

DISTRICT COURTS, FAIR USE, AND LITERARY PARODIES: PARSING THE BEAUTIFUL, RECIPROCAL ARRANGEMENT

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Among other things, you'll find that you're not the first person who was ever confused and frightened and even sickened by human behavior. You're by no means alone on that score, you'll be excited and stimulated to know. Many, many men have been just as troubled morally and spiritually as you are right now. Happily, some of them kept records of their troubles. You'll learn from them—if you want to. Just as someday, if you have something to offer, someone will learn something from you. It's a beautiful, reciprocal arrangement. And it isn't education. It's history. It's poetry.¹

I. INTRODUCTION

Authors have long sought to contribute to this “beautiful, reciprocal arrangement” by creating original works of scholarship, often in response to other writers troubled by the same moral and spiritual dilemmas. Copyright has somewhat complicated this arrangement by deeming some references to another’s work to be violative of that author’s rights to his original. Congress has tried to strike a delicate balance between the rights of an original author to his creation and the right to contribute to the “marketplace of ideas” guaranteed to the public by the First Amendment.² To do so, it codified the judicial fair use doctrine and vested district courts with the discretion to determine when uses have crossed the line from fair use to infringement.³ The lack of precision in where courts should draw the line,

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¹ J.D. SALINGER, *THE CATCHER IN THE RYE* 246 (1951).

² See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”).

³ See 17 U.S.C. § 107 (2006) (codifying the judicial doctrine of fair use).

however, sometimes leads courts to prioritize one set of rights over the other, resulting in uncertainty and unpredictability.

In the United States, the use of copyright to protect one's economic interest in artistic creation derives from the British Statute of Anne, which Parliament passed in 1710 to prevent publishers from publishing books without the original author's consent.⁴ The Statute of Anne gave economic rights to authors of books, but it also limited these rights by restricting the copyright to printing and reprinting copies of that book.⁵ In addition, the term of the copyright was limited to fourteen years.⁶ Following the Revolution, the fledgling United States incorporated the limitations on copyright from the Statute of Anne in an early resolution of the Continental Congress⁷ and later used this tradition in the formation of the United States Constitution's Copyright Clause.⁸

Modern copyright protection in the United States is found in the Copyright Act of 1976, specifically 17 U.S.C. § 102, which explicitly allows for copyrights over particular modes of expression, such as

⁴ See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), available at http://avalon.law.yale.edu/18th_century/anne_1710.asp ("Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing . . . books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment . . ."); see also Tracey Topper Gonzales, Note, *Distinguishing the Derivative from the Transformative: Expanding Market-Based Inquiries in Fair Use Adjudications*, 21 CARDOZO ARTS & ENT. L.J. 229, 232 (2003).

⁵ Statute of Anne, 1710, 8 Ann., c. 19 (Eng.) (stating that the title of the statute is "[a]n act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned").

⁶ *Id.* ("That the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of first publishing the same, and no longer."); see also Diane Kilpatrick-Lee, *Criminal Copyright Law: Preventing a Clear Danger to the U.S. Economy or Clearly Preventing the Original Purpose of Copyright Law?*, 14 U. BALT. INTELL. PROP. L.J. 87, 91 (2005).

⁷ Journal of the United States in Congress Assembled, Containing the Proceedings from Nov. 1782 to Nov. 1783, at 256–57 (Philadelphia, C.D. Claypoole, 1783), available at http://ipmall.info/hosted_resources/lipa/copyrights/Resolution%20of%20the%20Continental%20Congress%20Respecting%20Copyright.pdf ("That it be recommended to the several States, to secure to the authors or publishers of any new books not hitherto printed . . . the copyright of such books for a certain time not less than fourteen years from the first publication . . .").

⁸ U.S. CONST. art. I, § 8, cl. 8 (stating that one of the powers of Congress is "[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"); see also Craig Joyce & L. Ray Patterson, Essay, *Copyright in 1791: An Essay*, 52 EMORY L.J. 909, 931–38 (2003).

literary works, musical works, and visual works.⁹ The statute also vests artists and authors with the right to reproduce their original work, as well as the right to create derivative works from their originals.¹⁰ Ultimately, copyright protection serves to encourage artists and authors to create original works for the benefit of the public welfare;¹¹ allowing them a monopoly over these creations incentivizes the process.¹² The protection, however, is statutorily limited; Congress specified that protection extends only to “original works of authorship fixed in any tangible medium of expression.”¹³ The statute further limits copyright protection by disallowing copyrights over “any idea, procedure, process, system, method of operation, concept, principle, or discovery.”¹⁴ Thus, Congress emphasized the limited nature of copyright protection by explicitly drawing a line between ideas and actual expression of those ideas.

