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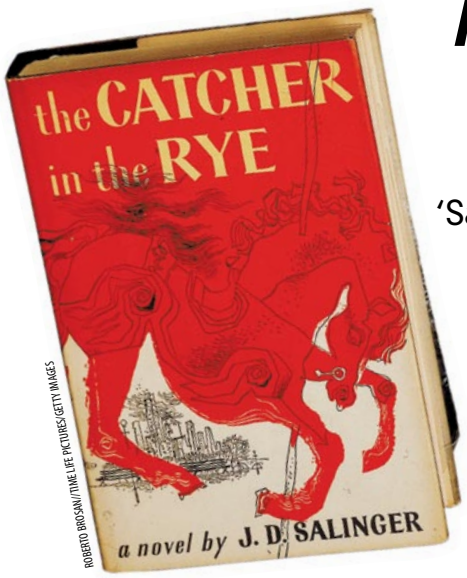
INTELLECTUAL PROPERTY LAW

A SPECIAL REPORT

A losing case for the fair use defense

'Salinger' found no critique of the original work, and thus no parody.



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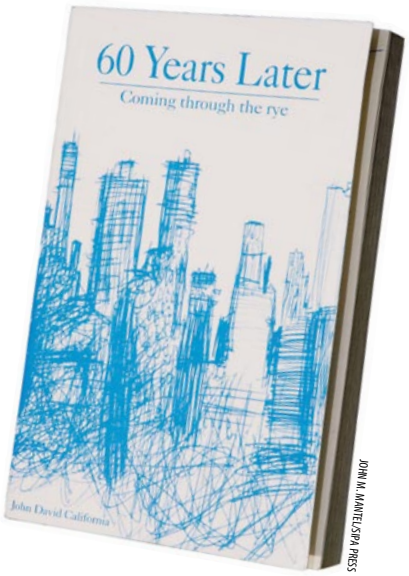

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BY LYNN B. BAYARD AND NADER R. HASAN

Fifteen years ago, in *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994), the U.S. Supreme Court— considering whether 2 Live Crew's song "Pretty Woman" infringed the copyright in Roy Orbison's 1964 classic rock ballad "Oh, Pretty Woman"—held that parody could qualify as a "fair use" under the Copyright Act of 1976. *Salinger v. Colting*, No. 09-cv-5095, 2009 WL 1916354 (S.D.N.Y. July 1, 2009), is the latest decision to put the parody defense to the fair use test. In *Salinger*, the court enjoined the publication of an unauthorized sequel to J.D. Salinger's classic, *The Catcher in the Rye*, ruling that it did not constitute fair use parody. *Salinger* is the latest in a line of cases following *Campbell* that have grappled with whether a variety of uses of copyrighted works—from an O.J. Simpson spin on Dr. Seuss' *The Cat in the Hat* to a Leslie Nielsen mimic of a famous photograph, and from a recast version of *Gone With the Wind* to a trivia book on *Seinfeld*—constitute fair use parody. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (*The Wind Done Gone*, which retold *Gone With the Wind* from another perspective to criticize the original's depiction of slavery, was a fair use parody); *Castle Rock Entm't v. Carol Publ'g Group Inc.*, 150 F.3d 132, 141-42 (2d Cir. 1998) (trivia book on the *Seinfeld* television series was not fair use); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 111 (2d Cir. 1998) (advertisement featuring a pregnant-looking Leslie Nielsen was a fair use parody of the celebrated *Vanity Fair* cover photograph featuring a pregnant Demi Moore); *Dr. Seuss Enter., L.P. v. Penguin Books USA Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997) (short story about the O.J. Simpson trial, told in the style of Dr. Seuss' *The Cat in the Hat*, was neither parody nor fair use).

ORIGINS OF THE DEFENSE

The Copyright Act grants copyright owners several exclusive rights, including, among others, the rights to "reproduce the copyrighted work" and "to prepare derivative works" such as sequels and adaptations. 17 U.S.C. 106. But to ensure that copyright law does not "stifle the very creativity which [it] is designed to foster," § 107 of the Copyright Act codifies a "fair use" defense to copyright infringement. See *Campbell*, 510 U.S. at 577; 17 U.S.C. 107.

Section 107 does not expressly define fair use. Rather, it sets forth illustrative, but not exclusive, examples of fair use—"criticism, comment, news reporting, teaching..., scholarship, or research"—and enumerates four "factors to be considered" in determining whether a work has made fair use of the copyrighted original: the purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount

and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. 107. Courts repeatedly counsel against a "rigid application" of the fair use factors, which "are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 577-78.

The first fair use factor—the "purpose and character" of the allegedly infringing work—is critical to the analysis. In assessing the first factor, courts focus on "whether and to what extent the new work is 'transformative,' " that is, whether the new work "adds something new, with a further purpose or different character," or whether it "merely supersedes...the original creation." Id. at 579.

In *Campbell*, the Supreme Court, for the first time, held that a parody is a form of comment or criticism that may have a transformative purpose by "shedding light on an earlier work, and, in the process, creating a new one." Id. To that end, the Court defined "parody" as a work that "use[s] some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work." Id. at 577.

