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

BRIEF FOR DEFENDANTS-APPELLANTS

FRANKFURT KURNIT KLEIN
& SELZ P.C.
Attorneys for Defendants-Appellants
488 Madison Avenue, 10th Floor
New York, New York 10022
(212) 980-0120

CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for Defendants-Appellants Windupbird Publishing, Ltd., Nicotext A.B. and ABP Inc. d/b/a SCB Distributors Inc. (all private non-governmental parties) certify that the following are corporate parents, affiliates and/or subsidiaries of said parties, which are publicly held:

None of the Defendants-Appellants is a publicly held entity.

FRANKFURT KURNIT KLEIN & SELZ, P.C.

By:_____
Edward H. Rosenthal (ER-8022)
Maura J. Wogan (MW-9589)
Jessie F. Beeber (JB-3129)
Cameron A. Myler (CM-7942)
Marisa Sarig (MS-3786)*

488 Madison Avenue, 9th Floor
New York, New York 10022
(212) 980-0120
Attorneys for Defendants-Appellants

*Admission to the Second Circuit is pending.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

Federal Statutes

Federal Rules

Other Authorities

PRELIMINARY STATEMENT

Defendants come to this Court seeking urgent relief. Without a shred of evidence of harm to the Plaintiff, the District Court has taken the extraordinary step of enjoining the publication of the book *60 Years Later: Coming Through the Rye* ("*60YL*"). But *60YL* is a complex and undeniably transformative comment on one of our nation's most famous authors, J.D. Salinger, his best known creation, Holden Caulfield, and his most celebrated work, *The Catcher in the Rye* ("*CITR*"). In a fictional medium, the author of *60YL* has done the same thing as the many critics and academics who came before him. He explores the relationship between Salinger, a recluse who famously has struggled to protect both his own image and his intellectual property, and his most iconic work. Had this commentary and criticism been published as an essay, a dissertation or an academic article, there is no doubt that it never would have been enjoined. And banning it, merely because it is presented in what might be a less academic form, not only deprives the Defendants of their rights, but also denies the public the opportunity to read this work and to appreciate the new light it sheds on one of the most famous works of American fiction.

The injunction against this book is an impermissible prior restraint and an unwarranted extension of the protection authors are entitled to under copyright

law, which was never intended to quash commentary and criticism of works of literature. The injunction must be vacated.

JURISDICTION

This appeal is from a Memorandum and Order of the U.S. District Court, Southern District of New York (Batts, J.) entered July 1, 2009 (the "Injunction Order") granting Plaintiff-Appellee J.D. Salinger's ("Salinger" or "Plaintiff") motion for a preliminary injunction against Defendants-Appellants Fredrik Colting, writing under the name John David California ("Colting"), Windupbird Publishing, Ltd., Nicotext A.B. and ABP Inc. d/b/a SCB Distributors Inc. ("SCB") (collectively, "Defendants"). This appeal is also from the District Court's order dated July 9, 2009 (the "Bond Denial Order") denying Defendants' request that Salinger be required to post a bond as security for the preliminary injunction.

Plaintiff alleges that the District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1338(a) and (b) (original jurisdiction) since it arose under the copyright laws of the United States, and 28 U.S.C. § 1338(b) and § 1367 (supplemental jurisdiction) since it contained related claims under New York state law. *See* Plaintiff's Complaint ("Compl."), ¶ 8 (A-13). This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) because a preliminary injunction was granted. This appeal is timely filed. The Injunction Order was entered on July 1, 2009 and the Notice of Appeal was filed

on July 2, 2009. The Bond Denial Order was issued after the Notice of Appeal was filed, but is related to the Injunction Order, and can properly be considered a part of this appeal. *See, e.g., United States v. Bedford Assocs.*, 618 F.2d 904, 916 n.23 (2d Cir. 1980).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the Injunction Order barring publication of Defendants' transformative work, which comments upon Plaintiff and his work, constitute an impermissible prior restraint?

Answer: Yes.

2. In light of the Supreme Court's decisions in *Winter v. Natural Res. Defense Council, Inc.*, ___ U.S. ___, 129 S. Ct. 365 (2008), *eBay, Inc. v. MercExchange*, 547 U.S. 388 (2006) and other authority, did the District Court err in relying upon a presumption of irreparable harm, and in entering a preliminary injunction barring publication of Defendants' work without any evidence of actual harm to Plaintiff and without considering the interests of Defendants or the public?

Answer: Yes.

3. Did the District Court err in determining that *60YL* infringes Plaintiff's copyright in *CITR* and the character Holden Caulfield even though *60YL* is not substantially similar to any copyrightable elements of Plaintiff's work?

Answer: Yes.

4. Did the District Court err in finding that *60YL* does not comment upon or criticize *CITR* itself and that the comments on Salinger are not sufficiently transformative to constitute fair use?

Answer: Yes.

5. Did the District Court err in rejecting Defendants' fair use defense where Plaintiff presented no evidence of any harm to the actual or potential market for Plaintiff's work or its authorized derivatives?

Answer: Yes.

6. Does the District Court's failure to require Plaintiff to post a bond require vacatur of the Injunction Order?

Answer: Yes.

STATEMENT OF THE CASE

On June 1, 2009, Salinger, the author of *CITR*, filed a complaint against Defendants alleging copyright infringement and common law unfair competition arising from Defendants' creation and imminent U.S. publication of Colting's book *60YL*. *See* Compl. ¶¶ 66-93 (A-26-29). Salinger also moved for a preliminary injunction on his copyright claim, seeking to prohibit the advertising, publication and distribution of *60YL* in the United States. *See* Plaintiff's Order to Show Cause (A-45-47).

Defendants opposed the motion, denying that there had been any infringement of Salinger's copyright and arguing that, to the extent that *60YL* incorporated any copyrightable material from *CITR*, such use was protected by the fair use doctrine because *60YL* is a critical commentary on Salinger and *CITR*. Defendants noted the absence of any evidence of irreparable harm and submitted evidence establishing that, in fact, no harm would result from the publication of *60YL*.

At oral argument on June 17, 2009 (the "Hearing"), the District Court held that *60YL* infringed upon Salinger's copyrights in *CITR* and the Holden Caulfield character. *See* Hearing Transcript ("Trs.") at 60 (SPA-17). On July 1, 2009, the District Court issued the Injunction Order (which incorporated by reference the transcript from the Hearing), finding that *60YL* was not entitled to a fair use defense. *See* Injunction Order at 36 (SPA-62). The District Court did not require Plaintiff to post a bond, which is required under Federal Rule 65(c).

On July 7, 2009, Defendants requested a bond in the amount of $500,000 as security for the preliminary injunction, based on the significant economic damages Defendants will suffer as a result of the Injunction Order, in addition to the irreparable harm that results from the prior restraint of their First Amendment rights. *See* Defendants' Letter to Judge Batts (A-647-48). Salinger opposed Defendants' request that same day. *See* Plaintiff's Letter to Judge Batts (A-649-

51). In the Bond Denial Order, the District Court denied Defendants' request, finding that "[i]t is not credible that future marketing of this book has been harmed" and "there is no need for Plaintiff to post a bond pursuant to Rule 65(c)." *See* Bond Denial Order (SPA-64). Defendants appeal, on an expedited basis, from the Injunction Order and the Bond Denial Order.

STATEMENT OF FACTS

60YL is a highly transformative work of commentary and criticism about *CITR* that explores the relationship between Salinger and Holden Caulfield, his most famous character. *60YL* is not a continuation or retelling of *CITR*, nor could it possibly satisfy the public interest in what happened to Holden or any of Salinger's other characters. Rather, *60YL* examines the widely-held impression of Holden as a free and independent hero, juxtaposed against the idea that Salinger is an author imprisoned by writer's block and fear of failure. *60YL* creates an imaginary world where Salinger brings his character back to life so that he may kill him and finally be free of the burden his character's fame has caused. Salinger and his creation meet face-to-face, and Salinger ultimately realizes that he cannot destroy what has become his own flesh-and-blood and allows his character to go free.

A. Plaintiff-Appellee Salinger and His Book

Salinger is perhaps America's most famous living author, and is nearly as famous for his reclusive persona as he is for being the author of *CITR*. Salinger published *CITR* in 1951. Declaration of Edward H. Rosenthal ("Rosenthal Decl.") Ex. E(iii) (A-523). It became an instant success, remaining on *The New York Times* best-seller list for over seven months. *Id.* Ex. E(i) (A-517). *CITR* has permeated both American literature and popular culture. It is "taught in schools across the country," and has been described as "a crucial American novel." Compl. ¶ 2 (A-11-12). It has influenced dozens of literary works, including *The Bell Jar* by Sylvia Plath and *Less Than Zero* by Bret Easton Ellis. Rosenthal Decl. Ex. E(xi) (A-576). It also has inspired countless movies, ranging from *The Graduate* (1967) to *Igby Goes Down* (2002). *Id.*; Compl. ¶ 34 (A-19).

CITR's protagonist, Holden Caulfield, has become synonymous with adolescent alienation and rebellion and is a cultural icon as such. He is revered by each new generation as a hero of sorts who can identify "phoniness" at any turn, does not bend to the conventions of the day and has not "sold out" like the grown-ups around him. Declaration of Fredrik Colting ("Colting Decl.") ¶ 8 (A322-23). Plaintiff describes Holden as a "precocious 16-year old boy struggling to find his way in the world and an angst-filled cynic," who feels "disconnected" from most people around him. Compl. ¶¶ 24, 26 (A-17). He is in fact, Plaintiff alleges, the

"prototype of the angst-filled, cynical teenager coming into his own." *Id.* ¶ 35 (A-20).

