

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., NOCOTEXT 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 *AMICUS CURIAE* THE NEW YORK
TIMES COMPANY, THE ASSOCIATED PRESS,
GANNETT CO., INC. and TRIBUNE COMPANY
ON BEHALF OF DEFENDANTS-APPELLANTS**

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AMICI CURIAE

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stations, WGN America, and WGN-AM. Popular news and information websites extend Tribune's nationwide audience.

SOURCE OF AUTHORITY TO FILE AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(a), counsel for the prospective amici has obtained consent of all parties, through their counsel, to the filing of this brief.

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**BRIEF AMICI CURIAE ON BEHALF OF NEWS
ORGANIZATIONS IN SUPPORT OF DEFENDANTS-APPELLANTS**

This brief is respectfully submitted by The New York Times Company, The Associated Press, Gannett Co., Inc., and Tribune Company (together, “*amici*”), urging reversal of the order below.

PRELIMINARY STATEMENT

In the Pentagon Papers case, a prior restraint on publication of classified documents was rejected by the United States Supreme Court in the face of claims by top U.S. Government officials that publication would have a deleterious affect on both the war and the peace efforts in Vietnam and would imperil national security.¹ Similarly, in *Nebraska Press Association v. Stuart*, a gag on publication of information which might have been prejudicial to a defendant’s fair trial was denied despite claims that his constitutional rights were being infringed.² Yet in this case, where the only harm appears to be to the pride of a reclusive author in not having his desires fulfilled barring commentary about his iconic book and character, without any actual financial harm, the lower court saw fit to ban publication of a new

¹ *New York Times Co. v. United States*, 403 U.S. 713 (1971)

² 427 U.S. 539 (1976)

book. Such a result defies common sense, and is not -- and cannot be -- the law.

Amici do not come to this position lightly. Amici are the most prestigious and the two largest newspaper publishers in the country, as well as the nation's preeminent news service. Amici publish copyrighted material every day, and depend on the copyright law to protect their writings. Indeed, their need for copyright protection is today more intense than ever as digital technologies make it ever easier for third parties to seize and repurpose the fruits of their costly newsgathering efforts. Nonetheless, Amici fiercely believe that the availability of a preliminary injunction under the copyright law cannot trump the prerogatives of the First Amendment, and that a book banning of at least arguably transformative work cannot be countenanced.

Amici acknowledge that a word-for-word taking may be enjoined. But this case, where defendant's book focuses on how the passage of 60 years has affected Holden Caulfield and how the author himself interacts with his famous character, is far different. While the district court determined that the fair use defense was not decisive, it certainly is the case that the literal reincarnation of Holden as a senior and his interaction with Mr. Salinger, who is trying to kill him, forms transformative commentary on

the book which - - as opposed to sheer piracy - - brings it into the realm of fair use. In such circumstances, as Judge Leval wrote, unlike “simple piracy” cases which are “worlds apart from many of those raising reasonable contentions of fair use”, “there may be a strong public interest in the publication of the secondary work. And the copyright owner’s interest may be adequately protected by an award of damages for whatever infringement is found.”³ And as the Supreme Court noted in *Campbell v. Acuff-Rose Music*, citing Judge Leval, “the goals of the copyright law...are not always best served by automatically granting injunctive relief when parodists [and presumably commentators] are found to have gone beyond the bounds of fair use.”⁴

Moreover, an injunction that effects a content-based, government-imposed speech restriction is especially inappropriate where it is entered without the procedural assurances of a full trial, but only after a brief hearing, without any witnesses, on a preliminary injunction motion.

Finally, our jurisprudence does accept money damages as a proxy for all sorts of other harms, from death and injury to pain and suffering. There is no reason why, if a copyright infringement is ultimately found, that

³ Pierre N. Leval, *Commentary: Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1133 (1990) (“Leval”)

⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, n.10 (1994)

monetary damages, rather than a book banning, would not be an adequate remedy. After all, in the interest of free speech, we don't ban ruinous libelous communication; we assess monetary damages to compensate for the reputational harm. It belies logic to conclude that authorial dignity deserves greater protection.

Prior restraint is our most disfavored remedy. Banning of speech, especially in a matter of general public interest, is particularly heinous to our longstanding tradition of debate and commentary on matters factual or literary. Eight years ago a district judge, at parallel stage of litigation, banned *The Wind Done Gone*, a book which, remarkably similar to the book at issue here, offered a unique and novel perspective on a classic American work of literature. The Eleventh Circuit reversed, holding that where the "harm can adequately be remedied through an award of monetary damages" and "a viable fair use defense is available...the issuance of the injunction was at odds with the shared principles of the First Amendment and the copyright law, acting as a prior restraint on speech."⁵ That outcome, overturning the injunction, must be the result here as well.

