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## **Salinger v. Colting**

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JAMES MARSHALL SPECTOR

## Salinger v. Colting

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I. “LIFE IS A GAME, BOY. LIFE IS A GAME THAT ONE PLAYS ACCORDING TO THE RULES.”<sup>1</sup>

Whether you win or lose depends on the interpretations, or perhaps misinterpretations, of the rules.<sup>2</sup> Over 316,000 new books are annually published in the United States, with fiction and literary works comprising more than 17% of those titles.<sup>3</sup> By their very nature, these novels constitute copyrighted works,<sup>4</sup> furnishing their authors with exclusive reproduction, distribution, and adaptation rights.<sup>5</sup> One of these novels, *The Catcher in the Rye*, attained critical and commercial success, selling over 400,000 copies a year, despite the occasional attempted library or school ban.<sup>6</sup> The book’s publisher and fans demanded a sequel, but the author stubbornly refused. Sixty years later, an unknown writer heeded the cries of unyielding fans by writing and publishing a self-proclaimed “sequel.”

Congress considers copyright infringement detrimental to its goal of creating a vibrant public domain for the progress of American culture.<sup>7</sup> Therefore, the Copyright Act grants these authors certain remedies when their literary works have been infringed.<sup>8</sup> Specifically, the original author can obtain court orders “to prevent or restrain” the alleged infringement of his novel “before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.”<sup>9</sup>

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1. J.D. SALINGER, *THE CATCHER IN THE RYE* 8 (1951) (emphasis removed).

2. *See id.* (“Game, my ass. Some game. If you get on the side where all the hot-shots are, then it’s a game, all right—I’ll admit that. But if you get on the *other* side, where there aren’t any hot-shots, then what’s a game about it? Nothing. No game.”).

3. *See Bowker Industry Report, New Book Titles & Editions, 2002–2010*, BOWKER, [http://www.bowkerinfo.com/pubtrack/AnnualBookProduction2010/ISBN\\_Output\\_2002-2010.pdf](http://www.bowkerinfo.com/pubtrack/AnnualBookProduction2010/ISBN_Output_2002-2010.pdf) (last visited Oct. 18, 2011). In 2010, Bowker reported a sub-total statistic of 316,480 books, with fiction and literary works comprising 55,550 of those titles. Not included are 2,776,260 non-traditional books, which consist “largely of reprints, often public domain, and other titles printed on-demand. The number also includes records received too late to receive subject classification.” *Id.*

4. *See* 17 U.S.C. § 102 (2006).

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works . . . .

*Id.*

5. *See* 17 U.S.C. § 106.

6. KENNETH SLAWENSKI, *J.D. SALINGER: A LIFE* 344, 392 (2010).

7. *See* U.S. CONST. art. I, § 8, cl. 8; *see also* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984) (“It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

8. *See* 17 U.S.C. §§ 501–513 (discussing copyright infringement and remedies).

9. BLACK’S LAW DICTIONARY 855 (9th ed. 2009); *see also* 17 U.S.C. § 502(a) (“Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant

Commonly referred to as preliminary or temporary injunctions,<sup>10</sup> these orders are “actually ordinary, even commonplace,”<sup>11</sup> despite being referred to as “extraordinary remed[ies].”<sup>12</sup> To obtain a preliminary injunction, the original author must demonstrate that a failure to issue an injunction will result in irreparable harm<sup>13</sup> and that he will likely succeed on the merits of the copyright infringement claim.<sup>14</sup> Federal courts have customarily presumed irreparable harm when the copyright holder establishes a prima facie case of infringement.<sup>15</sup> A 2006 Supreme Court decision, however, established stricter standards for determining irreparable harm for permanent injunctions in patent infringement actions.<sup>16</sup> In 2010, the U.S. Court of Appeals for the Second Circuit interpreted this Supreme Court patent ruling to apply to *copyright* infringement cases.<sup>17</sup> As a result of this higher standard, not only may J.D. Salinger—arguably one of the greatest American writers of the twentieth century,<sup>18</sup> face a more onerous task in protecting his classic American novel from the unauthorized sequel, but also countless other authors who have attained varying degrees of success.

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temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”).

10. See 17 U.S.C. § 502(a); BLACK’S LAW DICTIONARY 855 (9th ed. 2009).
11. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.06[b] (rev. ed. 2011) (citing *Ga. Television Co. v. TV News Clips, Inc.*, 718 F. Supp. 939, 945 (N.D. Ga. 1989) (“Preliminary injunctions are a common judicial response to the imminent infringement of an apparently valid copyright.”)).
12. *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008)).
13. Irreparable harm is an injury “for which money damages cannot provide adequate compensation.” *Tellock v. Davis*, 84 F. App’x 109, 111 (2d Cir. 2003) (quoting *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002)) (internal alterations and quotations omitted).
14. *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 331 F.3d 342, 349 (2d Cir. 2003) (citing *Forest City Daly Hous., Inc. v. Town of North Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999)).
15. *Salinger v. Colting*, 641 F. Supp. 2d 250, 268 (S.D.N.Y. 2009), *vacated and remanded by* 607 F.3d 68 (2d Cir. 2010) (citing *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 66 (2d Cir.1996)). A prima facie case of infringement requires the plaintiff to “show ownership of a valid copyright and copying by the defendant.” *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977).
16. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). A court only grants a permanent injunction after a final hearing and “actual success on the merits.” *Del Pino v. AT&T Info. Sys.*, 921 F. Supp. 761, 765 (S.D. Fla. 1995) (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987)).
17. See *Salinger*, 607 F.3d at 77 (comparing *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 319–20 n.1 (S.D.N.Y. 2008), which held “that eBay only applies to permanent injunctions in patent cases,” with *Microsoft Corp. v. AGA Solutions, Inc.*, 589 F. Supp. 2d 195, 204 (E.D.N.Y. 2008), which applied “eBay in a permanent injunction trademark case”).
18. See Charles McGrath, *J.D. Salinger, Literary Recluse, Dies at 91*, N.Y. TIMES, Jan. 28, 2010, at A1, available at [http://www.nytimes.com/2010/01/29/books/29salinger.html?\\_r=1&ref=j\\_d\\_salinger](http://www.nytimes.com/2010/01/29/books/29salinger.html?_r=1&ref=j_d_salinger) (last visited Oct. 13, 2011) (“Salinger . . . was thought at one time to be the most important American writer to emerge since World War II . . .”).

