Results-Oriented Jurisprudence: A Second Circuit Panel Meets J. D. Salinger Coming Through the Rye

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By

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ABSTRACT

The Second Circuit’s 2010 decision in Salinger v. Colting has been widely noticed for vacating a preliminary injunction J. D. Salinger obtained against distribution in the U.S. of Fredrik Colting’s novel, 60 YEARS LATER – COMING THROUGH THE RYE. In an opinion by Judge Guido Calabresi, the panel adopted the standard for equitable relief from eBay, Inc. v. MercExchange (U.S. 2006), overruled circuit precedent, and held that henceforth district courts must find, not presume, that irreparable harm is in fact likely before enjoining a copyright defendant’s activities. This is the first article to observe that what the Second Circuit gave copyright defendants procedurally it took away substantively. In remanding, the court acknowledged that Salinger had no evidence of financial harm but opined that Colting’s novel invaded Salinger’s “right not to speak” and that such an invasion unquestionably constituted irreparable harm. I begin by showing that the district court simply misread Colting’s metafiction, and I suggest two practical strategies litigators might use to avoid such poor literary fact-finding. Then I discuss the appellate panel’s rhetorical move. Legally and factually inapt, the rhetoric undermines copyright fair use by enhancing copyright owners’ supposed First Amendment interests at the expense of users’ and the public’s. This is exactly backwards. By remanding with this rationale, the court sheltered from further review the district court’s dubious assessment of the merits while simultaneously expanding copyright to protect holders’ personal preferences. Plainly, both courts deferred to a high-status, egg-shell author and disapproved of a bumptious upstart – perhaps with some cause – but neither court should have used copyright doctrines to sanction the latter, and the appellate court should not have promoted an expansive property-rights theory of copyright under the guise of regulating equitable remedies.
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PART 1 – INTRODUCTION and OVERVIEW

This is an article about literary and legal issues in disputes over unlicensed derivative uses of copyrighted works in the United States. I focus on J.D. Salinger’s recent suit against Fredrik Colting, but my argument could apply to any kind of work—whether literary, imagist or musical—that incorporates without overt political or critical comment a recognizable allusion to a copyrighted work.


3 JOHN DAVID CALIFORNIA, 60 YEARS LATER – COMING THROUGH THE RYE (2009). John David California was Colting’s pen name. See Salinger v. Colting, 607 F.3d at 71 (noting the pen name).
4 J. D. SALINGER, THE CATCHER IN THE RYE (1951) (“CATCHER”). In this paper, references to the novel’s text are to the pagination in a paperback edition: J.D. SALINGER, THE CATCHER IN THE RYE (Boston: Little Brown & Co./ LB Books, 1991). At the outset, it should be noted that the obvious reference in Colting’s title was not actionable as a copyright infringement because titles are not copyrightable. See, e.g., Benay v. Warner Bros. Entmt, Inc., 607 F.3d 620, 627 (9th Cir. 2010) (noting that titles are not copyrightable in themselves but may be relevant to infringement claims based on other similarities). A title may be trademarked, but Salinger had not registered a trademark and did not allege that he had a common law trademark. Moreover, even if he had a trademark in the title, or variations on the title, he could not have sued for trademark infringement if Colting was otherwise entitled to reproduce all or part of his work. See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (holding that plaintiff could not maintain a trademark claim for reverse passing off where the defendant had attached its name to public domain material that it had copied, even though the material was substantially similar to copyrighted material that the plaintiff was marketing under its own brand). Salinger also alleged a common law claim of unfair competition under New York State law, Compl., Salinger v. Colting, 607 F.3d 68 (No. 09 CIV 5095), but the parties settled before the courts could consider the merits of that claim. See infra fn. ___ for settlement terms. In any event, Salinger could not have pursued claims under federal trademark or state unfair competition law for unauthorized reproduction of his expression because the federal copyright statute preempts equivalent claims. 17 U.S.C. § 301. See, e.g., NBA v. Motorola, Inc., 105 F.3d 841, 851 (2d Cir. 1997) (noting that “unfair competition and misappropriation claims founded solely in the copying of a plaintiff’s protected expression are preempted by [federal copyright law]”). The only unpreempted claim that Salinger might have sustained under state law would have been a claim for “passing off” Colting’s work as if it were Salinger’s Salinger does assert this claim on p 19 of complaint). That claim would have required that Salinger show, among other things, that consumers were actually confused or were likely to
Colting’s novel is a metafiction – that is, it is a fiction about a fiction.\(^6\) Colting’s conceit is that a fictional narrator, who resembles J.D. Salinger, is trying to write the end of his most famous character, Holden Caulfield. Because Colting’s metafiction is based upon the Caulfield character as it appears in \textit{Catcher}, there are numerous, obvious similarities

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\(^6\) Metafiction may strike some readers as a pretentious term. Wikipedia suggests the following meaning: “Metafiction is a type of fiction that self-consciously addresses the devices of fiction, exposing the fictional illusion.” That’s a good enough definition of Colting’s fiction. See \textit{infra}, Part 3 for a discussion of the metafiction. I have resisted the temptation also to describe Colting’s work as “postmodern” because I read the following comment in \textit{David Auburn}, et al. (eds), \textit{Oxford American Writer’s Thesaurus} 694-95 (2004) which noted that “\textit{Postmodern} is among the most widely employed critical terms of our time, mainly because it can mean just about anything. Moreover, it neatly suggests that its user is learned, widely read, up to date on the latest in literary theory, and, in general, really cool, not to say – ahem – edgy. In essence \textit{postmodern} describes the kind of self-aware writing or painting that doesn’t take itself completely seriously, that recognizes with a wink that it’s just writing or painting. In some ways, postmodern is an offshoot of Brechtian drama’s ‘alienation’ effect, in which the actor may address the audience, move in and out of character, regard the entire play and his role in it with world-weary irony. Similarly, the postmodern author deliberately undercuts the smooth surface of his narrative and by somehow standing back and commenting on the action prevents the reader from ‘losing himself in the story. Unfortunately, this isn’t really very new. Many classic novelists have done this, notably Cervantes and Sterne, not to mention such twentieth-century masters as James Joyce. Just as modernism has been called a variant of romanticism, so postmodernism may be simply a late form of modernism. Whatever the case, unless you’re going to define it clearly, don’t bandy the word about.” [The initials – MD – at the end of this entry suggest it was written by Michael Dirda – one of the editors.] I will never use the word again! Nevertheless, Colting’s novel exemplifies the characteristics of this (ahem) type of fiction.
of character and scene between the two novels. The U.S. District Court for the Southern District of New York, Judge Deborah A. Batts, decided that because the similarities were substantial and in her view not a transformative fair use of the original, Salinger would prevail on the merits. The judge issued a preliminary injunction, pending trial, that barred distribution of 60 YEARS LATER in the United States.

The case has been much noticed for the decision by a panel of the Court of Appeals for the Second Circuit to vacate the injunction on the ground that the district court had not made a finding that Salinger would suffer irreparable harm, but the underlying merits of Salinger’s copyright claim have escaped sustained scrutiny in part because the parties settled. Future authors and the public should be grateful that there are no binding precedents on the copyright issues. Nevertheless, because J.D. Salinger and Holden Caulfield are so well-known and because the Second Circuit is particularly influential in copyright matters, especially for the publishing industry

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7 By its nature, metafictions, like parodies, need to summon up the original source in order to make their point. See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (holding that 2 Live Crews’ use of the opening guitar riff from Roy Orbison’s Oh Pretty Woman was a fair use because it was necessary to establish the object of a parody.)

8 Salinger v. Colting, 641 F. Supp. 2d 250, 269, vacated, 607 F.3d 68 (2d. Cir. 2010). (In subsequent references to this case, I refer only to the district court opinion, as needed, without citation to the subsequent history.)


10 But see Who owns the lives of fictional characters?: A Marquette law faculty blog debate, reprinted as THE BLOG DEBATE: CHARACTER CONTROL, MARQUETTE LAWYER 15 – 23 (Summer 2010).

11 Publisher’s Weekly reported that Colting agreed as part of the settlement not to publish or distribute 60 YEARS LATER in the United States until the copyright on CATCHER expired. He retained the right to publish and distribute in other countries provided that the marketing referred neither to Salinger nor to the litigation. Andrew Albanese, J.D. Salinger Estate, Swedish Author Settle Copyright Suit, PUBLISHER’S WEEKLY (Jan. 11, 2011), available at http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/45738-j-d-salinger-estate-swedish-author-settle-copyright-suit.html.
headquartered within its jurisdiction, I think it’s worthwhile to discourage creators, publishers, legal practitioners, and judges from attributing any persuasive value to the district or appellate opinions’ analyses of Salinger’s copyright infringement claim. The issues in Salinger’s case will recur as contemporary creators make more or less explicit use of copyrighted works in new works of political, cultural or artistic commentary.\(^\text{12}\)

Therefore, this article analyzes the merits of the district court’s and the appellate panel’s view of the copyright merits. I argue that the district judge made one basic mistake of fact – a misreading of Colting’s metafiction – that, once made, inevitably led to the legal conclusion that Colting’s novel was not a fair use. I compare Colting’s narrative technique with Salinger’s to show how the district judge misread the likely different effects of Colting’s metafiction on the average reader.

Judge Batts displayed no familiarity with literary technique or theory and no inclination to credit either.\(^\text{13}\) Although she acknowledged that Colting’s initial advertisement of his own novel as a “sequel” to \textsc{Catcher} did not determine his novel’s

\(^\text{12}\) See William W. Fisher III, \textit{The Implications for Law of User Innovation}, 94 Minn. L. Rev. 1417 (2010) for a description of the numerous ways contemporary consumers may use and adapt patented inventions and copyrighted works and for balanced and creative recommendations on how intellectual property laws should be adapted to maximize owners’ and users’ well-being. I note that Colting – who seems to have used a proprietary (perhaps his own) publishing company to publish \textsc{60 Years Later} – appears not to have benefited from, or been blocked by, the kind of legal advice that an established publisher would have dispensed. Compl. Par. 13 (alleging that the publisher Windupbird Publishing Ltd.’s address is a Mailboxes’ storefront). Colting appears, then, to be more akin to a self-published “fan fiction” writer than to a traditionally published author. \textit{See, e.g.,} Stacey M. Lantagne, \textit{The Better Angels of Our Fanfiction: The Need for True and Logical Precedent}, 33 Hastings Comm. & Ent. L. J. 159, 169 (noting that the Salinger case is “the closest analogue to a fanfiction fair use analysis”).

\(^\text{13}\) The judge conducted oral arguments on the preliminary injunction without having read the affidavits of the defense’s literature experts, Robert Spoo and Martha Woodmansee, Tr. Hearing 5, although she refers to Woodmansee’s affidavit in her later opinion on fair use. \textit{Salinger v. Colting}, 641 F. Supp. 2d at 261.
legal character for copyright purposes,\textsuperscript{14} she was unable to credit his own, his lawyer’s, or his experts’ characterization of the novel as a transformative postmodern metafiction. In her comments during the hearing\textsuperscript{15} and in her written opinion on the fair use issue, the judge seemed to interpret Colting’s novel as an exercise in the same literary realist techniques Salinger had used so effectively in \textit{Catcher} – only this time done poorly.\textsuperscript{16} She read the novel as if Holden Caulfield, now aged into an elderly Mr. C, were recounting his further adventures and musings in his own voice.\textsuperscript{17} She apparently viewed Colting’s use of a controlling, superior narrator – a fictional writer remarkably like Salinger -- as merely an add-on, another character in the plot that would not affect a reader’s perception of Mr. C or Holden Caulfield. Judge Batts even seemed to insist

\textsuperscript{14} \textit{Salinger v. Colting}, 641 F. Supp. 2d at 260 (noting that an author “‘need not label their whole [work] . . . a parody in order to claim fair use protection’” (citation omitted).

\textsuperscript{15} During the hearing on Salinger’s motion for a preliminary injunction, the judge engaged with Salinger’s and Colting’s attorneys on the issue of whether \textit{60 Years Later}’s similarities to \textit{Catcher} might comment on or criticize the latter and so qualify as a fair use. During Mr. Rosenthal’s (Colting’s attorney) argument that the novel was a fair use, the judge interrupted or questioned him 30 times. Tr. Hearing 27 – 43. The judge did not ask a single question during Ms. Paul’s (Salinger’s attorney) response. Tr. Hearing 43 – 54. The tenor of her comments and questions to Mr. Rosenthal indicated that she failed to see any significant comment or transformation of the original resulting from Colting’s adoption of a different narrator and narrative technique. In particular, the judge seemed to view the book’s description of the relationship between the fictional narrator and his creation Mr. C as merely a criticism of the real Salinger and not a comment on his work. For example, the judge commented toward the end of Mr. Rosenthal’s argument: “I am having difficulty here in seeing the critical commentary that you say is present in terms of the character or the book. It seems that there is a lot of critical comment on Mr. Salinger, but that is not the standard.” Tr. Hearing 42.

\textsuperscript{16} 641 F. Supp.2d at 258-60.

\textsuperscript{17} Ms. Paul argued, without interruption by the judge: “The fact that they injected Mr. Salinger into this novel does have some transformative value. Some. Limited. Look at it qualitatively, look at it quantitatively. 94 percent of this book is told in Holden Caulfield’s voice, and I’m referring to \textit{60 Years Later}. 6 percent is told in Salinger’s voice. Of the 277-page book, the climactic Chapter 20, where they confront each other, is 30 pages, I think. Something like that.

Most importantly, I think, let’s imagine taking the italics out of the book and deleting Chapter 20. The novel stands. Let’s imagine taking the Holden Caulfield character out of the book. Not a single page remains. He is on every page of the book. This is a book about Holden Caulfield. It is a sequel. The definitions of sequel leave no doubt about it . . .

Mr. Colting says: ‘My book is not designed to satisfy any interest that the public might have in finding out what happened to Holden Caulfield.’ But we do find out. We find out that just a week or so after \textit{Catcher} leaves off, D.B. comes to visit him in the mental hospital. . . .” [Ms. Paul goes on to list a series of developments in the life of Holden Caulfield.] Tr. Hearing 44, 45.
that Colting’s work might only be a fair use if Colting’s novel conveyed a realistic critique of the realistic Holden.\(^{18}\)

With all due respect, this reading missed the point of 60 YEARS LATER and misjudged its effect on ordinary readers not predisposed by a copyright lawsuit to see the two works as providing comparable pleasures. Colting’s novel deconstructs the realism of CATCHER. Colting’s point – modest as it is – is that Salinger is the Author and the Subject. There never was anyone else speaking in the fiction – no Holden Caulfield, no little sister Phoebe. Colting’s other point is wholly original expression and illustrates that the fictional Salinger is bound up with and tortured by his most famous creation. Colting’s novel reproduces some characters and scenes from CATCHER in order to depict the fictional Salinger obsessively trying to rewrite them. It is hard for me to believe that any ordinary reader would find in this exercise a sequel to the pleasures of CATCHER, nor can I believe that such a reader could maintain any fantasies about Holden Caulfield’s realism or Salinger’s wisdom after reading this book.

The district court, however, simply discounted the effect of 60 YEARS LATER’s metafiction on readers, largely, it seems, because Colting had unwisely or cunningly described his novel as a sequel in its British launch.\(^{19}\) Even so, both the district court and

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\(^{18}\) See Salinger v. Colting, 641 F. Supp. 2d at 258 – 260 (describing how, in the judge’s view, Colting’s book is not a commentary on the Caulfield character because the character remains largely the same, except for age).