⁵ *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (2001)

ARGUMENT

I.

A PRIOR RESTRAINT ON SPEECH IS A DISFAVORED REMEDY AND SHOULD NOT BE ISSUED AGAINST AN ARGUABLY TRANSFORMATIVE WORK, WITHOUT ALL PROCEDURAL SAFEGUARDS, AND WHERE MONETARY DAMAGES PROVIDE AN ADEQUATE REMEDY.

A. The Dangers of Prior Restraints.

Prior restraints are the most offensive and least tolerable prohibition on speech. The Supreme Court has admonished, “[a]ny system of prior restraints comes to this court barring a heavy presumption against its constitutional validity.” *New York Times Co. v. United States* 403 U.S. 713, 714 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 78 (1963).

As the Court explained in *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980), “[t]he presumption against prior restraints is heavier - - and the degree of protection broader - - than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.” Indeed, prior restraints cut against the very wording and core of the First Amendment, unlike the much more indirect effect of the First Amendment on libel law, *New York Times Co. v. Sullivan*, 376 U.S. 254

(1964), or on the law regarding access to the judicial system, *Richmond Newspapers, Inc v. Virginia*, 448 U.S. 555 (1980). At bottom, they are direct Government action (in the person of the Judiciary) restricting individual speech - - precisely what the Constitution proscribes. Thus, “[t]he special vice of a prior restraint is that communication will be suppressed...before an adequate determination that it is unprotected by the First Amendment.” *Pittsburgh Press Co. v Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973).

Judicial concerns about prior restraint have historic antecedents in early U.S. copyright practice. In the first fifty years of the Republic, most courts refused to grant preliminary injunctive relief in reported copyright cases, requiring with some force that plaintiff copyright owners clearly show that a later legal remedy would not adequately compensate them. See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L. J.147, 154, 156 (1998) (“Volokh”).⁶ These cases reflect an enduring principle in American jurisprudence that few

⁶ For example, at the turn of the 20th century in *Dunn v. Lumberman’s Credit Ass’n*, 209 U.S. 20 (1908), the Supreme Court held that even though copying of protectable material was clearly established, a permanent injunction was not warranted because the infringer’s work contained a large amount of material that was not copied, and enjoining the publication of the infringer’s book would impose too great a hardship.

justifications permit a court to enter a prior restraint. If at all, they are valid only in the most extraordinary circumstances, such as the “publication of the sailing dates of transports” of troops during wartime or “incitements to acts of violence and the overthrow by force of orderly government.” *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Similarly, there has been a long tradition in American law that libels never can be enjoined, and while libelous statements might be very injurious to reputation, the law will not permit them to be barred, but only require that the false speaker pay the victim for his damage. And as pointed out, supra at p.1, neither the interest in national security nor the interest of protecting a defendant’s fair trial right has been found by our highest Court sufficient to enjoin publication.

As the case law illustrates, few interests short of life or limb will support a prior restraint on free speech. The Supreme Court’s consistent rejection of prior restraint reflects the “chief purpose” of the Constitution’s free-speech clause: “to prevent previous restraints upon publication.” *Near, supra*, 283 U.S. at 713.

As a result, prior restraints - - particularly at the early preliminary injunction stage - - are almost never granted in libel cases, in cases threatening national security, in cases potentially prejudicing a defendant’s fair trial and in obscenity cases. At the preliminary injunction stage, the

danger of prior restraint is amplified by the fact the banned speech ultimately may be found to be protected, thus causing permanent constitutional injury that cannot be remedied. As Justice Black stated in the Pentagon Papers case, “every moment’s continuance of the injunctions against the newspapers amount[ed] to a flagrant, indefensible and continuing violation of the First Amendment.” 403 U.S. at 715 (Black, J., Douglas, J., concurring)

As is demonstrated, infra, the purported harm in a copyright case such as this one is, if anything, far less than in those instances above where prior restraints are routinely denied. Recognizing this, the commentators and the courts have begun to acknowledge there is no reason why the copyright law should not be informed, as are all other bodies of law, by the First Amendment. Hence, unless the harm is commensurate with the grave remedy of prior restraint, the purpose of the copyright law truly endangered by the allowance of publication, and the infringement is closer to pure copying (than to being arguably transformative), prior restraints should not be allowed in copyright actions any more than they are in any other area of law.

