

09-2878-CV

United States Court of Appeals
for the
Second Circuit

J.D. SALINGER, individually and as Trustee of the J.D. Salinger Literary Trust,

Plaintiff-Appellee,

– v. –

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

Defendants-Appellants.

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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiff-Appellee J.D. Salinger, perhaps America's most famous living author, asks this Court to uphold the ban of a transformative work of fiction that comments directly on him, his iconic work and his character Holden Caulfield. Salinger argues, based on a rigid reading of *Campbell v. Acuff-Rose Music, Inc.* and its progeny, that there is no room under fair use principles for this book. And in so doing he asks this Court to ignore the most important lesson of *Campbell*, that there are no bright-line rules for this Court to apply.

Instead, this Court must read and consider *60YL* in light of all four fair use factors. It must decide whether, consistent with this Court's reasoning in *Blanch v. Koons*, it will join with the Eleventh Circuit in *Suntrust Bank v. Houghton Mifflin Co.*, reject Salinger's narrow reading of *Campbell*, and permit the publication of this commentary presented in fictional form.

It cannot be emphasized enough that Plaintiff has failed to show that he will suffer any actual harm by the publication of *60YL* in the United States. His representatives' unsubstantiated musings that his wishes are not being honored, that his privacy is being invaded and that his reputation will be hurt have no place in copyright analysis and cannot substitute for hard evidence of market impact. Without the presumption of irreparable harm (which has no application in this case in light of *eBay, Inc. v. MercExchange, LLC* and *Winter v. National Resources*

Defense Council, Inc.), Plaintiff’s injunction cannot stand. Plaintiff also has failed to meet his burden to show that the balance of equities favors an injunction or that the public will be served by its entry. The injunction must be lifted and the public allowed to read and consider *60YL*, and decide for themselves whether it adds to their understanding and appreciation of Salinger, Holden Caulfield and *CITR*.

ARGUMENT

I

COLTING’S WORK MAKES FAIR USE OF *CITR*

While there is no rule that *60YL* must ridicule *CITR* or even that it must comment directly on *CITR* in order to fit within the safe harbor of fair use, *60YL* does both. Moreover, given that there is no evidence of market harm in the record, it is clear that the minimal amount of material taken from *CITR* is fair use.

A. *60YL* Need Not, But Does, Comment upon and Ridicule *CITR*

The analysis of whether one creative work permissibly borrows from another begins with the Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). Plaintiff urges that under *Campbell* the new work must “ridicule” the underlying work to qualify as a parody. Pl. Br. at 32. But this is an overly narrow reading of *Campbell*, which only says that “the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.” *Campbell*, 510 U.S. at 580.

In arguing that parody requires ridicule, Plaintiff relies on one phrase in *Campbell* where the Court stated that the “joinder of reference and ridicule . . . marks off the author’s choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.” Pl. Br. at 30-31, quoting *Campbell*, 510 U.S. at 583. Reading that sentence in the context of the paragraph in which it appears, however, makes it clear that the *Campbell* Court was speaking specifically about the work in front of it in that case – 2 Live Crew’s song that substituted the romantic words of Roy Orbison’s original with “degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility” in a way that ridiculed the “naiveté” of the original. *Campbell*, 510 U.S. at 583. *Campbell* thus did not limit the application of the fair use defense only to parodies that ridicule. To the contrary, *Campbell* held in a broader sense that fair use protection, which long had been available to other types of comment and criticism, was available for parody (and other creative works of commentary and criticism) as well. *Id.*

Plaintiff belittles the Eleventh Circuit’s decision in *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), an important post-*Campbell* case that reiterates and adopts *Campbell*’s holding that a parody need not ridicule the original in order to command fair use protection. Pl. Br. at 31. Plaintiff claims that the *Suntrust* Court ignored *Campbell*, but that is not the case. Instead, *Suntrust*

carefully notes that *Campbell* “suggests that the aim of parody is ‘comic effect or ridicule,’ but it then proceeds to discuss parody more expansively in terms of its ‘commentary’ on the original.” 268 F.3d at 1268, quoting *Campbell*, 510 U.S. at 580. It concludes that “[i]n light of the admonition in *Campbell* that courts should not judge the quality of the work or the success of the attempted humor in discerning its parodic character, we choose to take the broader view . . . [W]e will treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work.” 268 F.3d at 1268-69. *Suntrust* is thus completely in line with the Supreme Court’s holding in *Campbell* and should not be discounted or ignored by this Court.