In the midst of *CITR*'s early success, Salinger moved to New Hampshire and withdrew from society. Rosenthal Decl. Ex. E(iii) (A-527). He published his last work in 1965. *Id.* (A-521). Despite (or perhaps because of) his reclusiveness, Salinger has become the focus of speculation about his personal life, and the subject of many biographies, including by his former lover Joyce Maynard and his daughter, Margaret Salinger. *Id.* Ex. E(ix) (A-571). Salinger has also appeared as a fictional character in works such as *Shoeless Joe*, the novel by W. P. Kinsella that inspired the film *Field of Dreams*. *Id.* Ex. E(vii) (A-543).

Salinger has reportedly had difficulty drawing the distinction between himself and Holden, speaking of Holden as an actual person and admitting that *CITR* was autobiographical and that his boyhood "was very much the same as the boy in the book." *Id.* Ex. F (A-596, 600-01). Salinger also has exercised iron-clad control over his intellectual property, refusing to allow others to adapt his characters or stories in other media. Affidavit of Phyllis Westberg ("Westberg Aff.") ¶¶ 15-19 (A-119-20). He has come out of his seclusion only (and, again, famously) for a series of lawsuits intended to prevent the use of his works. *Id.* Salinger's work, or lack thereof, has been subjected to frequent critical examination. Analyses of his self-imposed exile and rumors of as-yet unpublished

manuscripts abound. Rosenthal Decl. Ex. E(viii) (A-546-573). Even in his silence, Salinger remains very much the focus of extraordinary public interest.

B. Defendant-Appellant Colting and His Book

Colting is a citizen and resident of Sweden. Colting Decl. ¶ 1 (A-321). *60YL* is his first novel to be published. *Id.* ¶ 4 (A-322). *60YL* is not, nor did Colting intend it to be, a sequel to *CITR*. *Id.* ¶¶ 24-25 (A-328).[1] It does not pick up where *CITR* left off, it does not represent the next adventure in the life of Holden Caulfield and it does not even take place in the same narrative world as *CITR*. *Id.* ¶ 24 (A-328). It was not designed to satisfy any interest the public might have in learning what happened next to Holden or the other characters in Salinger's book. *Id.* ¶ 25 (A-328). Rather, it is a critical examination of the character Holden and the way he is portrayed in *CITR*, the relationship between

[1] The District Court cites early press reports (claiming that Colting intended to write the "second half" of Holden's story as a "tribute" to *CITR* and Salinger) as evidence that Colting intended *60YL* to be a sequel. Injunction Order at 16-17 n.3 (SPA-42). The District Court also points out that the book, as originally published in the U.K., stated that it was "a marvelous sequel to one of our most beloved classics." *Id.* But it must be understood that Colting is a first-time Swedish novelist, not a copyright attorney or a federal judge, who did not understand or appreciate the significance of the term "sequel" from the standpoint of whether he was creating an infringing derivative work of *CITR* or an important piece of commentary protected by the First Amendment. *60YL* simply is not a sequel, and Colting now realizes that the original description of that book was inaccurate. Colting Decl. ¶ 24 (A-328).

Salinger and his iconic creation, and the life of a particular author as he grows old but remains imprisoned by the literary character he created.[2] *Id.*

Colting, like so many others, has long been fascinated by Salinger and his relationship to Holden. *Id* ¶ 7 (A-322). He was intrigued by the fact that, after creating Holden and other characters, Salinger apparently developed writer's block. He has not published a new work in nearly half a century, and has withdrawn from society, refusing to allow others to use any of his characters or stories in other media. *Id.* Colting was also intrigued by Holden himself, who has become such a heroic figure in the minds of countless readers because he is authentic, fiercely independent, and free from societal norms and family demands. *Id.* ¶ 8 (A-322-23). This dichotomy between a "blocked," reclusive and controlling creator and his "free" and famous character inspired Colting to imagine a fantastical world where Salinger and Holden meet and play out this conflict.

Throughout the book, in order to differentiate between his two main characters, Colting puts his fictionalized Salinger's words in italics (they are also

[2] No edition of *60YL* will ever be labeled or marketed as a "sequel" and any U.S. edition will include a prominent disclaimer describing it as "An Unauthorized Fictional Examination of the Relationship between J.D. Salinger and His Most Famous Character." Declaration of Aaron Silverman ("Silverman Decl.") Ex. A (A-338). In addition, the word "unauthorized" will appear on the spine, and the back cover will have a prominent disclaimer that the book has not been "approved, licensed or endorsed by J.D. Salinger." Silverman Decl. ¶ 3 (A-336) & Ex. A (A-338).

presented in italics in this brief) while the words of Salinger's creation, who Colting calls "Mr. C," appear in regular typeface.[3] Colting Decl. ¶ 11 (A-324). Salinger is depicted as a 90-year-old author, bitter and angry that the fame of Mr. C has essentially controlled him, forcing him into hiding for the past 60 years. Salinger decides to reanimate Mr. C, now aged 60 more years himself, and to kill him off so that he (Salinger) can finally be free. *Id.* ¶¶ 11-12 (A-324).

Salinger's re-awakening of Mr. C is slowly revealed to the reader. Chapter One has only one line, in Mr. C's voice: "I open my eyes and, just like that, I'm awake." *60YL* at 7.[4] Chapter Two introduces the Salinger character, with just two lines: "*I'm bringing him back. After all these years I've finally decided to bring him back.*" *Id.* at 9. In the next chapter, Colting further explores Mr. C's reanimation, from Mr. C's point of view. He is bewildered, it feels like he "only just closed [his] eyes, but at the same time . . . like [he] has been sleeping for ages." *Id.* at 11. At first, Mr. C mistakenly believes that he has awoken on the day after *CITR* ended, when Holden was in an institution. *Id.* at 13. ("The only thing I can think of that was different about yesterday was that I finished telling you about

[3] While *CITR* is written in the first person past tense, *60YL* is in the present tense.

[4] For this Court's convenience, actual copies of *60YL* and *CITR* were filed as exhibits on this appeal. Citations to *60YL* and *CITR* refer to the actual page numbers of these books. As stated above, disclaimers will appear on any U.S. edition of *60YL* permitted to be published. *See* revised cover of *60YL* (A-338).

all this madcap stuff that happened to me lately.") But it is soon revealed that Mr. C makes this mistake because Salinger has kept Mr. C frozen for the past 60 years, so that Mr. C has no choice but to believe that he is still a seventeen-year-old boy. *Id.*

Mr. C quickly begins to understand not only that he is in a different place ("Did they move me while I was sleeping? Because this isn't my room . . . it's definitely not the same place I fell asleep in just a few hours ago.") but also that he is a different person ("[S]omething is really wrong with my arms. My skin is . . . covered with tiny dark spots . . . and it's loose and saggy . . . . The veins on top of my hands are really visible . . . . These aren't my arms; these aren't my arms at all.") *Id.* at 16, 18. By the end of the chapter, he has looked in the mirror and discovered the unthinkable – that he is an old man. *Id.* at 19.

Surprised and confused, Mr. C does not understand how he became trapped in an old man's body, and thinks it all just must be a dream. *See, e.g.*, *id.* at 26-29. Salinger starts to feel sorry for his scared "*little rabbit, a young boy in an old man's cloak*" and wonders what has happened to Mr. C in the time he has forced Mr. C to lay dormant. *Id.* at 35.

Colting then introduces another important theme: Salinger's control, or lack thereof, over his character. Salinger ponders the fact that although he is the puppet master, he does not have complete control over his creation:

> *Even though I'm the one holding all the strings, I don't know what happens to them when we let them be without care for so long. Do they meet with others and create lives like yours and mine? Or are they simply placed inside a cocoon and awakened only when you again sharpen your pen?*

Id. at 35. Salinger concludes that Mr. C is confused because "*[i]f you don't have a past you don't exist*." *Id.* at 34. So in order to kill Mr. C, Salinger has to "*build [Mr. C] from where I left off. I have to give him a past for the simple reason that you can't kill what doesn't exist*." *Id.* at 36.

At the end of Chapter Four, Salinger resolves to write Mr. C's story "*as fast as the tiny arms*" of his typewriter "*can hit*." *Id.* at 36. Simultaneously, Mr. C begins to hear the "tapping" of the typewriter keys in the "back of [his] mind." *Id.* at 37. This is one of the first indications that the separation between creator and creation has been breached, as Mr. C can actually hear Salinger typing out the words that animate him. *See* Colting Decl. ¶ 13 (A-324-25).

At first, Salinger seems to succeed in controlling Mr. C. He cursorily gives Mr. C a backstory to fill up the time between age sixteen and 76, including a wife named Mary and a son, Daniel. *60YL* at 43. But this new backstory does not really tell what happened in the intervening years. Instead, in keeping with Colting's theme that Mr. C is becoming aware that he is a literary character controlled by a creator, Colting has Mr. C begin to catch on to the fact that his

understanding about what has transpired since he last appeared in *CITR* has been created for him and is not based upon real memories. Mr. C thus says:

> I don't remember anything before my sixteenth birthday. I can tell you what happened, but I don't have any memories of my own. It's the same with the rest of my life. I know where and how I met Mary, how we fell in love, how we got Daniel . . . but still it feels like looking at a wall pinned with thousands of sun faded polaroid[s]. They are not my life; they're only snapshots of my life. Between the tapping dream 60 years ago and the dream last night, my life seems to have played out in a heavyset mist between two station stops.

Id.