B. The Intersection of Copyright and Prior Restraint.

The copyright law and the First Amendment, while intuitively in conflict,⁷ ideally can work together to prevent censorship and foster creativity. As Nimmer writes, there are “conflicting interests that must be accommodated in drawing a definitional balance” between the two doctrines. 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §1.10 [B] [1] (2001). In establishing this balance “on the copyright side, economic encouragement for creators must be preserved and the privacy of unpublished works recognized. Freedom of speech [,on the other hand,] requires the preservation of a meaningful public or democratic dialogue...”*Id.*

As we have discussed, supra, outside of the copyright context, few justifications allow a court to ban speech. There has always been an almost insurmountable presumption against the constitutional validity of such a prior restraint. Despite this hurdle, copyright law authorizes -- but does not mandate -- preliminary injunctions to prevent copyright infringement. Where the copyright holder establishes a *prima facie* case of infringement, courts in the past have often presumed irreparable harm and have often

⁷ “While the First Amendment disallows laws that abridge the freedom of speech, the Copyright Clause calls specifically for such a law.” *SunTrust Bank*, 268 F. 3d at 1263.

issued preliminary injunctions. Such injunctive relief halting the publication of a book or other work that contains independently expressive speech threatens First Amendment interests. More importantly, at this intersection of copyright and First Amendment law, constitutional principles of the First Amendment should always inform the balances of the substantive copyright law.

As with the First Amendment, copyright law also generally protects and promotes the societal interest in free expression. The rights and entitlements conferred by copyright law assure copyright holders a fair return on their labors. This encourages those artistic and literary efforts and thus increases the amount and quality of speech available to the public. This societal bargain is reflected in Article I § 8 of the Constitution: “The Congress shall have Power ... to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries.” At bottom, copyright law serves to preserve, not deter, the arts and writings.

However, stark tensions arise if First Amendment procedural protections are ignored in the effort to protect a copyright. The Copyright Act authorizes courts to issue preliminary injunctions to prevent infringements. 17 U.S.C. §502(a). In many cases, these preliminary

injunctions may issue against books, movies, news articles or other works of art. Often, such works enjoy arguable fair use or other First Amendment defenses to a copyright infringement claim. In light of these defenses, it is critical that courts asked to preliminarily enjoin speech require more than a mere showing that the copyright holder is likely to prevail on the merits of the copyright infringement claim. If a copyright holder can show a likelihood of success on the merits of the claim, then harm is somehow presumed and a court might -- wrongly we submit -- issue a preliminary injunction. What is missing from this equation is the recognition that the First Amendment severely limits the availability of preliminary injunctions in this and all cases.

Article I § 8 of the Constitution makes no mention of remedies or injunctions. The remedies contained in the Copyright Act are statutorily created and should never be allowed to trump First Amendment protections. In short, although copyright law is grounded in the Constitution, it certainly is not inconsistent with the Act's purpose to apply First Amendment protections to the statutory remedies Congress created.

The Supreme Court has made clear that the First Amendment limits the restraints that may be imposed on even highly suspect speech. Indeed, injunctions entered prior to a final determination that speech falls outside the

protections of the First Amendment are considered unconstitutional prior restraints. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989) (probable cause that books were obscene insufficient to remove them from circulation); *M.I.C. Ltd. v. Bedford Township*, 463 U.S. 1341, 1343 (1983) (Brennan, Circuit Justice) (issuing emergency stay because “the trial court's broad proscription [barred], in advance of any final judicial determination that the suppressed films are obscene, the exhibition of any film that might offend the court's ban”); *Vance*, supra, 445 U.S. at 316, n. 13 (finding statutes, which authorized prior restraints before a final adjudication that speech was obscene, unconstitutional). When confronted with speech that may be libelous or obscene, it may appear desirable to enjoin the speech so as to avert the harm that the potentially unprotected speech may cause. And it is hard to deny that reputational harm is often a ruinous injury that is hard to quantify in terms of monetary damages. However, “prior restraint law embodies a judgment that such prophylactic injunctions are generally too grave a burden on free speech rights.” *Volokh*, supra, at 176. Amici believe that in a free society the balance in copyright cases must weigh heavily against prior restraint unless the copying approaches the piracy end of the spectrum.

