
INTELLECTUAL PROPERTY

SIXTY YEARS LATER: HOLDEN CAULFIELD, FAIR USE, AND PRIOR RESTRAINT UNDER THE COPYRIGHT ACT

By David Applegate*

When J.D. Salinger published *The Catcher in the Rye* in 1951, he likely had little idea that his novel would become a mainstay of high school and college literature classes, that the name and character “Holden Caulfield” would pass into the popular lexicon,¹ or that over half a century later both Salinger and Caulfield would become the focus of what could be the next important U.S. copyright law case. But with the filing in New York of *Salinger v. Colting*,² now on appeal to the U.S. Court of Appeals for the Second Circuit,³ that could well come to pass.

The Catcher in the Rye

On its face, Salinger’s now-famous story is mundane: in a first-person account in vernacular language, a disaffected sixteen-year old wanders Manhattan after being kicked out of prep school just before the holidays, moving from one random encounter to another and frequently returning to Central Park before meeting his sister Phoebe, the one person in whom he trusts.⁴ The adventures of Caulfield, who first appeared some five or six years earlier in a magazine short story, feature such forgettable scenes and trivial moments as Caulfield stumbling in the dark on his way through the bathroom and wondering aloud to himself where the ducks must go when the Central Park ponds freeze in the winter.⁵

At first blush, then, Salinger’s book would seem no more destined for greatness than William Kotzwinkle’s equally entertaining *The Fan Man*, first serialized in *Esquire*, in which a shifty and typically stoned character named “Horse Badorties” has trouble leaving his apartment because of all the distractions running through his disoriented mind, and which has a recent Amazon.com sales rank of exactly 48,884.⁶ Yet *The Catcher in the Rye* has achieved literary stardom, not only showing up ubiquitously on assigned reading lists but also making *Time*’s and the Modern Library’s lists of greatest novels and becoming a consistent fan favorite and best-seller.⁷

Copyright Term Protection

At the time of *Catcher*’s 1951 publication, United States copyrights were governed by the 1909 Copyright Act, under which authors of published works could obtain twenty-eight years of initial copyright protection plus a twenty-eight year renewal term, for a total of fifty-six years.⁸ Under then-existing copyright law, therefore, Salinger’s copyright on *The Catcher in*

the Rye would have expired in 2007, even with renewal,⁹ and anyone would have been free to reprint Salinger’s book or to write Caulfield’s continuing adventures thereafter.

But just twenty-five years after *Catcher*’s publication, Congress enacted the Copyright Act of 1976—the first major overhaul of copyright law in sixty-seven years—and extended the length of the renewal period for copyrights in their first term as of January 1, 1978 (such as *The Catcher in the Rye*’s) to forty-seven years, for a total of seventy-five years’ protection.¹⁰ Not quite another quarter-century later, the Sonny Bono (yes, that Sonny Bono) Copyright Extension Act of 1998 extended copyright protection an additional twenty years; in the case of *The Catcher in the Rye*, to ninety-five years from the year of its publication.¹¹

So under existing law, no one can legally copy Salinger’s book or publish a derivative work featuring the continuing adventures of Holden Caulfield until the year 2047.¹² Or can one?

“J. D. California”

On May 7, 2009, under the pseudonym John David (“J. D.”) California, a Swedish author named Fredrik Colting published in the United Kingdom a book entitled *60 Years Later: Coming Through the Rye*.¹³ Initially touted as a sequel to *Catcher* in which Caulfield is a seventy-six-year old man on the run from a nursing home,¹⁴ the book has since been characterized as both a legally-protected parody¹⁵ and a criticism of both Caulfield and Salinger,¹⁶ as well as perhaps just a literary fraud.¹⁷ Whether parody, criticism, sequel, or fraud, the book features Salinger as a character and posits in part that Salinger is trying to kill Caulfield. In reality, by suing to prevent its U.S. publication and sale, Salinger wanted to kill the book instead.¹⁸

J. D. Salinger

As Salinger himself readily admitted before his recent death,¹⁹ he was notoriously reclusive, possessive, proud, and feisty. “For over fifty years,” his complaint asserts, he “has been fiercely protective of both his intellectual property and his privacy.”²⁰ In addition to not having published or authorized any publication of “any new narrative” involving Holden Caulfield (or indeed any work derivative of *Catcher*) since its 1951 publication, the complaint continues, Salinger did not publish any additional work whatsoever after 1965; and other than a 1949 film of one of his short stories, he has never permitted adaptations of any of his works.²¹ Even when approached specifically about *Catcher* by such film luminaries as Harvey Weinstein and Steven Spielberg, the complaint asserts, Salinger always declined, saying in effect that “[t]here’s no more to Holden Caulfield. Read the book again. It’s all there.”²²

* David Applegate is an attorney at Williams Montgomery & John. An honors graduate of Yale University and a past chairman of the Hinton Moot Court Program at the University of Chicago Law School, Mr. Applegate speaks and writes frequently on matters of litigation and intellectual property, is an adjunct faculty member of the Practising Law Institute, and has been a guest lecturer at the University of Chicago Law School.