The idea/expression dichotomy embodied in the statute ensures some measure of First Amendment protection while still preserving an author’s limited monopoly over his expression.¹⁵ Not all elements of a given work will always be copyrightable; for this reason, whether someone has infringed another’s copyright will first depend upon a court’s characterization of an author’s or artist’s work as protectable expression rather than merely an idea, which cannot generally be copyrighted.¹⁶ Ultimately, the idea/expression dichotomy serves to prevent someone from “stifling public debate by maintaining a monopo-

⁹ 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.”).

¹⁰ *Id.* § 106.

¹¹ See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

¹² See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”); see also *Kilpatrick-Lee*, *supra* note 6, at 94.

¹³ 17 U.S.C. § 102(a).

¹⁴ § 102(b).

¹⁵ See Barbara S. Murphy, Comment, *The Wind Done Gone: Parody or Piracy? A Comment on Suntrust Bank v. Houghton Mifflin Company*, 19 GA. ST. U. L. REV. 567, 573 (2002).

¹⁶ See Jonathan S. Katz, *Expanded Notions of Copyright Protection: Idea Protection Within the Copyright Act*, 77 B.U. L. REV. 873, 878–79 (1997).

ly on historical fact or bare ideas.”¹⁷ Nevertheless, the boundary between what is just an idea and what constitutes copyrightable expression is a difficult one to fix with any precision. As Judge Learned Hand once commented, “Nobody has ever been able to fix that boundary, and nobody ever can.”¹⁸ Thus, although the idea/expression boundary is intended to protect important First Amendment concerns, it is not always able to do so, nor does it create clear guidelines for creators and producers to follow.¹⁹

U.S. copyright law, as opposed to the law in many European countries, is further limited in that U.S. law does not generally explicitly recognize an author’s moral rights to his creation.²⁰ “Moral rights,” a doctrine originally established in France, embodies the idea that an author possesses more than merely economic rights in his or her creation.²¹ Such rights include “the right to prevent others from being named as the author of his work” as well as “the right to prevent others from making deforming changes in his work.”²² The Berne Convention, signed by several countries, codified these rights more broadly to protect authors’ non-economic rights, primarily rights to attribution and integrity.²³ In the United States, explicit statutory protection of moral rights extends only to works of visual art rather than to literary or musical works.²⁴ Further, “Congress made clear its antipathy to the expansion of copyright law to embrace gen-

¹⁷ Tiffany D. Trunko, *Remedies for Copyright Infringement: Respecting the First Amendment*, 89 COLUM. L. REV. 1940, 1949 (1989).

¹⁸ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

¹⁹ In cases of literary works, the idea/expression dichotomy becomes relevant in a discussion of whether a character or storyline is copyrightable expression rather than merely an idea. Generally, literary characters are considered copyrightable to the extent that they are well developed in the fictional story in which they appear. *See id.* (“It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinctly.”); *see also* Michael Todd Helfand, Note, *When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623 (1992).

²⁰ *See Gilliam v. Am. Broad. Co.*, 538 F.2d 14, 24 (2d Cir. 1976) (“American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.”).

²¹ 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01 (2009).

²² *Id.*

²³ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3, available at <http://www.law.cornell.edu/treaties/berne/6bis.html>.

²⁴ Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(a) (2006). “Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not that author is the copyright owner.” *Id.* § 106A(b).

eral moral rights.”²⁵ The lack of explicit statutory protection for the moral rights of authors underscores Congress’s protection of the “marketplace of ideas” and furthers the progress of science and the arts protected by the U.S. Constitution.²⁶

In addition to the idea/expression dichotomy and the general lack of protection for moral rights, Congress has also limited copyright protection in its statutory embodiment of the judicially created fair use doctrine, 17 U.S.C. § 107. Section 107 allows for “infringement” of copyrights, so long as that infringement is for a legitimate purpose. Legitimate purposes include, but are not limited to, “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”²⁷ To determine whether a work qualifies as fair use, courts apply four factors to the work in question.²⁸

Courts first address “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”²⁹ This first factor tends to assess how transformative a work is when compared to the original.³⁰ To be considered transformative, “[t]he use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”³¹

The second factor courts consider in analyzing fair use is “the nature of the copyrighted work.”³² This factor “recognizes that there is a hierarchy of copyright protection in which original, creative works are afforded greater protection than derivative works or factual compilations.”³³

The third fair use factor assesses “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”³⁴ This factor has both quantitative and qualitative elements.³⁵ The ap-

²⁵ 3 NIMMER & NIMMER, *supra* note 21, § 8D.06.

²⁶ See U.S. CONST. art. I, § 8, cl. 8.

²⁷ 17 U.S.C. § 107 (2006).

²⁸ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

²⁹ § 107(1).

³⁰ See *Campbell*, 510 U.S. at 579.

³¹ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

³² § 107(2).

³³ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001); see also *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (“In general, fair use is more likely to be found in factual works than in fictional novels.”).

³⁴ § 107(3).