In Chapter Eight, Colting acts out this tension between character and creator in a remarkably creative way. The chapter begins with an explication of Salinger's motivation for killing Mr. C. Although he "*made [Mr. C]*," so that Mr. C is his "*son*" and his "*property*," for "*such a long time*" Mr. C has been "*a burden . . . a boulder anchored to [Salinger's] leg*." *Id.* at 62. Wherever Salinger has gone, Mr. C has followed. *Id.* The fame Mr. C has brought him has come with a price ("*Once upon a time I sold my soul to the devil for a golden goose. I've been paying for it ever since*.") and the only way out is to kill Mr. C. *Id.* [5]

Salinger reveals that he has sent Mr. C back to New York City ("*the place I know him best*"). *Id.* at 62. He imagines Mr. C "*sitting in a café not far from the*

[5] Salinger observes that he "*should have done with [Mr. C] just what Shelley did to her monster, so now, I will wipe my slates clean and finish what I've started . . . .I worked so hard to get him to leave me alone, and now I'm the one bringing him back just so that I can kill him*." *60YL* at 48.

bus station, waiting for me to whistle my tune." *Id.* at 63. The book then switches to Mr. C's voice, recounting that he is "sitting in a café not far from the bus station . . . . I guess I should have some sort of plan but I really don't know where to start." *Id* He gets up to take a walk and steps into a crosswalk without looking. *Id.* at 66. He doesn't see or hear the huge truck that suddenly appears and passes "within an inch" of his shoulder, almost killing him. *Id.* Because, despite Salinger's efforts, Mr. C has avoided death, Salinger is forced to start writing the scene all over again. Mr. C again says, "I am sitting in a café not far from the bus station," only now he has slightly more self-determination, saying "I'm trying to think of what to do next, or where to go, but I'm confident that time will show me eventually." Again he steps out into the crosswalk, only this time a homeless man's shriek saves Mr. C from being hit by the truck. *Id.* at 70. Then Salinger starts the scene over once more, with Mr. C saying that he is "sitting in a café not far from the bus station" but this time, instead of depending on Salinger to chart his next move, Mr. C opines that he himself "will think of something" to do." *Id.* at 71. Chapter Eight ends with the truck again bearing down on Mr. C, only this time he is not taken unawares, he sees it "coming from a distance" and is able to avoid it. *Id.* at 73. Chapter Nine starts again with "I'm sitting in a café not far from the bus station," but this time Mr. C expresses no doubt about what he is going to do next, and no truck appears at all. *Id.* at 73.

Thus, although Salinger is writing the scene over and over again, each time trying to kill Mr. C with a truck, Mr. C is also beginning to wrest control of his destiny from Salinger, and each attempt by Salinger is actually making Mr. C stronger and more independent. This makes Salinger furious. He screams "*How dare he! . . . Who does he think he is? My creation, a piece of living art, seems to have grown a will of its own . . . . I won't stand for it.*" *Id.* at 83. This sets the stage for the drama that plays out on the subsequent pages. Salinger tries over and over, without success, to kill Mr. C (by falling construction debris, a lunatic woman with a knife, suicide by drowning and suicide by pills). He loses more and more control over the story and suddenly new characters (found nowhere in *CITR)* like Mr. C's love interest Charlie, start appearing without Salinger's consent. *Id.* at 140. Salinger, however, ultimately begins to doubt his decision to destroy Mr. C. In a climactic scene, Mr. C and Salinger meet face-to-face at Salinger's home in New Hampshire, and although Salinger picks up a heavy statue intending to bash Mr. C over the head, he can't bring himself to do it. *Id.* at 228-29.

In the end, Salinger gives up and decides to let Mr. C go free. In his parting words, he says he is "*terribly sorry for everything*" and will "*always love*" Mr. C, his "*son*." *Id.* at 268. In the last scene of the book, Mr. C is his own person. He is in an institution again (this time a retirement home) and, although the "last time" he was also in a "place much like this," this time he's "getting things right." *Id.* at

275. In the last few pages, Mr. C reconciles with his own son, who has transformed from a fragment of the backstory Salinger created for Mr. C into a real character.

Thus, *60YL* is far from being a sequel to *CITR*. It is an in-depth, though fictional, criticism of the level of control the real Salinger has sought to exert over his creation, and the effects of that control on Salinger, the public, and the work itself. Colting Decl. ¶ 17 (A-326).

C. *60YL* Takes Minimal Material from *CITR* and Only to Serve its Critical Purpose

Colting is not a pirate, he only used as much of *CITR* as he needed to conjure up the original and to make his points. *Id.* ¶ 26 (A-329). Apart from the book's dedication to J.D. Salinger ("the most terrific liar you ever saw in your life"), there is no copying of any literal expression from *CITR*, though a few of Holden's catchphrases, such as "phony" and "goddam," are used to make the connection between Mr. C and Holden. *Id.* Where there are references to scenes that occurred in *CITR*, those scenes are transformed to fit Colting's purpose.

For example, as discussed below, the carousel scene from *CITR* (which serves as a way for Holden and his sister, Phoebe, to reconcile) is transformed in *60YL* to, among other things, a comment on Holden's lack of connection to the world around him. In *CITR*, Phoebe pleads with Holden to join her on the carousel, but Holden just stands back and watches her as she goes around and

around, a symptom of his "disconnect" from the world around him. *CITR* at 211-12. In *60YL*, Mr. C actually joins Phoebe on the carousel and rides with her, something that prompts Salinger, in his last piece of narration, to let Mr. C go. *60YL* at 268. Mr. C and Phoebe then walk hand-in-hand through the park, Mr. C commenting that there is "not a thing in the world I would like to change." *Id.*

Only three of the approximately 80 characters from *CITR* arguably appear in *60YL*: Mr. C, Phoebe and Stradlater (his prep school roommate). Colting Decl. ¶ 28 (A-329). *60YL* also adds about 25 characters that do not appear in *CITR*. *Id.* ¶ 31 (A-330) & Ex. A (A-333-34). Most significantly, the book includes Salinger himself as the narrator/puppet master of Mr. C. Colting Decl. ¶ 32 (A-330). Indeed, it is Salinger who is the most important character, directing all of the action, trying again and again to kill off his character, which prods the reader to consider how much control an author has, or should have, over his character.

D. Academic Experts Conclude that *60YL* is Transformative and a Serious Commentary on *CITR* and Holden Caulfield

The two literary experts who submitted declarations to the District Court both confirm the importance of *60YL* as literary criticism, though each has a slightly different take on the book. Martha Woodmansee, Professor of English and Law at Case Western Reserve University, opines that *60YL* is "a work of meta-commentary . . . . [that] pursues critical reflection on J.D. Salinger and his masterpiece [*CITR*] just as do the articles that literary scholars conventionally write

and publish in scholarly journals, but it casts its commentary in an innovative 'post-modern' form, specifically, that of a novel." Declaration of Martha Woodmansee ("Woodmansee Decl.") ¶ 9 (A-363). In her opinion, *60YL* "seeks to change opinions about [*CITR*], not just scholarly opinions, which have always been mixed, but the sentimental fetishizing of this novel by three generations of fans." *Id.*

Woodmansee concludes that the "illustrative, parodic passages . . . 'repetitions with a difference,' that appear in [*60YL*], force readers to critically reevaluate Holden in particular, and [*CITR*] more generally. In this way . . . the parodic novel [*60YL*] seeks to foster reconsideration of [*CITR*] to renew public debate of the panoply of important issues surrounding adolescent rebellion and old age that [*CITR*] put into discussion in 1951." *Id.* ¶ 17 (A-366-67).

Robert Spoo, a tenured professor at the University of Tulsa, College of Law with an M.A. and Ph.D. in English from Princeton University, concluded that *60YL* is a "sustained commentary on and critique of *CITR*, revisiting and analyzing the attitudes and assumptions of the teenaged Holden Caulfield. In this respect, *60YL* is similar to a work of literary criticism." Declaration of Robert Spoo ("Spoo Decl.") ¶ 7 (A-343-44). Spoo, whose expertise is in the intersection of intellectual property, modernist literature and the copyright-related needs of scholars, also observed that while "[*CITR*] is a portrait of frustrated adolescence, [*60YL*] is a

portrait of anguished old age—a portrait that in various ways comments on and critiques the earlier picture of troubled youth." *Id.* ¶ 4 (A-340).

For example, Spoo states that Mr. C's recollection of "old Spencer" "serves as a critique of the callous attitude toward old age that the teenage Holden exhibited in [*CITR*]." *Id.* ¶ 6(a) (A-341-42). His interaction with an aged Stradlater "provides perspective and commentary on Holden's immature stubbornness and rigidity in [*CITR*], his inability to see beyond the surface of the students he knew at Pencey Prep." *Id.* ¶ 6(b) (A-342). And, at the end of *60YL*, the "transformative picture" in which Mr. C asks his son Daniel, "Did I ever tell you about the catcher in the rye?" "revises and comments upon Holden's limited, if poignant, adolescent fantasy of [*CITR*]." *Id.* ¶ 6(d) (A-343). Thus, two respected academicians both perceive the transformative nature and rich fodder for commentary in *60YL*.

E. Defendants Are Damaged by the Injunction

If *60YL* cannot be published in the U.S., Colting's reputation as an author will be tarnished and SCB's failure to deliver the book will harm its reputation with its customers. If the injunction is not lifted, the substantial time and money Defendants invested in the marketing and promotion of *60YL*, including by featuring it prominently in their catalogs and at the London Book Fair, distributing advance copies to booksellers, retaining a public relations firm and purchasing

advertising, will be lost. The timing of the publication in the U.S. was set to take advantage of the publicity surrounding the book's publication in London this Spring, and the injunction is causing an irretrievable loss of the momentum Defendants worked hard to create. Colting Decl. ¶¶ 36-37 (A-331-32); Silverman Decl. ¶¶ 5-7 (A-336-37).

By contrast, the record is completely devoid of any evidence that Salinger has suffered or will suffer any harm as a result of the publication of *60YL*. As the District Court acknowledged, it "appears unlikely that *60YL* would undermine the market for [*CITR*] itself." Injunction Order at 34 (SPA-60). As far as sequel rights, Salinger's representative has sworn that although Salinger will never exploit them, they are still extremely valuable, regardless of the publication of *60YL*. Westberg Aff. ¶¶ 17, 18 (A-115, 120) (a sequel would command at least a $5 million advance). In any event, *60YL* is a transformative work that will not act as a substitute in the marketplace for any authorized sequel or other derivative works.