The Constitutional Dimensions of Copyright

In theory, at least, the U.S. Constitution creates a government of enumerated powers. Following a preamble that sets forth the Constitution's general purposes, Article I prescribes the powers of the legislature, Article II sets forth the powers of the president, and Article III sets forth the powers of the judiciary.⁴¹ Known popularly as "The Bill of Rights," the first ten amendments arguably protect five fundamental freedoms, all encompassed by the First Amendment: freedom of religion, freedom of speech, freedom of the press, freedom peaceably to assemble, and freedom to petition the government for redress of grievances.⁴²

So what happens when an enumerated power runs smack dab, as Salinger's Caulfield might say, into one of the First Amendment's fundamental freedoms? That is, in part, what *Salinger v. Colting* asks.

U.S. copyright protection is manifestly an enumerated power. Although its principles date to England's Statute of Ann, circa 1710,⁴³ U.S. copyright law derives its constitutional authority from Article I, Section 8, clause 8, sandwiched in between the power to establish post offices and post roads and to constitute tribunals "inferior to" the Supreme Court:

The Congress shall have Power . . . To promote the Progress of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their respective Writings

As courts and commentators have long recognized, this enumerated power intuitively conflicts with the First Amendment, for "[w]hile the First Amendment disallows laws that abridge the freedom of speech, the Copyright Clause calls specifically for such a law."⁴⁴ Part of what keeps the two provisions in harmony, however, is the expressed purpose of the copyright clause: to promote the progress of "science," or knowledge. By giving time-limited monopolies to authors, the Copyright Act and the enabling clause of the Constitution provide authors with the incentive not only to create, but also to publish—literally, that is, to make available to the public—new and creative works, all of which in theory add to the body of available thought and knowledge.⁴⁵

But the progress of science, or knowledge, would necessarily be hobbled if readers or viewers of copyrighted works could not, in some way and at some time, make use of what they have read or seen. Thus, after a statutorily "limited" time, copyright protection expires and the previously exclusive rights that copyright law secures to the author⁴⁶ become available to all; the previously copyrighted work becomes, that is, part of the copyright "commons." Accordingly, anyone today can publish the works of William Shakespeare or can write a sequel or prequel to "Othello," although one cannot yet do that with the works of J. K. Rowling or the adventures of Harry Potter. One set of exclusive rights has expired, another has not. In the meantime, while a copyright is in force, copyright law protects and promotes free expression—a societal interest and a fundamental freedom—by rewarding and promoting writing and the creative arts.

As currently constituted, exclusive U. S. copyright law rights encompass, among others, the rights to reproduce the

copyrighted works and to create "derivative works" based upon the copyrighted work; that is, a work based on a pre-existing work, such as an abridgment, condensation, or "any other form in which a work may be recast, transformed, or adapted."⁴⁷ And although Congress has repeatedly extended the term of U. S. copyrights—such that the copyright term is arguably no longer appropriately "limited"—the Supreme Court has rejected the argument that Congress has exceeded its power in doing so.⁴⁸ Thus, Salinger's claim to continuing protection for his book and his character, including the right to make "derivative" works such as the continuing adventures of Holden Caulfield, would appear to be both statutorily-protected and constitutionally-sound, at least until the year 2047.

Current Controversy

At issue on the current appeal, however, is not just the viability of a "fair use" defense to Colting's parody/sequel, but also the propriety of a preliminary injunction against selling the book in the United States—that is, in First Amendment parlance, a "prior restraint." Lined up as *amici* on the side of the accused infringer are Public Citizen, Inc., Amici Publishers, and Library Amici, who together make three sets of arguments implicating the First Amendment.

First, amicus Public Citizen argues that the district court improperly confused Salinger's valid copyright in *Catcher* with the absence of a viable copyright in the character of Holden Caulfield and that the court thus violated copyright law's idea-expression dichotomy and thus also undermined the First Amendment. Second, Amici Publishers argue, if Colting's work is even arguably transformative within the meaning of the copyright law, then the First Amendment prohibits the court from granting a prior restraint, particularly at the preliminary injunction stage and especially where money damages would ultimately suffice. Third, the Library Amici argue that, by applying both an incorrect preliminary injunction standard and an unduly restrictive "fair use" standard," the District Court unduly impinged on the First Amendment.