Some courts have noted the danger that preliminary injunctions in copyright infringement cases may constitute impermissible prior restraints. For example, in *Religious Technology Center v. Lerma*, the Church of Scientology sought to enjoin *The Washington Post* from publishing the writings of Church founder L. Ron Hubbard. 897 F. Supp. 260, 261-62 (E.D. Va. 1995). The District Court proceeded with a traditional preliminary injunction analysis, but in balancing the harms noted that "to the extent that the requested relief would place limitations on the defendants' reporting, it would constitute a prior restraint on expression." *Id.* at 262. As such, there was a strong presumption against the constitutionality of such an injunction. *Id.* In finding the balance of harms tipped in favor of *The Washington Post*, the court stressed that "[i]f a threat to national security was insufficient to warrant a prior restraint in *New York Times Co. v. United States*, the threat to plaintiff's copyrights and trade secrets is woefully inadequate." *Id.* at 263.

Likewise, the court in *Globe International, Inc. v. National Enquirer, Inc.*, No. 98-10613 CAS, 1999 WL 727232 (C.D. Cal. Jan. 25, 1999), noted that despite the fact that Congress included preliminary injunctions as a remedy for infringement, the prior restraint analysis has been applied to requests for such relief in copyright infringement cases:

The spirit of the First Amendment applies to the copyright

laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.

Id. at *5 (quoting *Rosemont Enter., Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966) (Lumbard, C.J., concurring)).

Perhaps the paradigm which best captures the troubling copyright/First Amendment intersection is in the Volokh article. In common-sense language the writers posit that “preliminary injunctions in copyright cases pose serious free speech problems.” And, grappling with the sometimes myopic view of copyright lawyers that their field is somehow immune from First Amendment prerogatives, they continue:

But could it be that copyright law is somehow especially immune from the normal concerns surrounding other speech restrictions? We've often heard this view among copyright lawyers. While copyright law is clearly a speech restriction, to many it lacks that speech restriction flavor. It doesn't sound like censorship, just people enforcing their lawful property rights. Still, while many have this intuition, is there some specific reason underlying it, some reason that can justify setting aside the normal First Amendment procedural guarantees?

Volokh, supra, at 182.

Their answer is a resounding “No”; there is nothing in the copyright law which would warrant allowing it to be interpreted independent of normal

First Amendment influences. They begin by pointing out that “the argument that copyright law should be exempted from standard First Amendment procedural rules because it protects property rights strikes us as a *non sequitur*. Free speech guarantees can’t be avoided simply by characterizing a speech restriction as an ‘intellectual property law.’ After all, one could plausibly view libel law as protecting a person’s property interest in his reputation....” *Id.* They reason that “content-based laws, specifically targeted at speech, must be seen as speech restrictions regardless of whether one frames them as ‘property’ rules.” *Volokh, supra*, at 184.

They conclude:

We respect the law's judgment that copyright is a form of property, and we sympathize with the outrage that people might feel when something that they've been told is theirs is nonetheless used by others without their consent, even if they are eventually compensated in some measure. But it's important to recognize that intellectual property rights, unlike other property rights, are a form of content-based, government-imposed speech restrictions. The mere fact that the restriction is denominated a “property right” should not exempt it from conventional First Amendment scrutiny or justify government action, such as a preliminary injunction, that may end up restricting speech which ultimately proves to be constitutionally protected. This is especially so where, as a practical matter, damages would be a fairly effective remedy.

Volokh, supra, at 206.

Unfortunately, to the contrary, the lower court did not take the First Amendment into account in coming to its conclusion. Indeed, in its 37-page opinion the lower court mentioned the words First Amendment only twice, and both times in an introductory quote from the *SunTrust Bank* case. See *Salinger v. Colting*, No. 09 Civ. 5095 (DAB), 2009 U.S. Dist. LEXIS 56012, at *4 (S.D.N.Y. July 1, 2009).

Many courts have said that in copyright law the balance between the First Amendment and copyright is preserved, in part, by the idea/expression dichotomy and the doctrine of fair use. *SunTrust Bank*, 268 F. 3rd at 1263. Thus, “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by the work.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991). The courts have recognized that the First Amendment must inform the balances mandated by the copyright law. Thus, when the Eleventh Circuit made its fair use analysis of *The Wind Done Gone*, much as this Court will do of the book here, it said, “[a]s we turn to the analysis required in this case, we must remain cognizant of the First Amendment protections interwoven into copyright law.” *SunTrust Bank*, 268 F. 3rd at 1265.