³⁵ 4 NIMMER & NIMMER, *supra* note 21, § 13.05(A)(3).

propriate quantity of material that may be taken ultimately depends on the purpose the new work is intended to serve, while the quality of the material that is used relates to whether the new work appropriates the “heart of the work,” or material that may interfere with the market of the original.³⁶

Finally, under the fourth factor, courts consider “the effect of the use upon the market for or value of the copyrighted work.”³⁷ “The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute, or, in [Justice] Story’s words ‘supersede[s] the use of the original.’”³⁸ Once a court evaluates each individual factor, it will weigh the factors to determine whether a use tips in favor of or against fair use.³⁹

Although the four factors apply in every case in which a court analyzes fair use, the subjectivity built into the test allows judges the discretion to look at each case individually rather than to rely on bright-line rules.⁴⁰ Because the fair use doctrine is “an equitable rule of reason,” Congress did not want to solidify a definition that could be applied to all situations; instead, Congress included in the statute criteria that had evolved over time through judicial decisions.⁴¹ Further, Congress made clear that codifying the fair use factors did not serve to change, narrow, or enlarge the previous judicial doctrine and that the factors are illustrative, not exhaustive, of what courts should consider.⁴² In codifying this fair use doctrine, Congress emphasized that “the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”⁴³ Additionally, the fundamental purpose of copyright is “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.”⁴⁴ The fair

³⁶ Leval, *supra* note 31, at 1122–23.

³⁷ § 107(4).

³⁸ Leval, *supra* note 31, at 1125 (quoting *Folsom v. March*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901)).

³⁹ See *Salinger v. Colting*, 641 F. Supp. 2d 250, 268 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

⁴⁰ See Michael A. Einhorn, *Miss Scarlett’s License Done Gone!: Parody, Satire, and Markets*, 20 CARDOZO ARTS & ENT. L.J. 589, 591 (2002).

⁴¹ H.R. REP. No. 94-1476, at 65 (1976).

⁴² *Encyclopedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1168 (W.D.N.Y. 1982).

⁴³ H.R. REP. No. 94-1476, at 66 (1976).

⁴⁴ U.S. CONST. art. I, § 8, cl. 8.

use doctrine furthers this goal by allowing authors and artists to transform existing works for some creative, original purpose.⁴⁵

Justice Story once stated,

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.⁴⁶

This Comment will address district courts' application of the four fair use factors to asserted cases of parody, most specifically in the context of parodic sequels to literary novels, to determine whether these court decisions adequately protect the First Amendment rights of the authors of these sequels.

Part II of this Comment discusses how courts have applied the fair use factors to parody in various forms of media and confronts the differences in analysis that may result depending upon which mode of expression is being studied. Part III discusses the different types of relief afforded depending on the form of expression the parody takes. Parts IV and V analyze two recent district court decisions that involved parodic sequels and discuss how the courts applied the fair use factors to reach their decisions about injunctive relief. Finally, Part VI discusses several possible solutions to the problem of "arbitrary" district court application of the fair use factors in this context.

II. FAIR USE AND PARODIES IN DIFFERENT FORMS OF MEDIA

In *Campbell v. Acuff-Rose Music, Inc.*, the U.S. Supreme Court made explicit that parody could fall within the purview of the fair use doctrine.⁴⁷ In *Campbell*, the Court analyzed rap group 2 Live Crew's use of the title, opening bass riff, and one verse of Roy Orbison's song "Oh, Pretty Woman" in its own rap "parody."⁴⁸ The Court first determined that the factors outlined in the Copyright Act were not exhaustive and should be considered in terms of all of the facts of a particular case; the statute essentially creates "general guidance" to courts, but courts are not limited to the examples listed in the statute.⁴⁹ The Court next commented that the "goal of copyright, to promote science and the arts, is generally furthered by the creation

⁴⁵ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–76 (1994).

⁴⁶ *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436).

⁴⁷ 510 U.S. 569, 580–81 (1994).

⁴⁸ See *Murphy*, *supra* note 15, at 578.

⁴⁹ *Campbell*, 510 U.S. at 577.

of transformative works.”⁵⁰ For this reason, those who transform another’s work through the use of parody are able to claim fair use, much in the way others who comment and criticize do.⁵¹ Finally, the Court cautioned that courts should be careful in applying factor four, which considers the effect on the market for the copyrighted work.⁵² Parodies will seldom become market substitutes for the original, which is what factor four is designed to prevent.⁵³ Factor four, therefore, should not be applied to consider the potential economic effects from a parody’s negative depiction of a given work.⁵⁴