**II. “MANY, MANY MEN HAVE BEEN JUST AS TROUBLED . . . AS YOU ARE RIGHT NOW.”<sup>19</sup>**

In *Salinger v. Colting*, the Second Circuit addressed the issue of whether the Supreme Court’s decisions in *eBay, Inc. v. MercExchange L.L.C.*<sup>20</sup> and *Winter v. Natural Resources Defense Council, Inc.*,<sup>21</sup> which established higher thresholds for injunctions in non-copyright instances, abrogated parts of the circuit’s traditional standard applicable in copyright cases.<sup>22</sup> In granting the motion for a preliminary injunction, the district court presumed irreparable harm after the plaintiff, J.D. Salinger, established a prima facie case of copyright infringement.<sup>23</sup> The Second Circuit later vacated and remanded the district court’s judgment, holding that the circuit’s well-established standard must be replaced by the higher threshold articulated in *eBay* and *Winter*.<sup>24</sup> This case comment contends that the Second Circuit erred on four grounds. First, it misinterpreted the Supreme Court’s use of copyright and non-patent cases in *eBay*. Second, the statutory language of the Copyright Act is distinct from that of the Patent Act in that the former does not limit grants of preliminary injunctions to “principles of equity,” while the latter does limit such grants. Third, the *Salinger* court ignored important policy implications underlying the different standards for granting injunctions in the copyright and patent contexts. Finally, the Second Circuit’s holding is not consistent with its own prior holdings<sup>25</sup> and has led the district courts to apply standards to injunction requests in an unpredictable manner.<sup>26</sup> The Second Circuit’s decision to apply the patent infringement’s onerous permanent injunction standard in the case of a preliminary injunction for copyright infringement creates a higher burden for plaintiffs who are attempting to enjoin defendants from infringing their work and will consequently disincentivize authors

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19. SALINGER, *supra* note 1, at 189.

20. 547 U.S. 388.

21. 555 U.S. 7 (2008).

22. *Salinger*, 607 F.3d at 74–75.

23. *Salinger v. Colting*, 641 F. Supp. 2d 250, 269 (S.D.N.Y. 2009), *vacated by* 607 F.3d 68 (2d Cir. 2010).

24. *Salinger*, 607 F.3d at 83.

25. See *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 66 (2d Cir. 1996) (“[T]he court below, having a sound legal and factual basis for its assessment of a likelihood of success of on the merits, was justified in relying on the presumption of irreparable harm.”); *Video Trip Corp. v. Lightning Video, Inc.*, 866 F.2d 50, 51–52 (2d Cir. 1989) (“In a copyright action the existence of irreparable injury is presumed upon a showing of a prima facie case of copyright infringement.”); *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir. 1985) (“Irreparable harm may ordinarily be presumed from copyright infringement.”); *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977) (“In copyright cases, however, if probable success—a prima facie case of copyright infringement—can be shown, the allegations of irreparable injury need not be very detailed, because such injury can normally be presumed when a copyright is infringed.”).

26. See *W. Supreme Buddha Ass’n v. Oasis World Peace & Health Found.*, 08-CV-1374 (TJM/DRH), 2010 U.S. Dist. LEXIS 89157, at \*11 (N.D.N.Y. Aug. 30, 2010).

from producing and releasing quality work in the United States.<sup>27</sup> A reduction in domestic creative output will negatively impact the public domain for which Congress initially created copyright protection.<sup>28</sup>

### III. “IF YOU REALLY WANT TO HEAR ABOUT IT . . . .”<sup>29</sup>

Plaintiff Jerome David Salinger published *The Catcher in the Rye* in 1951.<sup>30</sup> The “instant success”<sup>31</sup> of *The Catcher in the Rye* rested on the narrative voice of its “sort of” autobiographical<sup>32</sup> main character, Holden Caulfield, who “became America’s best-known literary truant since Huckleberry Finn.”<sup>33</sup> In his “own strange, wonderful language,”<sup>34</sup> Holden recounts his meanderings through New York City on the verge of a mental breakdown.<sup>35</sup> He considers removing himself from society rather than dealing with “phonies” and writers who “prostitute” themselves for money.<sup>36</sup> An emotional scene with his sister, Phoebe, at the Central Park carousel finally convinces him to abandon these plans.<sup>37</sup> Salinger, on the other hand, fulfilled Holden’s fantasy by secluding himself to a cabin in New Hampshire and even stopped publishing after 1965.<sup>38</sup> On rare occasions, Salinger left the privacy of his New Hampshire estate to seek injunctions against those allegedly infringing his copyrighted work.<sup>39</sup> Salinger never authorized anyone to publish a sequel to *The Catcher in the Rye*.<sup>40</sup>

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27. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1013 (1990) (“One traditional justification for the public domain is that the public domain is the public’s price for the grant of a copyright. The public is said to grant the copyright as an incentive to persuade the author to create and publish original works that will enrich the public domain.”).

28. See *id.* at 1023 (“The public domain . . . furnishes a crucial device to an otherwise unworkable system by reserving the raw material of authorship to the commons, thus leaving that raw material available for other authors to use.”).

29. SALINGER, *supra* note 1, at 1.

30. *Salinger v. Colting*, 607 F.3d 68, 70 (2d Cir. 2010).

31. *Id.* at 71.

32. *Id.* at 71 n.3 (citing PAUL ALEXANDER, SALINGER: A BIOGRAPHY 177–78 (1999)).

33. McGrath, *supra* note 18.

34. *Salinger*, 607 F.3d at 71 (quoting Nash K. Burger, *Books of the Times*, N.Y. TIMES, July 16, 1951, at 32, available at <http://www.nytimes.com/books/98/09/13/specials/salinger-rye02.html>).

35. See SALINGER, *supra* note 1, at 1.

36. *Id.* at 2.

37. *Id.* at 210–13.

38. *Salinger*, 607 F.3d at 71.