\(^{19}\) Salinger v. Colting, 641 F. Supp.2d at 262 (stating that “[i]t is simply not credible for Defendant Colting to assert now that his primary purpose was to critique Salinger and his persona, while he and his agents’ previous statements regarding the book discuss no such critique, and in fact reference various other purposes behind the book”). The court of appeals quoted this sentence and observed tepidly that “[s]uch a finding [about witness credibility] is not clear error.” 607 F.3d at 83.
the appellate court acknowledged that the defendant’s description of his work is not necessarily determinative of its character for purposes of the fair use defense.\textsuperscript{20}

If we take the courts at their word that they were able to isolate the defendant’s marketing behavior and his shaky credibility from the legal character of his novel for copyright purposes, then I argue that the district court’s inability to perceive any significant transformative value was enabled by a mechanical application of the copyright doctrine of substantial similarity. That doctrine tests whether a defendant has in some fashion appropriated copyrighted expression. It seems that the judge was so overwhelmed by evidence of appropriation that she could not imagine that it might not be misappropriation. Salinger’s well-documented list of similarities seemed to persuade the judge of such quantitative similarity that she was unable to credit the qualitative differences in narrative technique.\textsuperscript{21}

In response, I present some strategies defense counsel might use when arguing a case before judges indifferent or hostile to postmodern narrative techniques. In particular, I argue that defense counsel ought to avoid engaging with plaintiff’s counsel on the issue of whether an allusive work is substantially similar to the copyrighted work and ought, instead, to concede the plaintiff’s prima facie case and argue the affirmative defense of fair use right as soon as possible.

Turning to the appellate opinion, I critique the appellate panel for largely adopting the district court's analysis, and using inapt and manipulative rhetoric to

\textsuperscript{20} See Salinger v. Colting, 641 F. Supp.2d at 260 (noting that a defendant need not label his work a parody to make it one); 607 F.3d at 83 (noting that “[i]t may be that a court can find that the fair use factor favors a defendant even when the defendant and his work lack a transformative purpose”).

\textsuperscript{21} Pl. Mem. in Support of Application for Preliminary Injunction 8 – 11 (June 1, 2009).
bolster its dubious reasoning.\textsuperscript{22} The panel adopted the district court’s misreading,\textsuperscript{23} albeit in dicta, and then added to the flaws in the fair use analysis by suggesting that Colting had inflicted irreparable harm upon Salinger by invading his “right not to speak.”\textsuperscript{24} Paradoxically, this dicta essentially undid the court’s holding on the preliminary injunction by providing a source of irreparable harm that would not require further fact-finding.\textsuperscript{25}

Beyond noting this curious paradox, I argue that defense counsel and advocates of a liberal fair use policy should strenuously resist the spread of the court’s rationale. If this “right not to speak” becomes an accepted rationale in disputes like this one, every unlicensed derivative work could be deemed by analogy to invade the first author’s supposed right not to speak and the defense of fair use could be seriously undermined.

The court’s lofty rhetoric may be nothing more than that -- a casual use of sonorous, constitutionally freighted prose to bolster a debatable legal conclusion. If, however, we take the court at its word, this rhetoric threatens to diminish fair use by placing more value on an earlier author’s freedom of expression than on a later author’s and the public’s freedom of expression. It ignores the plain meaning of Section 107 of

\textsuperscript{22} The appellate opinion’s summary of the district court’s analysis of the fair use issue is a minor masterpiece of grudging concurrence in the outcome but not the rationale. The court only addresses the district court’s analysis of the character of Colting’s work. It observes that the district court’s reliance on Colting’s lack of credibility may not be a sufficient basis for determining the character of the novel, but concludes without explanation that “with all the other facts in this case” Colting is unlikely to prove his fair use defense. \textit{Salinger v. Colting}, 607 F.3d at 83.
\textsuperscript{23} See \textit{Salinger v. Colting}, 607 F.3d at 83.
\textsuperscript{24} \textit{Id.} at 81 (noting that the First Amendment protects a “right not to speak” and that loss of that right “unquestionably constitutes irreparable injury”). I criticize the court’s reliance on a “right not to speak” in this dispute over copyright and fair use \textit{infra} at pp. _____.
\textsuperscript{25} I discuss the interaction of the court’s holding on the injunction with its dicta on fair use \textit{infra} at pp. _____.
the Copyright Act and tips the balance of power even more toward copyright holders and away from subsequent users and the consuming public. Because the appellate opinion was written by the eminent scholar of law and economics and now judge, Guido Calabresi, I doubt that the rhetoric is accidental but suspect that it reflects an economic analysis that copyright doctrine will generally produce efficient trading in rights—and a proper balance among the three stakeholders— if it is interpreted as a set of clear property, rather than fuzzy liability, rules. Because the court neglects to say this in so many words, however, it is harder for litigants and other advocates of broader fair use rights to combat the creep of an ideology cradled in such apparently inviolate privileges as a right not to speak.

Before I move to a more detailed discussion of these copyright issues, however, I must pause to observe that a legal realist might think the judges’ opinions on the copyright merits have nothing much to do with copyright doctrine. Arguably, the problem was Colting’s behavior, not his novel. His initial marketing tactics in England seem to have been unethical and perhaps unlawful. Those tactics allowed—perhaps they even deliberately encouraged—British readers to infer that 60 YEARS LATER was a sequel to CATCHER, perhaps even an authorized sequel and, perhaps even a sequel written by Salinger. Conceivably, if readers were in fact fooled, these tactics might amount to some sort of false advertising or a passing-off of 60 YEARS LATER as if its author

26 The fourth factor of the fair use test requires the court to consider “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4).
might be Salinger. But whether they were unlawful or unethical, these tactics were marginally relevant in the U.S. litigation because Colting had not deployed them in the U.S. and Salinger’s complaint did not seek a remedy for his British marketing. Nevertheless, as a practical matter, the tactics damaged Colting’s credibility and undermined any appeal he might make to the courts’ discretion not to ban his book.

The rest of the paper is organized as follows. Part 2 provides background. It describes the two novels, the proceedings at the district court, that court’s opinion, and the opinion from the court of appeals.

Part 3 critiques the district court’s analysis of the books and of the applicable law. I intend this section to be useful to defense lawyers and to judges. I incorporate a modest lesson about narrative techniques to help both groups grapple with postmodern derivative uses more thoughtfully. I also suggest that copyright defendants might avoid Colting’s fate by conceding the issue of substantial similarity in order to prevent the plaintiff from emphasizing facts that may encourage a judge to suspect that the defendant is a ruthless or lazy free-rider, especially if the judge is one to suspect that

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28 See, supra, n. ___ (on the viability of Salinger’s claim for unfair competition under New York State law).
29 For example, the district judge noted that “[u]ntil the present lawsuit was filed, Defendants made no indication that 60 Years was in any way a parody or critique of Catcher. Quite to the contrary, the original jacket of 60 Years states that it is ‘. . . a marvelous sequel to one of our most beloved classics.’ (emphasis added [by the court]).” Salinger v. Colting, 641 F. Supp.2d at 260, fn. 3. Colting’s attorney tried to limit the damage by arguing that Colting—who resided in Sweden—did not understand the legal significance of the word “sequel.” Given his evident mastery of English and his deep familiarity with Salinger, as evidenced by his novel, it seems preposterous that he did not both understand the word’s colloquial meaning and anticipate Salinger’s hostile reaction. Perhaps he was feckless, but what seems more likely is that he was ill-advised—or rather not advised at all. Colting published his novel in England through Windupbird Publishing, which appears to be his own publishing company. In any case, Edward Rosenthal, Colting’s attorney in the U.S. litigation, told me that he believed that Colting was genuinely surprised when Salinger sued him. Author conversation with Edward Rosenthal, August __, 2010.
claims to metafiction may be post-hoc rationalizations for rip-offs.\textsuperscript{30} Instead, I suggest that defendants start off with an assertive argument that their work is a fair use so that they can begin on moral high ground and force plaintiffs into a defensive position of arguing the right to censor it.

In Part 4 I fault the court of appeals for indulging in lofty rhetoric about an authorial “right not to speak” that, if taken literally, would weigh against any fair use defense for any unlicensed derivative work and would remove the restraint on preliminary injunctions in copyright cases that the panel’s holding had seemed to impose.

PART 2 – BACKGROUND ON THE NOVELS AND THE LITIGATION

In 2009 J.D. Salinger sued Fredrik Colting, claiming that Colting’s novel 60 YEARS
LATER – COMING THROUGH THE RYE\(^\text{31}\) infringed Mr. Salinger’s copyright in THE CATCHER IN THE
RYE\(^\text{32}\) and in the iconic adolescent character Holden Caulfield.\(^\text{33}\) The complaint also
stated a claim for unfair competition under New York State law,\(^\text{34}\) but the plaintiffs\(^\text{35}\) did
not pursue that claim in the pre-trial proceedings. As noted above, the Second Circuit
issued an important holding on equitable remedies in copyright litigation, and the
decision has been cited by other courts.\(^\text{36}\) My focus, however, is on the courts’
evaluation of Salinger’s infringement claim.

J.D. Salinger published THE CATCHER IN THE RYE in 1951. Holden Caulfield is the
novel’s first-person narrator. Holden, who reveals that he is 16, narrates his thoughts
and experiences during two December days and nights he spends wandering around
Manhattan after running away from his prep school. He is avoiding his parents who will
soon learn that he has once again flunked out of school. Holden has a series of awkward
and often unpleasant encounters with strangers and acquaintances. He fantasizes about

\(^{31}\) See n. __, supra.
\(^{32}\) See n. __, supra.
\(^{33}\) Salinger v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), vacated, 607 F.3d 68 (2d Cir. 2010)
\(^{34}\) Compl. at 18, Salinger v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), vacated, 607 F.3d 68 (2d Cir.
\(^{35}\) After Salinger died in January 2010, the trustees of his estate and the trust were substituted as
plaintiffs. Caption Amended, February 18, 2010 (No. 09 CIV 5095) (09-2878) (latter docket is 2d Cir.)
\(^{36}\) See, e.g., Precision Lifeline Sys., Inc. v. Precision Lift, Inc., __F.3d __, 2011 WL 3659315 at *9 (9th Cir.
2011) (adopting Salinger v. Colting’s holding on the standards for equitable relief in copyright cases); CLT
connection with injunctions in trademark cases).
escape, first to a cabin in the woods and then out West. He is acutely sensitive to what he characterizes as hypocrisy in others. He drinks too much and seems to develop a fever. He is distraught over the death of a younger brother. His only meaningful relationship is with his little sister Phoebe, whose love for him seems to save him from possible disaster. He is lonely, alienated, uncouth, ineffective, self-centered, forlorn, and to many readers, lovable. Salinger ends the novel by having Holden reveal that he has been writing while confined in a psychiatric treatment ward.

The novel was a bestseller and, while early reviews were mixed, critical appreciation for it grew over time, and it is now ensconced in the American literary canon.37 A favorite of high-school and college English teachers, it has never gone out of print. Salinger’s own behavior probably helped sustain popular interest in his novel and in himself. In a move that seemed to fulfill one of Holden’s dreams of escape, Salinger withdrew from Manhattan’s literary scene to live in rural New Hampshire. He continued

37 See, e.g., Louis Menand, Life and Letters, Holden at Fifty, The “Catcher in the Rye” and what it spawned, The New Yorker, October 10, 2001, available at www.newyorker.com/archive/2001/10/01/011001fa_FACT3 (last checked July 9, 2011). Many books and articles have been written about Salinger and about his fiction. The most recent book is a relatively sympathetic biography: KENNETH SLAWENSKI, J.D. SALINGER, A LIFE (2010). My summaries here of Salinger’s life, publication history and personality, are principally informed by Slawenski’s biography. Readers may find Slawenski’s description of Salinger’s later years particularly illuminating because it accords with Colting’s fictional depiction of an isolated and eccentric character, distressed by the public pressures associated with the popularity of his 1951 novel and who may be writing something but who is not publishing. Id. at 373 – 399. Slawenski’s final chapter describes Salinger’s reaction to Colting’s novel and the litigation under discussion in this article. Id. at 400 – 414. An unflattering description of Salinger appears in JOYCE MAYNARD, AT HOME IN THE WORLD, A MEMOIR (1998). For other discussions of Salinger and his writings, see, e.g., PAUL ALEXANDER, SALINGER (1999); EBERHARD ALSEN, A READERS GUIDE TO J.D. SALINGER (2002); WARREN FRENCH, J.D. SALINGER REVISITED (1988); HENRY ANATOLE GRUNWALD, ED., SALINGER, A CRITICAL AND PERSONAL PORTRAIT (1962); IAN HAMILTON, IN SEARCH OF J.D. SALINGER (1988). Ian Hamilton’s book may be particularly interesting for readers of this article. Hamilton recounts his efforts to write a biography of Salinger, only to have publication blocked when Salinger sued successfully for copyright infringement on the ground that Hamilton’s inclusion of paraphrases from Salinger’s unpublished letters infringed his copyrights. Id. at 191 – 212. For the litigation Hamilton describes, see SALINGER v. RANDOM HOUSE, INC., 650 F. Supp. 413 (S.D.N.Y. 1986), rev’d, 811 F.2d 90 (2d. Cir. 1987). Readers may also be bemused to note that the defendant Random House in that earlier litigation is now Salinger’s publisher.
to write and publish occasionally – fictions involving characters obsessed with transcendental, existential purity – but he published nothing more using the character Holden – and nothing at all after 1965. Although he received several offers to make films of *Catcher*, he turned them all down. In fact, with one exception, he never permitted any uses of his work except for print re-issues and compilations. Sadly, but predictably, Salinger’s retreat from the New York – and Hollywood – entertainment industry only fueled media fascination with him and contributed to some popular conflation of the “reclusive” author with Holden, the withdrawn and alienated character.\(^{38}\)

As a result, I think it’s fair to say that for many people, especially those who came of age in the 1960s and ‘70s, the names Holden Caulfield and J.D. Salinger conjure up characters they think they know and ones that are associated each with the other, much as Huck Finn brings to mind Mark Twain, and vice versa. “Holden” brings to mind two American archetypes. One is a sad, lonely, alienated, adolescent male, searching for a better world in which to grow up. The character sits forever, immature and uncompromised, in mid-20\(^{th}\) century America -- too young to claim credit for winning WWII, too uncool to be a Beat, too old to become a ‘60s hippie or campus radical – an over-privileged, prep-school kid with a broken heart, a suspicion of adult complacency, and nowhere to go.\(^{39}\) The other is the character’s solitary author, hoping only to be let alone in his cabin in the woods.

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\(^{38}\) See *Kenneth Slawenski, J.D. Salinger, A Life* (2010) *passim*.

\(^{39}\) For one summary of *Catcher’s* plot and Caulfield’s character and the work’s place in American literary and popular culture, see Slawenski, *id.* at 205 – 214. See also Louis Menand, *Life and Letters, Holden at*
In 2009, a barbarian crashed the gates. Fredrik Colting, a literary unknown, wrote his novel, *60 Years Later*. Colting published first in England and made plans to distribute the novel in the United States. In the novel, a 76-year-old character, Mr. C, seems to narrate his experiences after running away from an assisted living facility in New Jersey. He spends several days confused and wandering around Manhattan encountering time-altered versions of some of the characters and places Holden encounters in *Catcher*. Mr. C seems to emerge gradually from a Rip-Van-Winkle-type snooze and begins to recall some of the details of his younger years, some of which refer to parts of *Catcher* and some of which are new – such as the acquisition of a wife and child. Mr. C also becomes aware of a constant tapping sound, which the reader discovers is emanating from a typewriter.

Another narrator, indicated by italics, interrupts Mr. C’s ruminations, rarely at first and then with greater frequency as the novel progresses. The reader comes to understand that this second narrator is Mr. C’s author – a neurotic who seems to suffer from writer’s block and who is enraged by the persistent existence of Mr. C. This second narrator is the source of the tapping. He tries repeatedly but unsuccessfully to write Mr. C out of existence until Mr. C arrives at his doorstep in New Hampshire and the two are reconciled – becoming one, so to speak.

The references to *Catcher* and to Holden and other characters, like his sister Phoebe, are unmistakable in several scenes throughout the novel and in the locutions, *Fifty, The “Catcher in the Rye” and what it spawned*, *The New Yorker*, October 10, 2001. For Salinger’s reaction to the book’s success and retreat to New Hampshire, see Slawenski, *supra* n. ___ at 215 – 240.

