

09 – 2878 – CV

IN THE
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

**BRIEF OF AMICI CURIAE AMERICAN LIBRARY ASSOCIATION,
ASSOCIATION OF RESEARCH LIBRARIES, ASSOCIATION OF
COLLEGE AND RESEARCH LIBRARIES, THE ORGANIZATION FOR
TRANSFORMATIVE WORKS AND THE RIGHT TO WRITE FUND IN
SUPPORT OF DEFENDANTS-APPELLANTS AND URGING REVERSAL**

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Rule 26.1 Corporate Disclosure Statement

As to each of the amici who have joined this brief, none has a parent corporation and no publicly traded corporation owns 10% or more of their stock.

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I. STATEMENT OF INTEREST

The injunction issued in this case implicates important First Amendment rights by prohibiting the publication of a book that comments on one of the most iconic literary figures of the 20th century and the author who created him. Amici consist of the American Library Association, the Association of Research Libraries, the Association of College and Research Libraries, The Organization of Transformative Works and the Write Right Fund. (A complete list of Amici and descriptions of their work is attached as Exhibit A.) Each is dedicated to protecting free speech rights and the free flow of ideas and information. Each therefore has a strong interest in making sure restraints like the one imposed here do not issue without due consideration of the free speech interests of authors, publishers, and the public, and are granted only upon a careful consideration of these interests and others.

II. INTRODUCTION

In enjoining the publication of *60 Years Later* (“60YL”), the District Court committed serious errors with a profound impact on free speech rights. It brushed aside half of the controlling preliminary injunction standard – whether this injunction is in the public interest, and the relative balance of equities and hardships among the parties. The Court compounded that error by applying a presumption of irreparable harm incompatible with controlling law and an unduly

restrictive fair use standard. Under the District Court's framework, an injunction followed unavoidably from a finding of likely infringement.

Supreme Court precedent bars this abbreviated analysis. A plaintiff seeking a preliminary injunction must also demonstrate irreparable harm, a balance of equities in his favor, and a public interest in injunctive relief. Courts must be especially wary of issuing injunctions against expressive works as to which there may be, after a full hearing, a viable fair use defense. In its rush to enjoin 60YL, the District Court ignored the free speech interests of the author and the public.

Prior restraints on speech are strongly disfavored precisely because they have the potential to cause grave damage to free speech rights. Copyright claims do not erase First Amendment interests. 60YL is a highly expressive work of fiction. It may or may not ultimately represent an infringement of Salinger's rights. But the question of whether to ban publication of 60YL pending that determination demands a more careful balancing of the important interests at stake.

This Court should reject the District Court's narrow conception of fair use centered only on parody, reverse the District Court's preliminary injunction order, and clarify the proper preliminary injunction standard: District courts must assess all four of the traditional equitable principles that guide injunction analysis and weigh them carefully based on actual proof. As part of this balancing, this Court should reaffirm the special First Amendment interests that are implicated

when parties seek provisional relief against expressive or creative works. While these interests may be overcome by evidence, they should not be dismissed without substantial proof of irreparable injury.

III. ARGUMENT

A preliminary injunction is “an extraordinary remedy never awarded as of right.” *Winter v. Nat’l Res. Def. Council*, 129 S.Ct. 365, 376 (2008); *see also Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77, 84-85 (2d Cir. 2007). Because it issues before liability is determined, a preliminary injunction is considered “one of the most drastic tools in the arsenal of judicial remedies.” *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 60 (2d Cir. 1985).

In order to obtain a preliminary injunction, a plaintiff “must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter*, 129 S.Ct. at 374 (vacating preliminary injunction); *see eBay, Inc. v. Mercexchange L.L.C.*, 547 U.S. 388, 392-93 (2006) (traditional equitable principles govern copyright injunctions).

Here, the District ignored half of the controlling test and misapplied the rest. It did not even mention the balance of equities or the public interest. It presumed without analysis or evidence that Salinger would suffer irreparable harm

absent a preliminary injunction – a presumption that controlling law no longer allows. While the District Court did assess the merits of Salinger’s infringement claim at length, it applied an unduly restrictive fair use standard by acting as a literary critic and defining transformativeness too narrowly.

A. The District Court Failed To Apply The Controlling Preliminary Injunction Standard

While the decision of whether to issue an injunction lies with the sound discretion of the District Court, that “discretion must be exercised consistent with traditional principles of equity.” *eBay*, 547 U.S at 394. Where a court fails to properly apply and assess each of the four traditional factors, its decision must be reversed. *See Winter*, 129 S.Ct. at 375-81; *eBay*, 547 U.S. at 394.

Here, the District Court ignored two of the four equitable factors altogether and applied a presumption of irreparable harm that is incompatible with controlling law. The preliminary injunction must be vacated for this reason alone, whether or not the District Court was correct on its assessment of the merits. *See Winter*, 129 S.Ct. at 381 (misapplication of three equitable factors required reversal “even if plaintiffs are correct on the underlying merits” of their claims).