Campbell thus created a broad standard for how district courts should approach the fair use doctrine in the context of parody. Therefore, in cases in which the creator of a derivative work is asserting a defense of fair use on the grounds of parody, courts must, as a threshold matter, determine whether such parody exists.⁵⁵ Even if a court finds the work to be a parody, a finding of fair use is not guaranteed; the court must then apply the other factors to determine whether the balance tips in favor of or against fair use.⁵⁶ In their analyses, courts will first attempt to distinguish between parody and satire; while parody requires some appropriation from another work to be able to criticize or comment on it, a satire stands alone and does not need to use another’s material in the same way that a parody would because a satire comments on something unrelated to the original.⁵⁷ Thus, if a court determines a writing to be a satire rather than a parody, the author will have less of a reason to appropriate work from another source because his satire should be able to stand on its own. To make this determination, a court will consider whether “a parodic character may reasonably be perceived”⁵⁸ in the new work; if so, the court will consider it a parody.⁵⁹

Following *Campbell*, another difficulty courts face in discerning parody is the inconsistent application of the term “parody.” The

⁵⁰ *Id.* at 579.

⁵¹ *Id.*

⁵² *Id.* at 591.

⁵³ *Id.*

⁵⁴ *Id.* at 591–92 (“We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”).

⁵⁵ *Campbell*, 510 U.S. at 582.

⁵⁶ Leval, *supra* note 31, at 1111.

⁵⁷ *Campbell*, 510 U.S. at 580–81.

⁵⁸ *Id.* at 582.

⁵⁹ *Id.*

Campbell Court determined that for the purpose of the Copyright Act, parody consists of “the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s work.”⁶⁰ Further, “a work [does] not have to advertise itself as a parody” because the same creative goals would be served with or without a label.⁶¹ Some confusion also lies in whether a parody is required to be humorous in making its point. A traditional definition of parody is “a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule.”⁶² But the legal definition of parody makes no reference to humor; instead, as *Campbell* makes clear, a work must merely comment on the original through incorporation of material from the original to qualify as a parody.⁶³ This definition, however, has not prevented some courts from assessing the level of humor found in a given work to determine whether or not it should qualify for the fair use defense as a parody.⁶⁴

Since *Campbell*, the circuits have defined parody both narrowly and broadly, reaching seemingly divergent results.⁶⁵ For example, in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, the Ninth Circuit held that a book that used stylistic and artistic elements from Dr. Seuss books to “parody” the O.J. Simpson murder trial did not constitute fair use because the author made “no effort to create a transformative work.”⁶⁶ Although in this case “a parodic character may be

⁶⁰ *Id.* at 580.

⁶¹ Jonathan M. Fox, *The Fair Use Commercial Parody Defense and How to Improve It*, 46 IDEA 619, 626 (2006).

⁶² *Parody – Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/parody> (last visited Feb. 25, 2011).

⁶³ *Campbell*, 510 U.S. at 580; see also Fox, *supra* note 61, at 619–20.

⁶⁴ See *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 113 (2d Cir. 2009) (“Although we recognize some humor in ‘Char’ bucks as a reference to the dark roast of the Starbucks coffees, Black Bear’s claim of humor fails to demonstrate such a clear parody as to qualify”); *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1405 (9th Cir. 1997) (“There are confusing parodies and non-confusing parodies. All they have in common is an attempt at humor through the use of someone else’s trademark.”); *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499, 509 (S.D.N.Y. 2009) (“This stems from [the] fact that parody’s humor ‘necessarily springs from recognizable allusion to its object through distorted imitation.’” (quoting *Campbell*, 510 U.S. at 588)); *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1373 n.11 (N.D. Ga. 2001) (“Parody is a term that implies wit and humor, neither of which is in evidence here.”), *rev’d*, 268 F.3d 1257 (11th Cir. 2001).

⁶⁵ See Fox, *supra* note 61, at 628–29.

⁶⁶ 109 F.3d 1394, 1401 (9th Cir. 1997) (“Although *The Cat NOT in the Hat!* does broadly mimic Dr. Seuss’ characteristic style, it does not hold *his style* up to ridicule.”). *But see* *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998)

reasonably perceived,” the court applied this standard narrowly and rejected the defendant’s fair use defense.⁶⁷ This case highlights that the difficulty with applying the fair use factors to works with parodic purposes, as opposed to those with scholarly or research purposes, is that “judges can ‘manipulate’ the flexible statutory fair use factors to effectively censor parodies ‘because they [find] them immoral or personally distasteful.’”⁶⁸ Whether this “manipulation” is intentional may be debatable, but the flexible standard does establish the basis for it to occur.⁶⁹ The *Campbell* court, however, cautioned that “[w]hether . . . parody is in good taste or bad does not and should not matter to fair use.”⁷⁰ This does not change the fact that, across jurisdictions, would-be parodists cannot know what to expect because court decisions are often unpredictable both in the way they draw the parody/satire distinction and in their determination of whether the parody can only comment on the original work or can use the original to comment on a broader issue.⁷¹

Courts also seem to differ in their interpretations of whether the use of copyrighted material in parodying matters other than the copyrighted material can qualify as fair use. This question of scope may arise if an author of a parodic sequel uses material from the original work to comment not only on the work but also on an issue loosely related to the work.⁷² In *Elsmere Music, Inc. v. National Broadcasting Co.*, the U.S. District Court for the Southern District of New York found that even if a parody “did not parody the plaintiff’s song itself, that finding would not preclude a finding of fair use.”⁷³ In *Elsmere*, the court addressed Saturday Night Live’s (SNL’s) use of Elsmere’s copyrighted song “I Love New York” in a parody entitled “I Love So-

(holding that because a movie poster that used material from a professional photograph could “reasonably be perceived as” a parody, it could be considered fair use).

