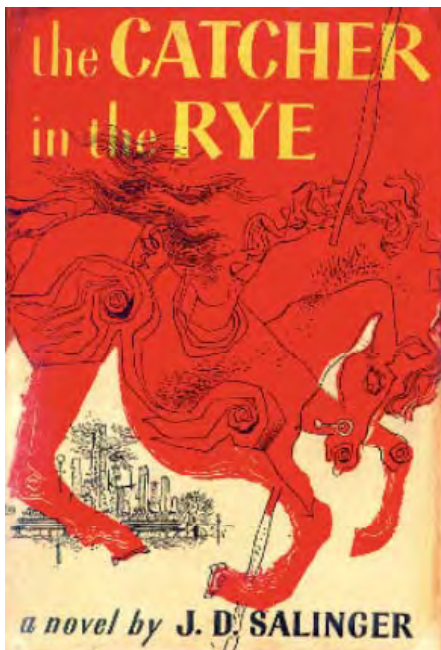


Focus On

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Copyright and *Catcher in the Rye*: A Federal Court Enjoins a Phony Sequel

Catcher in the Rye is an American literary icon that has inspired adolescents and post-adolescents worldwide. Well before “Sex in the City” hit the small screen, *Catcher in the Rye* was America’s passport to a seedy New York City viewed through the eyes of a troubled adolescent, who ends up in a mental institution. The novel inspired John Lennon’s killer. The author of the book, J.D. Salinger, is a famous recluse, who refuses to permit films, adaptations, or sequels of *Catcher in the Rye*.



The case examined in this article—*Salinger v. Colting*, 2009 WL 1916354 (S.D.N.Y.)—involves Fredrik Colting, a Swedish resident, who wrote a book using the character Holden Caulfield, the legendary protagonist in *Catcher in the Rye*. Colting, using the pseudonym “John David California,” wrote a book entitled *60 Years Later: Coming Through the Rye* about “Mr. C.” a thinly disguised Holden Caulfield. Colting’s novel, which was published in England, was marketed as a sequel to J.D. Salinger’s classic. Upon the book’s arrival on American shores, an in-

junction was issued.

Salinger v. Colting is that exceedingly rare decision: a preliminary injunction against the publication of a literary work that is alleged to be infringing another literary work. The injunction, issued by a federal district judge in the Southern District of New York, prohibits the publication of *60 Years Later* in the United States. The preliminary injunction, issued July 1, 2009, has already been challenged by expedited appeal before the Second Circuit Court of Appeals. By the time this article is published, the injunction may have been vacated, modified,

or left in place pending the outcome of the litigation.

This article aims to give the reader the tools that may help understand the legal principles underlying the publication of *60 Years Later* and to think about whether the result is correct or desirable. We all know that, more than a century ago, French Impressionists suddenly all started painting water lilies using lavender paint and painting in exactly the same style. These artists groused over glasses of red wine through a fog of unfiltered cigarettes, but no one sued them for what they were doing. Today Salinger is grouching over someone else wanting to portray a disaffected, slightly mad character who had experiences in New York City that were similar to those of Salinger’s protagonist. What’s the beef? Salinger had been asleep for decades and hasn’t bothered to write *Catcher II*, *Catcher III*, or *Nightmare on Catcher Street*.

Under U.S. copyright law, authors are entitled to protection of their literary creations. Copyright law was one of the first creations of the Founders and has a foundation in Article I, Section 8 of the U.S. Constitution, which grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Copyright law has morphed in directions that would surprise the Founders. For example, the reference to “Writings” in Article I, Section 8 today includes copyright protection of photography, sound recordings, choreography, and software. However, the language in the Constitution clearly guarantees authors the “exclusive Right” to their “Writings” for “limited Times,” leading one to ask if *60 Years Later* was published within the “limited Times” initially contemplated by the Founders?

The first U.S. national copyright law, which was passed on May 31, 1790, granted book authors the exclusive right to “print, reprint, publish or vend” their works for a period up to 28 years. But in 1789 Congress passed a measure that threatened to overshadow the nascent copyright law: the First Amendment to the U.S. Constitution, which was ratified by three-fourths of the states in 1791, provided that “Congress shall make no law ... abridging the freedom of speech, or of the press.” So why, in 2009, in the case of *60 Years Later* does a federal judge have the power to freeze printing presses poised to print books?