Finally, although Salinger seeks the extraordinary relief of stopping the publication of a book, there is no declaration from him in the record at all, including with respect to any alleged harm to him or his rights. The only word we have from Salinger is the hearsay statement of his agent that he knows about *60YL* (though she does not say that he has read it) and authorized this lawsuit. Westberg Aff. ¶¶ 4, 7 (A-115, 116). In sum, the First Amendment right to publish and

distribute a transformative commentary and the public's right to read and learn from Colting's book far outweigh any right to suppress *60YL*, especially where the remedy of monetary damages is available.

STANDARD OF REVIEW

An appeal from the issuance of a preliminary injunction is reviewed for abuse of discretion. *See Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 136 (2d Cir. 1992). However, because of the unique First Amendment freedoms at stake in this case, this Court is free to "'make an independent examination of the whole record' in order to make sure 'that the judgment [of the district court] does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *see also Metropolitan Opera Ass'n v. Local 100*, 239 F.3d 172, 176 (2d Cir. 2001) (when considering the validity of an injunction involving the First Amendment, the appellate court has "an obligation to 'make an independent examination of the whole record'").

In a copyright case, this Court must "review findings of substantial similarity for the purposes of determining copyright infringement *de novo*." *See Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 766 (2d Cir. 1991); *Business Trends Analysts, Inc. v. Freedonia Group, Inc.*, 887 F.2d 399, 402-03 (2d Cir. 1989). *De novo* review is appropriate because "[w]here . . . the determination of similarity rests solely on a comparison of the works in issue rather than on

credibility of witnesses or other evidence only for the factfinder, 'we are in as good a position as the trial judge' to determine the issue." *Folio Impressions*, 937 F.2d at 766.

While the application of the fair use defense is generally a mixed question of law and fact, where the district court has "found facts sufficient to evaluate each of the statutory factors," an appellate court may conduct its own legal analysis as to whether there is a fair use of the copyrighted work. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (internal quotations and citations omitted). Thus, this Court must review the District Court's conclusion as to whether the fair use defense applies must be reviewed *de novo*. *See New Era Publ'ns Int'l v. Carol Publ'g Group*, 904 F.2d 152, 155 (2d Cir. 1990). Subsidiary findings of fact should be reviewed under the "clearly erroneous" standard. *See* Fed. R. Civ. P. 52(a); *Twin Peaks Prod., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993).

SUMMARY OF ARGUMENT

As shown in **Point I** below, barring the publication of *60YL*, a transformative work of fiction that criticizes and comments upon Salinger and his work, is an impermissible prior restraint not tolerated by the First Amendment. While injunctions might be appropriate in copyright cases involving simple piracy, the same is not true of a case, like this one, concerning a transformative work of

fiction that copied minimal elements from the original. Moreover, the District Court improperly ignored the Supreme Court's standard for injunctions set forth in *eBay* which, among other things, requires plaintiffs to show actual irreparable harm that cannot be compensated with monetary damages. *See eBay*, 547 U.S. at 392-93. No such showing was made here, as the record is devoid of any evidence of harm to Plaintiff. Finally, the District Court erred in failing to balance the harm visited upon Defendants, and the public, by the entry of this injunction. *See Winter*, 129 S. Ct. at 376.

Point II establishes that the District Court erred in determining that *60YL* infringed upon the copyrights in the Holden character and *CITR*. The District Court stands alone in this Circuit in finding that a literary character appearing in one work is copyrightable. Moreover, it erred in determining that Mr. C was substantially similar to any protectible aspects of Holden. Finally, the District Court improperly determined that *60YL* was substantially similar to *CITR* as a whole. There was no likelihood of success on the merits of Plaintiff's copyright claims.

Finally, **Point III** establishes that, even if there were copyright infringement, *60YL* is entitled to the affirmative defense of fair use. Taking each of the four fair use factors in turn, Defendants have shown that: (i) *60YL* is a transformative work of fiction that comments both upon Salinger and his underlying work, though

commentary on Salinger alone would have been sufficient given the highly transformative nature of Colting's book; (ii) the nature of *CITR* as a work of fiction does not militate against a finding of fair use, especially where the "thin" copyright in a character is at issue; (iii) *60YL* took only what was reasonably necessary from *CITR* to satisfy its parodic purpose; and (iv) there is no evidence that *60YL* harms the market for *CITR* or any authorized derivatives.

For these reasons, the Injunction Order should be reversed, and the preliminary injunction vacated.[6]

ARGUMENT

POINT I

THE DISTRICT COURT'S INJUNCTION BARRING THE PUBLICATION OF THIS TRANSFORMATIVE WORK IS AN IMPERMISSIBLE PRIOR RESTRAINT

As this Court has recognized, a book is not "an ordinary subject of commerce," and an injunction prohibiting its publication should not be issued without an unequivocal showing of the right to such relief, both legally and factually. *Rosemont Enterprises, Inc. v. Random House, Inc.* 366 F.2d 303, 311 (2d Cir. 1966). The District Court's injunction in this case deprives the general public and scholars of the right to read Colting's imaginative and transformative

[6] The Bond Denial Order should also be reversed, as Defendants have established the likelihood of damages as a result of entry of the injunction. *See supra* pp. 20-21.

work, and to evaluate its criticism and commentary for themselves. Stopping the presses on this book, even for a short period of time, is a prior restraint that the First Amendment cannot tolerate.

The Supreme Court has held that "any system of prior restraint[ ] of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan,* 372 U.S. 58, 70 (1963). Because of First Amendment concerns, courts have refused to enjoin speech that could undercut a defendant's right to a fair trial, *see Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1931), or even that could damage an innocent citizen's reputation. *See Metropolitan Opera*, 239 F.3d at 176; *see also Tory v. Cochran*, 544 U.S. 734, 736 (2005) (injunction against defamatory speech is a prior restraint). The First Amendment also prevents enjoining a pornographic film until there is a final determination of obscenity. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316-17 (1980) ("prior restraints would be more objectionable and more onerous than the threat of criminal sanctions"). Even the Pentagon Papers, which allegedly contained information that would jeopardize national security, were allowed to be published in deference to this critically important element of our free society. *See New York Times Co. v. United States*, 403 U.S. 713, 727 (1971).

How, then, can an injunction barring the publication of a clearly transformative book be tolerated? And how can an injunction issue at this preliminary stage of litigation based solely on a presumption that some irreparable harm will befall Salinger if Defendants' book is allowed to see the light of day? The banning of Colting's book without one sliver of evidence that either Plaintiff or his work is being harmed is a matter of grave First Amendment concern.

A. This is Not a Case of "Simple Piracy" Where an Injunction Might be Appropriate

In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Supreme Court warned that the goals of copyright are not always served by issuing injunctions, even if the taking from a copyrighted work goes "beyond the bounds of fair use." *Id.* at 578 n.10. There is a vast difference between cases involving "simple piracy," where injunctions may be warranted, and those "worlds apart" that raise reasonable contentions of fair use. *Id.*, quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV 1105, 1132 (1990). Moreover, because society is well-served by criticism, and because creators of original works are unlikely to authorize it, creators "cannot be given the power to block the dissemination of critical derivative works." *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 115 n.3 (2d Cir. 1998); *see also Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (vacating district court injunction against publication of work that parodied *Gone with the Wind*).

60YL is not simple piracy. It is a transformative novel that asks many critical questions about *CITR* and Salinger, and exposes the irony of an author driven into hiding by a character so free and heroic that he has taken on a life of his own. Indeed, it is worlds apart from works containing direct takings and blatant infringements. *Cf. Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987) (enjoining biographer's use of "expressive content of [Salinger's] unpublished writings"). *60YL* uses almost no expression from *CITR* and only three characters from Salinger's work, all of whom are transformed. *60YL* does not continue the story of *CITR*, nor could it possibly serve as a substitute for an authorized sequel or other derivative work. The injunction was not appropriate and should be lifted.

B. The Irreparable Harm to Defendants and the Public Outweighs any Presumed Harm to Plaintiff

The District Court issued its injunction without finding that *60YL* would cause any actual harm to Plaintiff and without performing the required balancing of the interests of Plaintiff, Defendants and the public. *See Winter v. Natural Res. Defense Council, Inc.*, 129 S. Ct. at 376. *Winter* held that "[i]n 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.'" *Winter*, 129 S. Ct. at 376, quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987). Instead, the District Court relied entirely on the misguided notion that a presumption of

irreparable harm should automatically follow from a finding of copyright infringement. Injunction Order at 36 (SPA-62). But in *eBay*, the Supreme Court recently confirmed that an injunction must not issue based solely upon a presumption of harm. *eBay*, 547 U.S. at 392-93 ("[A]s in our decision today, this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed") (citing *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001); *Campbell*, 510 U.S. at 578, n. 10).[7] The Supreme Court confirmed that a plaintiff must *prove*: (1) irreparable harm; (2) that such harm cannot be remedied by monetary damages; (3) that considering the balance of hardships between the parties, a remedy in equity is warranted; and (4) that the public interest would not be disserved by the injunction. *eBay*, 547 U.S. at 391 (citing *Amoco*, 480 U.S. at 542 (reciting standard for preliminary injunction)).[8]

---

[7] Many commentators, including leading jurists, have long held the belief that an injunction should not issue automatically upon a finding of copyright infringement. *See, e.g.,* Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L. J. 147, 169 (1998); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1030 (1970); Pierre N. Leval, *Fair Use or Foul*?, 36 J. COPYRIGHT SOC. 167, 179-80 (1989); James Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983, 995-96, 1001 (1990); Alex Kozinski and Christopher Newman, *What's so Fair about Fair Use?,* 46 J. COPYRIGHT SOC. 513 (1999).