⁶⁷ *Dr. Seuss*, 109 F.3d at 1403.

⁶⁸ Murphy, *supra* note 15, at 578.

⁶⁹ See 4 NIMMER & NIMMER, *supra* note 21, § 13.05(A)(5)(a) (“Accordingly, courts weigh the factors the way they deem best in individual cases. The result, unfortunately, is often that the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions.” (internal quotation marks omitted)).

⁷⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994).

⁷¹ See Beth Warnken Van Hecke, *But Seriously Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 MINN. L. REV. 465, 474 (1992).

⁷² See *infra* Parts IV, V (discussing two cases of parodic sequels; one commented on the original novel and the depiction of African-American slaves during the Reconstruction era, and the other commented on the original novel and its relationship with the novel’s author).

⁷³ 482 F. Supp. 741, 746 (S.D.N.Y. 1980).

dom.”⁷⁴ Elsmere argued that SNL did not use the song to parody the song itself, but rather to comment on New York City’s problems in general.⁷⁵ The court determined that “the issue to be resolved by a court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied song itself.”⁷⁶

Similarly, in *M.C.A., Inc. v. Wilson*, the Second Circuit found that “a permissible parody need not be directed solely to the copyrighted song but may also reflect on life in general. However, if the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up.”⁷⁷ Further, in *Bourne Co. v. Twentieth Century Fox Film Corp.*, the Southern District of New York addressed a claim that the defendant’s creation of a song entitled “I Need a Jew” infringed on the plaintiff’s copyright of the song “When You Wish upon a Star.”⁷⁸ The plaintiff claimed that the use constituted copyright infringement because the song “I Need a Jew” did not parody the song “When You Wish upon a Star,” but rather commented on racism and bigotry in general.⁷⁹ The court held that “[t]he song can be ‘reasonably perceived’ to be commenting that any categorical view of a race of people is childish and simplistic, just like wishing upon a star.”⁸⁰ In addition, the court said that the defendants “were clearly attempting to comment in some way on the wishful, hopeful scene in *Pinocchio* with which the song is associated.”⁸¹ In contrast, in *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*, the court held that “[t]he concept or form of parody which justifies protection under the copyright law, and exemption from liability for infringement, consists of an original expression which has social value by

⁷⁴ *Id.* at 744.

⁷⁵ *Id.* at 745. Although this case was decided more than a decade before *Campbell*, *Campbell* explained that “[a] parody that more loosely targets an original than the parody presented here may still be sufficiently aimed at an original work to come within our analysis of parody.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 n.14 (1994). This footnote leaves the door open for courts to weigh more or less heavily whether the parody comments on the original or on another issue depending on whether the other fair use factors tip for or against fair use. *Id.* For this reason, *Elsmere* and similar decisions are still cited by courts agreeing with this proposition. See, e.g., *Abilene Music, Inc. v. Sony Music Ent., Inc.*, 320 F. Supp. 2d 84, 91 (S.D.N.Y. 2003).

⁷⁶ *Elsmere*, 482 F. Supp. at 746.

⁷⁷ 677 F.2d 180, 185 (2d Cir. 1981).

⁷⁸ 602 F. Supp. 2d 499 (S.D.N.Y. 2009).

⁷⁹ *Id.* at 506.

⁸⁰ *Id.*

⁸¹ *Id.* at 507 (italics added).

commenting upon the work being parodied.”⁸² The uncertainty as to the extent of the legal definition of parody may be the difference between a finding of fair use and a finding of infringement. Those who choose to comment on society or on a given work through the use of parody should know the boundaries of this form of expression and should be aware of the potential future legal battle before the work is published rather than afterward.

The approach to the fair use factors that a court uses in a given case often depends upon which mode of expression the derivative work employs. In cases of literary infringement, courts will excerpt passages from both works and draw qualitative comparisons.⁸³ When courts are analyzing musical or other nonliterary works, however, they will often attempt to assess potential infringement in terms of quantity of material appropriated from an original.⁸⁴ A quantitative analysis is more objective and poses less of a risk of “judicial manipulation” of the fair use factors than does a subjective qualitative analysis. For this reason, the First Amendment rights of literary parodists are put in a more perilous position than those of their musical or even visual counterparts. This is most evident when courts use injunctive relief in cases of literary parody.