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40 *John David California, 60 Years Later – Coming Through the Rye* (2009).
memories and some of the attitudes of Mr. C. In case any potential reader might have missed the reference in the title, Colting and his publisher marketed the novel in England as a “sequel” to Catcher,\(^{41}\) -- a marketing move that Colting no doubt came to rue. In a crowning bit of cheek, the novel was dedicated: “To J.D. Salinger, the most terrific liar you ever saw in your life.”\(^{42}\) It’s not clear from Colting’s comments about his own motives – in interviews and the court documents – whether he is an ambitious bumpkin with bad manners or an iconoclast with premeditation. In any event, the novel and the marketing were perfectly designed to rattle Salinger’s cage.\(^{43}\)

Salinger’s British agent promptly informed Salinger and his American publisher Random House, and Salinger then filed suit in the United States Court for the Southern District of New York.\(^{44}\) Salinger claimed infringement of the copyright in Catcher as a whole and in the character Holden Caulfield and moved for a preliminary injunction barring Colting and his co-defendants from distributing 60 Years Later in the United States while the litigation was pending.\(^{45}\) In pre-trial proceedings about the injunction, Colting defended on the merits, arguing that 60 Years Later did not infringe Catcher because it was not substantially similar to Catcher and that, in any event, Colting’s adaptation of some scenes and characters, including Holden, was a fair use of Salinger’s

\(^{41}\) Compl. at 19, 2009 WL 1529592 (S.D.N.Y. June 1, 2009). The allegation that the defendants marketed the novel as a sequel was made under the unfair competition claim.

\(^{42}\) 60 YEARS LATER, dedication (unpaginated).

\(^{43}\) See Slawenski, supra n. ___ at 401 – 405.

\(^{44}\) Affidavit of Phyllis Westberg, Salinger v. Colting (No. 09 CIV 5095) (author has hard copy)

\(^{45}\) Compl., 2009 WL 1529592
work. Colting argued, in particular, that \textit{60 Years Later} was fair because it would have no negative effect on sales of \textit{Catcher}. \footnote{Amended Answer and Counterclaim, August 17, 2009, 2009 WL 3210417; Defendants’ Memorandum of Law in Opposition to Plaintiff’s Motion for Preliminary Injunction, June 15, 2009, 2009 WL 1916613.}

The district court was utterly unpersuaded by any aspect of the defense. At the motion hearing, she ruled from the bench that the two novels were substantially similar. A few days later, she issued the preliminary injunction with a written opinion reiterating her conclusion that \textit{60 Years Later} was substantially similar and that Colting would not prove a fair use. \footnote{Tr. Hearing at 25. (author has hard copy).} Considering the likelihood that Salinger would prevail on the merits were a trial conducted, Judge Batts ordered a preliminary injunction, relying in part on a presumption that Salinger would suffer irreparable harm in the interim were an injunction not issued. \footnote{\textit{Salinger v. Colting}, 641 F. Supp. 2d 250.}

Colting appealed from the order issuing the preliminary injunction. After a ten-month delay, the Court of Appeals for the Second Circuit vacated the injunction and remanded the case for further proceedings. \footnote{\textit{Salinger v. Colting}, 641 F. Supp. 2d at 269.} In the interval between the district court order and the appellate remand, Salinger died, and Colleen and Matthew Salinger, his trustees, were substituted as plaintiffs. \footnote{\textit{Salinger v. Colting}, 607 F.3d 68.}

The court of appeals devoted most of its opinion to an issue of first impression in the circuit,\footnote{See n. \_\_ \textit{supra}.} explaining that the district court had erred in issuing the injunction based on a presumption that Salinger would suffer irreparable harm in the interim.
on a presumption of irreparable harm. In a recent patent case, eBay, Inc. v. MercExchange, the U.S. Supreme Court had held that a court may not order an equitable remedy based merely on a presumption of irreparable harm but must make specific findings of fact that harm was both likely and irreparable by a later award of damages. Colting had raised this issue at the district court, but that court had confined eBay to patent cases. The court of appeals held that this was error, explaining that the Supreme Court’s rationale applied to equitable remedies generally and not just to remedies for patent infringement. The court of appeals remanded so that the district court might take evidence on the likely harm to Salinger.

The court of appeal’s opinion betrayed no concern that the district court would be unable to support issuance of another injunction; indeed, the opinion almost outlines the findings the lower court would need to make. Recognizing that eBay provided sufficient grounds to vacate the injunction, the court of appeals nonetheless reviewed the merits of Salinger’s copyright claims, saying that it was doing so in the interests of judicial efficiency. In a few pages of dicta at the end of the opinion, the court of appeals agreed with the district court’s estimate that Colting had infringed Salinger’s work and would not succeed in defending on the ground of fair use – although the appellate court did suggest some ways that the lower court might bolster its fair use analysis the next time around.

\[53\] Salinger v. Colting, 607 F.3d at 79, 84.
\[55\] Salinger v. Colting, 607 F.3d at 78.
\[56\] Salinger v. Colting, 607 F.3d at 82.
\[57\] Salinger v. Colting, 607 F.3d at 83.
\[58\] Salinger v. Colting, 607 F. 3d at 83.
“infringement of the right not to speak, ‘for even minimal periods of time, unquestionably constitutes irreparable injury.’”

But there was to be no second time around and no final judgment on the merits, or even on the propriety of another preliminary injunction. After the court of appeals’ decision, Colting settled with Salinger’s trustees.


60 See, supra, n. ___.

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60 See, supra, n. ___.
PART 3 – The District Court’s Analysis

This part concerns the district court’s conclusion that Salinger was likely to win his infringement claim because 60 YEARS LATER was substantially similar to and not a fair use of CATCHER and the character Holden Caulfield. The court adopted plaintiff’s theory of the case – that 60 YEARS LATER was a sequel to CATCHER – a theory given a major boost by Colting’s own use of the word until his U.S. lawyers alerted him to the unfortunate legal implications. As a practical matter, it may be that no literary or legal argument could have overcome the effect of this one word. But I think the literary and legal arguments deserve another review because the underlying issues of what makes a

61 Hearing at pp. 28-29. (Mr. Rosenthal, Colting’s attorney, responding to the court’s comment that the book was advertised as a sequel, said: “The author is from Sweden. English is not his first language. Before we or any U.S. lawyers were involved in the case, he put the word sequel on the back of the book and in some promotional marketing copy. . . . [I]n his declaration . . . [h]e made it very, very clear that this book was not intended as a sequel, in the sense that we know a sequel. It is not intended as the next day, the next chapter in Holden Caulfield’s life. It is not intended to satisfy the need of the public to know what happened to Holden Caulfield. . . . It is designed as a critical commentary on the relationship between J.D. Salinger and the character he created.” Rosenthal also represented that the U.S. publication would be different, making it clear to consumers that the novel was not authorized or endorsed by Salinger. The court was not persuaded, citing a variety of statements Colting had made to the press giving a range of motives for writing the novel. 641 F.Supp.2d at 260, fn.3. This collection of statements made at different times and to different interviewers was masterfully assembled by the plaintiff and presented in exhibits attached to his agent’s affidavit. See Westberg Aff., cited by the court. Id. With the exception of the cover designation of “sequel,” Colting’s oral remarks seem cherry-picked and fundamentally incoherent. To me, they reflect an inexperienced and injudicious writer, caught up in the glare of some media attention and willing to say just about anything to make his novel and himself seem attractive.

62 Although the district court simply challenged Colting’s crediblity in describing the purpose of his book, the emphasis she put on his use of the word sequel suggests that she suspected him of bad faith. It is fairly clear that failing to ask permission to make an arguable fair use is not bad faith, but perhaps marketing a fair use as if it’s a licensable derivative work may be. This seems to be an issue of first impression. Cf. Blanch v. Koons, 467 F.3d 244, 255-56 (2d Cir. 2006) (discussing the meaning of bad faith in fair use cases.) On the other hand, both the district and appellate courts in the Salinger case treated Colting’s description of his work as going to the “character and purpose” of his novel under the first fair use factor, 17 U.S.C. § 107(1), and not to the question of his bad faith. See Salinger v. Colting, 641 F. Supp.2d at 260 (discussing whether Colting’s earlier statements about his purpose undermine his claim that the book was a parody and concluding that the parody claim is an ex-post rationalization), vacated, 607 F.3d at 83 (commenting that “[i]t may be that a court can find that the fair use factor favors a defendant even when the defendant and his work lack a transformative purpose.”)
sequel and why that description matters for copyright liability, are important and recurring. I hope the following analysis will be practically helpful to attorneys and judges in future cases where the defendant’s marketing practices have not so complicated the copyright issues.

My intuition is that defenders of metafictions – and similar incorporations and retoolings of copyrighted works in other media63 – must simplify and narrow the issues in order to persuade trial judges who may not be familiar with basic literary, art, or music theory and who may be, by temperament and training, downright skeptical about the value of theory – especially theories with the prefix “meta” – and dubious about

63 See, e.g., Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006) (holding as a fair use Jeff Koon’s incorporation of a photograph of women’s legs from an ad into a painting that Koons said was designed to comment on the use of certain kinds of imagery in mass market culture). It is worth noting that Koons, or his lawyers, have plainly learned how to justify his appropriation of others’ copyrighted images – or the courts have become more tolerant of appropriative visual art. In three earlier cases, he was found liable for copyright infringement. See id. at 247 and cases cited there. See Lynne A. Greenberg, The Art of Appropriations: Puppies, Piracy and Post-Modernism, 11 Cardozo Arts & Entertainment L. J. 1, 22 – 33 (1992) (criticizing one of these earlier decisions (Rogers v. Koons) for holding Koons liable). There are several factors, besides scholarly criticism, that may account for the Second Circuit’s more favorable attitude toward Koons’ appropriation than toward Colting’s. First, in this latest case, Koons was articulate and consistent in describing his motives. He did not market, indeed could not have marketed, his collage by pointing to its use of Blanch’s picture. Blanch’s picture – of a model’s legs – was copyrighted but lacked the high cultural status or independent recognition afforded CATCHER. Koons’ use of the photo without a license would deprive Blanch of a license fee but it would not otherwise impair the market for Blanch’s work, except possibly to the extent that Koons’ collage rendered the image too controversial for further use in advertisements. That, of course, would be a transformative effect and so would likely be sheltered by fair use. See E. Kenly Ames, Note, Beyond Rogers v. Koons: A Fair Use Standard for Appropriation, 93 Colum. L. Rev. 1473 (1993) (arguing in part that courts should permit appropriative uses where they do not compete in the principal market for the copyrighted work.) Of course, the essence of Salinger’s argument that Colting’s book was a sequel is that the book would compete in the principal market for the original or its close derivatives. This suggests that substantial metafictional uses of literary works are likely to pose closer questions about market competition than snippets of photos or popular music riffs will. But see Bridgeport Music Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005) (holding that small amount of music sampling not a fair use.) There is only one recent appellate case that deals with a claimed fair use of a novel by a novel. See Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (holding that THE WIND DONE GONE was a fair use of GONE WITH THE WIND.) Other high profile literary disputes have not generated judicial opinions. See David Roh, Two Copyright Cases from a Literary Perspective, 22 Cardozo Stud. L. & Lit. 110, 127 (2010) (discussing the narrative technique used in THE WIND DONE GONE). Roh’s article usefully discusses other literary disputes, including the dispute over a retelling of Nabokov’s LOLITA from Lolita’s point of view.)
experts’ objectivity. I argue that defendants trying to defend a metafiction as a fair use should present the judge with one major claim of right and one description of the material facts narrowly tailored to fit the claim. The major claim of right must be presented in terms of the affirmative defense of fair use. They must imagine themselves as plaintiffs, aggressively asserting a right to express themselves about the plaintiff’s work in the mode of their choice. Defendants should avoid cluttering up this claim with other possible defenses – such as a lack of substantial similarity or a theoretical argument that a literary character is not copyrighted – because they will not prevail under current law, and disputes over these matters only enable the plaintiff to emphasize the similarities that support its prima facie claim. Defendants of a metafiction must also direct the judge’s attention to narrative structure as the material fact. This is because defendants must convince the judge that the subject and object of their later work is the plaintiff’s copyrighted work.

64 Judge Batts had not read Colting’s literary experts’ affidavits before conducting the hearing on Salinger’s motion for a preliminary injunction. Preliminary Injunction Hearing, Salinger v. Colting, 641 F.Supp.2d 250, at 3. (“Hearing”) There was a skirmish, early in the proceedings, about whether one of Colting’s literary experts’ declarations was admissible. Salinger argued that the Second Circuit forbids expert opinion to substitute for that of the ordinary observer in determining substantial similarity, see, e.g. Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946). Pl.’s in Limine Motion to Strike Certain Exhibits and Expert Declarations, June 19, 2009. Colting argued that the expert testimony was submitted not on the issue of substantial similarity but on the issue of whether Colting’s novel was a fair use. Def.’s Mem. of Law in Opposition to Pl.’s In Limine Motion, June 23, 2009. Ultimately, the judge admitted declarations by Professors Robert Spoo’s declaration and Martha Woodmansee. The judge even refers to Woodmansee’s declaration in her opinion on fair use but, paradoxically, uses selected portions of Woodmansee’s analysis against Colting. See Salinger v. Colting, 641 F. Supp.2d at 258. I’ll return to the significance of the judge’s selective references to Woodmansee’s declaration, infra at pp. ___.

65 See Joseph P. Bauer, Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies, 67 Wash. & Lee L. Rev. 831 (2010) (arguing that recent copyright decisions have tended to underprotect First Amendment rights); William W. Fisher III, The Implications for Law of User Innovation, 94 MINN. L. REV. 1417 (2010), supra n. ___ (arguing in part that fair use of expressive works should be liberalized in order to promote the “flourishing” of users and consumers); Joseph P. Liu, Copyright and Time: A Proposal, 101 MICH. L. REV. 409 (2002) (suggesting that courts should consider the length of a copyright term in the fair use analysis.)
This strategy solves two problems confronting authors of metafictions that are doctrinally “substantially similar” to the underlying work. First, it provides a principled way to distinguish derivative works that provide readers with the kinds of entertainment that sequels generally do from derivative works that do not provide the same kinds of entertainment -- even though, on the surface, both types of works contain countable, recognizable resemblances to the plaintiff’s copyrighted work – such as the same character or plot elements. Second, it goes a long way to establishing that the metafiction is inherently transformative of the reader’s perception of the copyrighted work. By focusing on the fact that the metafiction forces the reader’s attention to the construction of and narrative perspective in the underlying work itself, defendants can argue that the reader’s understanding of the original is necessarily transformed.

Colting failed to persuade the district judge that 60 YEARS LATER’s narrative structure made any difference to the reader. It plainly did not to the judge. As a result, the judge read the novel as though it were another work of literary realism in the same vein as CATCHER—one that would provide the eager reader with more material about the beloved character Holden Caulfield.\footnote{Salinger v. Colting, 641 F. Supp.2d at 258 – 260 (rejecting Colting’s argument that his novel transformed the character Holden Caulfield, commenting for example: that “Holden Caulfield as delineated by Salinger was already often ‘miserable’ and ‘unconnected’ as well as frequently ‘absurd[]’ and ‘ridiculous,’” as Colting says of his elderly version of the character,” id. at 258; that “the contrast between Holden’s authentic but critical and rebellious nature and his tendency toward depressive alienation is one of the key themes of CATCHER (sic). That many readers and critics have apparently idolized Caulfield for the former, despite-or perhaps because of-the latter, does not change the fact that those elements were already in CATCHER (sic). It is hardly parodic to repeat that same exercise in contrast, just because society and the characters have changed,” id. at 259; and “[f]or the foregoing reasons, 60 Years’ plain purpose is not to expose Holden Caulfield’s disconnectedness, absurdity, and ridiculousness, but rather to satisfy Holden’s fans’ passion to Holden Caulfield’s disconnectedness, absurdity, and ridiculousness.” Id. at 260.)} The judge treated Colting’s use of an “uber-narrator” – a character resembling Salinger – as having almost no effect on the reader’s
perception of the Caulfield character or of the relationship between the fictional or real authors Salinger and their fictions. Although the court acknowledged that Colting was free to write about Salinger, the court did not think it necessary for Colting to use any of Salinger’s work to do so. This ruling confused separate issues. Even the plaintiff did not suggest that Colting might not write about Salinger; the issue was whether Colting could make up a fictional Salinger and depict that character revising the real Salinger’s material. The court concluded that the depiction of a fictional Salinger revising his own novel was not a comment or critique upon the work, but only upon the real writer, and thus was not a fair use.67

I think the judge’s reading is wrong in the sense that it does not reflect how an ordinary reader would respond. Prompted by the plaintiff, the judge seems to have read the novel as a sequel about Caulfield with a different narrator pasted on top. That misreading, combined with Colting’s unfortunate use of the term sequel, convinced the judge that Colting’s claim that he had composed a metafiction was just an ex-post rationalization for an unlicensed sequel.68

Of course, I can’t prove how an ordinary reader would respond, but I can provide an alternative reading – very close to the one that Colting’s attorney described69 and supported by the defense experts70 – and then offer some suggestions for litigation strategies that might have convinced the judge to take this other reading seriously, at

67 *Salinger v. Colting*, 641 F. Supp.2d at 262 (concluding that Colting used the Holden Caulfield character and the fictional narrator as tools to comment on the real Salinger, rather than on the work itself. The court also thought it significant that the fictional narrator only appeared on 40 out of 277 pages.)
69 Hearing at 34-35, 57-58.
least to the extent of denying the plaintiff’s demand for a preliminary injunction and deferring judgment to trial. Therefore, in the balance of this section, I offer an alternative reading of 60 YEARS LATER, followed by one suggestion for how to argue the facts and one for how to argue the law that might help another judge credit the transformative effect of a metafictional narrative structure.