Similarly, *Campbell* does not limit fair use to commentary on the underlying work, as opposed to commentary on the author of that work. As shown above, *Campbell* sought to carve out a place in the fair use analysis for parodies, which it loosely defined as “the use of some elements of a prior author’s composition to create a new one that, *at least in part*, comments on that author’s work.” *Campbell*, 510 U.S. at 580 (emphasis added). *Campbell* made clear that parodies are not the only creative works entitled to fair use protection, and also that commentary on the underlying work is not the be-all and end-all of the analysis. *Id.* Thus, *Campbell* left room for a “parody that more loosely targets an original”

than the 2 Live Crew song at issue there (*id.* at 581, n.14), for a work that contains “both parodic and nonparodic elements” (*id.* at 581), and even for a “satire” that comments not on the underlying work, but rather on society at large (*id.*).

In an important recent decision, *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), this Court followed the analysis in *Campbell* and held that a creative work that does not comment on the original can still be entitled to fair use protection. 467 F.3d at 253. In *Blanch*, Jeff Koons’s artwork incorporated Andrea Blanch’s fashion photograph without commenting upon it, and instead used the photograph as “fodder” for Koons’s more general comment on “the social and aesthetic consequences of mass media.” *Id.* Koons was nonetheless entitled to a fair use defense, because he had articulated a valid “justification” for the use of the photograph (*id.* at 255) and because Blanch had failed to show that Koons’s use of her work harmed the market for it (*id.* at 258). Thus, Plaintiff’s pronouncement that, in order to be fair use, a work must comment directly on a particular work as opposed to the author of that particular work is simply wrong.

In any event, *60YL* both ridicules and comments on *CITR*.¹ Although the “ridicule” element is unnecessary, *60YL* certainly “ridicules” Salinger and his work, as it is in no way laudatory. It questions whether Holden is actually as heroic, free and independent as countless readers believe him to be, or is nothing more than a puppet controlled by a murderous, and then eventually benevolent, master. *See 60YL* at 35-36 (Salinger is “the one holding all the strings” and writes Mr. C’s story “as fast as the tiny arms” of his typewriter “can hit”); *id.* at 62-73 (Salinger sitting at his typewriter attempts to control the story of Mr. C’s arrival in New York City). *60YL* also exposes Salinger’s decision to hide himself from the public and to leave Holden “frozen in time” for what Colting believes it to be – an indulgent choice of a frustrated writer too paralyzed by fear of failure to create additional works.² *See id.* at 62 (Mr. C has been “a burden . . . a boulder anchored

¹ Plaintiff’s brief contains numerous conclusory and dismissive characterizations of *60YL*. *See, e.g.*, Pl. Br. at 32 (*60YL* merely “uses *Catcher* and Holden as building blocks for a sequential work, featuring the same characters and settings, placed later in time”); *id.* at 43 (Defendants have done nothing to the Holden character “other than age him”). But Plaintiff has not rebutted (nor could he) the actual contents of *60YL*, a creative work that comments upon, and criticizes, not only Salinger, but Holden and *CITR* as well.

² Incredibly, although there is no statement whatsoever from Salinger in the record, Plaintiff’s brief suggests that Salinger may have written new works. Pl. Br. at 37 (stating that “Defendants have absolutely no basis for knowing whether or not Salinger has written since 1965.”). Of course, Defendants have no way of testing the veracity of Plaintiff’s suggestion, nor does it matter whether Colting is right or wrong about Salinger’s motivations to withdraw from society and to stop publishing new works. Salinger is of course free to publish new works, to speak

to [Salinger's] leg," the fame Mr. C has brought Salinger has come with a price, and the only way out is to kill Mr. C); Colting Decl. ¶ 9 (A-323) ("the more I learned about Salinger, and how he shut himself off from the rest of society, the more I wondered about how Salinger now feels about his famous character. I know that Salinger has admitted that Holden is highly autobiographical, and I began to wonder how he feels about the fact that, while he has aged, his character remains frozen.").