The secret to answering the question lies in 17 U.S.C. § 106, the provision of the Copyright Act that grants authors modern-day exclusive rights to their writings.

Section 106 grants authors the right to prepare derivative works based upon the copyrighted work. The definition of a “derivative work” is found in 17 U.S.C. § 101, the definitional section of the Copyright Act: “A ‘derivative work’ is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed or adapted.”

Thus, *60 Years Later* is a “derivative work” under the Copyright Act because it is based on *Catcher in the Rye*. Because J.D. Salinger, the author of *Catcher in the Rye* owns the “exclusive right” to prepare derivative works, no one can prepare a derivative work without obtaining a license from him. Or can they?

Consistent with the First Amendment and free speech, the public retains the right to make fun of anyone, rich or poor, weak or powerful. Therefore, copyright law contains a safety valve that permits such mockery and criticism. This safety valve is codified as the “fair use” exception to the exclusive rights granted to authors by the Copyright Act. “Fair use” is never quite defined in the Copyright Act, but 17 U.S.C. § 107 gives some clues about its meaning: “... the fair use of a copyrighted work, including such use by reproduction in copies, ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright.”

The author and publisher of *60 Years Later* argued that the book is protected by this statutory fair use doctrine. Although the statute doesn’t define “fair use,” § 107 provides some helpful examples and lays out a four-factor test that courts are to apply in determining whether a use of a copyrighted work is a fair use:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

One use of a copyrighted work that is protected speech and thus “fair use” is parody. Courts will treat a work as a parody if its aim is to comment on or to criticize a prior copyrighted work by appropriating elements of the original in creating a new artistic work, as opposed to a scholarly or journalistic one. In the leading case in this area, *Suntrust Bank v. Houghton Mifflin Company*, 268 F.3d 1257, 1266 (11th Cir. 2001) the court found that the book *The Wind Done Gone* was to be treated as a parody, because it was a “specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in *Gone With the Wind*.” *Id.* at 1268–69.

One of the factors assisting the district court in *Salinger v. Colting* is that the defendant had marketed *60 Years Later* as a “sequel” rather than as a criticism, parody or any sort of an assault on the original. An original author is traditionally compensated for a sequel that uses a well-delineated character.

The fair use doctrine is the bête noire of the federal judiciary because it entails a painstaking comparison of two works. Scholars have criticized these comparisons as being notoriously subjective: comparing two photographs is one thing, but a comparison of two literary works that may run several hundred pages and involve characters separated by 60 years is another. The custom of litigators is to prepare charts, often signed by eminent experts, that offer a line-by-line comparison and contrast of the two literary works, tallying the similarities and differences. Plaintiffs in such cases seek to show a tedious and slavish copy; defendants seek to show a daring, imaginative, and critical departure that uses little of the original.

As in most decisions involving the fair use doctrine, in the current case, the district court quoted enough purported similarities and differences to give the reader a flavor of the works being compared. Readers may remember that, in *Catcher in the Rye*, while Holden was trying to figure out what profession he’d enjoy, he concluded that, even though “[l]awyers are alright” he would not want to be one because “Even if you did go around saving guys’ lives ... How would you know you weren’t being a phony?” In *60 Years Later*, the defendant’s character, Mr. C. is stuck on the same obsession with phonies—one of the similarities that led the district court to grant the injunction. The district court presumed irreparable harm, relying on a case decided in 1996 that predated the U.S. Supreme Court’s decision in *eBay Inc. v. MercExchange LLC*, 547 U.S. 388 (2006), which removed the presumption of irreparable harm in certain cases involving rights to intellectual property. Would J.D. Salinger be irreparably harmed by reading *60 Years Later*, or would damages in the form of royalties make him whole? Moreover, how do we know that he isn’t being a phony?

As this article goes to press, a check on PACER shows that the injunction has been briefed and argued to the Second Circuit, and the litigation proceeds apace before the district court, which has declined to require an injunction bond. Pending the Second Circuit’s decision, none of us can read *60 Years Later* to find out whether we think the novel is phony. But if we feel like tracking down some phonies, we may well take out that dog-eared copy of *Catcher in the Rye* and visit our perpetually adolescent friend, Holden Caulfield. **TFL**

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