The key facts are the narrative techniques of each work. Salinger’s Caulfield is a work of literary realism – the first-person reminiscences of a life-like boy; Colting’s Mr. C is a construct in a metafiction – like a hologram that flickers on when Colting’s fictional narrator turns his attention in its direction. The reader doesn’t find out what happened to the life-like boy after CATCHER ends; the reader finds out what thoughts Colting’s fictional narrator puts into the head of his fictional Mr. C. Colting’s novel relentlessly emphasizes the unreality of Mr. C and his predecessor, Holden Caulfield. It relentlessly emphasizes that Mr. C is a figment of the fevered imagination of the writer-narrator and the object of the latter’s obsessive rewriting. This narrative structure deprives both the C character and the plot of any of the literary realism of CATCHER.

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71 Although the court of appeals agreed with the district court’s finding that Salinger would prevail on the merits at trial, even that court cautioned the lower court about the difficulty of making the fair use analysis in a rush and without a trial. See Salinger v. Colting, 607 F.3d at 80 – 81.
72 For an accessible introduction to the techniques of narration in fiction, see JAMES WOOD, HOW FICTION WORKS 3-38 (2008). For an introduction to fictional characters. See id. at 94 – 137.
73 The judge revealed her insensitivity to the difference in narrators in commenting that Colting’s book was excessively similar to Salinger’s because in part “[b]oth narratives are told from the first-person point of view of a sarcastic, often uncouth protagonist who relies heavily on slang, euphemism, and colloquialisms, makes constant digressions and asides, refers to readers in the second person, constantly assures the reader that he is being honest and that he is giving them the truth.” Salinger v. Colting, 641 F. Supp.2d at 266. The judge seems to be referring to Holden Caulfield and Mr. C, as if the latter were the fictional narrator of Colting’s book, instead of the object of the fictional narrator’s attention.
74 See, e.g., 60 YEARS LATER 135-36 (in which “everything goes black” for Mr. C, the italicized fictional narrator intervenes with a paragraph that begins “What nonsense is this?” and ends “I will pick up my pen and get back in the saddle.” In the next paragraph, Mr. C is apparently back describing some soup.) An
In the hearing, Ms. Paul, Salinger’s attorney, challenged Colting’s argument that his book was not “designed to satisfy any interest that the public might have in finding out what happened to Holden Caulfield.” Ms. Paul responds, “But we do find out. We find out that just a week or so after Catcher leaves off, D.B. comes to visit him in the mental hospital with a new girlfriend. . . . We find out that Phoebe got married. . . . We find out that he became a high school teacher. . . . etc.” 75 The district court later concludes “60 Years’ plain purpose [is not to parody Caulfield] but rather to satisfy Holden’s fans’ passion for Holden Caulfield’s disconnectedness, absurdity, and ridiculousness, which Catcher has ‘elevated into the realm of protectable creative expression.’” 76

With all due respect, this just is not an accurate description of the facts. The reader does not find out what happened to the realistic character. The reader finds out that “what happened to Holden Caulfield?” is a ridiculous question. He never existed. Readers won’t find a realistic depiction of a character’s “disconnectedness.” They will see a highly stylized depiction of the fictional writer-narrator struggling at first over how to terminate the character 77 – which of course the writer-narrator cannot manage because, as Colting’s novel implies, the realistic character escaped from Salinger’s prose

75 Hearing at 45.
76 Salinger v. Colting, 641 F.3d at 260.
77 60 YEARS LATER 62–63.
and has an ongoing existence in the popular mind. Perhaps what a reasonably discerning reader might glean from Colting’s book is a story about a writer very much like Salinger being driven to distraction by the fame his character brought him and by some readers’ hopes for a sequel. However, they won’t get it from this book.

**CATCHER** does not read like a sequel. **CATCHER** provides a realistic description of an adolescent boy’s consciousness. **60 YEARS LATER** provides a post-modern deconstruction of that realistic illusion through the narrative voice of a somewhat hallucinatory aging, neurotic writer’s consciousness. If Catcher is “about” Holden Caulfield, **60 Years Later** is “about” a fictional Salinger and his relationship to his creation. That Holden Caulfield also seems to have grown old, acquired a wife and son, revisited some old haunts, and eventually reunited with his creator are visible plot elements, but that plot is always subordinate to the organizing idea that a fictional narrator Salinger is writing and rewriting this character and the scenes he moves through. Holden is reduced to words on the page – in a nice play on copyright law – to the expression in which “he” is embodied. Of course, the additional irony is that the narrator Salinger isn’t real either. All of this is written by Colting – which leads to the core question. Should copyright law be interpreted to deny Colting the opportunity to express himself in this way?

With all due respect, I think it is simply an incompetent (or biased) reading to ignore Colting’s narrative construct – to discount its effect because, as the judge noted,

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78 Arguably, Colting is playing with the literary and legal puzzle about what constitutes a character – words on the page or the reading public’s idea of and associations to the character. In a nutshell, the legal issue arises because copyright attaches to tangible expression. 17 U.S.C. 102. Plainly, however, a character may be “created” initially by such expression but it may persist in the minds of readers quite detached from the tangible expression. So, for example, just the name Holden or a mention of his favorite red hat may summon diverse and complex associations in readers’ minds. See, infra, at for some further discussion of copyright in character.
the fictional Salinger only appears on 44 of 277 pages. This is the kind of reading that would earn an F in English 101 (or so I hope!).

Colting’s prose style is also very different – and not as pleasing or interesting as Salinger’s. It is true that he occasionally puts some of Holden’s characteristic locutions in Mr. C’s interior monologue but, while those may have seemed realistic in Salinger’s depiction of a 1950s teenager, they don’t in the mouth of a contemporary old man. Indeed, even when the narrator Salinger is not “talking,” Mr. C’s own monologue reminds the reader that he is being acted upon.

This difference in narrative technique constitutes comment on and criticism of the original, just as much as a non-fiction, didactic deconstruction of literary realism by a literary critic would. It interrupts, it destabilizes, it undermines the illusion of reality created in Salinger’s fiction. It makes you think about what a literary character is. Colting’s story line, such as it is, requires reference to Salinger’s novel. The conceit is that Salinger must control this character with which he identifies and is identified. To illustrate that obsession, Colting employs the fiction that Salinger is rewriting Caulfield.

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79 Salinger v. Colting, 641 F. Supp.2d at 262. In fairness to the judge, she did acknowledge that even a quantitatively minor character could have a transformative effect.

80 E.g. “I don’t, I really don’t” at p. 3.

81 E.g. “The only thing I can think of that was different about yesterday was that I finished telling you about all this madcap stuff that happened to me lately. I wrote it all down in the notebook, the one I can’t even find now because it’s so goddamned dark in here.” At p. 13. This seems to be reference to the close of CATCHER: “Anyway...D.B. asked me what I thought about all this stuff I just finished telling you about. I don’t know what the hell to say,” CATCHER at 212. In any case, the reference is clear but the realism is gone. This does not sound like a 76 year old man.

82 E.g. After a “meeting” with his sister Phoebe, she suddenly disappears into a mist and Mr. C writes: “The door to the pantry suddenly slams shut and I am pulled backwards and fall into a black hole. It’s the blackest of black and the deepest of holes.” In the next paragraph, it is suddenly light and Mr. C wakes up. At 208 – 09. This kind of passage, even without the explicit intervention of the italicized narration from the fictional Salinger, makes it perfectly obvious that the character Mr. C is being given “consciousness” at the narrator’s whim.
This fiction contains a comment on and criticism of Salinger’s character and his personal and professional identification with his most famous and successful literary character as well as an alteration and reduction of that character to an aspect of Salinger himself. Far from satisfying Caulfield enthusiasts for more of “him,” this book would surely disappoint.\(^83\)

This is a purpose or character of Colting’s work that the district court should have at least considered under the first fair use factor – the purpose and character of the work\(^84\) -- but it is unclear that the court understood it. Instead, the district judge had concluded that there was substantial similarity between the characters Holden Caulfield and Mr. C and between the novels’ scenes or plots.\(^85\) Having made that initial finding -- without apparently perceiving any differences flowing from the meta-fiction in which S is rewriting Caulfield/Mr. C – the district court did not perceive any justification for the parallels between the books.\(^86\) Had the judge perceived the shift from literary realism to meta-fiction in the first place, then she might have judged the similarities between the books and the characters as necessary to Colting’s theme. The hearing transcript makes it clear that she did not perceive any commentary or criticism stemming from the use of the narrator-writing character.\(^87\)

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\(^83\) In making this point, I am aware that there may be a different ground for liability if Colting succeeding in convincing readers that the book was a sequel in the traditional sense. That is, perhaps, a form of false advertising, and it might violate trademark or unfair competition laws. See, _infra_, at ___ for a discussion of Salinger’s unfair competition claim.

\(^84\) 17 U.S.C. § 107(1).

\(^85\) 641 F. Supp.2d at 254.

\(^86\) 641 F. Supp.2d at 256 – 264.

\(^87\) Colting’s attorney tried to explain the point clearly in the hearing on the preliminary injunction:  
Mr. Rosenthal: But it is not so simple as our author (Colting) has made him (Caulfield) become because that is not what the book is. The book is, the Salinger character is really the central character in _60 Years Later_.
The Court: All right. Reasonable people can differ on this.
Mr. Rosenthal: Let me explain why. He appears on 40 pages in the book. As the book progresses, it becomes more and more about the Salinger character. When I started reading this book –

The Court: 40 pages out of 277?
Mr. Rosenthal: But just because somebody is not on the most number of pages doesn’t mean is not the central character.

When I started reading the book, I was a little bit confused about what was going on. I didn’t quite understand it. Then as the book progresses, the Salinger narrator becomes more and more important. You get to Chapter 8 of the book where all of the sudden you see this incredible moment where the Salinger narrator takes over the book. He says in the italicized portion: ‘I made him once. I cast him in my own book. In a way he is my son, my property. I won’t mourn him when he’s gone.’ Then he talks about killing him off.

“I intend to be fast ans swift. My time is running out, and I will leave nothing to chance.” Then he talks about different ways of killing him. He says: “I see him sitting in a café not far from the bus station, waiting for to” –

The Court: What is the purpose of quoting to me from the book?
Mr. Rosenthal: “I am trying to show – then what happens in Chapter 8 is that you start reading about happens to Mr. C. It says: ‘I am sitting in a café nor far from the bus station,’ which is just what the Salinger narrator has talked about. There are then three different incarnations of that story in Chapter 8 as the Salinger narrator tries to kill off Mr. C. He is unable to do it. Chapter 9 starts with the same words, and this time the character lives on.

So it is not about what happened to Holden Caulfield, it is about the J. D. Salinger narrator trying to deal with his characters. In the book you start to hear the tap, tap, tapping. The Mr. C character can’t figure out what it is. It turns out that it is Salinger typing him. There are these moments when the character can’t figure out what is happening to him. That is because he is being manipulated by Salinger.

The Court: All right. This is a commentary on the original work.
Mr. Rosenthal: Yes.

The Court: Because?
Mr. Rosenthal: Because the original work has become an iconic representation of a disaffected youth who has certain characteristics, and now we are reading an analysis of the creation, the creator of that work and what happens to the character many, many years later when we see the character having lived his whole life. You start to have more understanding about what the character was and what the book was and it changes your reading of the original work.” Hearing, June 17, 2009 at 33 – 35.

The Court: But do people need Mr. California’s version in order to view the story differently? How about just reading it twice, maybe five years later, ten years later, 30 years later, 40 years later. Would that not also provide a sufficient basis, not based on what somebody else is thinking it is, but based on your own reevaluation of the book, reanalysis of the book?

Mr. Rosenthal: That might be right, but that essentially – there is a reason why literary criticism and analysis and education is important.

The Court: I guess this is my problem. I am not sure this is literary criticism and analysis.

Hearing at pp. 37 -38.

The Court: I guess my initial problem here is whether or not your author is a critic, whether or not he is making a commentary on the work. Hearing at 38.

The Court (after lunch break): I had hoped to be in a position to make the ruling on the fair-use aspect of it from the bench this afternoon. Obviously I have already determined that there is a copyright, that there is substantial similarity. So we have narrowed the open issue down to the fair use aspect.
This leads to my second point – that defendants should focus their arguments on the fair use defense in cases of this type and relegate other potential, but probably losing, defenses to the back burner. A defendant who plans ultimately to defend on the basis of fair use might not engage with the plaintiff on whether the challenged work is substantially similar to the copyrighted work but might elect to concede the point and focus in immediately on fair use. This is because any literal reproduction of a portion of a work or any recognizable non-literal allusion to a copyrighted work will be deemed a substantial similarity no matter how small or how altered the reference may be and no matter how much the defendant’s entire work may read differently to that audience. Authors of mash-ups, fan fictions, sequels, or parodies and other derivative uses risk their credibility by arguing in court that the work is not substantially similar.88

Although, in theory, substantial similarity is one legal doctrine that, like fair use, differentiates between appropriations and misappropriations, modern copyright law now treats any recognizable appropriation as a prima facie misappropriation leaving only the fair use doctrine to excuse a select few.89 In making this point, I don’t pretend

I have listened to the arguments of counsel and actually find some of them on both parts impressive. I don’t wish to rush the complicated question of fair use and all its subparts. So that I will issue an opinion, a written decision, on the fair use aspect as quickly as I can. Hearing at 60.

88 The substantial similarity issue remains an important element of the plaintiff’s prima facie case and one for which it has the burden of proof. I do not suggest that substantial similarity is never a viable issue for defendants. There are many cases whether there is a significant issue about the source of the defendant’s work. My point is only that substantial similarity is likely to be a losing issue any work that has any allusions to a copyrighted work that a member of the public might recognize. I am also not condoning that state of the law.

89 See, e.g., Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70 (2d Cir. 1997) (holding that a two-minute display of a picture in a set for a television show was not a de minimis use and was infringing); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) (holding that two textile patterns with the same general color and various lines and patterns that were not identical would nonetheless have the same aesthetic appeal for the ordinary observer and thus were substantially similar)
to have unearthed a new judicial phenomenon; instead my suggestions are strategic ones to help defendants cope with the current reality. In a nutshell, Colting might have been better off to concede the similarities between 60 Years Later and Catcher while taking an aggressive posture on fair use. By disputing substantial similarity, a defendant may enable a plaintiff to emphasize the prima facie case for substantial similarity – and that may make post-modern constructs, like Colting’s metafiction – look really bad.