60YL is also transformative in another important respect, it was created for a dramatically different purpose than the original. *See Blanch*, 467 F.3d at 252 (finding transformative use where Koons's purposes in using "Blanch's image [were] sharply different from [plaintiff's] goals in creating it"); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (finding transformative use where defendant's purpose in using copyrighted concert posters was "plainly different from the original purpose for which they were created"). Just as *The Wind Done Gone*, while admittedly a novel, was created for the purpose of commenting on and criticizing *Gone with the Wind*, *60YL* was created to shed light on Salinger and his most famous work. *See Suntrust*, 268 F.3d at

out against the way he is portrayed in *60YL*, to comment upon, criticize or even ridicule *60YL*, or to remain silent. What he cannot do is use this Court to bury a book his representatives claim does not meet with his approval.

1270 (“[*The Wind Done Gone*] is more than an abstract, pure fictional work. It is principally and purposefully a critical statement” on *Gone with the Wind*).

As shown by *60YL* itself, Colting’s declaration outlining his purposes in creating it, the experts’ analyses of the book, and Defendants’ opening brief, it is impossible to conclude that Colting simply referenced *CITR* in order to “avoid the drudgery in working up something fresh.” *Campbell*, 510 U.S. at 580.

B. Defendants’ Purported “Bad Faith” Has No Bearing on the Fair Use Analysis

Plaintiff also argues that Defendants’ purported “bad faith” in marketing the book as a sequel cuts against a finding of fair use. Pl. Br. at 40-42. This is based solely on Defendants not labeling *60YL* as a parody, but instead putting the word “sequel” on the back cover of an early edition of the book for a short period of time, and on Colting’s early statements to the press regarding the relationship between *60YL* and *CITR*.³ But such purported instances of “bad faith” have no bearing on the fair use analysis this Court must undertake.

Going back as far as *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), there has been some suggestion that a defendant’s good or bad faith in obtaining the original work (as opposed to how the defendant’s work

³ At their worst, these statements suggest that Colting could have chosen better words to describe his work. They do not change the fundamental nature of the book, however, which remains a commentary on *CITR*, Salinger and the relationship between Salinger and Holden.

was first described) is a subfactor to be considered in the first factor analysis. 471 U.S. at 593-94. The rather extreme circumstances of *Harper & Row* involved defendants who knew that they had a “purloined” copy of the plaintiff’s unpublished manuscript, but published verbatim excerpts from it anyway, “for the very purpose of preempting the plaintiff’s first publication rights, rights already sold by the copyright owner, for which the defendants had an opportunity to bid.” *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478-79 (2d Cir. 2004) (citing *Harper & Row*, 471 U.S. at 562). Ultimately, the Court in *Harper & Row* rejected the proffered fair use defense “not just because of the defendants’ bad faith, but also because the defendants had failed to make any substantial transformative use of the copyrighted work.” *NXIVM*, 364 F.3d at 479 (citing *Harper & Row*, 471 U.S. at 543).

Since *Campbell*, there has been much debate about whether this “bad faith” subfactor was only “de-emphasized . . . or essentially written out the first part of the fair use test.” *Blanch*, 467 F.3d at 255; *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1126-28 (1990) (arguing against considering the defendants’ good or bad faith). In the final analysis, “even if the bad faith subfactor weighs in plaintiffs’ favor, the first factor [can] still favor [] defendants in light of the transformative nature of the secondary use as criticism.

If no statutory factor can be dispositive after *Campbell*, neither can a single subfactor be, *a fortiori*.” *NXIVM*, 364 F.3d at 479.

Plaintiff cites to no case where calling a book a “sequel,” or “misleading the public as to the nature and origin” of the defendant’s work is bad faith for fair use purposes, nor for that matter does he cite to any case where the complained-of behavior is at all similar to the actions of the Defendants in this case. *See* Pl. Br. at 41 & n.8. As a result, Defendants’ early marketing of the book is irrelevant to the fair use analysis.

Plaintiff further suggests that the Supreme Court’s decision in *Dastar Corporation v. Twentieth Century Fox Film Corporation*, 539 U.S. 23 (2003) requires this Court to consider the marketing of the book as part of the copyright analysis. 539 U.S. at 41. Plaintiff claims that *Dastar* “ruled that books are not ‘goods or services’ subject to the Lanham Act,” and, as a result, acts constituting misrepresentation of origin must now become part of the copyright fair use analysis. *Id.* But this is a gross over-simplification of *Dastar*, which plainly states that a writer or publisher who advertises or promotes a book in such a way as “misrepresents [its] nature, characteristics [or] qualities” does have a claim under Section 43(a)(1)(B) of the Lanham Act. *See id.* at 38, quoting 15 U.S.C. § 1125(a)(1)(B). The Court in *Dastar* neither mandates nor suggests a change in

the fair use analysis, and Plaintiff has not cited any case holding that *Dastar* affects it in any way.