1. The Court Failed To Consider The Balance Of Equities, Or The Public Interest

The United States Supreme Court has stressed “the importance of assessing the balance of equities and the public interest in determining whether to

grant a preliminary injunction.” *Winter*, 129 S.Ct. at 378. “In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. . . . In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Id.* at 376-77 (internal citations omitted); accord *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1121 (2d Cir. 1975) (“[C]ourts of equity may go much further both to give or to withhold relief in furtherance of the public interest than where only private interests are involved.”).

In vacating an injunction against the U.S. Navy, the *Winter* Court criticized the district court because it “addressed these considerations in only a cursory fashion” consisting of “one (albeit lengthy) sentence.” *Winter*, 129 S.Ct. at 378. That was one sentence more than the District Court devoted to the balance of equities and the public interest in this case. The District Court failed to explain what, if any, evidence would permit it to conclude Salinger met his burden as to either factor. The District Court’s error is especially important here because both factors counsel against provisional relief.

a. The Public Interest Cuts Strongly Against A Preliminary Injunction

There are profound First Amendment interests involved where a court is asked to enjoin the publication of expressive or creative works. *See, e.g., Vance*

v. Universal Amusement Co., 445 U.S. 308, 315-16 (1980) (“[The] burden of supporting an injunction against a future exhibition [of a motion picture] is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication.”); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *Metro. Opera Ass’n, Inc. v. Local 100*, 239 F.3d 172, 176 (2d Cir. 2001) (internal citation omitted)).

These concerns do not disappear simply because a copyright is asserted. At the very least, Colting presents a colorable fair use defense. (Pp. 15-31, below.) The fair use doctrine is itself a critical “First Amendment safeguard.” *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003); *see also Suntrust v. Houghton Mifflin, Co.*, 268 F.3d 1257, 1263-65 (11th Cir. 2001); Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1132 (1990). Far from eliminating any First Amendment concern, the parties’ opposing assertions of infringement and fair use demonstrate there is a profound First Amendment question here.

The First Amendment interests at stake are not limited to authors and publishers: readers have a right to *receive* information and judge its value for themselves. *See Martin v. City of Struthers, Ohio*, 319 U.S. 141 (1943); *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

The First Amendment right to receive information is rooted in the fundamental public interest in the free and open exchange of ideas and information. *See, e.g., Assoc'd Press v. U.S.*, 326 U.S. 1, 20 (1945) (The First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”). The open dialogue protected by the First Amendment covers “every sort of publication which affords a vehicle of information and opinion,” including literature. *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938).

The First Amendment right to receive information should play a prominent role in determining whether an injunction is in the public interest. In *Rosemont*, this Court reversed the grant of a preliminary injunction against an allegedly infringing Howard Hughes biography because “the public [was] deprived of an opportunity to become acquainted with the life of a person endowed with extraordinary talents.” *Rosemont Enterprises v. Random House*, 366 F.2d 303, 311 (2d Cir. 1966). In doing so, this Court recognized that preliminary injunctions are fraught with the same dangers as other prior restraints on speech. *See id.*; *see also Bihari v. Gross*, 119 F. Supp. 2d 309, 325 (S.D.N.Y. 2000) (denying preliminary injunction on trademark claim where it would prevent the public from having access to speech of public concern).

Similarly, in *Suntrust Bank*, the Eleventh Circuit reversed a preliminary injunction banning publication of *The Wind Done Gone*, and in doing so recognized the “public interest is always served in promoting First Amendment values” such as access to expressive works. *Suntrust*, 268 F.3d at 1276; *see also Trust Co. Bank v. Putman Pub. Group, Inc.*, 5 U.S.P.Q.2d 1874, 1877 (C.D. Cal 1988) (denying preliminary injunction against adaptation due in part to “strong public interest favoring the publication of books and novels”).

The First Amendment interest in the dissemination of speech is so strong that even some works found to infringe on a full evidentiary hearing should not be enjoined. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, n.10 (1994) (caution is necessary in granting injunctive relief in cases “involving parodies (or other critical works)” even when creators “are found to have gone beyond the bounds of fair use”); *New York Times Co. v. Tasini*, 533 U.S. 483, 486 (2001) (injunctive relief “hardly follows” from decision affirming finding of copyright infringement); *Abend v. MCA*, 863 F.2d 1465, 1479 (9th Cir. 1988) (“injunction [against an infringing derivative work] could cause public injury by denying the public the opportunity to view a classic film”), *aff’d on other grounds sub nom. Stewart v. Abend*, 495 U.S. 207 (1990); Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §14.06[B] (2001) (“The interest in dissemination of an infringing work may justify a confinement of the remedy to a money

recovery.”); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147, 208 (1998); Leval, 103 Harv. L. Rev. at 1132.