Notwithstanding copyright law's accommodations to the First Amendment, neither the fair use doctrine nor the idea/expression dichotomy provides the bright-line guidance that the Supreme Court has required of laws that distinguish permitted speech from that which is prohibited. *See NAACP v. Button*, 371 U.S. 415, 431 (1963)(noting that "standards of permissible statutory vagueness are strict in the area of free expression"). Particularly because judges may interpret these vague copyright regimes⁸ in varying ways that may ultimately be inadequately sensitive to free speech interests, the influence of the First Amendment must perforce be even greater when a court considers the remedy of a preliminary injunction.

Thus, both the procedural and substantive cautions which fundamental constitutional doctrine demand must be scrupulously considered before implementing such a harsh and disfavored remedy. The copyright law, while allowing for injunctions, does not mandate them and, indeed, the copyright clause in the Constitution says nothing about this sort of remedy. Copyright law does not operate in a vacuum and, as all other law, must be at the least balanced against, and more accurately, trumped by, the Constitution. For all

⁸Commentators have documented how confusion about the proper scope of fair use often suppresses speech. *See generally* Marjorie Heins & Tricia Beckles, *Will Fair Use Survive? Free Expression in the Age of Copyright Control* (2005).

these reasons, particularly given the facts of this case, to which we now turn, this prior restraint is unconstitutional.

C. If the New Work is Arguably Transformative, a Prior Restraint is Unjustified.

Copyright infringements run across a spectrum from sheer piracy to transformative uses. Amici do not disagree with the proposition that in cases approaching pure copying, injunctions may be appropriate; thus, there is no great danger to protected speech in a case of literal copying unaccompanied by criticism, commentary or some other new or transformative use. Defendants accused of selling photocopies of *The Catcher in the Rye* or videotaping a film in a movie theater and selling bootleg copies on the streets can and should be enjoined. Importantly, such piracy is not truly the infringer's speech, and may justify an injunctive remedy.

But, as Judge Leval wrote, those cases of "simple piracy" where injunctive remedies are justified, are "worlds apart from many of those raising reasonable contentions of fair use." Leval, supra, at 1132. Indeed, utilizing Judge Leval's analysis, the Supreme Court has warned against issuing injunctions where there are issues of fair use. *Campbell*, supra, 510 U.S. at 578, n.10. This analysis pertains not only where the fair use defense

triumphs, but also where the fair use defense is viable, colorable or arguable, that is, where the new work is closer on a spectrum to a transformative use than it is to mere copying. Thus, the court recognized in *Campbell* that while injunctions may be issued in cases involving “simple piracy”, in those “raising reasonable contentions of fair use,” especially where “there may be a strong public interest in the publication of the secondary work [and] the copyright owner’s interests may be adequately protected by an award of damages for whatever infringement is found,” prior restraints are not appropriate. *Id.*; Leval, *supra*, at 1133; *See also SunTrust Bank, supra*, 268 F. 3d at 1165. The wisdom of the *Campbell* decision was reasserted in *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001), where the Court stated that in spite of a finding of copyright infringement, “it hardly follows....that an injunction...must issue,” noting that the copyright statute merely says that a court “may” enjoin an infringement. The *Tasini* court also cited *Campbell* in stating that “goals of copyright law are not always best served by automatically granting injunctive relief.” *Id.*⁹

⁹ Other Courts of Appeal have made a similar analysis. Thus, in *In re Capital Cities/ABC, Inc.*, 918 F. 2d 140, 144 (11th Cir. 1990), the court, in the context of a work involving public figures historical in nature, not far from a work about Holden Caulfield, stated that “the degree of copying necessary to constitute actionable infringement must be high and the fact of copying clear.”

Judge Leval's explanation, adopted by the Supreme Court, is sound. As he writes, critics and scholars "regularly quote from copyrighted matter to make points essential to their instructive undertakings. Whether their takings will pass the fair use test is difficult to predict. It depends on widely varying perceptions held by different judges. Yet there may be a strong public interest in the publication of the secondary work." Leval, supra, at 1131. Noting that "the copyright owner's interest may be adequately protected by an award of damages for whatever infringement is found," Judge Leval concluded that "the customary bias in favor of the injunctive remedy in conventional cases of copyright infringement has no proper application" to a case of a colorably transformative use, even where a fair use defense is ultimately rejected. Since in this case the new book is certainly closer to a fair use commentary on the original work and is at least arguably or colorably transformative, it is "worlds apart" from a case of mere copying or sheer piracy.¹⁰ Thus, as the Supreme Court concluded, it is not a case where a prior restraint, particularly at this preliminary stage, is warranted.