Although substantial similarity and fair use are technically different tests, the amount and substantiality of copying are relevant to both, and these tests are sufficiently vague and open-textured that a judge unversed in copyright law may well elide the two. In this case, the contest over substantial similarity allowed Salinger’s attorneys to line up and emphasize the inevitable and numerous similarities between Colting’s metafiction and CATCHER.\(^{90}\) To a judge unfamiliar or resistant to the idea that narrative technique might substantially transform a reader’s response to a character and a story, or to anyone reading the opinions in this case without having read both novels, the list looks very substantial and unjustified whether one is applying the substantial similarity or the fair use paradigm. Salinger’s attorney’s argument emphasized “similarity bean-counting,” and in so doing managed to obscure the significance of the fair use issue and to persuade the district court to adopt Salinger’s theory of the case. In the end, a defendant like Colting could still make the same factual

\(^{90}\) Salinger v. Colting, 641 F. Supp.2d at 263 – 268 (listing in the context of the court’s fair use analysis of factor 3 – amount and substantiality of the use – a list of similarities). See also Affidavit of Phyllis Westberg, Exhibits G and L; Hearing at 6 – 11.
arguments that the effect of a work will not be substantially similar for the audience, but that case may be made more effectively within the language of fair use.\footnote{17 U.S.C. § 107.}

For readers not already familiar with copyright doctrine, a short summary of relevant copyright doctrine may be helpful at this point. The doctrines have been exhaustively analyzed elsewhere.\footnote{E.g., 4-13 NIMMER ON COPYRIGHT § 13.01 et seq.; PATRY ON FAIR USE (2011).} The basic message is that copyright cases that turn on whether two works of literary, musical or visual art are substantially similar to each other and on whether the later one makes a fair use of the earlier one are so diverse, so intensely factual, and the assessments so subjective that legal rules dictate a series of questions but rarely dictate particular judgments.\footnote{A seminal article is Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105 (1990). See, e.g., Salinger v. Colting, 607 F.3d at 81 (citing Leval and Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579, n. 10 (noting that “the fair use enquiry often requires close questions of judgment”).}

To state a prima facie case of copyright infringement, Salinger had to show that he owned a valid copyright and that Colting had invaded at least one of his exclusive rights under Section 106 of the Copyright Act of 1976.\footnote{17 U.S.C. § 106} Colting’s novel implicated two overlapping exclusive rights: the right of reproduction and the right to make a derivative work.\footnote{17 U.S.C. § 106 (1), (2). All derivative works necessarily involve some reproduction of the copyrighted work, and in a sense any reproduction is derivative, at least in the colloquial sense of the word. The distinction between the right of reproduction and the right to make a derivative work is not particularly significant for purposes of establishing an infringement. Instead, the distinction is important for allocating rights in a “derivative work” that also includes new, original expression. Under the statute such a derivative work entitles its author to a copyright in the derivative work as a whole and in the original expression he has added, provided that his use of the original work was lawful. 17 U.S.C. § 103. The author of the original work retains copyright in the original.} Both require the plaintiff to show that the defendant had access to

\footnote{17 U.S.C. § 106 (1), (2). All derivative works necessarily involve some reproduction of the copyrighted work, and in a sense any reproduction is derivative, at least in the colloquial sense of the word. The distinction between the right of reproduction and the right to make a derivative work is not particularly significant for purposes of establishing an infringement. Instead, the distinction is important for allocating rights in a “derivative work” that also includes new, original expression. Under the statute such a derivative work entitles its author to a copyright in the derivative work as a whole and in the original expression he has added, provided that his use of the original work was lawful. 17 U.S.C. § 103. The author of the original work retains copyright in the original.}
the original and actually used it in making the reproduction or derivative. A work may be infringing even though it does not include an exact replica of the original work, but in such cases the plaintiff must show that the allegedly infringing work, whether it is a reproduction or a derivative, is at least “substantially similar” to the original. Once Salinger succeeded in stating a prima facie case, Colting was entitled to assert the affirmative defense of fair use.

Because Colting did not dispute Salinger’s copyright in CATCHER as a whole and because he conceded, as he obviously had to, access to CATCHER and use of it in writing 60 YEARS LATER, the only debatable issues seemed to be whether 60 YEARS LATER was substantially similar to CATCHER and, if so, whether Colting was entitled to the fair use defense.

I use the phrase “seemed to be” because, under contemporary case law, there was not much contest that 60 YEARS LATER was substantially similar to CATCHER in a

96 The point here is that an apparent reproduction or derivative work is not an infringement if it was actually created independently without influence from the original.

97 Need citation for the idea that a derivative must be substantially similar. Goldstein, Nimmer etc.

98 Section 107 provides in part:

[T]he fair use of a copyrighted work . . . for purposes such as . . . criticism, [or] comment . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(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.

99 The parties did argue intensively in the pre-trial proceedings over the interesting issue of whether Salinger had a separate copyright in the character of Holden Caulfield. The district court said that he did, but the court of appeals said that it was unnecessary to decide, 607 F.3d at 83, since Salinger’s copyright in the novel was sufficient to sustain his claim. I discuss the character copyright issue infra at __.
doctrinal sense. The court of appeals even indicated some impatience with Colting’s attempt to argue otherwise by characterizing the argument as “manifestly meritless.”

At the same time, the question of whether 60 YEARS LATER was substantially similar to CATCHER in the colloquial sense of the word remained an important and arguable issue.

Formally, the substantial similarity test is used to assess two different issues. First, a finding of substantial similarity between two works supports an inference that the defendant must have copied even though the defendant denies having done so.

That issue was not relevant here because Colting admitted access and use of Salinger’s work. Second, and confusingly, a finding of substantial similarity is used to support a legal conclusion that the copying is so extensive – in quality or quantity – that a license would ordinarily be required. This is the subjective, value-laden aspect of the substantial similarity test that supposedly differentiates appropriation from

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100 Salinger v. Colting, 607 F.3d at 83. The court of appeals did not deign to explain this assertion. It simultaneously asserted that it was unnecessary to decide whether Salinger owned a separate copyright in the Caulfield character. Presumably, the court of appeals means the experienced reader to infer the unstated legal rationale – that there are sufficient allusions of title, locution, character and place and temporally sequenced scenes to signal to the average reader that Colting’s work is derivative of Salinger’s. The court was on solid precedential ground alleging that there was no credible issue about substantial similarity, if the court only meant that Colting’s work was allusive to Salinger’s, both by subjective design and reader response. The court was on shakier ground in asserting that there was no need to decide whether Salinger had a separate copyright in the Caulfield character. For more on the issue of copyright in character, see, infra, at ___.

101 See, e.g., Castle Rock Entertainment Inc. v. Carol Pub. Group, Inc., 150 F.3d 132 (2d Cir. 1998) (holding that a game that based questions and answers on references to episodes of the television show Seinfeld were substantially similar and infringing). In Salinger, the district court recited a customary, and typically confusing, formulation of the “substantial similarity” test. It cited Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1266 (11th Cir. 2001) for the proposition that “[s]ubstantial similarity’ exists where ‘an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work,” and Castle Rock Entertainment Inc. v. Carol Pub. Group, Inc., 150 F.3d 132, 139 (2d Cir. 1998) for the proposition that “[u]nder the ‘ordinary observer test’ . . . two works are substantially similar where the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal of the two works as the same.” Salinger v. Colting, 641 F. Supp. 2d at 254. The reader will note that these two formulations actually point in rather different directions. The first points to whether an observer would detect some copying. The second, however, points to the rather different question of how the detected similarities would affect the observer’s assessment of the works’ aesthetic appeal.
misappropriation, but the test has little purchase in itself and, in my view, overlaps with the fair use analysis to such a degree that defendants might as well proceed apace to that affirmative defense.

Colting’s attorneys plainly understood this. They argued, accurately, that YEARS LATER used de minimis verbatim copying of Salinger’s expression and that its overall effect on readers would be very different, but even while making this defense of insubstantial similarity, the defendant’s memorandum in opposition to the motion for a preliminary injunction repeatedly – and sensibly -- tried to switch the focus to whether what had been taken was a fair use.102

It’s obvious why. The precedents on substantial similarity were not favorable. A work might be substantially similar even though it was not identical in most details, nor was a quantitatively small use of verbatim expression necessarily excused.103 The Eleventh Circuit’s decision concerning a novel, THE WIND DONE GONE, was close on point. Like Colting’s book, it involved a recasting of the original iconic work with obvious and numerous similarities of plot and character. The author had retold GONE WITH THE WIND from the point of view of one of the black characters and reversed some of the roles so that white characters appeared in some of the demeaning roles previously assigned to

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102 Defs.’ Mem of Law in Opposition to Plaintiff’s Motion for Preliminary Injunction.
103 See, e.g., Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70 (2d Cir. 1997) (holding that a two-minute display of a picture in a set for a television show was not a de minimis use and was infringing); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) (holding that two textile patterns with the same general color and various lines and patterns that were not identical would nonetheless have the same aesthetic appeal for the ordinary observer and thus were substantially similar); Steinberg v. Columbia Pictures Ind., 663 F. Supp. 706 (S.D.N.Y. 1987) (holding that a movie poster that incorporated a version of the famous New Yorker magazine cover showing a New Yorker’s perspective on the U.S. into a larger frame and added novel elements would strike the observer as the same even though most of the details in the original had been altered).
blacks. The author had changed character names but had included scenes that paralleled scenes in *Gone with the Wind* and then added a lot of new material. Although the Eleventh Circuit ultimately concluded that *The Wind Done Gone* was a fair use, it first concluded that it was substantially similar because it had made recognizable reference to, if not verbatim use of, character, plot and scenes from *Gone with the Wind.*\(^{104}\) In essence, the substantial similarity test reduces to the question of whether the ordinary observer would detect in the challenged work the influence of the copyrighted work. The *Wind Done Gone* case, although not binding in the Second Circuit, makes that point.\(^{105}\) Despite some confusing language in the Second Circuit precedents,\(^{106}\) the test

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\(^{104}\) *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1266 – 67 (11th Cir. 2001) (finding that “substantial similarity” exists where “an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work”). The language “substantial similarity” is not helpful because it suggests that the test involves some quantitative or qualitative measurement. Instead, any actual reproduction or any recognizable allusion, although not involving any actual reproduction, may be substantially similar. This confusion arises because copyright law incorporates both property-like concepts – “you may not use my stuff without my permission” and unfair competition concepts – “you may not free-ride on a relation I have built with consumers.” One can see in the quoted language from the Eleventh Circuit the influence of both concepts – appropriation and consumer recognition.

\(^{105}\) *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1266 – 67 (11th Cir. 2001). This view is also consistent with Professor Nimmer’s taxonomy of the many forms substantial similarity may take. It seems to me that Colting’s novel arguably fits Nimmer’s description of a “non-comprehensive, non-literal copy” with a few verbatim words and phrases added. See 4 NIMMER ON COPYRIGHT § 13.03(A)(1)(e) and cases cited therein. For readers interested in exploring substantial similarity, see 4 NIMMER ON COPYRIGHT §§12.10(B)(3), 13.03 generally, 13.03(E)(1), 13.03(E)(3) and cases cited therein; ROGER E. SCHETTER, JOHN R. THOMAS, INTELLECTUAL PROPERTY – THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS § 9.1.2.2 (2003).

\(^{106}\) See *Salinger v. Colting*, 641 F. Supp.2d at 255, citing *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 139 (2d Cir. 1998) (“Under the ‘ordinary observer’ test . . . two works are substantially similar where the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal of the two works as the same.”)(internal citations omitted). In fact, this does not mean that the observer must regard the works as providing the same aesthetic appeal overall but only that the observer must be able to detect in the second work an allusion or reference back to the copyrighted work. In *Castle Rock*, the Second Circuit held that a game that used questions based on *Seinfeld* episodes infringed the copyright in the latter. Cases involving visual works illustrate the alternate property and unfair competition concepts of the substantial similarity test more clearly. In *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), Jeff Koons’ incorporation of an altered portion of a photograph into a larger collage was a prima facie infringement because the photographer’s work had been reproduced in some fashion even though an ordinary observer might not recognize its source. The court held found substantial similarity but excused it as a fair use. In *Steinberg v. Columbia Pictures, Inc.*, however, the defendants made an original drawing that looked very much like, but was not
is functionally the same. Substantial similarity does not require substantial reproduction, nor substantially similar appeal.

Therefore, where one novel puts a recognizable spin on a previous novel by incorporating obvious references back to character or plot, the lawfulness of such a use, if unlicensed, now rests entirely on the application of the fair use defense. The litigant who tries to defend a use on the ground that her work is not substantially similar, rather than on the ground of fair use, will run into some very difficult precedent and may risk undermining credibility. It is better perhaps to admit the influence and concede

in fact a literal copy in any respect, of the famous New Yorker magazine cover depicting a New Yorker’s parochial view of the world. The court found it substantially similar because it would evoke the original in an observer’s mind, and the court held that it was not a fair use. Steinberg v. Columbia Pictures Ind., 663 F. Supp.2d 706 (S.D.N.Y. 1987). These two cases illustrate that substantial similarity can be defined either by the user’s behavior — the appropriation of the copyright holder’s property — or by the observer’s (reader’s) response. Nor is it a useful predictor of liability as the different outcomes in these two cases suggest. Fair use is the determinative issue. These two cases also illustrate that consumer recognition of the copyrighted work complicates a defendant’s claim of fair use because it will always invite the question of whether the defendant’s use is motivated by a desire to free-ride on the consumer recognition rather than to make a statement that requires reference to the work. In the instance of defendants like Jeff Koons, who claim to be commenting upon popular culture, the distinction between free-riding on others’ expressive artifacts or commenting upon them may be nigh-on impossible to make. This was an issue in Two Live Crews’ use of Roy Orbison’s Oh Pretty Woman. The rap song may have commented on the original, but it also would attract more attention from listeners who recognized the original riff. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (holding the use a fair use).

These cases raise a philosophical or theoretical question that may account for the enduring attention to the otherwise non-determinative substantial similarity test. The question is whether the copyright creator should be entitled not only to own exclusive rights to control the use of his expression, and near similitudes to it, but whether the copyright holder should also be able to control access to consumer recognition (reader/observer responses) that was inspired by that expression but that is not delimited by it. This second concern is, I think, the reason that the substantial similarity test lacks salience — because the valuable asset is no longer delimited by the copyrighted text. This is, perhaps, why it seemed important to both parties to argue about whether Salinger had a separate character in the character Holden Caulfield. Reader recognition of and associations to an idea of that character — a recognition that might be provoked perhaps by the slightest similarity of expressive reference — “Rye,” a favorite hat, the use of the word “phony” or the phrase “it kills me, it really does” — is the most readily exploitable asset associated with Salinger’s novel. In remarking that it was unnecessary to decide the issue, the court of appeals seemed to sidestep this thorny issue by finding substantial similarity in other elements — presumably plot and scene. Nevertheless, the issue of whether Salinger alone had the right to exploit reader recognition of his work — whatever the technical basis for finding the works similar — remained at the heart of the dispute. I discuss the character copyright issue infra at ____.
substantial similarity; better perhaps to concede that the issue is whether it is fair
deliberately to tap into an observer’s recognition of a pre-existing work.

If the substantial similarity test lacks much bite, its weakness may stem from its
uncertain application to derivative uses. The key issue in most cases of any complexity
isn’t whether the challenged work competes for market share with the original work. If
it does, the similarities between the works are likely obvious and extensive, and the
parties will settle. The more difficult issue is whether the owner of the copyright in the
original might have licensed the challenged work as a derivative work – however

107 Formally, substantial similarity and fair use remain separate tests for whether a particular
appropriation of copyrighted expression is a misappropriation of the expression. For one thing,
substantial similarity is the plaintiff’s burden to prove while fair use is the defendant’s. For another,
substantial similarity is purely a creature of case law while fair use is now codified in Section 107, although
it remains heavily influenced by its common law history and later judicial interpretation. Plainly a more
robust substantial similarity test would be to copyright defendants’ advantage if only because they do not
bear the burden of proof.