Let us consider each argument further.

Argument One: The Courts Should Not Restrain Arguably Transformative Works

First Amendment Restrictions on Preliminary Injunctions

Amici Publishers, who say they "do not come to this position lightly," acknowledge that a court may justifiably enjoin a "word-for-word" taking, but citing both the "Pentagon Papers" and the *Nebraska Press Association* cases, argue that the First Amendment is sufficiently strong that a prior restraint is "our most disfavored remedy."⁴⁹ In the Pentagon Papers case, the U.S. Supreme Court declined to prohibit *The New York Times* from publishing purloined and classified U.S. government documents despite the government's claim that their publication would jeopardize national security during the Vietnam War;⁵⁰ five years later, in *Nebraska Press Association v. Stuart*, the high Court declined to suppress publication of information that could have prejudiced a defendant's right to a fair trial.⁵¹ If neither national security nor the Sixth Amendment right to a fair trial justifies an injunction, Amici Publishers argue, then neither should the mere "pride of a reclusive author in not having his

desires fulfilled barring commentary about his iconic book and character, without any actual financial harm”⁵²

It is true, as Amici Publishers argue, that the Supreme Court has consistently held that any “system of prior restraints” comes before the Court with a heavy presumption against it,⁵³ even in the context of libel or access to the judicial system.⁵⁴ In contrast to the common law of libel, however, where “there has been a long tradition in American law” against enjoining libelous speech, U.S. copyright law explicitly authorizes the grant of injunctions,⁵⁵ and injunctions by their nature either restrain or mandate conduct. Injunctive relief, moreover, is not necessarily a “system of prior restraints,” but instead a category of discretionary equitable relief that courts may grant only *after* weighing the traditional equitable requirements of likely success on the merits, an inadequate remedy at law, a balancing of harms, and consideration of the public interest.⁵⁶ Thus, the force of Amici Publishers’ argument comes mainly from simply characterizing the district court’s award of an injunction as a “prior restraint” rather than from analyzing the appropriateness of the specific relief granted in this specific case.

Independent of the adequacy of monetary relief and the adequacy of the record before the district court, which Amici Publishers later address, the real equitable questions concerning the appropriateness of a preliminary injunction therefore become a balancing of harms and consideration of the public interest.

Balancing the Harms

If, as Amici Publishers suggest, the only harm to Salinger in not granting a preliminary injunction is to his wounded pride, then the court in *Salinger* must balance that against the harm, if any, to Colting in granting the requested relief, and that too appears slight. Put aside both Colting’s too-cute-by-half decision to publish his book under the name pseudonym “J.D. California”⁵⁷ and the fact that his publishing house has in the past specialized in low-budget trivia books, astrology books, and the like.⁵⁸ Amici Publishers still fail to show how Colting could not be made whole by recouping from Salinger in damages any profits on sales he may lose during the pendency of the preliminary injunction, or any additional costs he may incur, if he were ultimately to prevail in the case. Hence, where granting a preliminary injunction is concerned, a true balancing of harms does not appear to favor Colting any more than it does Salinger.

The Public Interest

That then leaves whether it would better serve the public interest to grant or to deny a preliminary injunction in this particular case. Amici Publishers agree that, “in cases approaching pure copying, injunctions may be appropriate,” but argue that, where accompanied by commentary, criticism, or some transformative use, a preliminary injunction—which Amici Publishers again characterize as a “prior restraint”—is categorically unjustified.⁵⁹ Yet here again, Amici Publishers fail to make a compelling case that a categorical prohibition against preliminarily enjoining even arguably transformative works would serve the public interest and instead simply fall back on inapposite cases and the alleged adequacy of money damages.⁶⁰

Rather, Amici Publishers argue by analogy that “critics and scholars ‘regularly quote from copyrighted matter to make points essential to their instructive undertakings’” and that whether their takings in any given case will pass the fair use test is “difficult to predict.”⁶¹ This is, in effect, one of many types of “slippery slope” arguments—“if you don’t do X in Y case, then you can’t do X in Y+1 case”⁶²—and it suffers from the flaw of many a slippery slope argument. The line may be difficult to draw, as Amici Publishers assert, but surely even Amici Publishers can distinguish critics and scholars quoting from copyrighted material, on the one hand, from a pseudonymous author appropriating another author’s character and name⁶³ for commercial sale, on the other.