39. See *id.*; see also *Salinger v. Random House, Inc.*, 818 F.2d 252 (2d Cir. 1987) (granting a preliminary injunction to stop publication of a biography which relied heavily on Salinger’s copyrighted, unpublished letters).

40. *Salinger*, 607 F.3d at 71. Even though Salinger died while Colting’s appeal to the Second Circuit was pending, the court allowed the trustees of his literary trust “to be substituted for Salinger as Appellees.” *Id.* at 70 n.1.

Defendant Fredrik Colting self-published *60 Years Later: Coming Through the Rye* in England in 2009.<sup>41</sup> Under the pseudonym John David California, Colting wrote *60 Years Later* from the perspective of its main character, Mr. C, who is “still Holden Caulfield, and has a particular view on things.”<sup>42</sup> Mr. C escapes the confines of a nursing home to meander through New York City, reunite with his sister, Phoebe, and recount memories along the way.<sup>43</sup> The back cover of *60 Years Later* praised Colting’s novel as “a marvelous sequel to one of our most beloved classics.”<sup>44</sup> Colting planned to release *60 Years Later* in the United States in September 2009.<sup>45</sup>

#### IV. “I’LL JUST TELL YOU ABOUT THIS MADMAN STUFF THAT HAPPENED.”<sup>46</sup>

In July 2009, Salinger filed a complaint in the U.S. District Court for the Southern District of New York, alleging that *60 Years Later* infringed on his copyrights in both *The Catcher in the Rye* and in the character of Holden Caulfield.<sup>47</sup> Salinger moved for a preliminary injunction to bar Colting from “reproducing, publishing, distributing, advertising, selling or otherwise disseminating the book *60 Years Later* in or to the United States.”<sup>48</sup>

The district court granted the preliminary injunction, finding that (1) Salinger had a valid copyright for *The Catcher in the Rye* and its characters, (2) Colting infringed Salinger’s copyright in both *The Catcher in the Rye* and its characters unless Colting had a successful fair use defense, (3) Colting likely did not have such a defense, and (4) a preliminary injunction was appropriate.<sup>49</sup> The court stated that there was a well-established standard to presume irreparable harm “[w]hen a Plaintiff establishes a prima facie case of copyright infringement” for obtaining a preliminary injunction.<sup>50</sup> Adhering to this customary standard, the district court then presumed

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41. *Id.* at 71.

42. *Id.* at 71–72 (citing Alison Flood, *Catcher in the Rye Sequel Published, but Not by Salinger*, GUARDIAN (May 14, 2009, 9:40AM), <http://www.guardian.co.uk/books/2009/may/14/catcher-in-the-rye-sequel>).

43. *Id.*; Complaint at 2, *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (No. 09 Civ. 5095); Ed Pilkington, *Salinger Sues Writer over Alleged Catcher in the Rye Sequel*, GUARDIAN (June 2, 2009, 12:44PM), <http://www.guardian.co.uk/books/2009/jun/02/salinger-catcher-in-rye-sequel-lawsuit>.

44. *Salinger*, 607 F.3d at 72.

45. *Id.* at 71.

46. SALINGER, *supra* note 1, at 1.

47. Complaint, *supra* note 43, at 1, 20.

48. *Id.* at 19–20.

49. *Salinger*, 607 F.3d at 73.

50. *Salinger*, 641 F. Supp. 2d at 268–69 (citing *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 66 (2d Cir. 1996); *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 552 (S.D.N.Y. 2008); *E. Gluck Corp. v. Rothenhaus*, 585 F. Supp. 2d 505, 519 (S.D.N.Y. 2008)).

[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.

irreparable harm after determining that Salinger had established a *prima facie* case of copyright infringement.<sup>51</sup> In a footnote, the district court addressed Colting's argument that the U.S. Supreme Court's stricter requirements for a plaintiff seeking a permanent injunction for patent infringement in *eBay* should apply to Salinger's motion for a preliminary injunction in the case at hand.<sup>52</sup> The court stated that *eBay* "dealt only with the presumption of irreparable harm in the *patent law* context, and thus is not controlling in the absence of Second Circuit precedent applying it in the *copyright* context."<sup>53</sup>

Colting subsequently appealed to the Second Circuit on the ground that *eBay* abrogated the standard employed by the district court.<sup>54</sup> In *eBay*, MercExchange "sought to license its patent" for "an electronic market designed to facilitate the sale of goods between private individuals by establishing a central authority to promote trust among participants" to eBay.<sup>55</sup> After negotiations between the two parties failed, MercExchange sought injunctive relief against eBay's alleged patent infringements.<sup>56</sup> The Supreme Court vacated and remanded the judgment of the U.S. Court of Appeals for the Federal Circuit, which had granted a permanent injunction against the defendants-appellants' patent infringements.<sup>57</sup> In so doing, the Supreme Court held that a plaintiff seeking a permanent injunction, in accordance with the Patent Act's principles of equity, must demonstrate that (1) he has suffered irreparable harm; (2) monetary damages are inadequate; (3) the balance of the hardships weighs in his favor; and (4) his interest in the permanent injunction outweighs the public interest.<sup>58</sup> The majority and two concurring opinions restricted the holding to the context of patent infringement.<sup>59</sup> Justice Thomas wrote the

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*Salinger*, 641 F. Supp. 2d at 254 (citing *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 331 F.3d 342, 349 (2d Cir. 2003)).