108 See R. Anthony Reese, Transformativeness and the Derivative Work Right, 31 Colum. J.L. & Arts 467
(2008) (reviewing all appellate decisions on fair use from 1997 – 2007); Paul Goldstein, Derivative rights
and Derivative Works in Copyright, 30 J. COPYRIGHT SOC’Y. 209 (1983) (for a seminal analysis of the problem
of applying the substantial similarity test to determine which derivative works require a license);

109 For purposes of a copyright holder’s exclusive rights, the copyright statute provides that a “derivative
work” is a work based upon one or more preexisting 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. A work
consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole,
represent an original work of authorship, is a “derivative work.” 17 U.S.C. § 101. Congress first codified an
2541 (1976). The 1909 Act use the term “other version.” Section 1(b) of the 1909 Act granted an
exclusive right “[t]o translate the copyrighted work into any other languages or dialects, or make any
other version thereof if it be a literary work; to dramatize if it be a nondramatic work; to convert it into a
novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to
complete, execute, and finish it if it be a model or design for a work of art. Copyright Act of 1909, 60th
Cong., 2d Sess., ch. 320, 35 Stat. 1075. The legislative history for the 1976 Act does not indicate any
particular reason for the change in terminology from “other version” to “derivative work” except that the
Copyright Office wanted to clarify the law. Obviously, the 1909 Act’s list of specific types and ways of
making an “other version” could be underinclusive for new media. Nevertheless, I have not found an
explanation for the switch to “derivative work.” The initial Report of the Register of Copyrights on the
general revision of the U.S. copyright law (Tentative Draft, May 1961) used the term “new versions.” The
“derivative work” language first appeared in a July 20, 1964 revision of the proposed statutory language,
88th Cong., 1st session (1964). See ALAN LATMAN & JAMES F. LIGHTSTONE, eds., KAMINSTEIN LEGISLATIVE HISTORY
PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976 (1989); ARNOLD
small the use and however different the second work may be overall. If a reference back
to the original can be spotted, the copyright owner will be entitled to say, in effect, “I
could have licensed that recognizable use of my work and since the user didn’t purchase
a license, I have been harmed.”

Rather than spend time arguing that the copy wasn’t substantially similar and
invite the plaintiff to document all the ways in which it is, defendants might be better

(Westlaw).

The statutory definition does not make clear whether Congress intended that a derivative work include
works that are derived from others in the colloquial sense or whether the point was to make clear that a
copyright holder had the right to license works into new media or formats. It may be that the
reproduction right covers the kind of referential use Colting made. Thus the fact that a derivative work
may not be properly classified as a statutory “derivative work” does not eliminate the maker’s potential
liability for copying. On the other hand, the distinction may have some relevance to the moral and
cultural propriety of the use. The more literal a reproduction of an expressive work, the more the first
author and others may feel that the user has invaded the first author’s “natural-law” rights to the fruits of
his creation; the more a second work is merely derivative, that is referential without being a
reproduction, the more the users natural-law rights to express himself come into play to complicate the
balance of interests that the law attempts. For an excellent analysis of this and related issues, see William
W. Fisher III, The Implications for Law of User Innovation, 94 Minn. L. Rev. 1417, 1450 – 51 (2010). See also
Amy B. Cohen, When Does a Work Infringe the Derivative Right of a Copyright Owner?, 17 Cardozo Arts &
Ent. L. J. 623 (1999); Paul Goldstein, Derivative rights and Derivative Works in Copyright, 30 J. COPYRIGHT

110 The print publishing industry was a leader in establishing the key cases that partial reproductions of
larger works infringed on the right to license derivative works. See, e.g., Harper & Row Publishers, Inc. v.
Nation Enter., 471 U.S. 539 (1985) (holding that the Nation magazine’s publication of a verbatim copy of a
small portion of a presidential memoir shortly before the book’s release was not a fair use where the
publisher of the memoir had given Time magazine the exclusive rights to run a story on the memoir to
 coincide with its release); Princeton University Press v. Michigan Document Serv., Inc., 99 F.3d 1381 (6th
Cir. 1996) (holding that unlicensed reproductions of portions of copyright texts in coursepaks was not a
fair use, even though there was evidence that the teachers would not assign the texts if the students had
to pay); American Geophysical Union v. Texaco, Inc. 60 F.3d 913 (2d Cir. 1994) (holding that in-house
reproduction of a purchased newsletter was not a fair use). American Geophysical is particularly
interesting for Colting’s case. The defendant had tried to argue that the plaintiff’s argument was circular
because the plaintiff could always assert a loss of licensing revenue because the defendant had not paid a
fee for the unlicensed use. The court commented “But such an assertion will not carry much weight if the
defendant has ‘filled a market niche that the [copyright owner] had no interest in occupying.’” The court
went on to say that it was appropriate to consider lost licensing revenues if there was a market already or a
“traditional, reasonable, or likely to be developed markets” could be anticipated. Id. at 930 – 31. In this
case, the appellate panel has abandoned the requirement that the plaintiff show that it might actually
have exploited a market for the derivative. See Salinger v. Colting, 607 F.3d at 81, 83 (opining that
Salinger would prevail even though he had no interest in licensing his work and noting that he might have
been irreparably harmed by loss, not of licensing revenues, but of the “right not to speak.”) I discuss this
issue in more detail, infra at __.
advised to direct the court’s response to the observer, i.e. the reader response, and to do so in terms of fair use.\textsuperscript{111} This strategy avoids going where the plaintiff wants to go – that is, to the argument that because the work is recognizably derivative, the plaintiff has thereby lost an exclusive right to license. Instead, the fair use analysis enables the defendant to focus on the argument that the plaintiff would not license this use (censorship) or that the defendant’s exploitation of the audience recognition built up by the plaintiff does not confirm but disabuses the audience of its previous understanding of the underlying work.\textsuperscript{112}

Given that Colting was bound to lose the “substantial similarity” issue – which the defense memorandum plainly anticipated -- defense counsel might have had more success with the district judge by conceding the point and zeroing in immediately on the fair use defense. Starting with fair use would have allowed Colting to begin in an assertive posture as the defender of free speech. It would have allowed defense counsel to begin by describing the character of Colting’s narrative as a metafiction about Salinger and his Caulfield character, rather than to begin by denying substantial similarity even if that argument was quickly elided with fair use. That might have put the


\textsuperscript{112} My argument may be loosely consonant with a trend that one scholar perceives in recent fair use decisions. Prof. Weinstock argues that the courts are now more focused on the character of the defendant’s work and less on the market effect than they were. He attributes this shift in part to courts’ (unstated) concern with the expansion of copyrights and the increase in their term. If so, the district court did not seem to spot the trend, and it’s not clear that the appellate panel did either. See Neil Weinstock Netanel, \textit{Making Sense of Fair Use}, 15 Lewis & Clark L. Rev. 715 (2011) (describing his own and two other scholars’ empirical analyses of recent fair use cases and suggesting that courts are now less inclined to decide cases on the basis of market effect than on the character of the use.) If there is a commercial impact, the use probably is unfair and the case doesn’t get to court. I discuss the appellate panel’s analysis of market effect in Part 4, infra __.
similarities in a different light – not as qualities to be excused or minimized but as intrinsic and necessary to the metafictional structure and theme.\textsuperscript{113} Then defense counsel might have had an easier time persuading the district court that the issue was not whether the defendant has taken the plaintiff’s work but whether the defendant may be prevented from expressing his message about the plaintiff’s work.

It may also educate the judge if defense attorneys expressly argue substantial similarity and fair use as related checks on the copyright owner’s power to control new and original expression, even if it is derivative. The way in which a judge conceptualizes the interaction of these two issues may influence her judgment of the merits. If the issues are viewed as wholly independent, then an initial finding that a second work is substantially similar may seem inherently wrongful and the judge may be inclined to place a higher burden of proof on the defendant to establish fair use. In contrast, if the two issues are viewed as two halves of one larger question – that is whether the defendant has exploited a right that the plaintiff alone was entitled to exploit – then the judge may be forced to articulate exactly what right is being exploited and may be less inclined to presume wrongfulness without also considering the character and purpose of the use. A judge who takes the second approach may be less inclined to view

\textsuperscript{113} This suggests one reason why the fair use defense has been successful in cases like the one involving the novel \textsc{The Wind Done Gone}, and the one involving Jeff Koons’ picture of model’s legs. In both cases, the defendants claimed to have a critical message and that the copyrighted work was the object of the message and thus a necessary component of the derivative work. \textit{See Suntrust Bank v. Houghton Mifflin Co.}, 268 F.3d 1257; \textit{Blanch v. Koons}, 467 F.3d 244. This was also the argument that Two Live Crew used successfully in \textit{Campbell v. Acuff-Rose Music Inc.}, 510 U.S. 569 (1994). As I discuss later, one of Colting’s problems may have been that his message was not obviously politically charged; he had a rather academic point about fiction.
substantial allusions to earlier works as presumptively unfair competition without considering the effect of the allusions on the observer/reader.

Fact arguments about substantial similarity in a colloquial sense remain very important but, in the current state of the law, I think they should be analyzed in the language of fair use. Two of section 107’s four factors indicate that the extent of similarity should bear on the fairness of the use, and the purpose for or character of the use should bear on the permissible extent of similarity.\(^{114}\) This approach preserves the goals of the constitutional and statutory copyright scheme – to promote the creation of new works by protecting copyrights to the extent of penalizing commercial free-riding and also permitting comment, criticism and parody, often substantiated by specific references to the subject text. The approach also fits more comfortably with contemporary understandings of how culture is transmitted and developed by admitting the influence but focusing on the extent by which the new work bends it.\(^{115}\)

Salinger’s attorneys plainly understood the psychological advantage of arguing his case in the traditional manner. Their filings and oral arguments listed emphasized similarities between Catcher and 60 Years Later – of course – and repeatedly characterized 60 Years Later as a sequel. One would expect that Judge Batts would read the filings before reading Colting’s novel and so would have read it with similarities in mind. In any event, after reading the novels, Judge Batts plainly took the view that those similarities could only be excused by a strong showing that Colting’s work had a


transformative purpose and effect. Judge Batts even characterized Colting’s uses as “stealing” during the hearing.\footnote{Hearing at 28.} It’s hardly surprising that a judge using such language would not later be inclined to find a fair use.

During the hearing, Judge Batts repeatedly questioned Mr. Rosenthal, Colting’s counsel, to explain how 60 Years Later amounted to a criticism or critique of the earlier novel or of the character Holden Caulfield. The judge could not understand how the character had been transformed. The fact that, in Colting’s construct, the character had become the object of the writer-narrator’s obsessive revisions and had been reduced to a phantom, a verbal creation turned into target of his ire, did not amount to a transformation in the judge’s view. The judge seemed to think that 60 Years Later could only be a fair use if Colting either criticized the novel or the Caulfield character expressly, or transformed the Caulfield character in some realistic way that cast Salinger’s character in some different way. The court concluded that “60 Years, however, contains no reasonably discernable rejoinder or specific criticism of any character or theme of Catcher.”\footnote{Salinger v. Colting, 641 F.Supp.2d at 258.} With all due respect, the judge seems to have missed the point.

This brings me back to my starting point that defendants in cases like this may be well-advised to hone their factual argument down to one – that the alteration of narrative perspective is the key material fact because that alteration necessarily transforms the reader’s perception of the copyrighted work. This is important especially when the two works share a common genre – such as fiction – that may make it harder
for a judge to see the difference between a realist sequel and a metafiction. Although a metafiction may also include some critical comment within the realist construct – for example, that youthful alienation doesn’t translate well to old age – that sort of comment will be harder to distinguish from ordinary character development. In hindsight and with due regard to the time pressure under which the lawyers were operating, the defense’s legal strategy was not, perhaps, ideal. The defense elected, perhaps because of Colting’s various and somewhat inconsistent descriptions of his novel, to make every possible claim of a fair use: Colting’s novel was a critique of Holden as an icon; it was a critique of Salinger; and it was a commentary on the relationship between Salinger and his fictional creation. 118 Because the defense argued that the second novel was, at least in part, a socio-literary critique of the Holden Caulfield character, they partially ratified the realist reading the district court relied upon. Because they argued that the book critiqued Salinger, they partially enabled the argument that Colting did not need to use anything in Catcher to do that. In retrospect and with this particular judge, these seem to have been arguments that, although valid, 118 See Defendants’ Memorandum of Law in Opposition to Plaintiff’s Motion for Preliminary Injunction (June 15, 2009) (arguing that the two novels are not substantially similar, that Salinger has no separate copyright in the Caulfield character, and that Colting’s novel is a fair use because it examines the relationship between the fictional Salinger and his character, because it critiques the adolescent icon, and critiques popular attitudes about CATCHER). With respect to the effect of the narrative perspective, the memorandum relied on Declarations from Colting, and Professors Spoo and Woodmansee. Both experts described the significance of Colting’s altered narrator, see Decl. Woodmansee, ¶¶ 4, 13. Decl. Prof. Spoo, ¶¶ 4, 5, 7, 9, but they and Colting also described critiques of the realistic character Caulfield. I am not suggesting that they should have done otherwise – because those critiques are perceptible. My point, though, is that transformative messages that operated within the realism of the novel and of Caulfield may have confused the judge or enabled the judge to indulge in some cherry-picking when, for example, she cited Colting’s and Woodmansee’s declarations to support the proposition that 60 YEARS LATER’s main point was a re-hash of Caulfield’s character. 641 F.Supp.2d at 258. In fairness, by the time of the hearing on the preliminary injunction, Mr. Rosenthal had clearly focused on the use of the fictional Salinger narrator as the key fact for the argument that Colting’s novel transformed Salinger’s. Hearing at pp. 33 – 35. See, supra at pp. ___, n. ___.
cancelled each other out. The defense might have been more successful had it
hammered away only on the transformation produced by Colting’s metafictional
narrative technique. At the same time, I recognize that defense counsel face challenging
strategic and ethical issues if they omit or downplay colorable defenses that might
appeal to a given judge or that need to be preserved for appeal. So, perhaps, I’ll soften
my initial stance and recommend that counsel emphasize one claim of right and one
material fact and subordinate the others until they assess the judge’s appreciation for
the art form.

One might object that the judge understood the metafiction well enough but did
not credit it because she thought it was not transformative enough. In her opinion, she
took care to distinguish two fair use cases, *Campbell v. Acuff-Rose Music* and *Suntrust v.
Houghton Mifflin*. She noted that the uses had been deemed fair because the
challenged works commented directly on the copyrighted work, whereas she concluded
that Colting’s novel commented mostly on Salinger and not on his work. Given my
argument above on how the metafiction could change a reader’s perception of the
Caulfield character from a realistic boy to an authorial construct, I find this distinction
unpersuasive. The judge, however, may have been less inclined to perceive a
transformative effect here because Colting’s novel did not purport to make a politically-
charged criticism of Salinger’s work and was not defended in that way. Instead, it made

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119 641 F. Supp. 2d at 257 – 58, discussing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (rap parody of sexism in Roy Orbison’s “Oh Pretty Woman”); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (novel retelling parts of Gone With the Wind to reveal racism). Interestingly, the court did not discuss the more recent *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (reproduction of picture of women’s legs as comment on cultural objectification), although the defense had cited and argued it. The relevance of *Blanch v. Koons* to metafiction is discussed in greater detail, *supra* at pp. ___.
a rather abstract, literary comment on the creation of a cultural icon. That’s still a comment and a transforming perspective on the original, but it’s not an overt comment on racial or gender cultural stereotypes; it’s just a comment on and unmasking of a fictional and cultural construct.

At the start of this section I suggested that a focus on the narrative technique of a metafiction provides a principled way to distinguish a conventional sequel. Colting’s novel is plainly a derivative work, at least in the colloquial sense of the word, but it’s not a sequel of the kind that an ordinary reader would expect or any commercial publisher would market as such. In commercial publishing a sequel generally takes one of two forms: the most common commercial sequel presents an established protagonist – a Perry Mason, Nancy Drew, Tin Tin, James Bond, Bruce Willis (of Die Hard movies) – and moves that protagonist through a plot that affords the reader or observer pleasures comparable to the plot in which the protagonist first appeared. So, if the plot presents a legal thriller, the sequel will too; if the plot involves solution of a mystery, the sequel will too; if the plot involves action in pursuit of bad guys, the sequel will too. The character of the protagonist is likely to be – in the legal parlance – sharply delineated and relatively unwavering.