[8] While *eBay* arose in the context of a permanent injunction, it applies equally to a preliminary injunction case. The Supreme Court has noted that the standard for permanent relief is essentially the same as that for preliminary relief, except that

The District Court declined to follow *eBay*, on the ground that it was a patent case and there was no Second Circuit case specifically applying it in the copyright context. Injunction Order at 36 (SPA-62). But no such specific application is necessary, because the Supreme Court derived its holding in *eBay* from pre-existing copyright cases, specifically stating that its:

> approach [in *eBay*] is consistent with our treatment of injunctions under the Copyright Act. Like a patent owner, a copyright holder possesses "the right to exclude others from using his property." *Fox Film Corp. v. Doyal,* 286 U.S. 123, 127, 52 S. Ct. 546, 76 L. Ed. 1010 (1932); *see also id.,* at 127-128, 52 Sect. 546 ("A copyright, like a patent, is at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects" (internal quotation marks omitted)). Like the Patent Act, the Copyright Act provides that courts "may" grant injunctive relief "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a).

eBay, 547 U.S. at 392-93.

Had the District Court applied the *eBay* standard, Plaintiff's request for an injunction would have been denied. On the first prong, absent the presumption, there is no evidence in the record that Plaintiff will suffer any harm whatsoever, much less irreparable harm, from the publication of *60YL*. Plaintiff's

---

the plaintiff must show actual success on the merits rather than a likelihood of success. *See Winter*, 129 S. Ct. at 381 ("[T]he balance of equities and consideration of the public interest . . . are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent."); s*ee also Amoco*, 480 U.S. at 546 n.12; Richard Dannay, *Copyright Injunctions and Fair Use: Enter eBay -- Four-Factor Fatigue or Four-Factor Freedom?*, 55 J. COPYRIGHT SOC. 449, 460 (2008).

representatives admit that Salinger has not written a sequel, and will never permit one either. Westberg Aff. ¶¶ 15, 16 (A-119-20). But even if Salinger were to change his mind, there is no evidence in the record that the market for an authorized sequel, a motion picture based on *CITR* or any other authorized derivative work would be harmed in the slightest by Colting's commentary.[9]

On the second prong, if this Court were to find that Plaintiff has shown harm, such harm may be remedied by monetary damages and therefore is not irreparable. *See Suntrust*, 268 F.3d at 1276; *On Davis v. The Gap, Inc*., 246 F.3d 152, 167 (2d Cir. 2001) (uncertainty about the amount of damages will not preclude an award of actual damages attributable to the infringement) (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.02[A] at 14-12 (1999)).

The third and fourth prongs, the balancing of the hardships and the impact of an injunction on the public interest, compel vacatur of the Injunction Order. An injunction against exercising one's First Amendment rights necessarily causes significant irreparable harm. Indeed, the Supreme Court has held that "[t]he loss of

[9] In similar circumstances, in *Suntrust*, the Eleventh Circuit reversed a preliminary injunction barring publication of *The Wind Done Gone* (a fictional commentary on *Gone With the Wind*) where the plaintiff "failed to show, at least at this early juncture in the case, how the publication of [The Wind Done Gone], a work that may have little to no appeal to the fans of [the original] who comprise the logical market for its authorized derivative works, will cause it irreparable injury." *Suntrust*, 268 F.3d at 1276.

First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (staying injunction prohibiting television broadcast of unsanitary practices in meat industry, finding such prior restraint caused "irreparable harm to the news media that is *intolerable* under the First Amendment") (emphasis added). Moreover, Defendants submitted evidence of the harm that would be caused to their marketing and promotion plans, including timing the publication of *60YL* in the U.S. to immediately follow release of the book in the U.K.

The District Court did not even consider the harm to the public in being denied the opportunity to read *60YL* and to decide for themselves whether Colting's work adds to or alters their understanding of *CITR*, Holden and Salinger. The harm to the public's right to receive information, and even entertainment, is perhaps the most compelling factor in weighing the balance of interests in a case of prior restraint. The Defendants' interests in publishing *60YL* and the right of the public to read this work of commentary and criticism require reversal of the Injunction Order.

POINT II

THE DISTRICT COURT ERRED IN HOLDING THAT *60YL* INFRINGES UPON THE COPYRIGHT IN HOLDEN CAULFIELD AND *CITR*

The District Court's holding that *60YL* infringes the copyright in both the Holden character and *CITR* should be reversed.[10]

A. There Was No Infringement of the Holden Character

Determining whether a character has been infringed requires consideration of two separate issues: "was the character as originally conceived and presented sufficiently developed to command copyright protection," and "did the alleged infringer copy such development and not merely a broader and more abstract outline." 1 NIMMER ON COPYRIGHT § 2.12 at 2-178.27; *see also Warner Bros. Inc. v. American Broad. Co. Inc.*, 530 F. Supp. 1187, 1190 (S.D.N.Y. 1982) ("*Warner Bros. I*").

On the first issue, the District Court concluded that the literary character Holden Caulfield was sufficiently "delineated by word" to merit copyright protection separate and apart from his depiction in *CITR*. Trs. at 24:12-18 (SPA-8). While courts in this Circuit have extended copyright protection to characters

[10] Rather than holding that Plaintiff had shown a likelihood of success on the merits of his copyright claims, the District Court seemed to find, on this preliminary record, that Plaintiff's copyrights were in fact infringed. Injunction Order at 2 (SPA-28). To the extent that the District Court's conclusion represents a final determination on this or any other issue, it must be reversed.

from cartoons, films and other visual media, none has done so for a literary character appearing in only a single work. *See, e.g., Silverman v. CBS Inc.*, 632 F. Supp. 1344, 1354 (S.D.N.Y. 1986) (parenthetical); *Warner Bros. I*, 530 F. Supp. at 1193 ("[a]s he is displayed in pictures in comic books, and by actors in the television and movie works, Superman is more readily protectible than he would be had he been merely a word portrait").

Even if this Court agrees with the District Court that the Holden character is entitled to some protection, Colting is not using Holden as he was "originally conceived." Rather, Colting is using and commenting upon the "broader and more abstract" idea of Holden that has evolved over time -- the boy cut off from our scrutiny in the prime of his life, the "prototype of the angst-filled, cynical teenager coming into his own" who Salinger has not permitted anyone to touch. Compl. ¶¶ 24, 26 (A-17).[11]

Although Plaintiff picks out supposed similarities between Holden and Mr. C, there is no substantial use of any copyright protected elements of the Holden character. *60YL* does not even use the name "Holden Caulfield." In *CITR*, Holden is supposed to be a real sixteen-year-old boy who has just been kicked out

[11] *See* Louis Menand, *Holden at Fifty*, *"The Catcher in the Rye and What It Spawned,"* THE NEW YORKER, Oct. 10, 2001 ("Salinger's withdrawal [from society] is one of the things behind . . . Holden's transformation from a fictional character into a culture hero"). Reproduced at Rosenthal Decl., Ex. E(iii) (A-527).

of prep school, while Mr. C is the fantastical figment of an aging author's imagination, trapped in a world he slowly begins to understand and control. With the exception of certain common words, phrases, and mannerisms ("phony," "crumby," "I really don't"), the portrait of Mr. C in *60YL* does not draw upon any physical characteristics, particular speeches or thoughts of Holden in *CITR*. *See* Spoo Decl. ¶ 8 (A-344). "Stirring one's memory of a copyrighted character is not the same as appearing to be substantially similar to that character, and only the latter is infringement." *Warner Bros. Inc. v. American Broad. Co. Inc.*, 720 F.2d 231, 242 (2d Cir. 1983).

B. There Was No Infringement of *CITR*

To determining substantial similarity, this Court must conduct its own "detailed examination of the works themselves." *Walker v. Time Life Films, Inc*., 784 F.2d 44, 49 (2d Cir. 1986). Only "protectible elements, standing alone" can be considered. *Williams v. Crighton*, 84 F.3d 581, 588 (2d Cir. 1996). Here, there is no substantial similarity between *60YL* and the protectible elements of *CITR*.

Plaintiff submitted below charts listing the purported similarities between *CITR* and *60YL* (the "*CITR* Chart" (A-76-110)) and between Holden and Mr. C (the "Holden Chart" (A-52-75)) but those charts are fraught with inaccuracies, exaggerations, mischaracterizations, and elements far too vague to be protected by copyright , such that they should have been rejected by the District Court and must

be rejected by this Court. *See Williams*, 84 F.3d at 590 (Charts like Plaintiff's are "inherently subjective and unreliable, particularly [because they] emphasize random similarities scattered throughout the works.") (citation and internal quotation omitted). For example, Plaintiff claims a monopoly on such ideas as Holden "leaves home suddenly (*CITR* Chart at 6 (A-81))," "arrives in New York (*id.* at 8 (A-83))," "lies a lot (*id.* at 11 (A-86))," "complains a lot (*id.* at 2 (A-53))," and "encounters three young women. *Id.* at 18 (A-93). Plaintiff also claims ownership of any narrative that "ends in an institution (Holden Chart at 12 (A-93))," "refers to the reader in the second person (*id.* at 23 (A-74))," uses "euphemisms for urination (*id.* at 24 (A-75))," and includes "repeated references to grippe/flu." *Id.* at 10 (A-61). Plaintiff's rights in *CITR* simply do not, and cannot, extend that far.