III. DISTRICT COURTS AND INJUNCTIVE RELIEF

Many scholars believe that issuing preliminary injunctions in copyright cases implicates concerns of prior restraint of an author’s First Amendment rights.⁸⁵ As Mark Lemley and Eugene Volokh have noted, “[p]reliminary injunctions in copyright cases—and in certain other types of intellectual property cases—are at least as troublesome as preliminary injunctions in obscenity or libel cases. We believe that under the Court’s prior restraint jurisprudence many intellectual

⁸² No. C79-1766A, 1981 U.S. Dist. LEXIS 15976 at *4–5 (N.D. Ga. August 26, 1981).

⁸³ See *infra* Parts IV, V.

⁸⁴ See *Savage v. Council on American-Islamic Relations Action Network, Inc.*, No. C 07-6076 SI, 2008 U.S. Dist. LEXIS 60545, at *19–21 (N.D. Cal. July 25, 2008) (discussing the amount of time appropriated from a radio program for a commentary on the program’s message and determining that the amount of time taken was reasonably necessary to the commentary); see also *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 325–26 (S.D.N.Y. 2008) (discussing the fact that because fifteen seconds of a song were used in a movie, the “amount and substantiality” factor tipped in favor of defendant).

⁸⁵ See, e.g., *Trunko*, *supra* note 17, at 1942 (“First amendment issues arise in copyright cases because enjoining publication of a book upon finding infringement may abridge the alleged infringer’s right to freedom of speech. Yet prior restraints in the form of injunctions are routinely available in copyright cases.”).

property preliminary injunctions are therefore unconstitutional.”⁸⁶ This is true especially in light of the fact that artists and authors filing copyright-infringement suits may seek a variety of relief, including injunctions, impoundments, damages or profits, and costs and attorney fees.⁸⁷ Under 17 U.S.C. § 502, a court with jurisdiction to hear copyright actions has the ability to grant injunctive relief “on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”⁸⁸ Plaintiffs in copyright-infringement suits tend to favor injunctive relief because it prevents infringers of the copyright from further marketing and distributing a work or a product that interferes with the economic viability of the original.⁸⁹ Injunctive relief, however, may serve to repress elements of original expression found alongside “infringing” material in a given work, which presents the problem of restraint of free speech.⁹⁰

Although courts dealing with other substantive issues will generally apply a four-factor test to establish whether injunctive relief is appropriate in a given case, these courts tend to treat plaintiffs in copyright cases more favorably and ease the standard.⁹¹ In non-copyright cases, courts will address (1) whether the plaintiff is likely to succeed on the merits; (2) whether the plaintiff will suffer irreparable injury if the injunction is not granted; (3) whether the balance of hardships tips in the plaintiff’s favor; and (4) whether granting the injunction would be in the public interest.⁹² In copyright-infringement cases,

⁸⁶ Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 241 (1998).

⁸⁷ 17 U.S.C. § 502–505 (2006).

⁸⁸ § 502(a).

⁸⁹ See Andrew F. Spillane, Comment, *The Continuing Vitality of the Presumption of Irreparable Harm in Copyright Cases*, 15 MARQ. INTELL. PROP. L. REV. 257, 283–85 (2011).

⁹⁰ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994). In *Campbell*, the Supreme Court noted that

[b]ecause the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the 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.

Id. (quoting Leval, *supra* note 31, at 1132); see also Trunko, *supra* note 17, at 1950 (“Courts tend to suspect that quotation is stealing and that moral opprobrium attaches to the act of derivative use, forgetting that all intellectual activity is in part derivative and that certain intellectual endeavors such as criticism or history are explicitly referential.”).

⁹¹ See Lemley & Volokh, *supra* note 86, at 158.

⁹² *Id.*

however, this factor analysis often collapses into a discussion of the plaintiff's likelihood of success on the merits, because irreparable harm to the original author is presumed.⁹³ In fact, all circuits except the Fifth Circuit "hold that when a plaintiff in a copyright case demonstrates a likelihood of success on the merits . . . the district court must presume that the remedies at law would be inadequate."⁹⁴

Although the readiness to issue preliminary injunctions does not conflict with First Amendment free speech issues in cases of outright piracy of an original work, this partiality may prove problematic in other cases because parties will often bring copyright-infringement claims against works that *do* have significant transformative value.⁹⁵ Further, whether the creator of a derivative work will be successful in an asserted fair use defense "depends on widely varying perceptions held by different judges."⁹⁶ In many copyright cases in which a court awards a party injunctive relief, "the copyright owner's interest may be adequately protected by an award of damages for whatever infringement is found."⁹⁷ In the context of unauthorized literary sequels, district courts seem to end up analyzing the merit of the sequel, or the quality of the writing, instead of determining how the sequel may affect the copyright-holder's rights to his or her original or to derivatives of the original.⁹⁸ Two recent district court cases involving such literary sequels, *Suntrust Bank v. Houghton Mifflin Company*⁹⁹ and *Salinger v. Colting*,¹⁰⁰ serve to illustrate this tendency.