And if, as copyright law and Article 1, Section 8, of the Constitution presume, it serves the public interest to grant authors the “exclusive” rights to their respective writings for limited times because doing so promotes the progress of science/knowledge, then the fact that Congress has included derivative works—which are necessarily transformative—among those exclusive rights suggests that the public interest favors granting preliminary injunctive relief, even where transformative use is involved. What, after all, can “exclusive” possibly mean, if not the right to exclude?

Amici Publishers further strain their argument by asserting that courts should not grant preliminary injunctions against challenged uses that are even “colorably transformative,” even where a fair use may ultimately be rejected⁶⁴; that is, the mere possibility that a challenged use may be found fair should suffice to prohibit preliminary injunctive relief. But to accept this premise would be to throw out entirely the first prong of the traditional preliminary injunction test, namely likelihood of ultimately success on the merits, and to substitute instead absolute certainty of success on the merits.

In short, if a case exists for categorically exempting potentially transformative uses from even the possibility of preliminary injunctive relief, then Amici Publishers have not made that case.

Prior Restraints and Preliminary Injunctions

Amici Publishers next argue that “prior restraints” are particularly inappropriate at the preliminary injunction stage, because each is a drastic remedy and no prior restraint should ever be made without a full evidentiary record. This argument, too, sounds superficially appealing but ultimately disappoints. Its superficial appeal lies in the argument that, because a preliminary injunction is an extraordinary remedy, it should not be granted until “all procedural safeguards, such as exhaustive fact-finding, cross-examination, and perhaps even a full jury trial are held.”⁶⁵ But that, of course, stands on its head the proposition on which Amici Publishers rely—namely, that preliminary injunctions should not be granted as a routine matter⁶⁶—and says that the courts should never grant preliminary injunctions at all; after all, only after trial on the merits have fact-finding (namely discovery) and full cross-examination been completed. But even at a preliminary injunction hearing, of course, one may call and cross-examine witnesses and may request discovery in advance of the hearing. It is only on a motion for a temporary restraining order, which expires after ten days, that one rarely has an opportunity for

discovery, and, even there, one may submit evidence and call available witnesses.⁶⁷

It may be true, as Amici Publishers suggest, that the record before the district court in this case was sparse,⁶⁸ but that does not mean it was inadequate for its task. For if, as Amici Publishers also suggest, the determining factor that warrants protecting Colting's challenged infringing work is its transformative nature,⁶⁹ then all the district court needed before it were the challenged and the original works themselves, from which the court could then make the appropriate comparisons. No testimony of either Mr. Salinger or Mr. Colting was necessary.

Amici Publishers' argument, moreover, is reverse tautological, which becomes clear when one reflects that Amici Publishers consistently use "prior restraint" and "preliminary injunction" interchangeably. This line of argument therefore becomes that "a preliminary injunction is particularly inappropriate at the preliminary injunction stage," which simply makes no sense: preliminary injunctions are by definition granted *only* at the preliminary injunction stage. In sum, this argument is simply not persuasive.

Sufficiency of Money Damages

Amici Publishers' final line of argument, that an award of money damages would adequately protect Salinger even if Colting's work is ultimately found infringing, is often the most persuasive argument against awarding injunctive relief in any case and yet the most perplexing. Copyright infringement plaintiffs typically seek the award of both damages (either statutory or actual) and injunctive relief and U.S. copyright law permits the award of both,⁷⁰ yet the two are mutually exclusive with respect to the same temporal infringement. That is, a successful infringement plaintiff could conceptually receive damages for the period of pretrial infringement and injunctive relief against post-verdict infringement, but if damages suffice for the pre-judgment period then why, except on equitable grounds, should they not also suffice for any post-judgment infringement? After all, if they are measurable for the one period, then they should be measurable for the other. The only satisfactory answer to this apparent conundrum can be that, once plaintiff has won on the merits a judgment of infringement, then the balance of equities has shifted because plaintiff has indeed shown "a likelihood of success" on the merits, but that does not in any way affect the conceptual adequacy of damages as a remedy.

Argument Two: The Injunction Violates the Idea-Expression Dichotomy

Public Citizen makes the next major argument against the District Court's ruling, namely that it violates the distinction between an uncopyrightable original idea and the copyrightable expression of that idea and therefore violates the First Amendment as well.