51. *Id.* at 268–69 ("Because Plaintiff has established a *prima facie* case of copyright infringement, irreparable harm from that infringement is presumed.").
52. *Id.* at 269 n.6; *see also* Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction at 14, 43–45, *Salinger v. Colting*, 641 F. Supp.2d 250 (S.D.N.Y. 2009) (No. 09 Civ. 5095).
53. *Salinger*, 641 F. Supp. at 268–69 n.6 (emphasis added).
54. Brief for Defendants-Appellants at 25–58, *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (No. 09-2878-cv). Colting also raised additional claims that (1) the district court's injunction was an impermissible prior restraint on his First Amendment rights because it "deprive[d] the general public and scholars of the right to read [his] imaginative and transformative work," (2) the district court erred in holding that *60 Years Later* infringed *The Catcher in the Rye* and Holden Caulfield since "there is no substantial use of any copyright protected elements of the Holden character," and (3) the district court erred in its determination that *60 Years Later* does not make fair use of *Catcher* "as a 'parody' in the legal sense." *Id.* at 25–30, 33, 40.
55. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006).
56. *Id.*
57. *Id.* at 394.
58. *Id.* at 391.
59. *See eBay*, 547 U.S. 388.

majority opinion, reasoning that courts applying the four-factor test properly adhered to the principles of equity when granting permanent injunctions for patent infringement lawsuits.<sup>60</sup> Chief Justice Roberts, with whom Justices Scalia and Ginsburg joined, wrote the first concurring opinion, explaining that the Court's holding merely clarified what courts have historically considered when granting permanent injunctions for patent infringement cases, rather than a radical departure from precedent.<sup>61</sup> Justice Kennedy, with whom Justices Stevens, Souter, and Breyer joined, wrote the second concurring opinion, reasoning that the proliferation of related patents, a product of technological advancement, required the Court to apply a higher threshold for such injunctions.<sup>62</sup>

The Second Circuit vacated and remanded the district court's judgment, holding that it erred in relying on an equitable standard that, in the court's view, had been abrogated by the *eBay* decision.<sup>63</sup> The Second Circuit analyzed the opinions in *eBay* to ascertain whether the Supreme Court clearly intended to extend the scope of its holding beyond patent cases.<sup>64</sup> The court agreed with Colting's contention that the four factors in *eBay* apply "to preliminary injunctions . . . that are issued for alleged copyright infringement."<sup>65</sup> The Second Circuit reasoned that the Supreme Court expressly relied on copyright cases to reach its *eBay* decision. It emphasized the Supreme Court's comparison of the similarities between the Patent Act and the Copyright Act,<sup>66</sup> noting that "[l]ike a patent owner, a copyright holder possesses the right to exclude others from using his property."<sup>67</sup> The Second Circuit additionally found that neither *eBay* nor *Winter*<sup>68</sup> "permit an easier grant of a preliminary than of a permanent injunction."<sup>69</sup> A footnote in the opinion further demonstrates the Second Circuit's holding that *eBay* could apply to any case in which the remedy might be an injunction.<sup>70</sup>

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60. *Id.* at 390.

61. *Id.* at 394–95 (Roberts, J., concurring).

62. *Id.* at 395 (Kennedy, J., concurring).

63. *Salinger v. Colting*, 607 F.3d 68, 84 (2d Cir. 2010).

64. *Id.* at 77–78 ("[N]othing in the text or the logic of *eBay* suggests that its rule is limited to patent cases. On the contrary, *eBay* strongly indicates that the traditional principles of equity it employed are the presumptive standard for injunctions in any context.").

65. *Id.* at 77; *see also* Brief for Defendants-Appellants, *supra* note 54, at 25–58.

66. *Salinger*, 607 F.3d at 78.

67. *Id.* (quoting *eBay*, 547 U.S. at 392).

68. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). In *Winter*, the Supreme Court reversed and vacated the judgment of the U.S. Court of Appeals for the Ninth Circuit, which granted a preliminary injunction imposing certain restrictions on the Navy's use of sonar in its training exercises. The court stated, "[T]he balance of equities and consideration of the public interest—are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent." *Id.* at 32.

69. *Salinger*, 607 F.3d at 78.

70. *Id.* at 78 n.7 ("[A]lthough today we are not called upon to extend *eBay* beyond the context of copyright cases, we see no reason that *eBay* would not apply with equal force to an injunction in *any* type of case.") (emphasis in original).

**V. “THEY GAVE IT UP BEFORE THEY EVER REALLY EVEN GOT STARTED.”<sup>71</sup>**

This case comment contends that the Second Circuit erroneously held that *eBay* and *Winter* abrogated the customary standard employed by the district court, and that the *eBay* four-factor test in equity, which was applied in a patent infringement suit, should be the standard for preliminary injunctions in copyright infringement cases.<sup>72</sup> The Second Circuit applied the wrong test in *Salinger* in three ways: first, it misinterpreted the Supreme Court’s reliance on copyright and non-patent cases in *eBay*; second, it ignored the distinction between the language of the Copyright and Patent Acts; and third, it failed to consider the differing policy concerns in granting permanent and preliminary injunctions under the Copyright and Patent Acts, respectively. Finally, because the Second Circuit’s holding is not consistent with its own prior holdings,<sup>73</sup> it has led district courts to apply inconsistent standards to requests for injunctions.<sup>74</sup> This case comment’s analysis of *eBay* will vitiate the Second Circuit’s application of the four-factor test in *Salinger*. By applying the standard for a permanent injunction under the Patent Act to a preliminary injunction under the Copyright Act, the Second Circuit has essentially nullified the difference between the two and made it much more difficult for a copyright holder to obtain a preliminary injunction.

**VI. “[I]F YOU HAVE SOMETHING TO OFFER, SOMEONE WILL LEARN SOMETHING FROM YOU.”<sup>75</sup>**

The Second Circuit misinterpreted the Supreme Court’s use of copyright and non-patent cases in *eBay* and erroneously concluded that *eBay*’s holding applied to the context of copyright infringement.<sup>76</sup> Indeed, the Supreme Court in *eBay* never stated that its rule should extend beyond patent cases.<sup>77</sup> Rather, the Court in *eBay* addressed the issue of whether the lower court had erred by adhering to a “general rule that courts will issue permanent injunctions against *patent infringements* absent exceptional circumstances.”<sup>78</sup> The language and logic of the Supreme Court’s analysis in *eBay* closely hewed to the Patent Act context, and therefore did not directly address whether such a standard should apply to grants of preliminary injunctions under the Copyright Act.<sup>79</sup> The Second Circuit in *Salinger* broadly interpreted the Supreme

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71. SALINGER, *supra* note 1, at 187.

72. *Salinger*, 607 F.3d at 82.

73. *See supra* note 25.

74. *See supra* note 26.

75. SALINGER, *supra* note 1, at 189.

76. *Salinger*, 607 F.3d at 77.

77. *See eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

78. *Id.* at 391 (quoting *eBay, Inc. v. MercExchange, L.L.C.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005) (emphasis added)).

