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Holden Caulfield and copyright injunctions

"Lawyers are all right, I guess — but it doesn't appeal to me ... I mean they're all right if they go around saving innocent guys' lives all the time, and like that, but you don't do that kind of stuff if you're a lawyer. All you do is make a lot of dough and play golf and play bridge and buy cars and drink Martinis and look like a hot-shot. And besides. Even if you did go around saving guys' lives and all, how would you know if you did it because you really wanted to save guys' lives, or because you did it because what you really wanted to do was be a terrific lawyer, with everybody slapping you on the back and congratulating you ...? How would you know you weren't being a phony? The trouble is, you wouldn't." — Holden Caulfield

Holden Caulfield, the 16-year old prep school reject and central character of J.D. Salinger's "Catcher in the Rye," obviously did not hold lawyers in high regard. Nevertheless, a lot of lawyers in New York recently have been busy trying to save Caulfield's life, or more precisely, trying to preserve him from being given a new life in an unauthorized sequel.

It had to happen sooner or later. Salinger stopped publishing and went into hiding in 1965, leaving us all wondering about the fate of the cynical teenager. Whatever happened to Caulfield as he grew up? Salinger refused to say. It was inevitable that some opportunistic writer would decide, "if Salinger won't tell us what happened to Holden Caulfield, I will." That is exactly what Frederik Colting did last year, publishing under the pen name John David California the book, "60 Years Later: Coming Through the Rye."

Colting's book tells the story of a 76-year-old man identified only as Mr. C. It is apparent, however, that Mr. C. is Holden Caulfield 60 years after his youthful odyssey in New York City. "60 Years Later" recounts a series of events that take place when the elderly Mr. C. spends several days roaming in New York City, just as the teenage Caulfield had once done. It is a thinly-veiled sequel to "Catcher in the Rye," involving many of the same characters, places, and themes as the



Inside IP Law

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original. Mr. C. has thoughts and personality traits similar to the 16-year old Caulfield, and uses the same idiosyncratic speech patterns as Caulfield. Mr. C. even wears the same red hunting cap.

Needless to say, the reclusive Salinger never authorized this sequel. The problem for Colting is that a sequel is "derivative work," and our copyright law does not allow someone to make a derivative work without permission from the copyright owner.

Salinger brought suit before the book was even released in the U.S., seeking a preliminary injunction. Colting's defense was "fair use," claiming that "60 Years Later" was a parody. This asserted defense is not as outlandish as it might seem, thanks to *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). In *Suntrust*, the court found that a critical re-telling of "Gone With the Wind" from the perspective of the slaves in a novel called "The Wind Done Gone" by Alice Randall was a fair use. The purpose of "The Wind Done Gone" was to serve as a critical commentary on the depiction of slavery in "Gone With the Wind." The court found that Randall's work was "a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of 'Gone With The Wind.'"

But Colting's book had none of the gravitas of Randall's work. Expert witness submissions attempted to attribute critical seriousness to Colting's book, suggesting that it evoked "Aristotelian fear and pity," and forced readers "to ask whether such anomie is all we fans of Holden may expect in old age," but the district court dismissed such comments as "post-hoc rationalizations." The court found that "60 Years Later" was not a parody at all, but just a rehashing of Salinger's work. After analyzing all the fair use factors, the court found that the defendant was not likely to prevail on the fair use defense. Since Salinger had shown a prima facie case of infringement, the court stated that irreparable injury was presumed and issued a preliminary injunction.

Unlike Colting's literary sequel, the judicial sequel was not a mere rehashing of the original, but rather contained an unexpected plot twist. On appeal, the 2nd Circuit vacated the preliminary injunction and remanded the case for further proceedings — not because of any issue relating to fair use, but solely because of a short statement by the district court noting that because the plaintiff had established a prima facie case of copyright infringement, "irreparable harm from that infringement is presumed."

If the 2nd Circuit had simply affirmed or reversed the case on fair use grounds, it would have been another run-of-the-mill fair use case. By ruling instead on the standards for injunctions in copyright case, the court's opinion (*Salinger v. Colting*, ___ F.3d ___, 2010 WL 1729126, April 30, 2010) becomes extremely important for all copyright infringement litigation because it answers the question "What is the fate of copyright injunctions after *eBay v. MercExchange*?" In *eBay*, the Supreme Court held that in patent cases, courts must apply the standards "historically employed by courts of equity" when deciding whether to issue a permanent injunction. 547 U.S. 388 (2006). One of these standards is that the plaintiff must

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demonstrate irreparable harm.

The problem is that since the dawn of U.S. copyright jurisprudence, courts have stated that when the plaintiff has made a prima facie showing of copyright infringement, irreparable harm is presumed. The *Salinger* court acknowledged that this principle was in fact the law of the 2nd Circuit. But courts after *eBay* have been uncertain whether the pronouncements from that patent case applied to copyright cases as well. The district court in *Salinger* said *eBay* was not applicable because it dealt only with irreparable harm “in the patent law context.” Other courts have found *eBay* to be more broadly applicable. A copyright sequel to the *eBay* case was needed, and the 2nd Circuit (long considered the most influential court in copyright matters) has now provided it.

The *Salinger* case unequivocally holds that *eBay* applies to copyright cases as well as patent cases. In fact, the court notes in footnote 7 that the principles enunciated in *eBay* ought to apply to any type of case involving a request for injunctive relief. Nothing in *eBay* suggests it is limited to patent cases, and the Supreme Court expressly relied on some copyright cases in its opinion.

The thrust of *eBay* and its major impact on intellectual property cases of all types is that it abrogates the longstanding precept that irreparable harm is presumed where infringement is shown. The *eBay* case teaches that courts must not adopt a categorical or general rule or presume that the plaintiff will suffer irreparable harm. However, the *Salinger* court notes that historically copyright infringement has in fact

caused irreparable injury, and while courts should not presume such harm, they should keep “one eye on historical tendencies.”

The *Salinger* case also answers another question lingering in the aftermath of *eBay*. Does *eBay* apply with equal force to preliminary injunctions as well as permanent injunctions? It does. According to the court, nothing in *eBay* or other Supreme Court cases permits an easier grant of a preliminary injunction than of a permanent injunction.

Sadly, 91 year-old J.D. Salinger passed away this year while the appeal was pending. Perhaps it was for the best, as he was spared the annoyance of seeing his injunction vacated, however short-lived Colting’s reprieve may be. Holden Caulfield dismissed it as just another crumbly decision for a phony author like John David California.