The other kind of sequel develops a complex character. The character will be psychologically consistent, perhaps, but will not be as static as the protagonist of the first kind of sequel. Plot may or may not be important, but it will not be the principal attraction for readers. The character will be. Examples include Laura from the LITTLE

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120 For a discussion of the statutory term “derivative work,” see supra at pp. __.
HOUSE IN THE BIG WOODS series\textsuperscript{121}, John “Rabbit” Angstrom in John Updikes’ several novels devoted to that character\textsuperscript{122}, Frank Bascombe in Richard Ford’s THE SPORTSWRITER and FOURTH OF JULY.\textsuperscript{123} The Harry Potter series are examples of sequels with some elements of each.\textsuperscript{124} The fantasy/action plots are relatively consistent in type and constitute a major attraction for fans but so too does the character of the protagonist Potter who develops somewhat more complexity as he ages. This kind of sequel, whether by the original creator or a licensee, offers the reader/observer consistency either of plot-type, character, or both. They do not up-end the operative conceit of the original.

A metafiction does. By altering the perspective or narrative stance, a metafiction turns the reader’s attention away from the objects of the original – will Holden ever find peace and happiness? -- and onto the original as object -- what is Holden Caulfield? Thus, the metafiction is derivative; it can’t exist without the original but its subject is not the same and it does not offer readers a comparable aesthetic, intellectual or emotional experience. Since CATCHER was a character study,\textsuperscript{125} one would expect a sequel to be of

\textsuperscript{121}Laura Ingalls Wilder, Little House in the Big Woods (1932); Little House on the Prairie (1935) (other books in series omitted).
\textsuperscript{122}John Updike, Rabbit Run (1960); Rabbit Redux (1971); Rabbit is Rich (1980); Rabbit at Rest (1990).
\textsuperscript{124}J.K. Rowling, Harry Potter and the Sorcerer’s Stone (1997) (subsequent sequels omitted).
\textsuperscript{125}Trying to talk about CATCHER without talking about the Caulfield character is slightly absurd. CATCHER is a novel in which “character is everything.” E. M. Forster, Aspects of the Novel 61 (Harcourt 1927, 1955) Holden Caulfield is fleshed out through an interior monologue in Holden’s voice and from which the real author vanishes. The final scene emphasizes the point. Salinger uses the conceit that Holden has been writing his memoir; he is not only the “I” narrator; he is the author. We come to understand the character as we do in large part because Salinger depicts Holden’s world from Holden’s point of view. Holden is convincing as an adolescent operating in that world. Forster’s book is a seminal, delightful, and accessible introduction to the elements of fiction. Readers interested in in the techniques of creating various kinds of fictional characters will find Chapter 2 of Forster’s book particularly relevant. For example, Forster uses Defoe’s Moll Flanders as the “example of a novel in which character is everything,” commenting that “Defoe makes a slight attempt at a plot . . . but he is quite perfunctory. . . . Nothing matters but the heroine; she stands in an open space like a tree, and having that that she seems absolutely real from every point of view, we must ask ourselves whether we should recognize her if we
the second type, but in Colting’s book the realistic character is eliminated, not
developed.\textsuperscript{126}

So, the policy question is starkly put. Should the copyright holder have the
exclusive right not only to license the conventional sequel but every type of derivative
that makes substantial use or allusion to the original, even those that upend the
original’s conceit? In this dispute, the lawyers tried to argue that issue by debating
whether the character was copyrighted and, if so, what the scope of the owner’s
exclusive rights should be when the character acquires public recognition beyond the
confines of the expression that first gave it birth. Initially, that issue seemed to be the
core of the dispute between Salinger and Colting, but the court of appeals believed that
it was unnecessary to decide whether Salinger owned a copyright in Caulfield –
presumably because there were sufficient similarities of expression, scene and plot
sequence to support the conclusion that the two works were substantially similar for
copyright purposes even without a copyright in Caulfield per se.\textsuperscript{127}

I won’t purport to resolve the philosophical and policy issues surrounding
copyright in literary character here.\textsuperscript{128} Perhaps what this case reveals is that the effort

\textsuperscript{126} It’s not clear which type of sequel Salinger’s lawyers thought 60 YEARS LATER represented. At times Ms. Paul seemed to emphasize the plot – arguing that the reader finds out what happened to Caulfield. At other times, she faults the novel because the character ages but does not develop.

\textsuperscript{127} Salinger v. Colting, 607 F.3d at 83, fn. 11.

\textsuperscript{128} There’s a significant literary and legal issue attending exactly what aspect of a literary character is copyrighted. The copyright statute conveys copyright on original works of expression fixed in a tangible medium. 17 U.S.C. § 102. A character is created by prose but the reader’s understanding of the character often extends, by association to the reader’s life experiences, well beyond the words the author used. As Lionel Trilling put it, characters “spring from the earth of a writer’s prose” but they have a life beyond.
isn’t worth making because the parties weren’t fighting over whether Salinger’s prose had created a “delineated” character – it clearly had, although this “rounded” character’s boundaries are not sharp like a cartoon character. The parties were arguing over rights in the reader’s recognition of and response to the character.

In conclusion, even if Salinger had a separate copyright in Caulfield, Colting’s metafiction transformed that character from realistic illusion to literary construct and so should have been a fair use. Colting’s message may not be profound or even entertaining, but it seems to me to be as transformative as recasting a rock song to make its sexism apparent, retelling a story from the point of view of a different character, or replicating a photograph of women’s legs as a cultural comment.

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PART 4 – THE COURT OF APPEALS OPINION: THE RIGHT NOT TO SPEAK

The appellate panel devoted most of its legal analysis to the standard for granting preliminary injunctive relief\textsuperscript{129} and only addressed the merits of Salinger’s copyright claim as a component of the required standard.\textsuperscript{130} The court did, however, devote considerable care to describing the background of the case, describing \textsc{Catcher} and its reception, Colting’s novel, its similarities to \textsc{Catcher}, Colting’s marketing tactics, and the district court’s analysis of the copyright claim.\textsuperscript{131} Given the court’s stated holding that the injunction must be vacated because the district court had used a standard for equitable relief that was incorrect on its face and not whether it had misapplied that or the earlier standard,\textsuperscript{132} none of this recitation of the underlying facts was strictly speaking necessary. The court only held that the preliminary injunction must be vacated because the Supreme Court’s decision in \textit{eBay v. MercExchange, L.L.C.},\textsuperscript{133} was binding and required the district court to make an actual finding of irreparable harm – which it had not done. By vacating the injunction on this ground – failure to follow the steps required by a general standard governing equitable relief – the appellate panel cleverly mooted Colting’s argument that the preliminary injunction

\begin{footnotesize}
\textsuperscript{129} \textit{Salinger v. Colting}, 607 F.3d at 74 -83 (discussing \textit{eBay v. MercExchange, L.L.C.}, 547 U.S. 388 (2006) and holding that \textit{eBay} abrogated the circuit’s prior standard for equitable relief, id. at 74 – 75).
\textsuperscript{130} \textit{Salinger v. Colting}, 607 F.3d at 80, 83 – 84.
\textsuperscript{131} \textit{Salinger v. Colting}, 607 F.3d at 70 – 74.
\textsuperscript{132} \textit{Salinger v. Colting}, 607 F.3d at 83 (noting that the district court had considered only one out of four factors required by \textit{eBay}’s standard for injunctive relief.)
\textsuperscript{133} 547 U.S. 388 (2006).
\end{footnotesize}
operated as an unconstitutional prior restraint on speech without directly addressing that issue.  

Of course, the issue at the heart of the case was whether Salinger’s copyright entitled him to suppress Colting’s novel for the duration of the copyright term, first by preliminary injunction and later by a permanent one should he prevail on the merits. With that perspective, the equities seem to shift in Colting’s direction. In Part 3 I have already discussed how the first of the fair use factors – the character and purpose of the work – might favor Colting, not Salinger. In criticizing the district court’s reading, I raised the possibility that an ordinary reader might find that his novel did, in fact, transform the original by deconstructing the realism of the Holden character and that his novel did, in fact, present an original, fictional portrait of Salinger obsessed with his work. If an ordinary reader would think so, that poses the question of whether the courts should enforce Salinger’s copyright to the extent of suppressing Colting’s work and depriving the public of access to it.

In this Part, I’ll address the fourth factor of the fair use analysis, but here I am going to focus on the court of appeals’ analysis, rather than the district court’s. The fourth factor in the fair use defense examines the effect of the challenged work on the market for the copyright work. This factor particularly reflects U.S. copyright law’s roots in utilitarian instrumentalism -- supposedly incentivizing new works by protecting copyright holders from free-rider...
would-be creators free to make some uses of copyrighted expression. Salinger, however, had submitted no evidence that Colting’s novel would impair the market for CATCHER or any derivative of it. One might have thought this absence should have tilted the fair use analysis in Colting’s favor, but it did not. In fact, the court of appeals went out of its way to suggest that Colting’s unlicensed derivative posed not only a harm, but an irreparable harm, to Salinger’s supposed right not to speak.

The fact that Salinger could point to no tangible harm to his financial interests, and yet both the trial and appellate courts opined that the fourth factor of the fair use test favored him adds to the sensation that the courts were simply determined that Salinger prevail. Unwittingly, perhaps, and out of disgust with Colting’s behavior, they may have collaborated with Salinger in suppressing expression he found offensive, rather than protecting his right to license derivative works.

It is worth noting, as well, that the scope of a copyright and of the fair use defense have more significance than they once did because of the long duration of the copyright term. Ironically, under the Copyright Act of 1909, in effect in 1951 when Salinger wrote Catcher, the copyright term would have been a maximum of 56 years.

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135 See U.S. Const. Art 1, § 8 (providing in part that Congress has power to enact laws “[t]o 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; 17 U.S.C. § 107 (providing, in part, that the “fair use” of copyrighted expression “is not an infringement”).

136 See Neil Weinstock Netanel, Making Sense of Fair Use, 15 Lewis & Clark L. Rev. 715 (2011) (suggesting that courts are less interested in market effect now and are more focused on the character of the use, and that they may be somewhat more liberal in recognizing fair uses in reaction to the expansion of the scope and term of copyrights since the Copyright Act of 1976.)

137 Salinger v. Colting, 607 F.3d at 81.

138 Copyright Act of 1909, 35 Stat. 1075, 17 U.S.C. §23. Under that Act Salinger would have received an initial copyright term of 28 years with a right of renewal for an additional 28 years. As Congress contemplated the copyright revisions that became the Copyright Act of 1976, the copyright terms of subsisting copyrights were gradually increased. In 1998, Congress amended the 1976 Act to extend the
Salinger’s copyright in *Catcher* would have expired before Colting published 60 years later in 2009, and so Colting would have been free to publish his novel without threat of liability to Salinger. Under current law, however, Salinger’s copyright will endure for 95 years after it was first secured in 1951 – that is, until 2047. It’s also worth noting that, at least with respect to Salinger and the extensions of his copyright, it is specious to suggest that the public’s interest in “promoting the store of knowledge” is accounted for by the incentive provided by copyright protection. Whatever incentivized Salinger to publish *Catcher* in 1951, it was doubtless not a copyright term 39 years longer than existed at the time.

In the face of these substantial challenges to the district court’s assessment of fair use, it may not be surprising, then, that the appellate panel invoked Salinger’s supposed “right not to speak.” That right, if it could be located in his copyright, would have the rhetorical force at least to face down Colting’s argument that he and the public had interests in free expression under the First Amendment that Salinger’s

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139 The current statute provides a copyright term of the author’s life plus 70 years for works published after its effective date on January 1, 1978. 17 U.S.C. § 303. Because Salinger’s copyright was already “subsisting” in its second term on that date, a different term applies – 95 years from the year in which the copyright was initially -- 140 17 U.S.C. § 304 (b).

141 *Salinger v. Colting*, 607 F.3d at 82 (commenting that “[t]he object of copyright law is to promote the store of knowledge available to the public. But to the extent it accomplishes this end by providing individuals a financial incentive to contribute to the store of knowledge, the public’s interest may well be already accounted for by the plaintiff’s interest.”)

142 *Salinger v. Colting*, 607 F.3d at 81 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) for the proposition that “loss of First Amendment freedoms” “for even minimal periods of time, unquestionably constitutes irreparable injury.”) *Elrod v. Burns*, it must be observed, is hardly on point. The case was brought by public employees who claimed that they were discharged because they were not members of the Democratic Party. The Supreme Court was referring to a right not to be coerced into association with a political party on pain of losing one’s job. The case has no relevance that I can see to a copyright holder’s right not to license a derivative work.
lawsuit threatened. It certainly sounded weightier than the legal fiction that Colting’s novel affected the market for Salinger’s work because it deprived him of the potential right to license a work that he would under no circumstances license. There was no derivative market to effect because Salinger had eschewed it.

It’s perfectly clear that Salinger had a right to do so. The correlative of a copyright holder’s undoubted exclusive right to license reproductions and derivative works is the right to refuse to license such works. But this basic insight into the nature of a property interest does nothing to advance the analysis of a fair use. To say that the fourth factor of the fair use analysis favors Salinger because invasion of his right not to license has damaged his interests assumes exactly what was in dispute – that is, whether Salinger had the right to license a work such as Colting’s or whether it was a fair use.

If a copyright holder, like Melville’s Bartleby, always “prefers not to” to participate in a market, that is his right, but that right remains circumscribed by another’s fair use.

There are other problems with the court’s invocation of a right not to speak in this context. For one, the court has inverted the statutory balance between copyright owners and users. Fair use is the doctrine that reconciles the copyright holder’s power

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143 The district court had concluded that Colting’s unauthorized work might undermine the market for authorized derivatives of CATCHER and the court had dispensed with the awkward fact that Salinger admitted that he had no intention of authorizing any derivatives by saying that there was value in the right to change his mind and in the right not to license. 641 F.Supp.2d at 267 – 68. The court of appeals summarized this finding in its description of the case background without comment. 607 F.3d at 74. The court of appeals introduced Salinger’s right not to speak in the context of analyzing whether he would suffer an irreparable harm without an injunction. Thus the court managed to infuse this so-called right into the fair use analysis without quite saying that it was determinative of the fourth factor in that analysis.

144 This issue – about whether a market for derivatives must exist before loss of a license fee can count toward the fourth fair use market effect factor – is discussed in Part 3, supra at pp. ___.
to suppress other’s expression with the First Amendment by limiting the scope of the copyright holder’s exclusive rights. Here, the court is invoking a First Amendment right not to speak for the purpose of enhancing the copyright holder’s exclusive rights against the user’s and the public’s speech interests. Even at the more mundane level of statutory interpretation, the court’s invocation of this supposed right seems of dubious relevance. The fourth factor of the fair use test in Section 107 requires a court to consider the “effect of the use upon the potential market for or value of the copyrighted work.” The language suggests a concern with commercial value, not dignitary interests such as a right not to speak. It is quite a stretch to find in that language statutory protection for the inchoate value of a right not to speak. Moreover, I sense a cognitive dissonance in importing a right not to speak into a copyright holder’s bundle of exclusive rights. Salinger has a copyright because he chose to speak and fixed that speech in tangible form. Moreover, at least in 1951 he was willing to enter the marketplace and reap its rewards by publishing his work. Part of the statutory bargain was that his copyright was limited by others’ rights to speak about and with his work -- that is to make fair uses of it. To argue now that he has suffered a market harm through invasion of his right not to speak – as opposed to his right not to license – strikes me as sophistry. It’s worth noting that Congress amended Section 107 in response to an earlier decision by the Second Circuit in a case brought by Salinger – to provide that

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148 Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987) (This case is the source of another legal fiction, designed to camouflage a “market failure” -- the idea that the copyright holder, who has no intention of
even unpublished works may be subject to fair use. If the statute subjects to fair use
even work that an author has not chosen to make public, it seems quite extraordinary to
interpret the statute to nonetheless protect a right not to speak through a derivative
work written by someone else.