¹⁰ Even the District Court agreed that there is a non-parodic transformative element in Defendants-Appellants' work through the addition of J.D. Salinger as a character. *See Salinger*, 2009 U.S. Dist. LEXIS 56012, at *26. Based upon the District Court's finding alone, it is apparent that Defendant's work is subject at the least to a colorable fair use defense.

D. A Prior Restraint is Particularly Inappropriate at the Preliminary Injunction Stage.

This court has ruled that “a preliminary injunction is an extraordinary remedy which should not be granted as a routine matter.” *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 80 (2d Cir. 1990). It is even more extraordinary when it entails a ban on non-piratical speech, a constitutionally protected activity. If there are any circumstances when such an injunction is appropriate, it would certainly not be at a preliminary stage of a litigation, before all procedural safeguards, such as exhaustive fact-finding, cross-examination, and perhaps even a full jury trial are held. Absent such procedural safeguards, the danger exists that a prior restraint is entered before a final determination that the material is, in fact, obscene or infringing.

This has been made clear in obscenity law, but is equally applicable to copyright law. For example, in *Vance*, supra, the Court struck down a Texas statute which authorized prior restraints of indefinite duration on the exhibition of motion pictures that were not finally adjudicated to be obscene. The Court reasoned that “such prior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal

prosecution.” 445 U.S. at 316. Likewise, in *Blount v. Rizzi*, 400 U.S. 410, 416 (1970), the Court stated;

The First Amendment requires that procedures be incorporated that ‘ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards is but a special instance of the large principles that the freedom of expression must be ringed about with adequate bulwarks.’

As the Volokh article states, when an injunction is entered prior to a final judicial determination, it is almost always treated as an unconstitutional prior restraint. “This is so even when the injunction is entered for the seemingly laudable purpose of preserving the status quo pending the final determination of whether the speech is protected.” Volokh, *supra*, at 170. In copyright cases, just as in obscenity cases, preliminary injunctions “no matter what sort of speech is being enjoined, rest not on ‘[a court’s] final determination that the [speech is] unprotected’ but on a mere finding of a *likelihood* that the speech is unprotected.” *Id.* at 173. (emphasis in original) In any case, including copyright, that is not enough to pass constitutional muster.

Here a book was banned on the basis of a two-hour hearing with no witnesses. There was no discovery, and the plaintiff Mr. Salinger did not

enter an affidavit even opining on how he claimed to have been injured, and certainly was not subject to cross-examination. This certainly seems like an inadequate record on which to ban distribution of a book.

This Court has long recognized the dangers of prior restraint in the context of the banning of a book. In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (1966), this Court reversed and vacated an injunction on a book about Howard Hughes which largely derived from a series of articles in Look Magazine. This court favorably cited a then-recent New York state court opinion which stated: “a preliminary injunction is a drastic remedy, and the Court’s reluctant to so intervene and condemn in this matter and at this stage of the action is heightened by the realization that we are here dealing with a book and not with an ordinary subject of commerce.” *Id.* at 311. The Second Circuit then went on to support and cite another state court opinion dealing with an attempt to enjoin the forthcoming biography of Ernest Hemingway by, in words just as apt here, observing the danger to the Constitution in banning a book at a preliminary stage:

A preliminary injunction is always a drastic remedy and the one seeking to invoke such stringent relief is obliged to establish a clear and compelling legal right thereto based upon undisputed facts. The normal reluctance to impose a summary restraint in advance of a full and complete trial is particularly acute in a case such as this which deals with the publication of a book. Before the court will intrude into an area fraught with sensitivity in its

possible impingement upon fundamental democratic and intellectual institutions, it will require a showing by the movant of a right, both legal and factual, in most unequivocal terms.

Rosemont Enterprises, 366 F.2d at 311.

For these reasons, prior restraint at the preliminary injunction stage - - without a full and final determination based on testimony of witnesses and cross-examination - - is a far too early stage at which to enter such a stark and constitutionally dangerous remedy.