In any event, the brief early marketing of *60YL* should not impact this case, as great pains have been taken to ensure that no potential purchaser will ever believe that the book was authorized or approved by Plaintiff. *See* Silverman Decl. ¶ 3 (A-336) & Ex. A (A-338) (copy of cover that will be used if *60YL* is allowed to be published in the U.S., containing prominent disclaimers on the front cover, back cover and spine).

Finally, whether *60YL* is a transformative parody or an unauthorized derivative work is determined by reading the actual work, not by the label attached to it. *See Campbell*, 510 U.S. at 583, n.17 (“Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived)” (internal citation omitted)). In other words, it is what it is – a transformative novel that makes fair use of elements from *CITR* in order to provide “new information, new aesthetics, new insights and understandings” about Holden and *CITR* – “the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” Leval, *supra*, at 1111.

C. Plaintiff’s Failure to Present Evidence of Market Harm is Fatal to His Claim for Injunctive Relief

Even if this Court were to credit Plaintiff’s (and the District Court’s) view of *60YL* as only minimally transformative, a finding with which Defendants

vehemently disagree, the fact that Plaintiff has adduced no evidence of market harm still militates in favor of a fair use finding.

The main thrust of *Campbell*, and the overarching theme of that entire opinion, was to make clear that there are no “bright-line rules,” that all four fair use factors are considered and balanced against each other in each case (510 U.S. at 577) and that the transformative nature of the later work is but one factor that enters into that balancing act (*id.* at 581, n.14). In keeping with this theme, the Court gave an example of the interplay between the first and fourth factors:

If a parody whose wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives [the factor four analysis] . . . it is more incumbent on one claiming fair use to establish the extent of transformation and the parody’s critical relationship to the original. By contrast, *when there is little or no risk of market substitution* . . . taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire, with lesser justification for the borrowing than would otherwise be required.

Id. (emphasis added).

Here, that interplay inescapably leads to the conclusion that *60YL* makes fair use of *CITR*. The District Court concluded that there is no harm to the market for *CITR*. Injunction Order at 34 (SPA-60). Plaintiff also concedes that “the markets for parody or literary criticism are excluded from relevant consideration” and that, if this Court determines (as it should) that *60YL* is “either a parody or some other form of literary criticism,” it will be “in an irrelevant transformative market.”

Pl. Br. at 45. Instead, Plaintiff points to only one piece of evidence in the record, Salinger’s agent’s statement that “offers have been made to make derivatives” (significantly, *not* that offers to make derivatives were withdrawn because of *60YL*). *Id.* Plaintiff then resorts to speculation, based merely on his endlessly repeated characterization of *60YL* as a “sequel” to *CITR*.⁴ For example, Plaintiff speculates that “upon reading [*60YL*], a reader *may* see less of a need to read [*CITR*] or, upon not liking [*60YL*], *might* be less inclined to read [*CITR*].” *Id.* at 46 (emphasis added). But there are no facts in the record to support that claim.

In sum, this Court could accept Plaintiff’s and the District Court’s characterizations of *60YL* as minimally transformative, because it supposedly comments only on Salinger (Pl. Br. at 35; Injunction Order at 20-21 (SPA-46-47)), and still find fair use under *Campbell*, given this complete absence of evidence of market harm.

Under any analysis, the District Court’s determination that *60YL* was not entitled to a fair use defense was in error, and must be reversed.

⁴ Plaintiff’s complaint that he did not have the opportunity to rebut Defendants’ submissions on the lack of market harm is unavailing. While we have no idea what Salinger himself thinks about *60YL*, surely it was incumbent upon Plaintiff to come forward with any and all evidence he had to support his claim that *60YL* would cause harm to *CITR* when he came to court seeking the extraordinary relief of a preliminary injunction.