Infringing or not, 60YL is an expressive and creative work. Even the District Court recognized it had something to say about J.D. Salinger, and *Catcher in the Rye* – one of the most popular novels of the 20th century. The public’s interest in the availability of this literary work must be a critical factor in the injunction analysis and the District Court’s failure to consider it represents a significant error that demands reversal in and of itself.

b. The Balance Of Equities Cuts Strongly Against A Preliminary Injunction

The balance of equities and hardships among the parties likewise cuts against injunctive relief. The District Court’s injunction inflicted an obvious and substantial First Amendment harm on Colting and his publisher because it suppressed their speech before it was deemed infringing after a full and fair adjudication. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973) (“The special vice of a prior restraint is that communication will be suppressed. . . before an adequate determination that it is unprotected by the First Amendment.”).

The fact Salinger asserts copyright infringement does not eliminate this First Amendment harm. (P. 7, above.) In being restrained before the fair use question is adjudicated on a full record, Colting and his publisher suffer all of the harms inherent in prior restraints of speech. Lemley & Volokh, 48 Duke L.J. at 169.

The preliminary injunction also inflicted economic harm on Colting and his publisher, who submitted evidence that delaying release of the book will destroy their plans for a carefully timed publication following the book's release in London. The evidence shows a delay will also cause Defendants to lose their investment of time and money in marketing and promotion efforts for the book. (A-331-332). Salinger, on the other hand, presents no evidence of any cognizable harm, much less one that cannot be remedied through money damages. (Pp. 14-15, below.)

2. The Court Erred In Presuming Irreparable Harm

The District Court's error in ignoring half of the preliminary injunction test was compounded by presuming irreparable harm without evidence. While many decisions of this Circuit and District Courts within it apply a

presumption of irreparable harm in copyright cases, that presumption is no longer compatible with controlling law.¹

The Supreme Court held courts must apply the traditional equitable factors in determining whether to grant injunctions in patent and copyright cases. *See eBay*, 547 U.S. at 391-92.² While *eBay* was a permanent injunction case, *Winter* holds the same equitable factors control the preliminary injunction analysis (except for actual versus likely success, reflecting the different stages of the proceedings). *See Winter*, 129 S.Ct. at 374. Accordingly, a plaintiff seeking injunctive relief in a copyright case must “demonstrate” irreparable harm, not simply presume it. *eBay*, 547 U.S. at 391; *see Richard Dannay, Copyright Injunctions and Fair Use*, 55 J. Copy. Soc’y 449, 460 (2008).

Following *eBay*, many courts have concluded a presumption of irreparable harm is incompatible with its holding. *See, e.g., Canon Inc. v. GCC Int’l, Ltd.*, 450 F. Supp. 2d 243, 254 (S.D.N.Y. 2006), *aff’d*, 263 Fed.Appx. 57, 2008 WL 213883 (C.A.Fed. (N.Y.) 2008); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1210-13 (C.D. Cal. 2007) (collecting cases);

¹ At least one prominent commentator has suggested this presumption has a dubious history, and arose more from repetition than any sound basis in law or policy. 6 William F. Patry, *Patry on Copyright* § 22:44-45, 48-49 (2009).

² The District Court concluded *eBay*’s holding is limited to patent cases. (SPA-62) It is not. It states the same four factor analysis applies to injunctions under the Copyright Act (*eBay*, 547 U.S. at 392-93) and everywhere else unless Congress says otherwise. *Id.*

Torspo Hockey Int'l, Inc. v. Kor Hockey Ltd., 491 F. Supp. 2d. 871, 881 (D. Minn. 2007). This Court has not spoken to that issue yet.

If there were any doubt about the validity of the presumption following *eBay*, it was erased by *Winter*. Prior to *Winter*, the Ninth Circuit permitted a plaintiff seeking a preliminary injunction on evidence of a “possibility” of irreparable harm. *Winter*, 129 S.Ct. at 375-76. The Supreme Court held this standard was too lax. It held that the “extraordinary” nature of the preliminary injunction remedy required a plaintiff to “demonstrate that irreparable injury is likely” upon a “clear showing” and questioned whether the extensive evidence submitted in support of the injunction satisfied that standard. *Id.* If providing evidence that demonstrates only a “possibility” of irreparable harm is insufficient, then it is surely insufficient to rely on a presumption without any evidence whatsoever.

eBay and *Winter* demand proof that irreparable harm is likely absent an injunction, and reject any rule that displaces this and the other “traditional equitable considerations” with shortcuts. *eBay*, 547 U.S. at 392-93; *see also Winter*, 129 S.Ct. 375-76. A “presumption [of irreparable damage] is contrary to traditional equitable principles.” *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 544-45 (1987); *see also eBay*, 547 U.S. at 391 (*Amoco* sets forth the “well-established principles of equity”); *Winter*, 129 S.Ct. at 374 (citing *Amoco* to establish

preliminary injunction factors). Any such presumption is doubly inappropriate for expressive or creative works, or for any work as to which a colorable fair use defense is raised. *See Campbell*, 510 U.S. at 578 n.10 and 591 (“No ‘presumption’ or inference of market harm . . . is applicable to a case involving something beyond mere duplication for commercial purposes.”).