As the court of appeals noted, however, rhetorical use of a right not to speak in
copyright cases has a long, if suspect, pedigree that dates back at least to the Supreme
Court’s 1985 decision in Harper & Row, Publishers, Inc. v. Nation Enterprises.149 In that
case, the Court held that the Nation magazine was not entitled to claim fair use when it
printed a short verbatim excerpt from former President Gerald Ford’s memoir before
the memoir was officially published. As the court of appeals noted in Salinger v. Colting,
one of rationales the Court used was that Ford had a right not to speak before he was ready.150 The rhetoric was factually inapt and manipulative even in that case because
Ford had completed his memoir and the books were ready for shipment by the time the
Nation published the excerpt. The vice in that case was that Harper & Row had licensed
first serial rights to Time magazine. The Nation scooped Time and thus damaged the
value of Time’s derivative license.151 The Second Circuit indulged in the same phrase

149 471 U.S. 539, 559 (1985)
150 Id., cited in Salinger v. Colting, 507 F.3d at 81.
151 I have criticized the courts before for using factually inapt and emotionally manipulative rhetoric to
rationalize debatable judgments in fair use cases. See Kate O’Neill, Against Dicta, A Legal Method for
Rescuing Fair Use from the Right of First Publication, 89 CAL. L. REV. 369, 416 (2001) (noting that President
Ford had completed the memoir before the excerpt was published). See id. 407 – 436 for a critique of the
Supreme Court’s and the Second Circuit’s use of manipulative rhetoric in two fair use cases, Harper &
again in another suit by Salinger – this time blocking biographer Ian Hamilton from
publishing paraphrases of portions of Salinger’s unpublished letters.\textsuperscript{152} The Second
Circuit’s broadly worded proscription on any use of unpublished expression provoked an
outcry from biographers and scholars, and Congress amended Section 107 to make clear
that even unpublished writings were subject to fair use.\textsuperscript{153} In any event, the reference to
a right not to speak had some claim to relevance in those cases that is lacking here
because those cases involved verbatim use or close paraphrase of words Ford and
Salinger authors had actually written. Its use in this case – where Salinger was trying to
block someone else’s derivative expression that includes only scattered verbatim words
from \textsc{catcher} – is really inapt.

Arguably, the market significance of the “right not to speak” to speak increased
after the decision in Campbell v. Acuff-Rose Music, Inc.\textsuperscript{154} In that case, the Supreme
Court decided that 2 Live Crew’s use of the iconic opening guitar riff from Roy
Orbison’s song, Oh Pretty Woman, was a fair use because it was necessary to support
what the Supreme Court deemed a parody of the original. But, within the decision,
the court needed to deal with the fourth of the fair use factors – the effect on the
market or potential market for the copyrighted work. Here, the Court decided that the
derivative use of the riff could have an effect on the market, not for the original, but
for derivatives. Although it was clear that Orbison’s agent, Acuff-Rose, would not

\textsuperscript{152} \textit{Salinger v. Random House, Inc.}, 811 F.2d 90 (2d Cir. 1987).
\textsuperscript{153} The amendment added the following to Section 107: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” 17 U.S.C. § 107, as amended by Pub. L. No. 102-492, 106 Stat. 3145 (Oct. 24, 1992).
license this use – indeed 2 Live Crew had requested permission and been turned down – the Court engaged in a bit of legal fiction-writing. It held that, because Acuff-Rose could have licensed the derivative use, the unlicensed use diminished potential, if unwanted, revenues for the derivative work. In Campbell, this rather tortured analysis of the fourth factor had no effect on the outcome because the court found that the defendants have copied in order to parody Orbison’s song and so adjudged the use fair,⁵⁵ but even in that case the market analysis is less factitious than it is in the present case. Presumably, Acuff-Rose was in the business of licensing Roy Orbison’s songs. Thus there was an established market for reproduction and derivative uses. In such a case, it is at least plausible that unlicensed derivative actually divests the market of revenue that might otherwise have been earned. Even so, the Court held that Acuff-Rose did not have the right to block this particular use.

In this most recent Salinger case, both the district court and the court of appeals used Salinger’s right not to speak to support their decisions that the fair-use analysis favored him even though – or rather because – there was no better evidence of any effect on the market for Salinger’s work.⁵⁶ As noted above, this rhetoric had its sources in precedent but the plaintiff’s attorney also understood the emotive force of the supposed right not to speak. At the hearing on the preliminary injunction, Salinger’s attorney argued that, by allegedly making an unauthorized derivative work, Colting had invaded her client’s “right not to publish” and, somewhat confusedly,

“right to control what happens to [his] work.” This elision of the two concepts is revealing of how a dignitary interest in not speaking or publishing can be juxtaposed rhetorically with a quite different interest -- an author’s interest in controlling how others may use his already published work. That latter interest may be primarily dignitary or it may be commercial; the courts did not inquire which; they simply converted a dignitary interest with a possibly censorious motive into a commercial interest. That is to say, neither court inquired into whether Salinger sued because he simply preferred not to have anyone tinker with or comment on his work, because he felt insulted or otherwise emotionally distressed by the kind of fictional treatment Colting gave him and his most famous character, or because he really was concerned to protect a traditional commercial interest – the right to exploit the market for other derivatives. The courts simply assume that because the motive might be the last one, it is.

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157 Hearing at 50 – 51. The attorney’s elision of a right not to publish with a right to control what happens to published work blurs several issues in a manner that is more persuasive at first than after thought. One issue concerns the right to publish works that the author did not intend to publish. Salinger litigated this issue with great success in *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), in which the Second Circuit held that a biographer could not use quotes or paraphrases of Salinger’s unpublished letters at all in a biography. It’s worth noting that the district court cited this earlier decision in the case under discussion. 641 F. Supp.2d at 268. The effect of the Second Circuit’s decision in that earlier Salinger case was softened by Congress in a 1990 amendment to Section 107 of the Copyright Act that provided that the fact that a work was unpublished did not necessarily mean that a copy could not be a fair use. *Salinger v. Colting*, 641 F. Supp. 2d at 269.

That decision, however, retained some life and was one of those cited in a later U.S. Supreme Case arising from a decision, again, by the Second Circuit. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, ___ (1985). In that case the Supreme Court recognized a right not to publish a work one has authored and intends to publish, at least not before one is ready to do so. The case involved ex-President Gerald Ford’s memoir, which was in the publication pipeline, and from which a left-liberal journal took without permission a vivid excerpt and published it verbatim and without comment. As I and others have noted critically, the Supreme Court justified a holding for the plaintiff partly by invoking the right to privacy, although it was arguably sufficient and more consistent with the utilitarian attributes of domestic copyright law to say only that the right not to have one’s own words published verbatim without permission is an attribute of the right to exclude certain uses – especially competitive uses – granted by the Copyright Act.
Even if Salinger’s motives really were commercial – to protect CATCHER’S singularity and reputation – any evidence that 60 YEARS LATER had affected the public’s interest in the original or its derivatives might tend to prove that Colting’s work did have a transformative effect. If Colting’s book did undermine a potential derivative market for other works based on Catcher – the analysis in Part 3 suggests that it would have done so not by fulfilling readers’ desires for more of the iconic Holden character but by diminishing the hold of its realist illusion on readers’ imaginations and perhaps by diminishing the reputation of its author. The latter effects, if they happened, reflect precisely the kind of transformative expression that the fair use defense is supposed to preserve from the copyright holder’s suppression.

In the end, I don’t think the court of appeals was at all concerned about Salinger’s right to speak or not to speak. I think it invoked this language to deflect attention from a factitious and circular argument that Colting’s work deprived Salinger of a valuable licensing right. Both the district and appellate courts were perturbed by Colting’s marketing tactics and expedient descriptions of his purposes. The problem was that his novel’s claim on the fair use defense was plausible, in part because Salinger had no evidence of any market effect. A purported irreparable invasion of Salinger’s right not to speak bolstered a weak link in his claim for infringement and thus made a questionable judgment for Salinger seem better grounded in law than it in fact was.

This rhetoric is very powerful, however, and I can only hope that this article helps confine it to the peculiar facts of this case. Unchecked, the rhetoric implies that Salinger’s copyright claim involves fundamental personal freedoms guaranteed to him
by the Bill of Rights and not just a privilege limited by time and fair use. Instead of analyzing whether Colting and the public’s interest in free expression were impaired, the appellate court’s rhetoric implies makes that the case turns on whether a crassly commercial copyist shall be permitted to invade Salinger’s personal autonomy and privacy. With a few short words, the court manages to translate Salinger’s undoubted commercial right to license – and to refuse to license – into a legitimate personal, private privilege to censor derivative works during the copyright term, unchecked by the doctrine of fair use. I think copyright defendants need to challenge this rhetoric head on because, taken at face value, it threatens to eviscerate fair use – except perhaps for derivative works of overtly political content.

There is one more point worth noting. First, whatever slight strategic relief the appellate panel’s holding on injunctions seemed to promise defendants is essentially undone by this rationale. The appellate panel vacated the district court’s preliminary injunction because it had presumed harm based on a likely infringement. The appellate holding required a trial court to take evidence and find an irreparable harm likely before issuing an injunction, effectively making it harder for copyright plaintiffs to gain a pre-trial strategic advantage over defendants by blocking their activities and revenues, if any. However, this rationale – that an unlicensed derivative invades the copyright holder’s right not to speak and that, in turn, constitutes an irreparable injury, threatens to restore copyright plaintiffs’ strategic advantage. With that rationale, and despite having just vacated the preliminary injunction for lack of evidence of irreparable harm,
the appellate panel turned right around and supplied the district court with a theory of irreparable harm that would suffice for a new preliminary injunction.

In the end, the appellate court’s indifference to the absence of any measurable effect on the market for a copyrighted work essentially means that the fourth factor in the fair-use analysis can never favor a defendant. The appellate panel’s explanation that a copyright holder is necessarily and irreparably harmed by invasion of his so-called and unquantifiable “right not to speak” when another makes an unlicensed use of his work simply reads actual market effect out of the statute.

I doubt this was an oversight. The author of the appellate opinion is Judge Guido Calabresi, a former law professor and dean,158 renowned for his scholarship in the field of law and economics.159 The opinion appears to reflect two recommendations from scholars with roots in economic analysis of law. First, it reflects the view that preliminary injunctive relief, if too readily issued to plaintiffs in infringement cases without evidence of irreparable commercial harm, gives plaintiffs an undo advantage in borderline cases.160 By suspending the defendant’s activities, and possibly revenue stream, the plaintiff may be able to extract a settlement on more favorable terms than the merits of its claims, if tried, would warrant. In addition, where the activity involves

158 Judge Calabresi was the youngest full professor at Yale Law School (age 29); dean of the law school from 1985-1994, when he was nominated to the 2nd Circuit. See Todd Purdum, Yale Law Dean Is Nominated to 2d Circuit Appeals Court, The New York Times, February 10, 1994, at B7.
159 E.g., GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) was a seminal study in the modern law of torts; see also Guido Calabresi, About Law and Economics: A Letter to Ronald Dworkin, 8 HOFSTRA L. REV. 553 (1980); 64 Md. L. Rev. symposium (2005), Calabresi’s The Costs of Accidents: A Generation of Impact on Law and Scholarship. Judge Calabresi also has judicial experience with at least one other high-profile fair use case, Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998) (Calabresi, concurring) (use of photo of Demi Moore’s pregnant belly in ad for Naked Gun 33 1/3 movie deemed a parody and a fair use).
expression – as copyright cases all do – a preliminary injunction may operate as a prior restraint on expression protected by the First Amendment. The second view is that markets, including markets for expression, generally function most efficiently if property rights are clear and enforced. This view counsels against liberal application of the fair use doctrine because the doctrine’s scope is fuzzy, fact-driven and applied post-hoc after litigation is initiated. Therefore, it renders the scope of the copyright holder’s property interests somewhat uncertain.

By purporting to insist upon evidence of irreparable harm prior to a preliminary injunction in copyright cases and then by positing that invasion of a right not to speak was an irreparable harm, the panel opinion managed to enact both academic recommendations. The opinion protects over-zealous copyright plaintiffs from themselves by making it somewhat more difficult to obtain injunctions that might be challenged as prior restraints under the First Amendments, while simultaneously it undermines fair use by removing actual market impact as a factor. If this rationale is adopted it increases plaintiffs’ ability to enforce copyrights as nearly inviolable property and personal rights.161 At the same time, the dicta gave such zealous plaintiffs an expansive property-like interest that could be support an infringement claims with no evidence of present or prospective financial loss.162 Thus, use of this “right not to speak”

161 See Salinger v. Colting, 607 F.3d at 76 (noting the defendants’ allegation that the injunction operated as a prior restraint); see generally Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L. J. 147, 159, 199 – 202 (1998).

rationale helps define copyright law as a property rule and not a liability rule, probably reflecting the theory that clear property rights encourage optimal trading and pricing.

Even if one believes that clear property rights in expression create efficient markets for expression and promote the public interest in access to new expression, the invocation of a “right not to speak” in this context suggests that a dignitary interest should be treated just the same as a commercial interest but avoids explaining why. Unexamined, the language tends to legitimize private copyright holders’ attempts to censor derivative works, not because they compete for market share but because they offend the holders. There is considerable pressure, from some copyright holders and from some scholars, to extend copyright to a nearly inviolable personal property – or even a human – right. I think in the interest of a vibrant culture, this pressure ought to be resisted.

163 The most satisfying explanation of the nature of the “right” Salinger might have and that might have been threatened by Colting’s behavior was something like the French “right of integrity” – a right not to be identified with an altered text. This is one element of what are often referred to as “moral rights.” Most are not explicitly recognized in American law although the integrity right has some analogue in unfair competition and trademark laws. See Jane C. Ginsburg, Moral Rights in a Common Law System, 1 ENT. L. REV. 121 (U.K.) (1990), As noted above, Salinger might not have been able to prove for purposes of New York State unfair competition law that any consumer was confused into thinking he wrote or “authorized” 60 YEARS LATER. For a helpful description of the right of integrity under French copyright laws, see STINA TEILMANN-LOCK, BRITISH AND FRENCH COPYRIGHT: A HISTORICAL STUDY OF AESTHETIC IMPLICATIONS 157 (2009) (noting that the “identification of an altered text with the signing author plainly violates the right of integrity because . . . [in French law] the signing author is responsible legally for the text.”); see also Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 TUL. L. REV. 991 (1990). In any event, this issue was resolved by Colting’s promise to indicate that his book was unauthorized. It is too bad that Salinger did not accept this as remedy enough.
CONCLUSION

This case illustrates the old adage that hard cases make bad law. Colting was an unattractive defendant. He may have been guilty of trying to pass off his novel as one written or authorized by Salinger. He was, at best, incoherent about his motives. His novel isn’t very good, and it is “mean to Salinger.” Salinger was, if not an attractive plaintiff, at least a dignified one – author of a classic novel, renowned for his aversion to publicity and consistent in his refusal to write or license any more works, and now an old man. On the other hand, lots of cases are hard, and copyright fair use cases may be especially hard because there are no bright line rules to distinguish fair from foul. And so, I think the courts – especially an appellate court with a significant reputation for expertise in copyright case -- do us all a disservice when they camouflage debatable judgments and policy choices with factually inapt and manipulative rhetoric. I have tried in this piece to supply litigants, judges, and advocates of greater fair use with grounds for challenging the spread of this kind of rhetoric and associated rationales.

I have also tried to supply a different kind of rhetoric – one drawn from writers, scholars and literary critics – that can help explain to a judge not so versed why a quantitatively substantial appropriation of copyrighted text may not be a misappropriation and may be a fair use. I have also suggested a legal strategy defense attorneys can take steps to improve the fact-findings in future cases. Rather than

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164 Salinger v. Colting, 641 F.Supp.2d at 267 (noting that the defendants had a “right to be mean to Mr. Salinger.”)
disputing the issue of substantial similarity in works that make obvious allusions to copyrighted works, defense attorneys might have more success by conceding the point and mounting a fair use defense directly.

Colting’s post-modern conceit is not remarkably revelatory about the nature of fiction, and it’s not much fun to read, but Colting does manage to weave together a fictional portrait of J.D. Salinger that incorporates much of what we think we know about him and then depicts that cultural construct working on another construct, Holden Caulfield. To hold, as the district and appellate courts seem prepared to do had Colting gone back to trial, that Colting had no right to write this novel and the public in the United States no right to read it until 2047 – is an extraordinary and unwarranted expansion of copyright into an excuse for censorship.

One might wish that both writers had demonstrated better character – Salinger by rising above and not suing; Colting by writing under his own name.