Not every parody is a fair use. Rather, a parody, like any other purported fair use, "has to work its way through the relevant [fair use] factors, and be judged case by case, in light of the ends of the copyright law." Id. at 581. If the purported parody "has no critical bearing on the substance or style of the original composition," but is a pretext "which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes...(if it does not vanish)." Id.

SEQUEL OR PARODY?

The *Salinger* case presented the question of whether Fredrik Colting's book, *60 Years Later: Coming Through The Rye*, written under the pseudonym "J.D. California," was protected parody or an infringing sequel to J.D. Salinger's *Catcher*. The star of *60 Years* is a 76-year-old Holden Caulfield, the rebellious (then-16-year-old) protagonist from *Catcher.* Indeed, Colting had touted *60 Years* as the sequel to *Catcher*, declaring that Holden Caulfield "deserve[d] to have another life than just his 16 years." 2009 WL 1916354, at *7 n.3.

Salinger sued Colting for copyright infringement, claiming that *60 Years* was an unauthorized sequel that violated Salinger's exclusive rights in the copyrights both to *Catcher* and the Holden Caulfield character. Colting maintained that *60 Years* was a fair use parody of *Catcher* because *60 Years* was a comment and critique of Salinger and his tortured relationship with Holden Caulfield, his most famous creation. In support, Colting cited Salinger's appearance in *60 Years* as a character who repeatedly tries, but fails, to kill off the elderly Caulfield.

The court rejected Colting's arguments as mere "post-hoc rationalizations," finding that *60 Years* was neither parody nor fair use. At the outset, the court observed that, to qualify as a parody, it is not enough that the purported parody uses the original to make a point about the original's "general style, the genre of art to which it belongs, or society as a whole." Id. at *4 (citing *Campbell,* 510 U.S. at 579). Rather, as *Campbell* teaches, the parody must present a critique that "specifically targets" the original work. Id.

60 Years did not. Unlike the parody at issue in the U.S. Court of Appeals for the 11th Circuit's decision in *Suntrust*—a "specific criticism of...the depiction of slavery and the relationships between blacks and whites in *Gone With the Wind*"—*60 Years* contained "no reasonably discernable...specific criticism of...*Catcher*." Id. at *5 (quoting *Suntrust*, 268 F.3d 1268-69). Rather, *60 Years* is merely a "tool...with which to criticize and comment upon the author, J.D. Salinger, and his supposed idiosyncrasies, rather than on the work itself." Id. at *8.

The court held that '60 Years' is merely a tool with which to criticize the author rather than his work.

Although the court found that *60 Years* was not a parody, it considered nevertheless whether the work qualified as a fair use. Turning first to the purpose and character of the new work, the court acknowledged that *60 Years*—which served an undisputed commercial purpose—contained some new, nonparodic transformative elements, including the Salinger character. But because the Salinger character played only a limited role in the work, and because *60 Years* borrowed heavily from *Catcher*, the first factor tipped in Salinger's favor. As the court observed, "just because a work recasts, transforms, or adapts an original work into a new mode of presentation, thus making it a derivative work under 17 U.S.C. 101, does not make the work transformative in the sense of the first fair use factor under *Campbell*." Id. at *8 (quoting *Castle Rock*, 150 F.3d at 143).

Moreover, because *Catcher* is a work of fiction "that falls within the core of copyright's protective purposes," the court determined that the second factor also cut against a fair use finding. Id. at *10.

Considering the third factor—the "amount and substantiality" of the copyrighted work used—the court easily concluded that Colting took "well more from *Catcher*, in both substance and style, than is necessary for the alleged transformative purpose of criticizing Salinger and his attitudes and behavior." Id. *60 Years* contained few novel elements; the Holden Caulfield character was essentially the same person as he was in *Catcher*, with "similar or identical thoughts, memories, and personality traits, often using precisely the same or only slightly modified language." Id. at *10. Furthermore, *60 Years* "depend[ed] upon similar (and sometimes identical) supporting characters, settings, tone, and plot devices to create a narrative that largely mirrors that of *Catcher*." Id. at *11. Thus, the third factor "weigh[ed] heavily" against a finding of fair use. Id. at *14.

Finally, regarding the effect of the new work upon the potential market for the copyrighted work, the court noted that, although *60 Years* was unlikely to harm the market for *Catcher* itself, it could harm the market for a sequel or other derivative works. Simply put, notwithstanding Salinger's repeated statements during the past 60 years that he has no plans to publish a sequel, the court found him "entitled to protect his opportunity" to do so. Id. at *15 (citing *J.D. Salinger v. Random House Inc.*, 811 F.2d 90, 99 (2d Cir. 1987)). Accordingly, the court enjoined the publication of *60 Years*.

Colting has appealed the district court's decision, arguing that his work is an "undeniably transformative comment." Regardless of how the U.S. Court of Appeals for the 2d Circuit ultimately rules, the district court's opinion serves as a helpful reminder that a parody may be protected by the fair use defense, but that conclusory assertions of "parody" will not render unfair use fair.

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