Once stripped of the presumption, Salinger has shown no likelihood of any harm, irreparable or otherwise. While his literary agent asserts that a *Catcher in the Rye* sequel by Salinger would be worth an advance of \$5 million (A-120), she does not suggest the publication of 60YL would undermine the value of that sequel or any derivative market. *Id.* Instead, she simply asserts “sequel rights” are valuable, and contends Salinger has the right not to license any sequels in order to protect “privacy” rights. (A-119-120).

Evidence that sequel rights are valuable does not constitute the required showing that 60YL would *interfere* with the value of the market for a Salinger-penned sequel. *See Suntrust*, 268 F.3d at 1274-75. In any event, lost licensing revenue can be remedied by a damage award. And copyright law simply does not protect privacy. *See Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003); *New Era Publications Int'l ApS v. Henry Holt & Co.*, 695 F.Supp. 1493, 1504-05 (S.D.N.Y. 1988) (Leval, J.) (“It is universally recognized . . . that the protection of privacy is not the function of our copyright law.”); Leval, 103 Harv. L. Rev. at

1129 (“Serious distortions will occur if we permit our copyright law to be twisted into the service of privacy interests.”).

Salinger bore the burden of demonstrating that the balance of harms tips in his favor by making a showing of likely harm based on record evidence. *See Lennon v. Premise Media*, 556 F.Supp.2d 310, 327-28 (S.D.N.Y. 2008). He offered no evidence that would allow the Court to conclude that his supposed harms outweigh the proven First Amendment and economic harms Colting and his publisher suffer as a result of this injunction. Having failed to present any evidence that would satisfy three of the four factors that control the preliminary injunction analysis, Salinger’s request for a preliminary injunction fails as a matter of law.

B. The District Court Erred By Applying An Unduly Restrictive Fair Use Standard

Fair use is designed to prevent copyright from “stifling the very creativity which [it] is designed to foster,” *Stewart*, 495 U.S. at 236, and safeguard First Amendment principles in copyright law, *Eldred*, 537 U.S. at 220. It thus gives special preference to transformative works that enrich the marketplace of ideas by modifying existing works to generate “new information, new aesthetics, new insights and understandings.” *Blanch v. Koons*, 467 F.3d 244, 251-52 (2d Cir. 2006).

In order to give this creativity-protective doctrine sufficient breathing space, courts must be able to recognize multiple forms of transformativeness. Contrary to *Campbell* and *Blanch*, the District Court required the defendant's use to fit within a narrow definition of parody and criticism, and then used that narrow construction to influence the outcomes on the remaining factors.

In *Campbell*, the Supreme Court recognized the importance of allowing for broad latitude in assessing transformativeness, holding that all that was required was that the parody be *merely capable* of being “reasonably ... perceived.” *Campbell*, 510 U.S. at 582. The Court insisted on this broad definition because it furthered the core purpose of the Copyright Act in promoting creativity. *See id.* at 579. This Court should reject the District Court's narrow interpretation of transformativeness and reiterate its broader scope.

1. The District Court Defined Transformativeness Too Narrowly

In both *Blanch* and *Campbell*, district courts were warned against serving as armchair critics, especially in judging artistic merit. *See id.* (“[I]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of a work, outside of the narrowest and most obvious limits.”) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.)); *Blanch*, 467 F.3d at 255 (“It is not, of course, our job to judge the merits of ‘Niagara,’ or of Koons’s approach to art.”). Yet this is exactly

what the District Court did here. Injunction Order at 18 n.4 (SPA-44) (comparing how skillfully Defendant achieved his commentary versus other defendants). The Court created a hierarchy of transformation, placing parody at the top and other transformations below.

a. Transformativeness Is More Than Parody

At the outset, the District Court erred in valuing parody, narrowly defined, over other types of transformativeness. *Id.* at 8-9 (SPA-34). Although the court discussed the possibility of nonparodic transformative uses, it used overtly mocking parody as the standard against which all other uses were to be measured, ruling that Defendant's use was not transformative because there were other ways of accomplishing his stated creative goals. *Id.* at 21 (SPA-47).

Campbell identified parody as one form of commentary that may qualify as transformative, but did not limit transformativeness to parody. *See Campbell*, 510 U.S. at 579. This Court has made clear that nonparodic, creative reworkings can be transformative; leeway to artists is granted not because they assault the original head-on, but because they have a genuine creative rationale for their uses. *See Blanch*, 467 F.3d at 254-55.

In *Blanch*, Jeff Koons copied part of a fashion photograph by Andrea Blanch. 467 F.3d at 247. Koons explained that “he intended to comment on the ways in which some of our most basic appetites – for food, play, and sex – are

mediated by popular images.” *Id.* (internal citation omitted). This court concluded that his use of Blanch’s photograph was transformative because Koons used Blanch’s photograph not simply to repackage it, but as “raw material” to create a new work with a different meaning and message. *Id.* at 253. The criticism was neither parodic nor specific to Blanch’s photograph, but it was a new message; that was sufficient. A “genuine creative rationale” for the copying, *id.* at 255, established transformativeness.