II

SALINGER HAS NOT MET HIS BURDEN OF SHOWING ENTITLEMENT TO A PRELIMINARY INJUNCTION

Defendants' fair use defense precludes a finding that Plaintiff has shown a clear likelihood of success on the merits of his copyright claim. This Court thus does not need to reach the issue of whether the District Court erred in presuming irreparable harm based merely on a *prima facie* showing of copyright infringement. Injunction Order at 36 (SPA-62). It is clear, however, that the presumption should not have applied, and that without the benefit of that presumption, Plaintiff has not met the burden set forth by the Supreme Court for issuance of the extraordinary remedy of an injunction. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-93 (2006) (injunction does not automatically issue following a finding of infringement); *see also* Leval, *supra*, at 1133 (“[a] court should grant or deny [an] injunction *for reasons*, and not simply as a mechanical reflex to a finding of infringement”) (emphasis added). Moreover, Plaintiff has completely failed to address the Supreme Court's holding in *Winter v. National Resources Defense Council, Inc.*, ___ U.S. ___, 129 S. Ct. 365 (2008) that a preliminary injunction can only be issued upon a “clear showing that the plaintiff is entitled to such relief.” 129 S. Ct. at 375-76.

What Plaintiff says about *eBay* is superficially true, it did arise in the patent context. *See* Pl. Br. at 49. But what Plaintiff ignores is that the *eBay* Court relied

heavily on copyright cases in coming to its conclusion. *See eBay*, 547 U.S. at 392-93. Plaintiff also fails to explain why *eBay* should not apply in copyright cases, other than by erroneously arguing that in patent cases injunctions are mandated “if irreparable harm is established,” and in copyright cases they are not. Pl. Br. at 19, 49. The Patent Act, however, has no such mandatory injunction requirement. Indeed, the Supreme Court in *eBay* points out that in patent law (just as in copyright law) an injunction “may” issue in accordance with principles of equity. *See eBay*, 547 U.S. at 391-92. (“Nothing in the Patent Act indicates that Congress intended such a departure. To the contrary, the Patent Act expressly provides that injunctions ‘may’ issue ‘in accordance with the principles of equity.’”), quoting 35 U.S.C. § 283.

Moreover, in each case cited by Plaintiff, the court found evidence of actual harm before issuing an injunction. *See, e.g., Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 552 (S.D.N.Y. 2008) (“[E]ven if irreparable injury is not presumed, Plaintiffs have presented sufficient evidence that such injury would result from Defendant’s infringement in the absence of relief”); *E. Gluck Corp. v. Rothenhaus*, 585 F. Supp. 2d 505, 519 (S.D.N.Y. 2008) (finding a likelihood of actual harm to plaintiff in a case arising under the Lanham Act). And, in *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008), the District Court

denied injunctive relief because it found defendants were “likely to prevail on their fair use defense.” 556 F. Supp. at 328.⁵

Finally, this Court should recognize and follow the *Campbell* Court’s warning that presumptions (and injunctions) are ill-advised in this context. Not only must all of the fair use factors be considered and weighed in every case, without the reliance on presumptions, but also “[n]o ‘presumption’ or inference of market harm . . . is applicable to a case involving something beyond mere duplication for commercial purposes.” 510 U.S. at 592 (distinguishing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)); see also *Suntrust*, 268 F.3d at 1276 (citing *Campbell* for proposition that there can be “no presumption of irreparable injury when the alleged infringer has a bona fide fair-use defense”). In a case such as this, “worlds apart” from one of piracy or counterfeiting, issuing an injunction, even if the taking from a copyrighted work goes “beyond the bounds of fair use,” does not serve the goals of the Copyright Act. *Campbell*, 510 U.S. at 578 n.10.

⁵ The Fourth Circuit has explicitly applied *eBay* in a copyright case. See *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (“Rejecting [plaintiff’s] claim to an automatic injunction or an ‘entitlement to one’ and instead, consistent with *eBay*, ‘apply[ing] traditional equity principles’); see also *Peter Letterese and Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1323 (11th Cir. 2008) (copyright case recognizing *eBay*’s holding that “injunction does not automatically issue upon a finding of infringement”) (internal citations omitted).

In any event, the continuing viability of the presumption of irreparable harm certainly ended with the clear holding of *Winter* that a preliminary injunction may never be awarded as of right and can only be issued upon a “clear showing that plaintiff is entitled to such relief.” 129 S. Ct. at 375-76, citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*per curiam*). Under *Winter*, a plaintiff must satisfy all four of these elements: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of equities in his favor; and (4) an injunction serves the public interest. *Winter*, 129 S. Ct. at 374 (citing *Munaf v. Geren*, ___ U.S. ___, 128 S. Ct. 2207, 2218-19 (2008)). In every case, the court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief” and “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 129 S. Ct. at 376-77.

