

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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J.D. SALINGER, individually and as
TRUSTEE of the J.D. SALINGER
LITERARY TRUST,

Plaintiff,

-against-

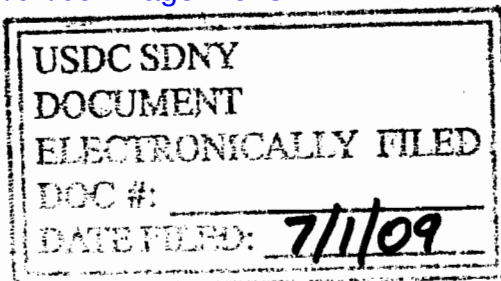
FREDRIK COLTING, writing under the name
JOHN DAVID CALIFORNIA, WINDUPBIRD
PUBLISHING LTD., NICOTEXT A.B., and ABP,
INC. d/b/a SCB DISTRIBUTORS INC.

Defendants.

-----X
DEBORAH A. BATTS, United States District Judge.

Plaintiff J.D. Salinger brings suit against Defendants
Fredrik Colting, writing under the name John David California,
Windupbird Publishing Ltd., Nicotext A.B., and ABP, Inc., doing
business as SCB Distributors Inc., alleging claims for Copyright
Infringement and common law Unfair Competition. Plaintiff
alleges that Defendants' novel, 60 Years Later: Coming Through
the Rye (hereinafter "60 Years"), is a derivative work of his
novel, The Catcher in the Rye (hereinafter "Catcher"), and that
the character of Mr. C from 60 Years, is an infringement on his
character, Holden Caulfield, from Catcher.

Plaintiff now moves for a preliminary injunction preventing
Defendants from publishing, advertising, or otherwise
distributing 60 Years in the United States of America during the
pendency of this suit. For the following reasons, a preliminary
injunction is GRANTED.



09 Civ. 5095 (DAB)
MEMORANDUM & ORDER

I. INTRODUCTION

As set forth on the record of June 17, 2009, and for the reasons stated therein, the Court found that Plaintiff possesses a valid Copyright in the novel The Catcher in the Rye, that the character of Holden Caulfield ("Holden" or "Caulfield") is sufficiently delineated so that a claim for infringement will lie. 2 Nimmer on Copyright § 2.12 (2009) ("[I]n those cases recognizing such protection, the character appropriated was distinctively delineated in the plaintiff's work."). Additionally, for the reasons stated on the record of June 17, 2009, the Court found that the Plaintiff had access to Catcher and that there are similarities that are probative of copying between the works. Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc., 150 F.3d 132, 137 (2d Cir. 1998). Finally, the Court found that Plaintiff has shown that there is substantial similarity between Catcher and 60 Years, as well as between the character Holden Caulfield from Catcher, and the character Mr. C from 60 Years, such that it was an unauthorized infringement of Plaintiff's copyright. Suntrust Bank v. Houghton Mifflin Company, 268 F.3d 1257, 1266 (11th Cir. 2001) (finding that "substantial similarity" exists where "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work"); Castle Rock, 150 F.3d at 139 ("Under the 'ordinary observer' test . . . two works are substantially

similar where the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal of the two works as the same.”) (internal quotations omitted).

The Court now addresses Defendants’ claim that their novel 60 Years and its protagonist Mr. C constitute fair use of Plaintiff’s copyrighted work under 17 U.S.C. §§ 107(1)-(4). The Court bases its analysis on the oral arguments of June 17, 2009 and the parties’ submissions.¹

II. DISCUSSION

A. The Preliminary Injunction Standard

Under Rule 65, “[t]o obtain a preliminary injunction a party must demonstrate: (1) that it will be irreparably harmed if an injunction is not granted, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of the hardships tipping decidedly in its favor.” Bronx Household of Faith v. Board of Educ. of City of New York, 331 F.3d 342, 349 (2d Cir. 2003) (citing Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999)).

¹ Upon reflection, the Court denies Plaintiff’s June 17, 2009 In Limine Motion to Strike Certain Exhibits and Expert Declarations. Accordingly, the Court has read the expert submissions of Defendants.

B. The Fair Use Doctrine

From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts....' " Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (quoting U.S. Const., Art. I, § 8, cl. 8). At the Constitutional level, while the "Copyright Clause and the First Amendment [are] intuitively in conflict, [they] were drafted to work together to prevent censorship" such that "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.3d at 1263 (citing Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001) (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560, (1985))).

"Copyright law thus must address the inevitable tension between the property rights it establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them- or ourselves by reference to the works of others, which must be protected up to a point. The fair-use doctrine mediates between the two sets of interests, determining where each set of interests ceases to control." Blanch v. Koons, 467 F.3d 244, 250 (2d Cir. 2006); see also Warner Bros. Entertainment Inc., v. RDR

Books, 575 F.Supp.2d 513, 540 (S.D.N.Y. 2008) ("At stake in this case are the incentive to create original works which copyright protection fosters and the freedom to produce secondary works which monopoly protection of copyright stifles - both interests benefit the public.") (quoting Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1109 (1990) (hereinafter "Leval")) (noting that although "the monopoly created by copyright . . . rewards the individual author in order to benefit the public[,] " on the other hand "the monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process.")

The doctrine of Fair Use was codified in § 107 of the 1976 Copyright Act. Section 107 calls for a four-factor test:

Limitations on exclusive rights: Fair use:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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