Copyrightability of Characters

Public Citizen argues first that the district court incorrectly found a valid copyright in the Caulfield character itself because copyright protection, in the words of the statute, extends to only "'original works of authorship' that are 'fixed' in a 'tangible medium of expression,'" which should preclude

"purely literary characters" in contrast to "graphically depicted characters."⁷¹ Public Citizen acknowledges the great confusion of courts in this area⁷² but concludes that characterization is "a mental impression formed from a character's appearance, thoughts, words, or actions, and is thus inherently subjective" and therefore uncopyrightable.⁷³ The district court's incorrect finding of copyrightability of the Caulfield character, Public Citizen continues, "contaminated" its infringement analysis, which is purportedly incompatible with copyright law's dichotomy between idea and expression; more simply put, the district court "asked the wrong question and it got the wrong answer."⁷⁴

Because the only Salinger copyright in issue is that to *Catcher*, not to Caulfield, Public Citizen argues, then *60 Years Later* does not infringe any valid copyright of Salinger's: other than a few common English words and phrases, Public Citizen asserts, no global similarities in structure and sequence nor "localized similarity" in language between the two works exists. Although a few scenes share common settings, both the scenes and the larger work are transformed.⁷⁵ Relying instead on the "frequent and extensive use of Caulfield's character traits,"⁷⁶ Public Citizen says, the district court got it wrong by impermissibly extending copyright protection not just to fixed expression but also to the very *idea* of Holden Caulfield, a protection that the Copyright Act expressly forbids.⁷⁷

First Amendment Impact

In doing so, moreover, the district court's analysis undermines core First Amendment protections, Public Citizen insists, because the idea-expression dichotomy is itself an important built-in accommodation of the First Amendment.⁷⁸ Unlike "fair use"—the alleged vagueness and unpredictability of which helps "chill" free speech and is burdensome because it must be pleaded as an affirmative defense—the idea-expression distinction allegedly "prevents copyright from extending to the suppression of literary imagination in the first place."⁷⁹ As a result, copyright law thus "encourages others to build freely upon the ideas and information conveyed by the work" while at the same time assuring authors the right to their original expression.⁸⁰ This ability to build on the ideas in others' work, Public Citizen asserts, is essential to First Amendment protection because "even the most creative or artistic activity depends on the ability to borrow from what has gone before."⁸¹ More simply put, Public Citizen argues, "Poetry can only be made out of other poems; novels out of other novels."⁸²

Had Public Citizen stopped with the idea-expression argument, then its case may have been more persuasive, but by moving on explicitly to a First Amendment argument, Public Citizen reveals the fatal flaw in its argument. Even if arguably overbroad (by recognizing copyright protection in Salinger's character as well as his book) the district court's injunction in fact does not prevent anyone from building on Salinger's work. Anyone is instead free, for the duration of *Catcher's* copyright, to explore the same themes, motifs, and characterizations, even from the perspective of a disaffected adolescent (or, in Colting's case, a disaffected septuagenarian) *so long as one does not appropriate the character of Caulfield himself.* (Thereafter, once the copyright expires, one of course may even appropriate Caulfield or copy the book in its entirety.)

4 See Complaint at ¶¶16-28, *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (No. 09 Civ. 5095).

5 Salinger's complaint states inconsistently that Caulfield "first appeared in a short story, 'Slight Rebellion off Madison,' that was published in *The New Yorker* in 1946," but that he "also appeared in the short story 'I'm Crazy,' published in Collier's magazine (December 22, 1945)." *Id.* at ¶29. Other Caulfield family members reportedly appeared even earlier, including in "Last Day of the Last Furlough," *The Saturday Evening Post* (July 15, 1944), and "This Sandwich Has No Mayonnaise," *Esquire* (October 1945) and two unpublished stories, "The Last and Best of the Peter Pans" and "The Ocean Full of Bowling Balls." *Id.*

6 ("I am all alone in my pad, man, my piled-up-to-the-ceiling-with-junk pad. Piled with sheet music, piled with garbage bags bursting with rubbish, piled with unnameable flecks of putrified wretchedness in grease. My pad, my own little Lower East Side Horse Badorties pad.") WILLIAM KOTZWINKLE, *THE FAN MAN* (Reprint ed. 1994); see, e.g., http://www.amazon.com/gp/product/0679752455/ref=cm_rdp_product/191-5144339-9542567#noop;http://web.fccj.edu/~hdenson/ENC%20Syllabi/horse.htm.

7 According to Salinger's lawsuit discussed in this article, *Time* named *Catcher* one of the 100 greatest novels of 1923-2005; in 1998 the Modern Library named it the 64th-greatest English-language novel of all time; and New York's Strand Bookstore's readers voted it their fourth favorite book of any kind. In addition, according to the complaint, *Catcher* has to date sold over 35 million copies in dozens of languages and as recently as May 2009 the book was outselling *Harry Potter and the Sorcerer's Stone*, *The DaVinci Code*, *To Kill a Mockingbird*, and *Of Mice and Men* on amazon.com. Salinger Complaint, *supra* note 4, at ¶¶31-33.