79. *Id.* at 392–93; *see supra* notes 59–62 and accompanying text.

Court's reliance in *eBay* on copyright cases to imply a similarity between copyright and patent injunctions, inferring that “[w]hatever the underlying issues and particular circumstances of the cases cited by the Court in *eBay*, it seems clear that the Supreme Court did not view patent and copyright injunctions as different in kind, or as requiring different standards.”<sup>80</sup> The Second Circuit failed to understand, however, that the Court in *eBay* cited three copyright cases—*N.Y. Times Co. v. Tasini*, *Campbell v. Acuff-Rose Music, Inc.*, and *Dun v. Lumbermen’s Credit Ass’n*—only to emphasize Congress’s intention that permanent injunctions be treated as a remedy, not a right that is available in all but exceptional circumstances.<sup>81</sup> In each of these three cases, the Supreme Court recognized that Congress vested the courts with a discretionary power through the Copyright Act to determine whether to issue permanent injunctions.<sup>82</sup> The Supreme Court in *eBay* merely indicated that Congress’s inclusion of the word “may” in the Copyright Act denoted that permanent injunctions were not automatic. While both the *Salinger* and *eBay* courts understood the distinction between a right and a remedy,<sup>83</sup> only the Supreme Court in *eBay* considered the differences between the two, thus limiting its holding to the patent remedy.

The Second Circuit in *Salinger* instead broadly interpreted the *eBay* holding by stating that “nothing in the text or the logic of *eBay* suggests that its rule is limited to patent cases. On the contrary, *eBay* strongly indicated that the traditional principles of equity it employed are the presumptive standard for injunctions in any context.”<sup>84</sup> In support of this conclusion, the Second Circuit emphasized the significance of two injunction cases cited in *eBay*, *Weinberger v. Romero-Barcelo*, and *Amoco Production Co. v. Village of Gambell*, which involved areas of law other than patent or copyright.<sup>85</sup>

80. *Salinger*, 607 F.3d at 78. The Second Circuit believed that “[b]ecause of these similarities, the [Supreme] 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.’” *Id.* (quoting *eBay*, 547 U.S. at 392–93).

81. *See eBay*, 547 U.S. at 395 (citing *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 505 (2001); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994); *Dun v. Lumbermen’s Credit Ass’n*, 209 U.S. 20, 23–24 (1908)). The Court in *eBay* cited another copyright case, *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932), which did not pertain to injunctions, but rather the taxation of copyrighted works, to emphasize that a copyright holder, like a patent owner, “possesses ‘the right to exclude others from using his property.’” 547 U.S. at 392.

82. *See N.Y. Times Co.*, 533 U.S. at 505 (“[I]t hardly follows from today’s decision that an injunction against the inclusion of these Articles in the Databases (much less all freelance articles in any databases) must issue.”); *see also Acuff-Rose Music*, 510 U.S. at 578 n.10 (“[T]he goals of the copyright law . . . are not always best served by automatically granting injunctive relief . . . .”); *Dun*, 209 U.S. at 21 (holding that it is within the discretion of the court to grant an injunction for the copyright infringement of a reference “book containing lists of merchants, manufacturers, and traders”). It is important to note that the Supreme Court decided *Dun* sixty-eight years before the current injunctive relief clause was enacted. *See id.*; *see also* 17 U.S.C. § 502 (1976).

83. *See Salinger*, 607 F.3d at 78 (“[L]ike a patent owner, a copyright holder possesses the right to exclude others from using his property.”) (quoting *eBay*, 547 U.S. at 392) (internal quotations and alterations omitted).

84. *Id.* at 77–78.

85. *Id.* at 78. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982), concerned a permanent injunction in the context of a violation of the Federal Water Pollution Control Act, and *Amoco Production Co. v.*

Rather than examining the underlying analysis in each case, the Second Circuit only concerned itself with the broad conclusion that the Supreme Court drew from these authorities in reaching its holding in *eBay*.<sup>86</sup> In *Weinberger* and *Amoco*, the Supreme Court specifically focused on the respective statutes' language to determine Congress's intent in providing injunctive remedies.<sup>87</sup> The Court in *Weinberger* held that "in the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."<sup>88</sup> Similarly, the Court in *Amoco* stated, "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'"<sup>89</sup> Contrary to the Second Circuit's reading, the "logic of these cases" did not support its conclusion "that the traditional principles of equity it employed [be] presumptive . . . in any context."<sup>90</sup> Rather, the Supreme Court explicitly qualified the context in which to employ such equitable principles—that is, where the statutory language specifically indicated Congress's intent to employ such equitable principles.<sup>91</sup> By referencing these two non-patent cases, the Supreme Court actually reiterated the requisite deference to the language adopted by Congress by concluding that "[t]hese familiar principles apply with equal force to disputes arising under the Patent Act."<sup>92</sup>

The *Salinger* court ignored important distinctions between the texts of the Copyright and Patent Acts. While the language of the Patent Act specifically limits grants of injunctions to "principles of equity," the equivalent language in the Copyright Act does not. In *eBay*, the Court followed the legislative deference of *Weinberger* and *Amoco* by analyzing the text of the Patent Act to determine when Congress intended that an injunction be issued.<sup>93</sup> The statute endows patents with the attributes of personal property "[s]ubject to the provisions of this title."<sup>94</sup> A separate provision of the Patent Act expressly provides that "[t]he several courts having jurisdiction of cases under this title may grant injunctions in accordance with

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*Village of Gambell*, 480 U.S. 531, 542 (1987), concerned a preliminary injunction to stop an alleged violation of § 810 of the Alaska National Interest Lands Conservation Act. *Salinger*, 607 F.3d at 78 (citing *eBay*, 547 U.S. at 391).

86. *See Salinger*, 607 F.3d at 78.

87. *See Weinberger*, 456 U.S. at 314–18; *see also Amoco Prod. Co.*, 480 U.S. at 548.

88. *Weinberger*, 456 U.S. at 316 n.11 (quoting *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981)).

89. *Amoco Prod. Co.*, 480 U.S. at 548 (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985)).

90. *Salinger*, 607 F.3d at 78.

91. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. at 394 (2006) ("[S]uch discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.").

92. *See id.* at 391.

93. *See id.* at 391–92.

94. 35 U.S.C. § 261 (2006).

the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”<sup>95</sup> Interestingly, the majority does not quote verbatim the aforementioned injunctive relief language taken from the statute. In stating that “the Patent Act itself indicates that patents shall have the attributes of personal property ‘[s]ubject to the provisions of this title,’ 35 U.S.C. § 261, including, presumably, the provision that injunctive relief ‘may’ issue *only* ‘in accordance with the principles of equity,’” the majority actually inserted the qualifier “only” between the words “may issue” and the phrase “in accordance with the principles of equity” even though “only” is not contained in the statutory text.<sup>96</sup> In doing so, the Supreme Court explicitly emphasized the “principles of equity” language as essential to the Court’s holding that a permanent injunction is not automatic.

Indeed, the Supreme Court specifically relied on the equitable principles embodied in this part of the statute when announcing in *eBay* the standard for issuing a permanent injunction in a patent infringement suit: “[a]ccording to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief.”<sup>97</sup> Consequently, the Supreme Court held that the statute’s language explicated the standard for granting a permanent injunction in a patent infringement case.<sup>98</sup>

The Second Circuit incorrectly reasoned that “[t]his approach [is] consistent with [its] treatment of injunctions under the Copyright Act,” implying that *eBay* should apply to copyright infringement suits.<sup>99</sup> As noted earlier, however, the Supreme Court’s approach emphasized the importance of looking to the applicable statute’s language and Congressional intent when granting remedies.<sup>100</sup> The Court referred to the similar use of the word “may” in both the Patent and Copyright Act to reiterate that the granting of injunctions rested in the court’s discretion and, as such, injunctive remedies would not automatically issue.<sup>101</sup> The Supreme Court did not further analyze the Copyright Act’s language because the issue before the Court was limited

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95. *Id.* § 283.

96. *eBay*, 547 U.S. at 392 (emphasis added).

97. *Id.* at 391. Note that one scholar questioned the basis for this general standard. See Andrew Beckerman-Rodau, *The Supreme Court Engages in Judicial Activism in Interpreting the Patent Law in eBay, Inc. v. MercExchange, L.L.C.*, 10 TUL. J. TECH. & INTEL. PROP. 165, 191 (2007) (“The majority decision in *eBay* failed to provide any explanation for its rejection of almost a century of precedent. . . [and] [e]ven if the Court’s conclusion is correct, it has an obligation to the public to explain why prior decisions of the Supreme Court are incorrect.”).

98. See *eBay*, 547 U.S. at 392.

99. *Id.*

100. *Id.* (citing 17 U.S.C. § 502(a) (2006)) (“Like the Patent Act, the Copyright Act provides that a court ‘may’ grant injunctive relief ‘on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.’”).

101. *Salinger v. Colting*, 607 F.3d 68, 78 (2d Cir. 2010). (“In response to the Federal Circuit’s reasoning that the Patent Act’s right to exclude justifies the preference for injunctive relief, the Court stated that ‘the creation of a right is distinct from the provision of remedies for violations of that right.’” (quoting *eBay*, 547 U.S. at 392)).

to the context of patents.<sup>102</sup> However, a comparison of the injunctive relief provisions in the Patent and Copyright Acts evinces a fundamental flaw in the Second Circuit’s reasoning. The essential “principles of equity” language contained in the Patent Act<sup>103</sup> does not appear in the Copyright Act’s injunction clause for infringement of literary works.<sup>104</sup> Congress did, however, include this exact “principles of equity” phrase for a separate injunction clause solely with respect to preventing the infringement of protected designs; namely boat hulls under Chapter 13 of the Copyright Act.<sup>105</sup> The inclusion of this language in the provision for injunctions against boat hull infringement, compared with the specific exclusion of this language in the general injunction provision, evinces Congress’s clear intent not to require that courts apply the same equitable principles when deciding whether to issue injunctions against the infringement of literary works.<sup>106</sup>

By presuming that the same equitable “principles”<sup>107</sup> should restrain the grant of a preliminary injunction under the Copyright act, the *Salinger* court ignored important policy distinctions between the two Acts—distinctions dating back to the founding of the United States.<sup>108</sup> The country’s first Patent and Copyright Acts

102. *See eBay*, 547 U.S. at 392–93.

103. 35 U.S.C. § 283 (2006).

104. *See* 17 U.S.C. § 502 (2006).

105. *See id.* § 1322 (“A court having jurisdiction over actions under this chapter may grant injunctions in accordance with the principles of equity to prevent infringement of a design under this chapter, including, in its discretion, prompt relief by temporary restraining orders and preliminary injunctions.”) (statutory cross references omitted).

106. The legislative history of injunctive relief under the Copyright Act bolsters this point. The 1790 Copyright Act contained no injunctive remedy; however, when Congress abrogated this statute in 1819, the new Act provided injunctive relief “according to the course and principles of courts of equity” but did not specify “the standards for granting such relief.” *See* 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 22:3 (2011). In response to the Supreme Court’s holding in *Dun*, Congress ratified the 1909 statute, specifically keeping the “according to the course and principles of courts of equity” language. *See* Act of 1909, § 36, 35 Stat. 1075 (1909) (current version at 17 U.S.C. § 101 (2006)); *see also* PATRY, *supra* § 22:4. This statute was superseded by the most recent Copyright Act in which the injunction clause did not contain any such phrase. *See* 17 U.S.C. § 502; *see also* PATRY, *supra* § 22:5. Thus, by deleting the phrase “principles of equity” from the Copyright Act’s injunction clause, Congress expressed its intent not to limit copyright injunctions to such principles. The 1976 House Report stated, “Section 502(a) reasserts the discretionary power of courts to grant injunctions and restraining orders, whether ‘preliminary,’ ‘temporary,’ ‘interlocutory,’ ‘permanent,’ or ‘final,’ to prevent or stop infringements of copyright.” H.R. REP. NO. 94-1476, § 502 (1976). The legislative intent to distinguish the means by which one obtained Patent and Copyright Act injunctions could not be clearer.