Blanch gave the proper scope to transformativeness: Parodies and direct criticism are not the only creative form that can “add[] something new,” and bestow upon the original “new expression, meaning or message.” *Campbell*, 510 U.S. at 579.

b. Transformativeness Need Not Be Apparent To All

Courts have recognized that fair use must not depend on a single judge’s perception of an artist’s merit but rather on the possibility that a reasonable member of society could perceive the transformative use. There are two core reasons for this: first, fair use is not reserved only to the artistically competent who manage to communicate so clearly that everyone in the audience understands the message. *Yankee Publ’g, Inc. v. News America Publ’g, Inc.*, 809 F.Supp. 267, 280 (S.D.N.Y. 1992) (Leval, J.) (“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed”)

(quoted in *Campbell*, 510 U.S. at 583). Second, and more importantly, art is not about singular meaning—either with respect to an original or to a transformative work.

The fair use standard is whether a transformative character “may reasonably be perceived,” *Campbell*, 510 U.S. at 582.³ A court is not required to do what literary critics cannot and put the final interpretive stamp on a work. We expect disagreement about the meaning of works, both original and critical, and we do not hold protection hostage to conveying a transformative meaning to a majority. *Cf. Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (“While individuals may disagree on the success or extent of a parody, parodic elements in a work will often justify fair use protection. . . . Use of surveys in assessing parody would allow majorities to determine the parodic nature of a work and possibly silence artistic creativity. Allowing majorities to determine whether a work is a parody would be greatly at odds with the purpose of the fair use exception and the Copyright Act.”).

This Court’s emphasis in *Blanch* on authors’ transformative *purposes*—rather than audience perceptions—likewise indicates that a credible

³ The Court in *Campbell* was evaluating a parody, but its language applies to all transformative uses. See *Blanch*, 467 F.3d at 255 (“We have applied *Campbell* in too many non-parody cases to require citation for the proposition that the broad principles of *Campbell* are not limited to cases involving parody.”).

purpose to add a new meaning or message is transformative even if the new author is ultimately a poor craftsperson and fails to reach his or her audience. *See Blanch*, 467 F.3d at 252 (“The sharply different objectives that Koons had in using, and Blanch had in creating, ‘Silk Sandals’ confirm[] the transformative nature of the use. ... His stated objective is thus not to repackage Blanch’s ‘Silk Sandals,’ but to employ it ‘in the creation of new information, new aesthetics, new insights and understandings.’”) (internal citations omitted).

If a new meaning or message is reasonably discernable in an accused work, it should be found to be transformative. Literary history reveals the wisdom of interpretive modesty. A number of works widely recognized as parodies were not *uniformly* recognized as such. Before writing *The Clansman* (filmed as *Birth of a Nation*), for example, Thomas Dixon wrote a “sequel” to *Uncle Tom’s Cabin*, keeping Simon Legree as a villain but defending the honor of the South.⁴ Dixon intended to refute Stowe’s novel, but the books had numerous similarities beyond using the same characters and many (though not all) reviewers saw his book as a superior successor to Stowe’s.⁵ Just as in the present case, meaning was not

⁴ Dixon was only one of many who rewrote *Uncle Tom’s Cabin* to criticize the novel and defend slavery, often styling the results as “sequels.” Sarah Robbins, *The Cambridge Introduction to Harriet Beecher Stowe* 103 (2007).

⁵ Melvyn Stokes, D.W. Griffith’s *The Birth of a Nation* 37, 41-42 (2007). Numerous other works have been interpreted both as parody and as valorization. Simon Dentith, *Parody* 36 (2000) (“[P]arody has the paradoxical effect of

unitary: the author intended transformation, but where some perceived criticism, others perceived consistency. *See also* Arnold J. Band, *Swallowing Jonah: The Eclipse of Parody*, 10 *Prooftexts* 177, 191 (1990) (explaining how perceptions of parody change over time).

c. Transformativeness Can Build on Features Present in the Original

In its transformativeness analysis, the district court apparently reasoned that Holden’s flaws were already present in the original, thus preventing others from exposing those flaws in critical creative works. *See, e.g.*, Injunction Order at 12-13 (SPA-38) (“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. . . . those effects were *already* thoroughly depicted and *apparent* in Salinger’s own narrative about Caulfield.”) (emphasis added). This was error on several levels.