8 17 U.S.C. § 24 (1909), as amended Sept. 19, 1962; Aug. 28, 1965; Nov. 16, 1967; and July 23, 1968.

9 Salinger or his agents initially registered *Catcher* with the U.S. Copyright Office on June 11, 1951, Reg. No. A00000056070/1951-06-11, and renewed it on January 22, 1979, Reg. No. RE00000018341/1979-01-22, before assigning the copyright on October 24, 2008, to the J.D. Salinger Literary Trust, assignment no. V3570D891. Salinger Complaint, *supra* note 4, ¶¶42-44, Exs. A and B. Copyrights expire at the end of the calendar year in which they are registered, see 17 U.S.C. § 304; hence, no gaps exist in Salinger's registration.

10 The precise length of copyright protection under the 1976 Act depended on whether a work was anonymous, pseudonymous, or a work made for hire; whether it was published or unpublished; when it was created; and whether it was in its first or its renewal term on January 1, 1978, the Act's effective date. See 17 U.S.C. §§ 302-304 (1976). Under the Act, copyrights in works created on or after January 1, 1978, endured for the life of the last surviving author plus fifty years; copyrights in anonymous and pseudonymous works and works made for hire endured for the shorter of seventy-five years from the year of first publication or 100 years from the year of creation; copyrights in their first term on the Act's effective date endured for twenty-eight years plus a renewal term of forty-seven years, for a total of seventy-five years' protection; and copyrights in their renewal term or for which renewal application was made in the year preceding the Act's effective date endured for a total of seventy-five years.

11 Again, the precise extension in any given case depends on the many factors enumerated above; the shortened version is that the Bono Act extends the terms of existing copyrights another twenty years. 17 U.S.C. §§ 302-304.

12 By statute, U.S. copyrights run through the end of the calendar year in which they expire, 17 U.S.C. § 304, so that *Catcher's* U.S. copyright now runs through December 31, 2046.

13 Posting of Dennis Johnson to MOBYLIVES, Melville House Publishing, "Fraud Behind Salinger Fraud Admits He's a Fraud," <http://mhpbooks.com/mobylikes/?p=7220> (June 12, 2009).

14 See Wikipedia Entry for "John David California," note 1, http://en.wikipedia.org/wiki/John_David_California#cite_note-1#cite_note-1 (citing salinger.org: 60 Years Later: Coming Through the Rye, http://salinger.org/index.php?title=60_Years_Later:_Coming_Through_the_Rye).

15 See Wikipedia Entry for "John David California," note 6, http://en.wikipedia.org/wiki/John_David_California#cite_note-6#cite_note-6 (citing Baltimore Sun: Author Sued by J.D. Salinger for 'Catcher in the

Rye' Sequel Submits Defense, <http://www.baltimoresun.com/entertainment/booksmags/bal-salinger-0616,0,7415101.story>).

16 See Wikipedia Entry for "John David California," note 7, http://en.wikipedia.org/wiki/John_David_California#cite_note-7#cite_note-7 (citing Svenska Dagbladet: Salingerbok stoppas tillfälligt, http://www.svd.se/kulturnoje/nyheter/salingerbok-stoppas-tillfalligt_3088635.svd).

17 See Salinger's Last Stand: Is Fredrik Colting's Book *60 Years Later* Fair Use or Just a "Goddam Phony"?, <http://www.encyclopedia.com/doc/1G1-202488117.html> (last visited Dec. 2, 2009).

18 Salinger Complaint, *supra* note 4.

19 Salinger died at age 91 on January 28, 2010, at his home in Cornish, New Hampshire. Charles McGrath, *J.D. Salinger, Literary Recluse, Dies at 91*, N.Y. TIMES, Jan. 29, 2010, at A1, available at <http://www.nytimes.com/2010/01/29/books/29salinger.html?scp=28sq=salinger&st=cse>.

20 Salinger Complaint, *supra* note 4, ¶36.

21 *Id.* at ¶¶ 36-38.

22 *Id.* at ¶39.

23 *Id.* at ¶¶ 16-28.

24 *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (No.09 Civ 5095).

25 For an excellent discussion of the differences between "probative similarity" and "substantial similarity," see ROBERT C. OSTERBERG & ERIC C. OSTERBERG, PRACTICING LAW INSTITUTE INTELLECTUAL PROPERTY LAW LIBRARY, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW (2005).

26 *Salinger*, 641 F. Supp. 2d at 263-64.

27 17 U.S.C. § 107.

