

87-188      timely/response/amici

Random House v. Salinger

Cert to CA2 (Newman, Miner)

Petr challenges the CA2's decision that a literary biographer's use of language from unpublished letters written by J.D. Salinger constituted copyright infringement. The case turns on the proper scope of the fair use doctrine in the context of unpublished materials. The Court last considered this question in Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985). In that case, the Court held that Nation Magazine's expropriation of language from President Ford's unpublished memoirs did not constitute fair use; Justice Brennan, joined by you and Justice White, dissented.

The background of this case is as follows. Ian Hamilton, a noted literary biographer, contracted with Random House to write a biography of J.D. Salinger. In the course of his research, Hamilton came across a great many letters written by Salinger in university libraries. Passages from a substantial number of these letters had appeared in a prior published work by another author. Hamilton made use of these letters in his biography: he quoted some passages and paraphrased many others. Salinger saw a copy of the manuscript and sued for a preliminary injunction. The DC denied the motion. In a careful and scholarly opinion, the DC first concluded that the vast

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majority of the material used by Hamilton was not protected by Salinger's copyright because the material conveyed facts and ideas rather than Salinger's expression. The DC then held that Hamilton's use of the material that was protected by the copyright was fair use. The CA reversed, finding that there was no fair use and ordering a preliminary injunction. The CA relied heavily on Harper & Row, stating that the case stood for the proposition that unpublished works "normally enjoy complete protection against copying any protected expression."

A number of factors make the CA's decision in this case even more extreme than the Court's decision in Harper & Row. First, the unpublished materials in this case were in the public domain. University libraries housed these materials and another author had quoted extensively from them. Second, Hamilton's use of the materials could not have diminished the commercial value of the materials to the original author. In Harper & Row, the Court placed great reliance on this factor. Here, however, Salinger testified that the letters had no commercial value to him because he did not intend ever to publish them. Third, the court here issued a prior restraint, whereas in Harper & Row the court only awarded damages. These factors could persuade the Court to put some limits on Harper & Row, which certainly stands in need of them. I therefore recommend a JOIN 3.