Moreover, Mr. C's fleeting and fragmentary memories of characters that appear in *CITR* serve chiefly as departure points for the aging Mr. C's extended dreamlike thoughts and fantasies, which occur nowhere in *CITR*. *See* Spoo Decl. ¶ 6 (A-341-43). There are also almost 80 characters in *CITR* that do not appear in *60YL* (*see* Declaration of Cameron A. Myler ("Myler Decl.") Ex. A (A-398-402)) and about 25 new characters in *60YL*, including Salinger himself "as the narrator/puppet master of the Mr. C character." *See* Colting Decl. Ex. A (A-333-34).

Finally, "unlike [*CITR*], in which Holden Caulfield is the exclusive narrator, [*60YL*] is a two-ply narrative in which the voice of Mr. C alternates with the imagined thoughts of Salinger himself, thus creating a sort of duet between author and character." Spoo Decl. ¶ 5 (A-340). Colting transforms Plaintiff's portrait of frustrated adolescence into a critical exploration of young Holden, and explores such themes as the relationship between Salinger and Holden and the amount of control Salinger can, and should, be able to have over him. Colting Decl. ¶ 6 (A-322); Spoo Decl. ¶¶ 4-5 (A-340-41); Woodmansee Decl. ¶¶ 3, 8-9 (A-361-63).

Taking all of these factors into account, there is no substantial similarity between *60YL* and *CITR*, Plaintiff cannot succeed on the merits of his claims, and the Injunction Order should be vacated.

POINT III

THE DISTRICT COURT ERRED IN DETERMINING THAT *60YL* DOES NOT MAKE FAIR USE OF *CITR*

Any appropriation of the copyrightable elements of Holden or *CITR* constitutes fair use. Fair use, an affirmative defense to copying, is a "guarantee of breathing space within the confines of copyright" that allows for new transformative works that further the public discourse and the free exchange of ideas. *See Campbell*, 510 U.S. at 579.[12]

[12] The fair use doctrine is the means by which copyright law is reconciled with and accommodates First Amendment rights of free expression. *See Nihon Keizai*

The Copyright Act sets forth the four non-exclusive factors that must be considered: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect on the potential market for or value of the copyrighted work. *See* 17 U.S.C. § 107.

However, as the Supreme Court has warned, a fair use analysis "is not to be simplified with bright-line rules, for the statute like the doctrine it recognizes calls for a case-by-case analysis." *Campbell*, 510 U.S. at 577. And, as this Court has explained, "the ultimate test of fair use . . . is whether the copyright law's goal of promoting the Progress of Science and useful Arts, U.S. Const., art. I, § 8, cl. 8, 'would be better served by allowing the use than by preventing it.'" *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (internal citations omitted) (finding that artist Jeff Koons' use of plaintiff's photograph in his art commenting on a certain style of mass communication was fair use). While Colting's commentary on Holden and his creator Salinger is in the form of a post-modern novel, that commentary is just as worthy of First Amendment protection as if it had been

---

Shimbun v. Comline Bus. Data, Inc., 166 F.3d 65, 74 (2d Cir. 1999) ("First Amendment concerns are protected by and coextensive with the fair use doctrine.").

written as an academic article or essay.[13] The "case-by-case" analysis called for by the Supreme Court in *Campbell* can only lead to one conclusion -- that *60YL* is a transformative work serving an entirely different purpose than *CITR*, that is, adding to our understanding of the iconic work.

A. *60YL* is Transformative and Directly Comments on Holden and *CITR*

There is a strong presumption in favor of fair use where the allegedly infringing work serves one of the purposes listed in 17 U.S.C. § 107: "criticism, comment, news reporting, teaching . . . scholarship, or research." *See NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004); *Harper & Row*, 471 U.S. at 560 (commentary and criticism are afforded considerable latitude in the context of fair use analysis).

Arguably, the courts have focused too much attention on what label should be given to creative works that function as commentary or criticism. They generally characterize such works as parodies, because that is a recognized form of protected comment and criticism under *Campbell*. *Campbell*, 510 U.S. 579. *60YL*

[13] In fact, some of Colting's observations have also been made by commentators and academics. *See* Rosenthal Decl. Ex. E(iii) (A-527) (Louis Menand, Harvard University professor and noted New Yorker contributor, observing that "after 1955, Salinger stopped writing stories in the conventional sense. He seemed to lose interest in fiction as an art form – *perhaps he thought there was something manipulative or inauthentic about literary device and authorial control. His presence began to dissolve into the world of his creation. He let the puppets take over the theatre.*") (emphasis added).

does not perhaps fit the definition of "parody" in the lay sense – it is not intended to be funny, and it does not directly poke fun at Salinger or his work. But *60YL* can rightly be characterized as a "parody" in the legal sense, because it is a creative work that "use[s] some elements of a prior author's composition to create a new one, at least in part, comment[ing] on that author's works." *See Campbell*, 510 U.S. at 580; s*ee also Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 810 (9th Cir. 2003).

But the critical question is not what we call *60YL*, but whether it "merely 'supersede[s] the objects' of the original creation," *Campbell*, 510 U.S. at 578 (citing *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)), or instead "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . in other words, whether and to what extent the new work is 'transformative.'" *Campbell*, 510 U.S. at 578. And this is a low threshold, as a work's parodic character need only "reasonably be perceived." *Campbell,* 510 U.S. at 582. A parody need not be funny, well-written or even successful in its attempt to criticize the earlier work. *See Campbell* at 583; *Leibovitz*, 137 F.3d at 114 (finding that court had to determine "whether a parodic character may reasonably be perceived," not judge "the quality of the parody").

1. The Transformative Nature of *60YL* Can Easily Be Perceived

As described in more detail above, *60YL* is a critical examination of Holden and the way he is portrayed in *CITR*, as part of the overall exploration of the relationship between Salinger and his iconic creation. Colting was influenced primarily by three separate concepts: the incredible level of fame the Holden character has achieved over the years; Salinger's withdrawal from society, seemingly in response to that fame; and the great lengths Salinger has gone to in order to exert control over the use of his works by others. This prompted Colting to write a novel where Salinger is imprisoned by the literary character he created, and must animate and kill him to be free. The story focuses on the interaction between a "blocked," reclusive and controlling creator and his fictional creation who, in a sense, is more "free," and alive, than he is.

60YL uses elements from *CITR* to conjure up the idea of the character Holden -- less the Holden as penned by Salinger -- more the heroic figure of Holden who resides in the minds of countless readers. Colting takes this figment of our collective imagination, the seemingly authentic and fiercely independent Holden, and "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message" to create a new work of fiction – a new story that is entirely "transformative." *See Campbell*, 510 U.S. at 579. While the dramatic arc of *CITR* focuses on Holden, *60YL* does not.

Rather, *60YL* is focused on, and driven by, the Salinger character tapping away at his typewriter: Salinger's decision to conjure up Mr. C and send him to New York to kill him off; Salinger's mounting frustration at his lack of control when each of his attempts fails to kill Mr. C; Salinger's surprise when "new" characters (characters he has not created) appear and become part of the story; Salinger's face-to-face confrontation with Mr. C; and, finally, Salinger's acceptance of Mr. C's independent existence and his realization of his love for his creation.

The character Mr. C is also entirely transformed and has little resemblance to Holden. Mr. C (who is never referred to as Holden) has the physical attributes and concerns of a 76-year-old man, not a sixteen-year-old boy. Mr. C is not even a real person (in the sense that Holden was portrayed as a real person in *CITR*). Rather, he is a cardboard fictional character under the control (to greater and, then, lesser degrees as the story proceeds) of Colting's Salinger character. Mr. C exists only to serve Salinger's own purposes, and Colting's as well.

Despite these differences, and maybe because of them, Mr. C helps us to understand much about Holden and *CITR*. Aged 60 years, Mr. C shows the effects of Holden's uncompromising world view. Although he "has some of the attributes and, at times, responds to people and circumstances in a similar way as Holden did in [*CITR*]," those attributes now seem "absurd and ridiculous." Colting Decl. ¶¶ 18, 21 (A-326, 327). In *60YL*, Colting shows us that the:

> qualities that appealed to so many in a sixteen-year-old boy are not so admirable in a 76-year-old man and in fact have prevented Mr. C from leading a happy life with healthy relationships . . . .[T]he very qualities that made this iconic character dear to so many readers have worked against him and betrayed him in the end, making him lead a lonely and miserable life.

Id. ¶ 8 (A-322-23).

The District Court erred in holding that *60YL* "contains no reasonably perceived parodic character as to *CITR* and Holden Caulfield." Injunction Order at 17 (SPA-43). Specifically, the District Court determined that Colting's commentary about Holden by "show[ing] the effects of Holden's uncompromising world view," was not parodic because "those effects were thoroughly depicted and apparent in Salinger's own narrative about Caulfield." *Id.* at 13 (SPA-39).[14] What the District Court missed, however, is that it is the very act of highlighting what *is* there --- shining a light on a particular aspect of a character or part of a work -- that is transformative. Parody, like other forms of comment or criticism, has "an obvious claim to transformative value" and "can provide social benefit, by *shedding light on an earlier work and, in the process, creating a new one*."

[14] At the Hearing, instead of determining whether a comment could reasonably be perceived, the District Court questioned whether this type of commentary was needed at all. Trs. at 37:15-21 (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. 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, re-estimation of the book, reanalysis of the book?).

Campbell, 510 U.S. at 578-79 (emphasis added); *see also Suntrust*, 268 F.3d at 1268-69 (novel *The Wind Done Gone* was found to be fair use because it highlighted the racism that was already present in *Gone With the Wind*); *Leibovitz*, 137 F.3d at 113 (movie poster was transformative because it commented on the "particular view of pregnancy as a source of pride" and "particular form of beauty" that already existed in the photograph it emulated).

2. *60YL* Does, But Did Not Need To, Comment Directly on Holden and *CITR*

The District Court also found that *60YL* was not transformative because Colting used *60YL* as a "tool with which to criticize and comment on the author, J.D. Salinger and his supposed idiosyncrasies," rather than "direct[ing] criticism toward [*CITR*] and Caulfield themselves." Injunction Order at 19 (SPA-45). But in this respect, the District Court misapprehended the law of fair use, and also misperceived the nature of Colting's work.

