work, subject only to having to pay a customary license fee. It is far too narrow to serve what *amici* admit is the necessary accommodation between copyright and First Amendment interests, both of which have constitutional fount. When Congress wanted to provide a compulsory copyright license in the context of musical compositions, it did so expressly. Nothing in the First Amendment or elsewhere supports overturning centuries of copyright jurisprudence by judicially imposing compulsory licensing.

Finally, *amici* argue that damages would be sufficient here and damages for injury to the right not to publish or authorize derivatives are no harder to quantify than in many other cases. *Times* Br. 27-28. They characterize Salinger's interest as property and point out that injury to property interests are, in many contexts, redressed by monetary damages. But not in all cases and not when avoidable.

Salinger seeks to exercise his adaptation right to prevent derivatives; that intangible right is difficult if not impossible to quantify. In this respect, this case presents a *harder* case than straight-out bootlegging cases in which *amici* acknowledge an injunction would be appropriate.

The cases of the Supreme Court and this Circuit support the grant of injunctive relief in cases precisely like this one. The rule appellants and *amici* urge is simply not the law. Since the Court below applied the governing law on fair use, carefully identified the expression that had been pirated, and exercised discretion to grant the preliminary injunction, the First Amendment is not a bar to the relief granted.

CONCLUSION

For the foregoing reasons, the Order of the court below should be *affirmed*.

Dated: New York, New York
August 13, 2009

DAVIS WRIGHT TREMAINE LLP

By: /s/ Marcia B. Paul
Marcia B. Paul
Kevan Choset

1633 Broadway
New York, New York 10019-6708
Phone (212) 489-8230
Fax (212) 489-8340

Counsel for Plaintiff-Appellee
J.D. Salinger

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman Font Style and 14 Point Size for the body of the brief and 12 Point Size for the footnotes.

By: /s/ Kevan Choset
Kevan Choset

CERTIFICATE OF SERVICE

09-2878-cv Salinger v. Fredrik Colting

I hereby certify that two copies of this Brief for Plaintiff-Appellee were sent by Hand delivery to:

Edward Rosenthal, Esq.
Frankfurt Kurnit Klein & Selz P.C.
488 Madison Avenue, 10th Floor
New York, New York 10022
(212) 980-0120

Attorneys for Defendants-Appellants

I also certify that the original and nine copies were also shipped via Hand delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576

on this 13th day of August 2009.

Notary Public:

/s/ Ramiro A. Honeywell

Sworn to me this

August 13, 2009

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

/s/ Nadia R. Oswald-Hamid

NADIA R. OSWALD HAMID
Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949

ANTI-VIRUS CERTIFICATION

Case Name: Salinger v. Fredrik Colting

Docket Number: 09-2878-cv

I, Nadia R. Oswald-Hamid, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/13/2009) and found to be VIRUS FREE.

/s/ Nadia R. Oswald-Hamid
Nadia R. Oswald-Hamid
Record Press, Inc.

Dated: August 13, 2009