Here, two things are clear: the District Court failed to apply the *Winter* standard and Plaintiff could not possibly satisfy it. Plaintiff has introduced no evidence of any actual harm. The District Court held that *60YL* would not undermine the market for *CITR* itself and Plaintiff has not shown (nor could he possibly show) that anyone interested in an authorized sequel to *CITR* would purchase *60YL* in place of such a work. Indeed, it defies common sense to think

that a work like *60YL*, irrespective of its literary value or the effectiveness of its criticism, could possibly affect the market for a new work written by J.D. Salinger or a Salinger-authorized work.⁶

As another attempt to create some suggestion of irreparable harm, Plaintiff resorts to a supposedly “constitutionally based” right not to speak, and argues invasion of his privacy. Pl. Br. at 50. But the cases Plaintiff relies upon are easily distinguishable. In *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), Plaintiff did successfully enjoin another author from publishing letters containing Salinger’s own words that he had never made public. Similarly, *Harper & Row* involved “scooping” the very words of an unpublished memoir. *See Harper & Row*, 471 U.S. at 542. Neither approximates the situation here, where Salinger seeks to enjoin commentary on his already-published work. *See New Era Publ’ns Intern., ApS v. Henry Holt and Co., Inc.*, 695 F. Supp. 1493, 1504 (S.D.N.Y. 1988) (“It is universally recognized . . . that the protection of privacy is not the function of our copyright law.”).

Moreover, Plaintiff does not present any evidence, nor could he, that the public thinks he authored *60YL*. Rather, his argument seems to be that he has

⁶ Moreover, Plaintiff acknowledges that “the value of a first derivative could perhaps be quantified and redressed by monetary damages” (Pl. Br. at 50) an admission of compensable damages that should be enough to end any claim he has to injunctive relief.

made a decision not to speak further on the subject of Holden, and thus the topic is off-limits to Colting as well. That is not something this Court should tolerate. *See Campbell*, 510 U.S. at 579 (“[Parody] can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”). Sustaining this injunction under such circumstances will give any author who is unhappy with criticism of his work a new arrow in his quiver. Salinger’s complaints that Colting’s work unfairly undercuts his own vision of his characters, should be left to the marketplace of ideas, not to the courts.

Plaintiff’s assertion -- that the harm he will suffer “is not solely (if at all) to his ‘pride’,” but is also “reputational” (Pl. Br. at 55) -- is a misuse of copyright. Plaintiff has no right to use the copyright laws to protect his pride *or* his reputation as there is no cognizable claim for some alleged violation of Salinger’s “moral rights.” *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02[A], 8D-10 (Visual Artists Rights Act and various state laws protecting the rights of integrity and attribution for *visual* artists “represent the furthest explicit recognition of moral rights to be found in U.S. jurisprudence, *both the federal and state laws relate solely to protection for works of visual art, and have no application to other copyrightable subject matter.*”) (emphasis added); *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) (“American copyright law, as presently written, does not recognize moral rights or provide a cause of

action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.”). Salinger created an iconic work of fiction that has been read by millions of people. Like anyone else who achieves fame and commercial success, Plaintiff must endure the pain that can come from imitation, mockery or criticism by others, no matter what form it takes.

Finally, Plaintiff makes no attempt to argue that he met his burden to show a balance of equities in his favor and that the public would benefit from the granting of an injunction (other than to wrongly discount Defendants’ evidence of harm). Pl. Br. at 51. In *Winter* and *eBay*, the Supreme Court put the burden squarely on the party seeking a preliminary injunction to satisfy each of the required elements before the granting of such extraordinary relief.

Plaintiff came into Court seeking to enjoin the U.S. publication of a book. He had the burden to establish each and every element required for this extraordinary relief. He failed to meet that burden. Accordingly, the District Court’s preliminary injunction banning the publication of *60YL* must be vacated immediately.

CONCLUSION

For the reasons set forth herein, and in Defendants' main brief, the
Injunction Order must be vacated.

Dated: New York, New York
August 21, 2009

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CERTIFICATE OF COMPLIANCE

As counsel of record to the Defendants-Appellants, I hereby certify that this brief complies with the type – volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. I am relying upon the word count of the word-processing system (Microsoft Word) used to prepare the brief, which indicates that 4,720 words appear in the brief.

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ss.:

**AFFIDAVIT OF
PERSONAL SERVICE**

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