28 Just as the status of the defendants in *New York Times v. Sullivan*, 376 U.S. 967 (1964), may have led the Supreme Court to formulate the "actual malice" standard applicable to libel and slander cases against "public figures," so the unique perspective of the author may have helped sway the court in *SunTrust Bank* to reverse a preliminary injunction against sales of the book *The Wind Done Gone*. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001).

29 *Salinger*, 641 F. Supp. 2d at 258-60. In particular, the Court noted that Colting himself had made clear in a number of public statements that he considered *60 Years Later* to be a sequel, not a parody or critique, such as: "[T]his is no spoof. . . . We are not concerned about any legal issues." *Id.* at 260 (citing Westberg Aff., Ex. H, Philip Sherwell, *J.D. Salinger Considers Legal Action to Stop The Catcher in the Rye Sequel*, TELEGRAPH.CO.UK, May 30, 2009).

30 *Id.* at 260-61.

31 *Id.* at 267-68.

32 *Id.* at 268.

33 The four traditional hurdles to preliminary injunctive relief are (1) likelihood of ultimate success on the merits, (2) inadequacy of money damages, (3) a balancing of harms between plaintiff and defendant, and (4) impact on the public interest. *E.g.*, *Aguila Records, Inc. v. Nueva Generacion Music Group, Inc.*, 2009 WL 3719422 (N.D. Ill. Nov. 4, 2009). Inadequacy of money damages is sometimes characterized as "irreparable harm." *E.g.*, *Ty, Inc. v. Publ'ns Int'l, Ltd.*, 81 F. Supp. 2d 899 (N.D. Ill. 2000).

34 547 U.S. 388 (2006).

35 *Salinger*, 641 F. Supp. 2d at 268-69 (citing *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 66 (2d Cir. 1996)); *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 552 (S.D.N.Y. 2008); *E. Gluck Corp. v. Rothenhaus*, 585 F. Supp. 2d 505, 519 (S.D.N.Y. 2008). Regarding *eBay*, the court reasoned that "that case dealt only with the presumption of irreparable harm in the patent law context, and thus is not controlling in the absence of Second Circuit precedent applying it in the copyright context." *Id.* n.6. *But see* *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008) ("[T]he 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.").