Assuming for a moment that Colting had made no comment whatsoever on the underlying work, and had reserved his scrutiny only for Salinger, Defendants still could have had a valid fair use defense. For instance, in *Blanch*, 467 F.3rd at 255, this Court found that the defendant, artist Jeff Koons, fairly "us[ed] [the plaintiff's] image [in his art] as fodder for his commentary on the social and aesthetic consequences of mass media," not commentary on the plaintiff's image itself. *See also Berlin v. E. C. Publications, Inc.*, 329 F.2d 541, 542 (2d Cir. 1964)

(*Mad Magazine* lyrics sung to Irving Berlin tunes were fair use even though the object of the parody was not Berlin's songs but the "idiotic world we live in today"); *Elsmere Music, Inc. v. National Broadcasting Co., Inc*., 482 F. Supp. 741, 746 (S.D.N.Y. 1980) (finding *Saturday Night Live* song, *I Love Sodom*, to be parody of *I Love New York* song because it targeted both the underlying song and the overall "'I Love New York' advertising campaign," and noting that even if "'I Love Sodom' did not parody the plaintiff's song itself, that finding would not preclude a finding of fair use."). Similarly here, a comment only on Salinger as America's most famous living author still could constitute fair use because *60YL* is entirely transformative.[15]

But, the fact is that Colting commented extensively not only on Salinger, but on Holden and *CITR* as well. One of the main themes of *60YL* is that Salinger has no existence apart from Holden and, so, must kill him in order to be free.[16] The

---

[15] While recognizing that the Salinger character was new (transformative), the District Court unfairly minimized the role of that character and found the "transformative aspect . . . limited." Injunction Order at 21 (SPA-47). But Salinger is the protagonist of the story. While his musings in the paraphrased sections of the book appear on "only" 40 pages, Salinger is present throughout the book manipulating, or attempting to manipulate, Mr. C on every page. "The fair use analysis as a whole avoids quantitative measurements . . . It is therefore not necessary for a parody to devote a certain proportion of its length to the copied material [or] focus only on the subject work." *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 84, 91 (S.D.N.Y. 2003).

[16] Again, this thesis that Salinger has no existence apart from Holden has been made by critics and academics, none of whom have been subject to lawsuits. *See*

District Court also ignored that, in the minds of readers and commentators, Salinger and *CITR* have become inextricably intertwined, such that a comment on Salinger is a comment on the work itself.

It is beyond dispute that a work that comments only in part on the underlying work, and then also comments on other, broader themes (including the work's creator) is a protected fair use. *See Campbell*, 510 U.S. at 580 (fair use defense available where allegedly infringing work has made "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,") (emphasis added); *MCA v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) ("a permissible parody need not be directed solely to the copyrighted song but may also reflect on life in general"); *Mattel v. Walking Productions,* 353 F.3d 792, 801-02 (9th Cir. 2004) (use of Barbie dolls in series of photographs was commentary not only on the dolls themselves, but also on "Barbie's influence on gender roles and the position of women in society") (Ninth Circuit noted that "[t]he original work need not be the sole subject of the parody; the parody 'may loosely target an original' as long as the parody 'reasonably could be perceived as commenting on the original or criticizing it, to some degree.'"), quoting *Campbell*,

---

Rosenthal Decl. Ex. E(iii) (A-529) (Louis Menand's observation that there is a sense, "confirmed by Salinger's own later manner, that there [is] no distinction between Salinger and his characters – that if you ran into Salinger . . . it would be exactly like running into Holding Caulfield . . . .").

510 U.S. at 583; *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (song "When Sonny Sniffs Glue" found a parody of "When Sunny Gets Blue" because defendant's version was intended to "poke fun [both] at the composers' song, and at [the singer's] rather singular vocal range"); *Lennon v. Premise Media*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008) (finding defendants' work to be a parody where film used "a portion of [plaintiff's song] 'Imagine' as 'fodder' for social commentary, altering it to further their distinct purpose").[17]

Because *60YL* comments directly on Holden Caulfield and *CITR* and the work is transformative, the first fair use factor weighs heavily in favor of a finding of fair use.

B. The Nature of the Copyrighted Work Does Not Weigh Against a Finding of Fair Use

The second statutory factor "calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that

[17] *See also Bourne Co. v. Twentieth Century Fox Film Corp., et al.,* 602 F. Supp. 2d 499, 506-07 (Batts, J.) (finding that defendant's song which was filled with offensive stereotypes of Jewish people could be perceived as commenting on the "warm and fuzzy" world view reflected in "When You Wish Upon a Star" as well as on Walt Disney himself, an alleged Anti-Semite); *Burnett v. Twentieth Century Fox Film Corp.,* 491 F. Supp. 2d 962, 968 (C.D. Cal. 2007) (finding protected parody and holding that it is immaterial whether the target of parody was Carol Burnett, her television show, the character she played, the show's theme music or all of these things).

fair use is more difficult to establish when the former works are copied." *Campbell*, 510 U.S. at 586.

However, the second factor is rarely "likely to help much in separating the fair use sheep from the infringing goats in a parody case" since parodies almost invariably copy publicly-known, expressive works. *Id.*; *see also Blanch*, 467 F.3d at 257 (according second factor limited weight in the court's fair-use analysis "because [defendant] used [the copyrighted] work in a transformative manner to comment on her image's social and aesthetic meaning rather than to exploit its creative virtues"); *Suntrust*, 268 F.3d at 1271 (finding that the second factor is given little weight in parody cases).

While *CITR* is a work of fiction that falls within the "core of intended copyright's protective purposes," *60YL* is a novel that is transformative in use and parody of *CITR*, so this factor should not weigh in favor of Plaintiff.

Moreover, the Holden character, which Salinger claims is copyrightable, does not lie as close to "the core of intended copyright protection" as *CITR*. While there is no doubt that copyright protection is available for characters from cartoons, films and other visual media, courts have been reluctant to grant such a level of protection to literary characters. *See e.g., Silverman*, 632 F. Supp. at 1354; *Warner Bros. I*, 530 F. Supp. at 1190. As such, any copyright protection afforded to the

Holden character is at most a thin one and this factor should not weigh against a finding of fair use.

C. The Amount and Substantiality of the *CITR* Material Used Is Reasonably Necessary for the Parodic Purpose of *60YL*

The question under the third factor is whether "'the quantity and value of the materials used,' are reasonable in relation to the purpose of the copying." *Campbell*, 510 U.S. at 586, quoting *Folsom*, 9 F. Cas. at 348; *see also id*. at 587 (noting that analysis "calls for thought not only about the quantity of the materials used, but about their quality and importance, too"); *Blanch*, 467 F.3d at 257 (same). A parody must be analyzed differently than other uses of copyrightable material because:

> Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know.

Campbell, 510 U.S. at 588.

The Supreme Court further instructs that a parodist or commentator can use more than necessary to "conjure up" the original and that "how much more is reasonable will depend . . . on the extent to which the [alleged infringing work's] overriding purpose and character is to parody the original or, in contrast, the

likelihood that the parody may serve as a market substitute for the original." *Campbell*, 510 U.S. at 588; see *also Suntrust*, 268 F.3d at 1273 (there is no requirement that "parodists take *the bare minimum amount* of copyright material necessary to conjure up the original work" (emphasis added)); *Leibovitz*, 137 F.3d at 116 (citing *Campbell* for the principle that copying more of original than is necessary to conjure it up will not necessarily tip the third factor against fair use).

Furthermore, in assessing this factor, the court must focus only on the protected elements of the original that are used by the new work. *See Leibovitz*, 137 F.3d at 115-16 (plaintiff "entitled to no protection for the appearance in her photograph of the body of a nude, pregnant female. Only the photographer's particular expression of such a body is entitled to protection"); *MasterCard Int'l Inc. v. Nader 2000 Primary Committee, Inc.*, No. 00-CV-6068, 2004 WL 434404, at *14 (S.D.N.Y. March 8, 2004) ("In assessing the third factor, the Court must focus on only the protected phrases of [plaintiff's allegedly infringed] Priceless Advertisements").

The District Court erroneously concluded here that "the third factor weigh[ed] heavily against a finding of fair use" because "Defendants have taken well more from [*CITR*], in both substance and style, than is necessary for the alleged transformative purpose." Injunction Order at 24-25 (SPA-50-51). That analysis is flawed in several respects.

For one thing, the District Court based its assessment on the erroneous conclusion that *60YL* "comment[ed] upon Salinger, rather than his work" and was therefore "non-parodic." In fact, the District Court admitted that it might have reached a different conclusion if it had found that *60YL* was commentary on *CITR*:

> Even this frequent and extensive use of Caulfield's character traits might arguably have been necessary to supplement a work of parody directed at *CITR* or the character of Caulfield, given that "parody must be able to conjure up at least enough of that original to make the object of its critical wit recognizable."

Id. at pp. 25-26 (SPA-51-52) (quoting *Campbell*, 510 U.S. at 588). As discussed above, there can be no question that *60YL* is a direct commentary on Salinger, Holden and *CITR*. For that reason alone, the District Court's determination on the substantiality of the use is in error.

The District Court also completely failed to recognize the differences between *60YL* and *CITR*, all of which were included in service of its parodic purpose. For instance, the District Court found that:

> Defendants have utilized the character of Holden Caulfield, reanimated as the elderly Mr. C, as the primary protagonist of [*60YL*]. Mr. C has similar or identical thoughts, memories, and personality traits to Caulfield, often using precisely the same or only slightly modified language from that used by Caulfield in [*CITR*], and has the same friends and family as Caulfield.