First, no artist should be able to insulate himself from criticism by creating an obviously flawed work or obviously flawed characters. It should

preserving the very text that it seeks to destroy This can have some odd effects, even running counter to the apparent intentions of the parodist. Thus the classic parody of *Don Quixote* . . . preserves the very chivalric romances that it attacks— with the unexpected result that for much of its history the novel has been read as a celebration of misplaced idealism rather than a satire of it.”); *see also id.* at 105-06 (discussing persistent uncertainty among literary critics over whether certain texts are parodic or respectful, including works by Alexander Pope and *The Rape of the Lock*).

always be open to others to transform the original. That Holden's flaws have always been obvious to many readers should offer Salinger no protection against transformative use, any more than it should protect him against critical reviews.⁶ *Cf. Kane v. Comedy Partners*, 68 U.S.P.Q.2d 1748, 1752-53 (S.D.N.Y. 2003) (no author can bring parody within the scope of her rights merely by being willing to license parody; transformative uses are simply outside the scope of the rights to which the copyright owner is entitled), *aff'd*, 98 Fed.Appx 73 (2d. Cir. 2004). The District Court erroneously reasoned that rereading *Catcher* itself could substitute for criticism of *Catcher*, essentially giving Salinger a monopoly on reassessments of Holden. *See* Transcript of June 17, 2009 Hearing at 37 (SPA-12) ("But do people need Mr. [Colting's] version in order to view the story differently? How about just reading it twice, or maybe five years later, ten years later, 30 years later, 40 years later.").

Second, very few works have a singular meaning apparent to all readers, and *Catcher* is certainly not among that small class. There is certainly no evidence in the record that the District Court's interpretation of *Catcher* is "apparent" to *all* or even *most* readers. While some readers may come away from

⁶ Notably, in *Suntrust*, another "unauthorized sequel" case, the defendant's presentation of Ashley Wilkes as a homosexual was deemed transformative by the Eleventh Circuit even though (or precisely because) it was heavily implied in the text of *Gone With the Wind*. *See Suntrust*, 268 F.3d at 1270 & n. 26.

Catcher with contempt for Holden’s immaturity and self-centeredness, others—as demonstrated by the use of *Catcher* in countless English classes, and by the heroic descriptions in Salinger’s own *Complaint*—have considered him a romantic hero.⁷ After all, even Swift’s *A Modest Proposal* was taken seriously by some readers.

In the particular context of *Catcher*, a work that shows the hero grown (or, rather, stagnated) into a bitter, self-absorbed old man operates as a criticism of the valorization of those same qualities in a youth. It is because there are many ways of reading Holden Caulfield that a portrayal of him meeting a sad end due to his unchanged flaws works as a commentary on the original. See Peter Friedman, *How good a literary critic was the judge in the Catcher in the Rye case?*, Ruling Imagination: Law and Creativity, July, 9, 2009, available at <http://blogs.geniocity.com/friedman/tag/coming-through-the-rye/> (“[B]y depicting a 76 year old Holden who is no different than Salinger’s 16 year old Holden, one might conclude that the author was parodying the self-absorbed, dense, and unreflective 16 year old (as well as the author, who has contributed nothing to the

⁷ See, e.g., Jennifer Schuessler, *Get a Life, Holden Caulfield*, N.Y. Times, June 20, 2009 at WK5 (“‘The Catcher in the Rye,’ published in 1951, is still a staple of the high school curriculum, beloved by many teachers who read and reread it in their own youth. ... Holden won over the ... 1960s generation who saw themselves in the disaffected preppy, according to the cultural critic Morris Dickstein. ‘The skepticism, the belief in the purity of the soul against the tawdry, trashy culture plays very well in the counterculture and post-counterculture generation,’ said Mr. Dickstein, who teaches at the Graduate Center of the University of the City of New York.”).

creative life of the society from which he has done everything to withdraw since 1964).”).⁸ Salinger’s writing may have seduced many readers into giving Holden too much credence, despite literary critics’ efforts to dissuade them. Showing Holden 60 years later offers an opportunity to present a critique readers of the original may have seen for themselves (as is true of any review), or may have missed.

Relatedly, the court erred in holding that similarities between aspects of the works, such as style, prevented a finding of transformativeness. The *Campbell* test looks for “new expression, meaning, *or* message.” *Campbell*, 510 U.S. at 569 (emphasis added). The test is disjunctive. Even if two works share some common purposes (as the popular songs in *Campbell* did) or a common style, a use may still be transformative where it alters the copyrighted work with “new expression [or] meaning.” *id.*, or creates a new work with “new . . . insights and understandings.” *Blanch*, 467 F.3d at 251-52 (quoting Leval, 103 Harv. L. Rev. at 1111).

d. Transformativeness Can Target the Author

The District Court also erred in its narrow approach to parody by holding that using *Catcher* to criticize its author was not transformative. Reports

⁸ Parody regularly targets characters’ “misrecognition of the world” and their “delusive mentality.” Dentith, *supra*, at 58. Given Holden’s relentless interiority, he is a perfect target for mockery by the exaggerated effect that comes from repetition.

of the “death of the author” aside, works cannot in practice so easily be detached from their authors. *See* Friedman, *supra*. Parody, by its explicit reference to other works, draws attention to the context of reading and writing; targeting the author of a transformed text fits within that literary tradition. *See* Dentith, *supra*, at 14-15.⁹ Moreover, the economic rationale for giving special leeway to uses targeting the original work applies powerfully to uses targeting the original author: most authors are extremely unlikely to license such works, preferring instead to suppress them. *See Campbell*, 510 U.S. at 592.