⁹³ See *Country Kids 'N City Slicks v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996) ("[T]he prevailing view in cases of copyright infringement [is] that a showing of likelihood of success on the merits raises a presumption of irreparable harm."); Lemley & Volokh, *supra* note 86, at 159 ("If the copyright owner demonstrates a likelihood of success, courts are virtually unanimous in dispensing with the need to show irreparable injury.")

⁹⁴ H. Tomas Gomez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197, 1206 (2008); see, e.g., *Cadence Design Sys. v. Avant! Corp.*, 125 F.3d 824, 827 (9th Cir. 1997) ("A copyright infringement defendant cannot rebut the presumption of irreparable harm by showing that money damages are adequate.")

⁹⁵ See, for example, *Suntrust Bank v. Houghton Mifflin Company* and *Salinger v. Colting*, discussed *infra* in Parts IV and V.

⁹⁶ Leval, *supra* note 31, at 1132.

⁹⁷ *Id.*

⁹⁸ See *infra* Parts IV, V.

⁹⁹ 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir. 2001).

¹⁰⁰ 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

IV. *SUNTRUST BANK V. HOUGHTON MIFFLIN COMPANY*

Plaintiff Suntrust Bank filed suit against Houghton Mifflin Company and sought a preliminary injunction to prevent the defendant from distributing *The Wind Done Gone* by Alice Randall (“Randall’s novel”), a sequel to *Gone with the Wind* (“GWTW”) that the plaintiff claimed interfered with its copyright.¹⁰¹ Randall’s novel retells the story of *GWTW* from the point of view of Cynara, a slave and the daughter of Mammy, a character in *GWTW*.¹⁰² The defendant claimed that the reason for the direct, explicit, and repeated references to *GWTW* was to critique *GWTW*’s negative depiction of African-Americans.¹⁰³ The court began its analysis by emphasizing that, under 17 U.S.C. § 106(2), authors of original works have the exclusive right to create derivative works.¹⁰⁴ Furthermore, the plaintiff had already created several sequels to the original novel; the plaintiff therefore argued that further publication and distribution of Randall’s novel would ultimately destroy the market for these products.¹⁰⁵

After establishing that Randall’s novel contained “actionable copying,” the court addressed the defendant’s fair use claim and found that the novel did not constitute a “fair use” of the material taken from *GWTW*.¹⁰⁶ To draw this conclusion, the court applied the four fair use factors under § 107.¹⁰⁷ First, the court analyzed the transformative value of Randall’s novel to determine whether “the purpose and character” of the use weighed in favor of a fair use finding.¹⁰⁸ This determination necessitated that the court analyze how the aspects taken from *GWTW* were integrated in the new novel and “what the author attempt[ed] to accomplish by creating her new work through the copying of the original expression of another artist.”¹⁰⁹ The court eventually conceded that Randall’s novel contained some parodic elements and was therefore at least a little transformative, but its overall purpose was not solely to comment on or to criticize the original, and therefore, the book was viewed as an unauthorized sequel.¹¹⁰ Essentially, the court determined that “the new work does not

¹⁰¹ *Suntrust*, 136 F. Supp. 2d at 1364.

¹⁰² *Id.*

¹⁰³ *Id.* at 1367.

¹⁰⁴ *Id.* at 1365.

¹⁰⁵ *Id.* at 1363–64.

¹⁰⁶ *Id.* at 1386.

¹⁰⁷ See discussion *supra* accompanying notes 28–39.

¹⁰⁸ *Suntrust*, 136 F. Supp. 2d at 1371.

¹⁰⁹ *Id.* at 1374.

¹¹⁰ *Id.* at 1377–78.

make use of a hero, but, rather, takes fifteen main characters, more fully explains what happened in the previous work, and then tells what happens to them thereafter—a sequel.”¹¹¹ The court explained that because an authorized sequel to *GWTW* could accomplish the same effect as Randall’s novel, albeit in a different writing style, Randall’s novel was not sufficiently transformative to be considered fair use.¹¹²

Next, the district court briefly concluded that because *GWTW* is a fictional novel and “is creative, imaginative, and written to gain a financial return for the author’s efforts,” it deserves greater protection under a fair use analysis than would a scholarly work.¹¹³ Factor two therefore weighed against fair use.¹¹⁴ In terms of the third fair use factor—the amount and substantiality of the work used—the court found that Randall’s novel used too much material from *GWTW* to comment on *GWTW*’s “inaccurate portrait of Southern history.”¹¹⁵ The court was not persuaded that Randall’s novel added sufficient new material and commentary to the original story to qualify for fair use.¹¹⁶ Specifically, the court remarked that “Ms. Randall’s use cannot receive the benefit of the fair use defense because she uses far more of the original than necessary.”¹¹⁷ In making this determination, however, the court did not define what amount would be “necessary” in order to make Randall’s point. Instead, the court noted that Randall’s novel “could have copied significantly less of the memorable parts of the original” and would have been able to qualify for fair use as a parody.¹¹⁸