E. Irreparable Injury Should Not be Assumed from the Fact of Infringement.

In *eBay Inc. v. MercExchange*, 547 U.S. 388, 392-93 (2006), the Supreme Court stated that “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.”¹¹ Thus, contrary to the grounds adopted by many courts, there is no

¹¹ The District Court attempted to skirt the *eBay* ruling in a footnote which noted that the case “dealt only with the presumption of irreparable harm in the patent law context.” *Salinger*, 2009 U.S. Dist. LEXIS 56012, at *46, n.6. However, the Supreme Court language specifically referred to the Copyright Act, and so the court’s attempt to ignore it should be unavailing. *See generally Microsoft v. AGA Solutions, Inc.*, 589 F. Supp. 2d 195, 203 (E.D.N.Y. 2008)(Applying *eBay* ruling in the context of a copyright dispute and denying injunction).

presumption of irreparable harm in copyright infringement actions. As the *eBay* court explained, “the Copyright Act provides that court ‘may’ grant injunctive relief ‘on such terms as it may deem reasonable to prevent or restrain infringement of a copyright’” *Id.* Thus, far from presumptively granting preliminary injunctive relief to a putative infringement victim, courts must carefully determine whether the purposes of the copyright law would be significantly enhanced by an injunction such that it somehow would overcome the usual constitutional presumption against prior restraints.

Furthermore, beyond the general Supreme Court rule announced above, the Court “has made clear that there is no presumption of irreparable injury when the alleged infringer has a bona fide fair-use defense.” *SunTrust Bank*, 268 F. 3d at 1276. As the Supreme Court noted in *Campbell*, “the goals of copyright law, ‘to stimulate the creation and publication of edifying matter,’ are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.” *Campbell*, 510 U.S. at 578, n.10. (citation omitted)

Summarizing the situation, Judge Leval noted that “one of the most unfortunate tendencies in the law surrounding fair use is the notion that rejection of a fair use defense necessarily implicates the grant of an

injunction. Many commentators have disparaged the overly automatic tendency of courts to grant injunctive relief.” Leval, *supra*, at 1130-31. Noting that the copyright statute expresses “no preference for injunctive relief,” Judge Leval observes that “legal rhetoric has dulled thought on the injunction remedy” and severely questions the “venerable maxim that irreparable injury is ‘presumed’ in a case of copyright infringement.”¹² Especially in a case of arguable fair use, Judge Leval concludes that “when a court rejects a fair defense, it should deal with the issue of the appropriate remedy on its merits. The court should grant or deny the injunction *for reasons*, and not simply as a mechanical reflex to a finding of infringement.” Leval at 1133. (emphasis in original)

Certainly the purposes behind the copyright law would not lead to a finding of irreparable injury or injunctive relief here. There are no *reasons* justifying a prior restraint. The writing of *The Catcher in the Rye* would hardly had been deterred if 60 years ago the author might have imagined that 60 years hence another work using his character might be written - - and there is certainly nothing in the record which even hints at such a bizarre conclusion. Indeed, the record is barren of any specific harm, let alone

¹² “In copyright preliminary injunction cases, courts often say that denying the injunction would cause ‘irreparable harm,’ but this is a legal fiction, not a judgment about economic reality.” Volokh, *supra*, at 205.

monetary harm, to the plaintiff at all. Under such circumstances, neither the law nor the facts justify the finding of an irreparable injury, and particularly with the Supreme Court's recent ruling on the subject, the assumption - - and implementation - - of a prior restraint was in error.

F. If Liability is Found, Money Damages Would be Sufficient

Since, as we have demonstrated, supra part E, the law no longer presumes irreparable injury, and since in this case's record there is no evidence whatsoever of irreparable injury, it seems clear that if the fair use defense is rejected and liability is found, money damages would be a very reasonable alternative. In all sort of cases from libel to wrongful death, our system of jurisprudence uses monetary remedies as a proxy for the harm actually suffered. This is a fundamental basis of our law even where the actual damages, whether they be reputational or pain and suffering, are difficult to quantify. There is no reason why this should not be the case in copyright cases as well, particularly when the alternative is the harsh remedy of prior restraint, which, as we have seen, is at total odds with the First Amendment.

Indeed, money damages may be more appropriate in copyright cases than in other areas. Copyright law is "primarily intended to provide a

financial incentive that encourages people to contribute to the marketplace of ideas.” Volokh, supra, at 205. Indeed, damage to such property interest is not truly irreparable - - an injured party can be made whole by a monetary award. In any event, such interests will rarely outweigh the harms caused by the curtailment of speech.