Injunction Order at 25 (SPA-51).

But a close reading of *60YL* shows that Colting actually used very little of the Holden character (dubbing him Mr. C, not Holden), in fact just enough to make

him recognizable in furtherance of Colting's themes. In *60YL*, Mr. C is not a prep-school boy aged 60 years, he is instead a figment of Salinger's imagination, a strawman Salinger must animate, then kill, so that he can be free. Colting's description of Mr. C includes none of the expression from *CITR*, with the exception of a few of Holden's catchphrases, used only to make the connection between Mr. C and Holden. *Id.*

Again, only three of the 80 or so characters from *CITR* arguably appear in *60YL* and they are almost unrecognizable (Phoebe is suffering from dementia and Stradlater, instead of being smooth and confident, weeps uncontrollably during his minor appearance in *60YL*). Mr. C's fleeting and fragmentary memories of other characters from *CITR*, like Allie, play in to the fantastical themes of *60YL* in a way that is completely different than the way they appear in *CITR*. *See* Spoo Decl. ¶ 6 (A-341-43).

The District Court's finding that *60YL* took too much of the "overall arc of the narrative," which it summarized as "both Holden and Mr. C leave their resident institutions and take mass transit to New York, where the majority of the story takes place, before ultimately ending up in a different institution altogether," Injunction Order at 30 (citing Paul Aff. Ex. C, Chart 2, 8-9 (SPA-56), plainly failed to take into account that such a plot is much too general be capable of copyright protection. *See Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930)

(holding that similarities in plot of a play were merely ideas not subject to copyright protection, and noting that all plots, when abstracted to a sufficient level of generalization, are no longer protected). It also failed to recognize the transformative nature of the narrative arc of *60YL*, which focuses on Salinger as the most important character, directing all of the action, trying again and again to kill off his character and ultimately letting him go.

As Colting has explained, he "thought very carefully about how to draw the connection between *CITR* and [his] own work, and only took as much of *CITR* as [he] needed to make [his] point." Colting Decl. ¶¶ 26-33 (A-329-31); *see also* Spoo Decl. ¶ 6 (A-341-43) (discussing reasons for certain parallels between the works); Woodmansee Decl. ¶¶ 13-17 (A-364-67) (same).

For example, in *CITR*, Holden's closest relationship appears to be with his ten-year-old sister, Phoebe, whom he endows with wisdom beyond her years. *See* Colting Decl. ¶ 19 (A-326). In *60YL*, Colting depicts Mr. C's relationship with Phoebe as "a ridiculous and desperate attempt of an old man to connect with someone who essentially is not there," highlighting how a disconnected youth plays out as an old man. *Id.* ¶ 21 (A-327).

Similarly, the carousel scene that Plaintiff claims was slavishly copied from *CITR* appears for a very specific purpose in *60YL*, and is transformed in order to underscore Colting's theses. While in *CITR* the carousel scene serves as a way for

Holden and Phoebe to connect (which ultimately fails), the carousel scene in *60YL* demonstrates the personal growth Mr. C has undergone. *See* Spoo Decl. ¶ 6(c) (A-341-42). Dr. Woodmansee sees the carousel scene as a demonstration of Salinger's loss of control over his hero. Woodmansee Decl. ¶ 13 (A-364). In any event, this limited reference serves an important purpose in *60YL*, as does every other allusion to *CITR*.

In short, Colting took virtually no protectible expression from CITR, and, at most, only the minimum amount of copyrighted material necessary to make his criticism and commentary on Plaintiff's work.

D. *60YL* Does Not Harm the Market for *CITR* or Any Authorized Derivative Work

The fourth fair use factor considers "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). This inquiry "must take account not only of harm to the original but also of harm to the market for derivative works." *Campbell*, 510 U.S. at 590, quoting *Harper & Row*, 471 U.S. at 568. The Second Circuit has determined that "[the court's] 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." *Blanch*, 467 F.3d at 258, quoting *NXIVM Corp.*, 364 F.3d at 481-82.

A presumption of market harm is particularly inappropriate when the secondary use is transformative, as in the case of parodies and other critical works. *See Campbell*, 510 U.S. at 591. As explained by the Supreme Court:

> when a commercial use amounts to mere duplication of the entirety of an original, it clearly "supersede[s] the objects" of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it ("supersed[ing] [its] objects"). This is so because the parody and the original usually serve different market functions.

Campbell, 510 U.S. at 591 (internal citations omitted); *see also Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (finding that because defendant's work fell "within a transformative market," plaintiff did not suffer market harm).

With regard to the market for derivatives, the only harm that need concern the court "is the harm of market substitution." *Campbell*, 510 U.S. at 593. Works of criticism and parody are particularly unlikely to have an impact on the market for derivative works authored or licensed by the copyright holder because they satisfy vastly different markets. *Id*. at 592 (concluding that "there is no protectible derivative market for criticism"). "The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market." *Id.*

Furthermore, "[t]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop." *Blanch*, 467 F.3d at 258, quoting *Campbell*, 510 U.S. at 592.

Here, the District Court correctly acknowledged that it "appears unlikely that *60YL* would undermine the market for [*CITR*] itself." Injunction at 34 (SPA-60). Indeed, Plaintiff has not (and cannot) point to any evidence that *60YL* will "usurp the market" for *CITR*, as *60YL* criticizes and comments on Holden, *CITR* and Salinger himself. As such, its "market function" is entirely different from that of *CITR* and thus is not a substitute for Salinger's book. If anything, *60YL* is likely to renew the public's interest in Salinger and his body of work, leading to an increase in sales of *CITR*. *See* Declaration of Sara Nelson ¶¶ 6, 7 (A-384); *see also* Declaration of Lucas Ortiz ¶ 7 (A-387).

However, the District Court erred in its conclusion that allowing publication of *60YL* "could substantially harm the market for a *CITR* sequel or other derivative works." Injunction Order at 34 (SPA-60). The facts of this case do not support such a finding and the District Court's reliance on *Warner Brothers Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) is to no avail.[18] *See RDR*

[18] The facts of this case are similar to those in *Suntrust* where, in reversing the district court's preliminary injunction, the Eleventh Circuit found that plaintiff "failed to show, at least at this early juncture in the case, how the publication of [The Wind Done Gone], a work that may have little to no appeal to the fans of

Books, 575 F. Supp. 2d at 550 (finding harm to derivative market because "consumers who purchased [defendant's Harry Potter] Lexicon would have scant incentive to purchase either of [plaintiff's] companion books, as the information contained in these short works has been incorporated into the Lexicon almost wholesale"). *60YL* is not anything close to "a mere duplication" of *CITR*, nor does it incorporate that work "wholesale." As set forth, *supra*, *60YL* is transformative and would in no event act as a market substitute for either *CITR* or any derivative works.

While this factor may weigh against fair use in cases where the challenged work is of the type that the copyright holder is likely to develop, *see, e.g., Castle Rock Entm't, Inc. v. Carol Publ'g Group,* 150 F.3d 132 (2d Cir. 1998) (unauthorized book containing trivia questions about plaintiff's television show), it is plain that Salinger would never permit a work like *60YL* that parodies and criticizes his work and himself.

There is no evidence to support a finding that *60YL* would serve as a market substitute for *CITR* or any derivative works. As such, the District Court erred when it determined that the fourth fair use factor tipped in Plaintiff's favor.

[Gone with the Wind] who comprise the logical market for its authorized derivative works, will cause it irreparable injury." *Suntrust*, 268 F.3d at 1276.

On balance, the fair use factors tip in favor of Defendants, and the Injunction Order should be vacated.

CONCLUSION

For the above-stated reasons, Defendants-Appellants respectfully request that this Court vacate the Injunction Order of the District Court.

Dated: New York, New York
July 23, 2009

FRANKFURT KURNIT KLEIN & SELZ, P.C.

By:_____
Edward H. Rosenthal (ER-8022)
Maura J. Wogan (MW-9589)
Jessie F. Beeber (JB-3129)
Cameron A. Myler (CM-7942)
Marisa Sarig (MS-3786)*

488 Madison Avenue, 9th Floor
New York, New York 10022
(212) 980-0120
Attorneys for Defendants-Appellants

*Admission to the Second Circuit is pending.

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 13,294 words appear in the brief.

FRANKFURT KURNIT KLEIN & SELZ, P.C.

By:_____
Edward H. Rosenthal (ER-8022)
Maura J. Wogan (MW-9589)
Jessie F. Beeber (JB-3129)
Cameron A. Myler (CM-7942)
Marisa Sarig (MS-3786)*

488 Madison Avenue, 9th Floor
New York, New York 10022
(212) 980-0120
Attorneys for Defendants-Appellants

*Admission to the Second Circuit is pending.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS NEXT DAY AIR

I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On July 23, 2009

deponent served the within: **Brief for Defendants-Appellants**

upon:

Marcia Beth Paul, Esq.
Davis Wright Tremaine LLP
Attorneys for Plaintiff-Appellee
1633 Broadway, 27th Floor
New York, New York 10019
(212) 489-8230
Marciapaul@dwt.com

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York and electronically via e-mail..

Sworn to before me on July 23, 2009

LUISA M. WALKER
Notary Public State of New York
No. 01WA6050280
Qualified in New York County
Commission Expires Oct. 30, 2010

Job # 223931

ANTI-VIRUS CERTIFICATION FORM
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: SALINGER V. COLTING

DOCKET NUMBER: 09-2878-cv

I, Luisa M. Walker, certify that I have scanned for viruses the PDF version of the

___XX__ Appellant's Brief

_____ Appellee's Brief

_____ Reply Brief

_____ Amicus Brief

that was submitted in this case as an email attachment to <civilcases@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used:

Vipre AntiVirus version 3.1 was used.

_____
Luisa M. Walker

Date: July 23, 2009