107. *See Salinger v. Colting*, 607 F.3d 68, 77–78 (2d Cir. 2010).

108. The framers of the Constitution considered intellectual property so essential to the future of the country that they expressly vested in Congress a grant of power to protect these rights. U.S. CONST. art. I, § 8, cl. 8. The “Patent and Copyright Clause” enabled the legislature “[t]o 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.” *Id.* Congress swiftly responded by enacting two separate patent and copyright statutes, which were signed into law on April 10, 1790 and May 31, 1790, respectively. *See* Patent Act of 1790, ch. 7, 1 Stat. 109 (1790) (current version at 35 U.S.C. § 1 (2006)); *see also* Act of 1790, ch. 15, 1 Stat. 124 (1790) (current version at 17 U.S.C. § 101 (2006)).

explicitly conveyed Congress's intent to distinguish the two types of intellectual property rights.<sup>109</sup> With the Patent Act, Congress struck a balance between the interests of the inventor, who receives an exclusive monopoly in his inventions for a limited time, and the interests of society, which benefits from the inventor's creations and discoveries.<sup>110</sup> By providing a "relatively short period of protection" for "relatively strong rights," the legislature pragmatically understood that "once an invention has been disclosed to the public, [its] useful life span may be relatively short" because another inventor might make "efficient improvements."<sup>111</sup> In contrast, Congress's Copyright Act created a balance between authors and society that provided authors with a longer period of protection at the cost of more limited monopoly rights.<sup>112</sup> The legislature, as one scholar noted, deemed the "[i]ncremental innovation of copyrighted works . . . less important for copyrightable items than for patentable items and, therefore, improvements are treated differently under copyright law."<sup>113</sup> Throughout the ensuing two centuries, the legislature perpetuated its goal of spurring creativity for the good of the public by requiring vastly dissimilar protection requirements for

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109. The 1790 Patent Act's preamble stated its purpose was "to promote the progress of useful Arts." Patent Act of 1790, ch. 7, 1 Stat. 109 (1790) (current version at 35 U.S.C. § 1 (2006)). The exclusive rights granted to "Inventors" in their "Discoveries" were to "promote the Progress of . . . useful Arts." See, e.g., JULIE COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 23 (3d ed. 2010) ("Note that under the principles of parallel construction, the exclusive rights granted to 'Authors' in their 'Writings' are to 'promote the Progress of Science.'"). Thus, the 1790 Copyright Act focused on the progress of Science, which at the time "broadly connoted knowledge and learning." *Id.* The copyright statute's preamble stated its purpose was to encourage "learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." Act of 1790, ch. 15, 1 Stat. 124 (1790) (current version at 17 U.S.C. § 101 (2006)).
110. See Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473, 1483 (2004); see also *Brenner v. Manson*, 383 U.S. 519, 534 (1966) ("The basic quid pro quo contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility."); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) ("From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.").
111. Moffat, *supra* note 110, at 1484.
112. See *id.* at 1485–86, 1532 n.56. In her article, Moffat compares Justice Stevens's dissent from *Eldred v. Ashcroft*, with the majority opinion. 537 U.S. 186 (2003). The dissent argued that the "twin purposes of encouraging new works and adding to the public domain" are relevant in both copyright and patent. Moffat, *supra* note 110, at 1532 n.56 (citing *Ashcroft*, 537 U.S. at 227) (Stevens, J., dissenting). In contrast, the majority held that the tradeoffs between public benefit and private motivation are different in the two contexts—in patent, the inventor only begrudgingly agrees to disclosure in exchange for limited exclusive rights, while in copyright the author has disclosure as his or her desired goal from the outset. Moffat, *supra* note 110, at 1532 n.56 (citing *Ashcroft*, 537 U.S. at 216).
113. Moffat, *supra* note 110, at 1486–87 (citing Dennis S. Karjala, *The Relative Roles of Patent and Copyright in the Protection of Computer Programs*, 17 J. MARSHALL J. COMPUTER & INFO. L. 41, 48 (1998) ("The policy basis for these differences between the two protection schemes is the social desirability, indeed necessity, of allowing later technological creators to make incremental improvements on the works of others.")).

patents and copyrights.<sup>114</sup> These distinctive requirements continued to reflect the differing rights and remedies accorded to patentees and copyright holders, respectively.<sup>115</sup> Accordingly, the legislature required a higher threshold to acquire patent protection<sup>116</sup> than for copyright protection.<sup>117</sup> Thus, an understanding of the history of the two distinct intellectual property rights indicates that the Second Circuit erred in holding that Congress intended for the requirements of a permanent injunction for patents to be the same as those for a preliminary injunction for copyrights. By blurring the line between patents and copyrights, the Second Circuit may have consequently diminished the power of each property right.

The Second Circuit has muddied the differences between preliminary and permanent injunctions by misunderstanding the context of *Winter*.<sup>118</sup> Adhering to principles similar to those advanced in *eBay*, the Supreme Court in *Winter* found that a preliminary injunction was not automatic for a violation of a federal statute when the statute's language provided that such a remedy was within the discretion of the

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114. Currently, in order to obtain patent protection, an inventor must apply for a patent to the U.S. Patent and Trademark Office, successfully meeting five statutory requirements: patentable subject matter, usefulness, novelty, non-obviousness, and sufficient disclosure. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 29 (Vicki Been et al. eds., 5th ed. 2010). On the other hand, “[c]opyright exists automatically upon creation of an original work of authorship” in a tangible medium of expression. PATRY, *supra* note 106, § 1:1.

115. MERGES ET AL., *supra* note 114, at 29–30.

The patent grant is nearly absolute, barring even those who independently develop the invention from practicing its art. Infringement will be found where the accused device, composition, or process embodies all of the elements of a valid patent claim (or accomplishes substantially the same function in substantially the same way to achieve the same result) . . . . In general, copyrights are easier to secure and last substantially longer than patents, although the scope of protection afforded copyrights is narrower and less absolute than that given to patents . . . . [Contrary to the independent development ban under the Patent Act], independent creation of a copyright work does not violate the Copyright Act.