- 36 *Salinger*, 641 F. Supp. 2d at 269.
- 37 Notice of Appeal, *Salinger v. Colting*, 641 F. Supp. 2d 250 (2009) (No. 09 Civ 5095).
- 38 Brief for The New York Times Company et al. as Amici Curiae Supporting Defendants-Appellants, *Salinger v. Colting*, 641 F. Supp. 2d 250 (2009) (No. 09-2878) (“Publishers Brief”).
- 39 Brief for American Library Association et al. as Amici Curiae Supporting Defendants-Appellants, *Salinger v. Colting*, 641 F. Supp. 2d 250 (2009) (No. 09-2878) (“Library Brief”).
- 40 Brief for Public Citizen, Inc., as Amici Curiae Supporting Defendants-Appellants, *Salinger v. Colting*, 641 F. Supp. 2d 250 (2009) (No. 09-2878) (“Public Brief”).
- 41 One is tempted to say more broadly that Article I deals with the powers of the executive branch, but as filings in recent litigation involving application of “open government” legislation to the Vice Presidency point out, the Office of the Vice President receives its first mention in Article I as President of the Senate, art. I, § 3, cl. 4, and only later appears incidentally in Article II. U.S. CONST. art. II, § 1, cls. 3 and 6; *id.* § 4.
- 42 Under this analysis, the Second and Third Amendments protect these five fundamental freedoms from intrusion by the military power of the government; the Fourth through Eighth Amendments protect these fundamental freedoms against the police power of the government; and the Ninth and Tenth Amendments clarify that the national government is limited to its enumerated powers and that the states and the people, respectively, retain all other rights and powers. See Burt Neuborne, *The House Was Quiet and the World Was Calm: The Reader Became the Book*, 57 Vand. L. Rev. 2007, 2082 (2004). One might also argue that the freedom of religion clause proclaims two specific religious freedoms: freedom from the establishment of a government religion, and the free exercise of religion. U.S. CONST. amend. I.
- 43 Also known as The Statute of “Anne” (for Queen Anne, during whose reign it was enacted), “An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned,” or the Copyright Act 1709 (8 Anne c.19 [also cited as 8 Ann c. 21]), this statute was enacted in 1709 and entered into force on 10 April 1710. Due to changes in the reckoning of the New Year from March to January, the correct year of enactment according to the modern calendar would reportedly be 1710. See John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, in PUBLISHING HISTORY 19(8), 39 n.3 (1980); Wikipedia Entry for Lyman Ray Patterson, http://en.wikipedia.org/wiki/Lyman_Ray_Patterson; Wikipedia Entry for Copyright in Historical Perspective, http://en.wikipedia.org/wiki/Copyright_in_Historical_Perspective; Wikipedia Entry for Vanderbilt University Press, http://en.wikipedia.org/wiki/Vanderbilt_University_Press; see also Wikipedia Entry for Calendar (New Style) Act 1750, [http://en.wikipedia.org/wiki/Calendar_\(New_Style\)_Act_1750](http://en.wikipedia.org/wiki/Calendar_(New_Style)_Act_1750). In any event, it is generally regarded as the first full-fledged copyright law.
- 44 *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001); see also I MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT §1.10 [B] [1] (2001) (acknowledging “conflicting interests that must be accommodated in drawing a definitional balance” between copyright law and the First Amendment).
- 45 To qualify for U.S. copyright protection in the first instance, a work must be “original.” *Feist Publ’ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).
- 46 Under 17 U.S.C. § 106, U.S. copyright law secures to authors the exclusive rights (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.
- 47 17 U.S.C. § 106(1), (2).
- 48 See David Applegate, *Eldred v. Ashcroft: The Supreme Court’s Mickey Mouse Copyright Decision*, 3 ENGAGE 87, 88 (Oct. 2003).
- 49 Press Brief at 2.
- 50 *New York Times Co. v. United States*, 403 U.S. 713 (1971).
- 51 *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).
- 52 Press Brief at 1.
- 53 Press Brief at 5 (citing *New York Times Co. v. United States*, 403 U.S. at 714 (1971), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 78 (1963), and *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980)).
- 54 *Id.* at 5-6 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).
- 55 17 U.S.C. § 502.
- 56 *E.g.*, *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *Christopher Phelps & Assocs. v. Galloway*, 429 F.3d 532 (4th Cir. 2007); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 518 F. Supp. 2d 1197 (C.D. Cal. 2007).
- 57 See *Johnson*, *supra* note 13.
- 58 Swedish Wikipedia Entry for “Nicotext,” <http://sv.wikipedia.org/wiki/Nicotext> (last visited June 19, 2009) (in Swedish) (discussing Nicotext, Colting’s publishing house).
- 59 Press Brief at 18.
- 60 *Id.* at 19-20 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *New York Times Co v Tasini*, 533 U.S. 483 (2001) (finding that the Author’s copyright had in fact been infringed)).
- 61 *Id.* at 20 (quoting Pierre N. Leval, *Commentary: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1131 (1990)).
- 62 See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003); Eugene Volokh & David Newman, *In Defense of the Slippery Slope*, LEGAL AFF. 21-23 (Mar/April 2003).
- 63 In addition to Colting’s choice of “J. D. California” as a pseudonym, Salinger appears under his own name as a character in Colting’s book. See Press Brief at 20, n.10 (citing *Salinger*, 2009 U.S. Dist. LEXIS 56012, at * 26).
- 64 Press Brief at 20.
- 65 *Id.* at 21.
- 66 *Id.* (citing *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 80 (2d Cir. 1990)).
- 67 Fed. R. Civ. P. 65 (b)(2).
- 68 Amici Publishers assert that “[h]ere a book was banned on the basis of a two-hour hearing with no witnesses. There was no discovery, and the plaintiff Mr. Salinger did not enter an affidavit even opining on how he claimed to have been injured, and certainly was not subject to cross-examination.” Press Brief at 22-23. Yet the district court had before it extensive briefs, affidavits of both parties, numerous exhibits, and the full texts of both books. *Salinger*, 641 F. Supp. 2d at 258-59.
- 69 *Id.* at 20.
- 70 17 U.S.C. §§ 502-504.
- 71 Public Brief at 3 (citing 17 U.S.C. § 102). Thus, in Public Citizen’s view, “Frazz’s” character Caulfield would be protected, but Salinger’s Holden Caulfield would not. See *supra* note 1. The same reasoning explains how such famous fictional characters as Superman and Mickey Mouse can qualify for copyright, as well as trademark, protection.
- 72 *Id.* at 5-9 (citing *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (discussing copyrightability of characters in Shakespeare’s “Twelfth Night”); *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (rejecting copyrightability of Dashiell Hammett’s “Sam Spade” character); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 621 (2d Cir. 1982) (leaving open the “difficult” and venerable” question of copyrightability of Edgar Rice Burroughs’s “Tarzan” character); *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) (same).
- 73 *Id.* at 9
- 74 *Id.* at 10.