In *Blanch*, it was appropriate for Koons to repurpose a single work that embodied the commercial mentality he wished to challenge even though he had no need to use that particular image; by his own admission, any similar image would have sufficed. Contrary to *Blanch*, the District Court wrongly required the defendant to demonstrate a need to use *Catcher* to criticize Salinger. *See* Injunction Order at 18-19 (SPA-44). Because of the widely recognized link between the book and its creator, however, it is particularly appropriate to repurpose *Catcher* to engage with the cultural relevance of its creator. Under

⁹ For example, *Don Quixote* targeted both the personal characteristics of popular authors and their works. Adrienne L. Martín, *Humor and Violence in Cervantes*, *The Cambridge Companion to Cervantes* 173-74 (ed. Anthony J. Cascardi 2002).

Campbell and *Blanch*, such a link need only be merely capable of reasonable perception.

2. The District Court’s Errors in Factor One Infected Its Analysis of the Remaining Factors

The nature of the work (factor two), the amount and substantiality of the material copied (factor three), and the effect of the unauthorized use on the market for the original (factor four) must be assessed in relation to the transformativeness of the use. *Campbell*, 510 U.S. at 586 (factors two and three); *id.* at 591 (factor four); *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) (“the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose”); *Blanch*, 467 F.3d 257-58 (factor three must be assessed in relation to purpose). As a result, the District Court’s analysis of these factors must be reassessed in light of its overly narrow conception of transformativeness.

Specifically, this Court should consider when applying factor two that Colting’s book targets a widely disseminated literary classic, which has already received substantial economic reward and as to which it is reasonable to expect creative and critical reactions. *See Blanch*, 467 F.3d at 256 (when plaintiff’s work is published, that element of factor two favors defendant); *Arca Inst., Inc. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992) (same). The District Court’s factor

two analysis, Injunction Order at 23-24 (SPA-49), omitted any consideration of *Catcher*'s publication status, which was error.

Likewise, the District Court's focus in factor three on the use of similar events and catchphrases in both narratives, without any finding of copying of substantial *expression*, must be re-examined by this Court as guided by proper consideration of transformativeness.

3. The District Court Erred in Considering Moral Rights as Economic Incentives

The District Court, without citation to any precedent, introduced an entirely new rationale in finding market harm: the speculation that authors might create out of a desire to *not* license derivative works. *See id* at 35 (SPA-61) (“[S]ome artists may be further incentivized to create original works due to the availability of the right *not* to produce any sequels. This might be the case, for instance, an author's artistic vision includes leaving certain portions or aspects of his character's story to the varied imaginations of his readers, or if he hopes that his readers will engage in discussion and speculation as to what happened subsequently.”).¹⁰

¹⁰ In fact, an unauthorized sequel can no more fix the canonical meaning of a text than a critical review can. The District Court ignored that an unauthorized work by someone other than Salinger can only be speculation. Historically, unauthorized “sequels” and revisionings of popular characters proliferated. Rather than being perceived by readers as authoritative, they increased the possibilities for debate. *See* David Brewer, *The Afterlife of Character* 14, 20-21, 38-39 (2005).

As a matter of logic, this consideration has no place in factor four, which asks the court to assess the effect of the defendant's use on the market for the original, and on the market for derivative works within legitimate derivative markets. *See NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 481-82 (2d Cir. 2004) (“In considering the fourth factor, our concern is not whether the secondary use *suppresses* or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work.”) (emphasis added). It is true that authors may decline to license derivative works in established markets and yet still retain rights in those markets. If Salinger does not want a standard movie version of *Catcher*, he is entitled to refuse all such licensing requests. But that does not mean that Salinger has an independent *economic* interest in refusing to license, only that the movie adaptation market is a generally recognized market for purposes of factor four. *See Blanch*, 467 F.3d at 258 n. 9 (factor four is concerned with whether there is a relevant derivative market for the copyright owner to tap into).

By framing the question as one of Salinger's interest in leaving his artistic vision untouched, the District Court imported moral rights concepts into fair use law, even though moral rights are not part of U.S. copyright law and even though moral rights are inherently in tension with fair use. *See* Geri J. Yonover, *Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14

Cardozo Arts & Ent. L. J. 79, 104 (1996). Individual authors' willingness to license transformative uses does not make such uses into a relevant market for factor four because copyright owners have no right to that market in the first place. *Bill Graham*, 448 F.3d at 614-15. Likewise, individual authors' *unwillingness* to participate in such markets has no place in the economic analysis required by the fourth factor. In fact, content-based refusal to license has been recognized as a factor *favoring* fair use. *See Suntrust*, 268 F.3d at 1270 n. 26; *id.* at 1277 (Marcus, J., concurring).

