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J.D. Salinger Case Extends *eBay*'s No Presumption of Irreparable Harm Standard for Injunctions in Patent Cases to Copyright Cases

In *Salinger and Salinger v. Colting et al.*, 09-2878-cv (April 30, 2010), the United States Court of Appeals for the Second Circuit vacated the preliminary injunction granted by the district court, holding that plaintiff Salinger must prove irreparable harm and may not simply rely upon a presumption of irreparable harm based on a finding of likelihood of success on the merits of his copyright infringement claim.

J.D. Salinger, the author of *Catcher in the Rye*, brought suit for copyright infringement against Fredrik Colting, alleging that Colting's book entitled *60 Years Later: Coming Through the Rye* infringed Salinger's copyright in *Catcher in the Rye*. Colting's book had previously been released in England, and Colting touted the book as a sequel to *Catcher in the Rye*. *Salinger* at *8.

Salinger moved for a preliminary injunction. The district court found that Salinger owned a valid copyright, that Colting's book infringed Salinger's copyright, and that Colting's fair use defense was likely to fail. Based on Second Circuit precedent and its finding that Salinger had established a *prima facie* case of copyright infringement, the district court presumed that Salinger would be irreparably harmed and, therefore, issued a preliminary injunction *Id.* at *9-10.

On appeal, the Second Circuit vacated the district court's ruling and remanded for further proceedings, holding that the "longstanding" standard for preliminary injunctions in copyright cases was inconsistent with the Supreme Court's decision in *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). *Id.* at *10. The court held that *eBay* applied with equal force "(a) to preliminary injunctions (b) that are issued for alleged copyright infringement." *Id.* at *15. The court observed that the *eBay* standard for injunctions was not limited to patent cases but rather was the "presumptive standard for injunctions in any context." *Id.* at *15. The court also noted that *eBay* does not permit an easier grant of a preliminary injunction as opposed to a permanent injunction. *Id.* at *16.

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The Second Circuit then set forth the test for determining whether to grant a plaintiff's motion for a preliminary injunction. First, the plaintiff must demonstrate either (a) a likelihood of success on the merits, or (b) a sufficiently serious questions going to the merits of the case, and a balancing of the hardships tipping in plaintiff's favor. *Id.* at *17-18. Second, the plaintiff must demonstrate that it will suffer irreparable harm if the injunction does not issue. *Id.* at *18. The court specifically noted that trial courts "must actually consider the injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the 'remedies available at law, such as monetary damages, are inadequate to compensate for that injury.'" *Id.* at *18. Third, courts must consider the balancing of the hardships and issue the injunction only if the balance tips in favor of the plaintiff. *Id.* Finally, courts must ensure that the public interest would not be "disserved" by the preliminary injunction's issuance. *Id.*

Given this new test, the court went on to explain the relationship between "irreparable harm" and the "balance of hardships" as well as to emphasize that, while historically speaking, the issuance of a preliminary injunction might be empirically warranted in copyright cases, "by anchoring the injunction standard to equitable principles … courts are able to keep pace with innovation in this rapidly changing technological era." *Id.* at *21. Moreover, as to the "public's interest," the court observed that the First Amendment is implicated whenever an injunction issues prior to trial, but some uses "will so patently infringe another's copyright … that the likely First Amendment value in the use is virtually nonexistent." *Id.* at *22.

Turning to the case before it, the Second Circuit vacated and remanded, since the district court had considered only the first of the four factors. *Id.* at *22. The court did, however, affirm the district court's finding that Salinger "is likely to succeed on the merits of his copyright infringement claim." *Id.* It readily dismissed the argument that the two works were not substantially similar as "manifestly meritless." *Id.* at *22-23. While finding the "fair use" defense "[m]ore serious," the court found in favor of Salinger based on the trial court's finding that Colting lacked credibility as to the purpose of his book. *Id.* at *23.

J.D. Salinger, a famous author who became a recluse for nearly his entire life and died while his case was on appeal, will now also be known as the author who helped re-make copyright law.

If you would like to discuss how *Salinger and Salinger v. Colting et al.* may affect your business, please contact any of the following members of Bryan Cave's Intellectual Property Client Service Group:

Robert Alpert
(212) 541-1292
robert.alpert
@bryancave.com

Marcy J. Bergman
(415) 675-3421
marcy.bergman
@bryancave.com

Michael J. Caruso
(212) 541-3037
michael.caruso
@bryancave.com

Kara E.F. Cenar
(312) 602-5019
kara.cenar
@bryancave.com

George C. Chen
(602) 364-7367
george.chen
@bryancave.com

J. Bennett Clark
(314) 259-2418
ben.clark
@bryancave.com

Daniel A. Crowe
(314) 259-2619
dacrowe
@bryancave.com

Chris L. Gilbert
(214) 721-8049
chris.gilbert
@bryancave.com

Stephen P. Gilbert
(212) 541-1236
spgilbert
@bryancave.com

Edward J. Hejlek
(314) 259-2420
edward.hejlek
@bryancave.com

Erik W. Kahn
(212) 541-1143
erik.kahn
@bryancave.com

Michael Kahn
(314) 259-2251
mike.kahn
@bryancave.com

Robert G. Lancaster
(310) 576-2239
rglancaster
@bryancave.com

Kenneth Lee Marshall
(415) 675-3444
klmarshall
@bryancave.com

Robert A. Padway
(415) 675-3428
robert.padway
@bryancave.com

Mark A. Paskar
(312) 602-5165
mapaskar
@bryancave.com

Jonathan Stuart Pink
(949) 223-7173
jonathan.pink
@bryancave.com

Ryan Tyler Pumpian
(404) 572-6851
ryan.pumpian
@bryancave.com

David A. Roodman
(314) 259-2614
daroodman
@bryancave.com

Eric P. Schroeder
(404) 572-6894
eric.schroeder
@bryancave.com

Joseph J. Villapol
(212) 541-2038
joseph.villapol
@bryancave.com

Charles L. Warner
(404) 572-6718
charles.warner
@bryancave.com