Absent a presumption of irreparable injury, the record in this case is wholly inadequate to support the issuance of an injunction banning speech. The record contains no evidence of actual or imminent, let alone, irreparable, injury. Amici in this brief have taken no position as to the ultimate validity of the fair use defense or, in fact, the ultimate question of liability. Rather, Amici submit that a preliminary injunction banning transformative speech is inappropriate and unconstitutional at this preliminary stage. Moreover, we submit that even a permanent injunction would seem to be inappropriate where, if liability is found, monetary damages can compensate plaintiff for his purported losses. As the Supreme Court has stated, the “goals of copyright law are ‘not always best served by automatically granting injunctive relief.” *Tasini*, supra, 533 U.S. at 505, quoting *Campbell*, supra, 510 U.S. at 578, n.10.

Monetary damages are obvious alternatives to injunctive relief. As the Eleventh Circuit concluded in the very similar *The Wind Done Gone*

case, “to the extent SunTrust suffers injury from TWDG’s putative infringement of its copyright in GWTW, such harm can adequately be remedied through an award of monetary damages.” *SunTrust Bank*, 268 F. 3d at 1277. Likewise, as that court concluded in *Greenburg v. National Geographic Society*, 244 F. 3d 1267, 1276 (11th Cir. 2001), “[i]n assessing the appropriateness of any injunctive relief, we urge the court to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public’s computer-aided access to this educational and entertaining work.”

Here, if liability is found, rather than ban publication depriving the public of a new perspective on Mr. Salinger’s iconic work and “access to this educational and entertaining” book, money damages would appear to be an appropriate remedy, no harder to quantify than in a plethora of other cases. If infringement is found, defendant could be forced to disgorge some or all of his profits; if plaintiff can prove monetary losses for sequels he may have written (notwithstanding he has not done so in 60 years) or for licensing opportunities the new publication has prejudiced, evidence can be entered with respect to those business losses; and if, as the record suggests, there are no monetary business losses at all, damages still could be assessed for the harm to plaintiff in having his character Holden Caulfield appear in public light again.

As Volokh reasons, in libel cases, where reputation can never be adequately remedied or perfectly repaired, injunctions are not tolerated, and monetary damages suffice. This is all the more why in copyright cases monetary compensation is appropriate -- since "damages can generally reward authors relatively adequately and are often not terribly hard to estimate." Volokh, supra, at 192. It is a basic tenet of our jurisprudence that "free speech requires us to suffer considerable indignities, for instance from statements of opinions that are injurious to our reputation, or from accurate statements of fact that are nonetheless unfair or emotionally distressing." Volokh, supra, at 207. For many of these harms the law renders no remedy; even if there is one, it is in the proxy of money damages, not in barring future speech.

Here the record does not reflect any harm to future Salinger works, but rather an infringement on his "moral right" to control his character and work. But that too is no justification for the most constitutionally disfavored remedy, blocking speech. As Volokh concludes, "[w]e don't believe that the interest in protecting owners' supposed moral rights to control their works is weighty enough to justify preliminary injunctions." *Id* at 207; *See also Campbell*, 510 U.S. at 569 (allowing 2 Live Crew's parody of Roy Orbison's song "Oh Pretty Woman", despite Orbison's "moral" objections). Again

comparing copyright infringements with the much greater harm in spreading libelous falsehoods, Volokh concludes, “[w]e don’t see why authorial dignity is so important that it’s entitled to special protection where other dignity interests are not.” *Volokh, supra*, at 208.

CONCLUSION

Despite the dangers inherent in prior restraints, First Amendment concerns did not factor into the district court’s analysis. Instead, the district court completely subordinated free speech interests and simply presumed the new publication would cause plaintiff irreparable harm. As we have demonstrated, the First Amendment requires more - - especially in the context of prior restraint. This is particularly true when the complained-of use is far closer to being transformative than to being mere copying; where the injunction is being issued at a preliminary stage of the proceedings; where the harm is not truly irreparable; and where monetary damages are a viable alternative. Clearly, when a pecuniary remedy is statutorily established, there is no legitimate reason to devalue First Amendment protections. As a nation, we have staked our all on the proposition that certain rights, notably that of free expression, must override other interests,

including even national security and fair trial rights -- and, so, certainly authorial dignity -- in all but the most extreme cases.

The preliminary injunction in this case should not be tolerated. If the book contained obscene pictures, a prior restraint could not issue. If the book contained libelous statements, a prior restraint could not issue. If the book revealed a national security secret short of surely causing direct and immediate danger to our nation or its people, a prior restraint could not issue. If the book might jeopardize the fair trial right of a criminal defendant, a prior restraint could not issue. If the book invaded another's privacy, a prior restraint could not issue. No prior restraint should have issued here.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 29 AND 32

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 6,949 words of text.

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2003, Times New Roman, Size 14.

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