The District Court's logic has no endpoint: Nonfictional criticism can affect the meaning of the original as readily as fictional treatments. The possibility of unauthorized bad reviews surely deters some writers; and criticism identifying and explicating particular themes in an author's work could also diminish the incentive to create, because readers might agree with the critic and stop discussing and speculating.

IV. CONCLUSION

The District Court's fair use errors compounded its faulty preliminary injunction analysis, illustrating why preliminary relief ought to be sparingly granted in expressive cases. The Supreme Court has consistently rejected "invitations to replace the traditional equitable principles" with a rule that "an injunction automatically follows" from a determination of infringement. *See eBay*,

547 U.S. at 392-93. The District Court recognized some of 60YL’s critical and transformative components and dismissed others. But it is beyond question that 60YL is an expressive work of fiction – the type of work that lies close to the center of First Amendment protection. At the very least, courts should exercise great caution in granting preliminary injunctions that ban creative and expressive works. *See Campbell*, 510 U.S. at 578 n.10 (urging caution against injunctive relief over “reasonable contentions of fair use”) (internal citations omitted); *Suntrust*, 268 F.3d at 1265 (courts must be cautious in granting injunctions over a “colorable fair-use defense”). The District Court failed to heed that caution here. Salinger failed to meet his evidentiary burden, and the injunction must be vacated.

Given the strong reasons to avoid restraining creative speech, it is vital to avoid confusion over the proper tests for fair use and for preliminary injunction relief. This Court’s prior articulations of the preliminary injunction standard do not align with *eBay* or *Winter*. *Compare NXIVM Corp.*, 364 F.3d at 476 *with Winter*, 129 S.Ct. at 374. This Court should articulate a preliminary injunction standard that demands specific consideration of each of the traditional equitable factors, and requires a plaintiff seeking a preliminary injunction to demonstrate he satisfies each factor with actual evidence, not mere presumptions.

The Court should likewise remind courts and litigants alike of the important difference between injunctions against verbatim copying versus those that would enjoin expressive works incorporating significant new creativity. Given the Supreme Court's express caution against enjoining the second category of works, and its admonition that fair use is a critical "First Amendment safeguard" a proper injunction test should remind courts to give due consideration to this distinction, and pay close attention to the free speech and expression interests of accused infringers and the public alike.

Respectfully Submitted,

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DECLARATION OF SERVICE

I, AMANDA SMITH, under penalty of perjury, declare and state that I am over eighteen years of age and not a party to the above-captioned action, and that on the 3rd day of August, 2009, I caused to be served by Federal Express and e-mail, Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae, American Library Association, Association of Research Libraries, Association of College and Research Libraries, The Organization for Transformative Works and The Right to Write Fund on the following:

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 August 3, 2009

AMANDA SMITH

Exhibit A

The following parties are amici curiae:

The American Library Association

Chicago, IL

The American Library Association (ALA) was founded in 1876 and is the oldest and largest library association in the world, with members in academic, public, government, school and special libraries. The ALA's mission is to promote access to information and protect intellectual freedom. It has been an outspoken advocate for the First Amendment throughout its 132-year history. The ALA has seven core action areas in which it focuses its strategic efforts: diversity, equitable access to information and library services, education and lifelong learning, intellectual freedom, advocacy for libraries and the profession, literacy and organizational excellence.

Association of Research Libraries

Washington, D.C.

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in the U.S. and Canada. ARL member libraries comprise a large portion of the academic and research library marketplace, together spending more than \$1 billion each year on library materials. ARL works to influence public policies affecting research libraries, including the promotion of intellectual freedom and open access to research and educational resources.

Association of College and Research Libraries

Chicago, IL

The Association of College and Research Libraries (ACRL) is the largest division of the American Library Association. The ACRL brings together academic librarians and other interested individuals who are dedicated to enhancing the ability of academic library and information professionals to serve the information needs of the higher education community and to improve learning, teaching and research. The ACRL currently has a membership of more than 13,000 people.

The Organization for Transformative Works

The Organization for Transformative Works (OTW) is a 501(c)(3) nonprofit dedicated to protecting and preserving noncommercial fanworks: works created by fans of existing works, including popular television shows, books, and movies. Harry Potter alone has generated hundreds of thousands of fan-written stories on one website, fanfiction.net; millions more such works exist. The alteration, transformation, and adaptation of stories is particularly popular among women and minorities, but transformations across nations, classes, and other divides also exist. Fanworks have recognized pedagogical, creative, and even political benefits, even when their merits may not be immediately apparent to those unfamiliar with the form. The OTW supports the transformation of stories to make new meaning across tastes, times, conventions and cultures, and has an interest in preserving a broad definition of transformativeness.

Right to Write Fund

Muskegon, MI

The Right to Write Fund is a 501(c)(3) non-profit organization whose mission is to provide a repository of information and support for individuals needing to learn more about their intellectual property rights in the face of legal intimidation, especially with respect to freedom of expression and fair use issues. The Fund collects and disseminates information, facts and analyses of intellectual property statutes to help define First Amendment rights in the technological age. It also actively supports and promotes values of free speech and open access.