*Id.*

116. To obtain protection under the 1790 Patent Act, an inventor was required to

petition . . . the Secretary of State, the Secretary for the department of war [sic], and the Attorney General of the United States, setting forth, that he . . . hath or have invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used, and praying that a patent may be granted therefore [if any two of these Secretaries determined that the] invention or discovery [was] sufficiently useful and important, to cause letters patent to be made out in the name of the United States.

Patent Act of 1790, ch. 7, 1 Stat. 109 (1790) (current version at 35 U.S.C. § 1 (2006)).

117. Pursuant to the 1790 Copyright Act, an “author” seeking protection had to merely “comply with the various formalities, including registration of title, publication of the registration in a local newspaper, and deposit a copy of the work with the Secretary of State within six months of publication.” COHEN ET AL., *supra* note 109, at 24.

118. *Salinger v. Colting*, 607 F.3d 68, 78–79 (2d Cir. 2010) (discussing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

court.<sup>119</sup> Thus, the Court re-emphasized the key concept that the statutory text should be a court's focus in determining its discretionary ability to issue an injunction.<sup>120</sup> The Second Circuit misconstrued the *eBay* and *Winter* cases by stating that neither “permit[s] an easier grant of a preliminary than of a permanent injunction,”<sup>121</sup> failing to apply its own customary standard.<sup>122</sup> The district court expressly, and correctly, followed the discretionary language of the Copyright Act's injunctive relief provision in stating that irreparable harm may be presumed if the plaintiff establishes a prima facie case of copyright infringement.<sup>123</sup> The fact that the court “may” presume irreparable harm rather than being required to do so establishes that the presumption is not automatic.

With *Salinger's* incongruence with to its own prior holdings, the Second Circuit has led to an unpredictable application of the standards applied to injunction requests among district courts.<sup>124</sup> In *Western Supreme Buddha Ass'n v. Oasis World Peace & Health Foundation*, the U.S. District Court for the Northern District of New York declined to apply the *Salinger* standard in addressing the plaintiff's request for a permanent injunction in a trademark case.<sup>125</sup> The district court reasoned that *Salinger v. Colting* should not apply to the instant case because *Salinger* addressed preliminary injunction standards, not permanent injunctions.<sup>126</sup> Because the Second Circuit applied *eBay's* permanent injunction standard to the preliminary injunction request in *Salinger*, a court might assume the same standard applies to permanent injunctions as well. But the Northern District did not agree. Confusion among the courts on whether to apply *Salinger* will diminish their abilities to consistently adjudicate these issues. Attorneys and their clients will not be able to reasonably determine how a court will handle a potential injunction request, leading to unpredictability and uncertainty for copyright holders.<sup>127</sup>

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119. *Winter*, 555 U.S. at 23. The court had discretion to take into account that the injunction would restrict naval “training exercises that have been taking place in SOCAL for the last 40 years.” *Id.* As the Court stated, “[a] proper consideration of these factors alone requires denial of the requested injunctive relief.” *Id.*

120. *Id.* at 22 (“Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997))).

121. *Salinger*, 607 F.3d at 78.

122. The court's customary standard of presuming irreparable harm was never automatic, but rather rested within the court's discretion. *See supra* notes 49–51 and accompanying text.

123. *See Salinger v. Colting*, 641 F. Supp. 2d 250, 268 (S.D.N.Y. 2009). *See also supra* pp. 772–73.

124. *See W. Supreme Buddha Ass'n v. Oasis World Peace & Health Found.*, 08-CV-1374 (TJM/DRH), 2010 U.S. Dist. LEXIS 89157, at \*11 (N.D.N.Y. Aug. 30, 2010).

125. *Id.*

126. *Id.* at \*11 n.3.

127. A copyright holder may become disincentivized to create if he is less confident in the strength of his copyright. As a result, the holding in *Salinger* may have contradicted the purposes behind the Copyright Act—to foster innovation. *See generally Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

VII. “[W]HAT I THOUGHT ABOUT ALL THIS STUFF I JUST FINISHED TELLING YOU ABOUT.”<sup>128</sup>

The holding in *Salinger* blurred the distinction between the permanent injunction remedies granted under the Patent Act and the preliminary injunction remedies found in the Copyright Act.<sup>129</sup> Rather, the court should have followed its own well-established standard. As a consequence of its error, the Second Circuit will unduly burden copyright holders who try to protect their works by obtaining a preliminary injunction. While a court may issue a preliminary injunction “before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case,” a court will only grant a permanent injunction “after a final hearing on the merits.”<sup>130</sup> If the two types of injunctions require “essentially” the same standard,<sup>131</sup> then it follows that a copyright holder will have to prove his case before the process of discovery has been completed.<sup>132</sup> This will undoubtedly weaken copyright holders’ ability to demonstrate the merits of their claims, thereby diminishing the protection of their work. Additionally, the *Salinger* holding may produce unpredictable results, leading to a more volatile judicial system.<sup>133</sup> As a result, authors may not be as inclined to exert their creative energies, thereby crippling the very public domain Congress considers essential to “the Progress of Science and useful Arts.”<sup>134</sup>

“That’s all I’m going to tell about.”<sup>135</sup>

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The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. The sole interest of the United States and the primary object in conferring the monopoly, this Court has said, lie [sic] in the general benefits derived by the public from the labors of authors.

*Id.* (quotations omitted).

128. *SALINGER*, *supra* note 1, at 213.

129. *See Salinger v. Colting*, 607 F.3d 68, 77–78 (2d Cir. 2010).

130. BLACK’S LAW DICTIONARY 855 (9th ed. 2009).

131. *See Salinger*, 607 F.3d at 78–79 (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.” (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 (1987))).

132. Under a permanent injunction, the very phrase “final hearing” implies that the plaintiff has had the luxury of discovery to prove the merits of his cause of action. *See* BLACK’S LAW DICTIONARY 855 (9th ed. 2009).

133. *See* *W. Supreme Buddha Ass’n v. Oasis World Peace & Health Found.*, 08-CV-1374 (TJM/DRH), 2010 U.S. Dist. LEXIS 89157, at \*11 (N.D.N.Y. Aug. 30, 2010).

134. U.S. CONST. art. I, § 8, cl. 8.

135. *SALINGER*, *supra* note 1, at 213.