Finally, the court assessed the fourth factor, the effect of the use on the market value of the original. In this analysis, the court emphasized that it needed to address “not only . . . the extent of the new work’s potential market harm to the earlier work but also . . . the effect that would occur if that type of use became widespread.”¹¹⁹ Although the transformative elements made the market effect on the original difficult to determine, the court found that Randall’s novel would ultimately interfere with the copyright-holder’s market for de-

¹¹¹ *Id.* at 1375.

¹¹² *Id.*

¹¹³ *Id.* at 1380.

¹¹⁴ *Suntrust*, 136 F. Supp. 2d at 1380.

¹¹⁵ *Id.* at 1380–81.

¹¹⁶ *Id.* at 1381.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Suntrust*, 136 F. Supp. 2d at 1382 (internal quotation marks omitted).

rivative works, and therefore this factor tipped against fair use.¹²⁰ The court totaled its findings for all four factors to determine that the plaintiff had a cognizable copyright infringement claim and that the defendant's asserted fair use defense would fail; the court thus granted the plaintiff's request for injunctive relief.¹²¹

Ultimately, the Eleventh Circuit reversed the district court's finding that Randall's novel infringed upon *GWTW*'s copyright.¹²² The Eleventh Circuit focused its analysis on whether or not the injunction was the appropriate form of relief in this case, but in order to do so, it needed to analyze both the merit of the copyright infringement claim as well as the defendant's fair use defense.¹²³ In its decision, the Eleventh Circuit discussed the history of copyright and focused on its protection of learning, the public domain, and the exclusive rights of the author that it provides.¹²⁴ The court addressed each of the fair use factors as applied to Randall's novel and found that factors one, three, and four arguably tipped in favor of fair use.¹²⁵ In drawing its conclusion, the court noted that "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 because the public had not had access to Randall's ideas or viewpoint in the form of expression that she chose."¹²⁶ Compared to the district court's opinion, which dismissed Randall's First Amendment claim in one paragraph, the Eleventh Circuit more readily recognized the need to analyze fair use in literary parodies through the First Amendment lens, which ultimately tipped the balance in favor of finding fair use.

V. *SALINGER V. COLTING*

In *Salinger v. Colting*, plaintiff J.D. Salinger filed a complaint against defendant Fredrik Colting, alleging copyright infringement and common law unfair competition; Salinger claimed that Colting's novel, *60 Years Later: Coming Through the Rye* ("*60 Years*"), is derivative of his novel *Catcher in the Rye* ("*Catcher*").¹²⁷ In response, Colting ar-

¹²⁰ *Id.* at 1383.

¹²¹ *Id.* at 1384–86.

¹²² *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), *rev'g* 136 F. Supp. 2d 1357 (N.D. Ga. 2001).

¹²³ *Id.* at 1260.

¹²⁴ *Id.* at 1261–62.

¹²⁵ *Id.* at 1271–76.

¹²⁶ *Id.* at 1277.

¹²⁷ 641 F. Supp. 2d 250, 253–54 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

gued that even if his novel otherwise infringed upon Salinger's copyright, the novel qualified for the fair use defense.¹²⁸ In determining whether to award Salinger a preliminary injunction to prevent Colting from publishing *60 Years* in the United States, the U.S. District Court for the Southern District of New York applied the four fair use factors by comparing the material found in *60 Years* with that of *Catcher*.¹²⁹ To assess the "purpose and character of the use," the court looked to the work's transformative quality and determined whether the new work "merely supersede[s] the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message"¹³⁰ The court said that a transformative use "is not strictly required," but can help guide the court in its evaluation of whether or not a work "advances knowledge and the progress of the arts."¹³¹

The court first analyzed whether *60 Years* qualifies as a parody, "which may claim fair use under § 107."¹³² The court also clarified that precedent had established that the parody characterization only extends to the elements of the work that criticize or comment on the original work rather than the author of the original work himself.¹³³ The court ultimately distinguished *Suntrust* by noting that *60 Years* "contains no reasonably discernable rejoinder or specific criticism of any character or theme of *Catcher*," which made it difficult to classify as a parody.¹³⁴ In its analysis of the parodic qualities of *60 Years*, the court excerpted long passages from both *Catcher* and *60 Years* and attempted to compare the language and themes of the novels to determine if substantial similarities existed between the two.

The court first analyzed the character of Holden Caulfield and compared it to Colting's Mr. C.¹³⁵ Much of the court's language in this analysis indicates that to reach a conclusion, the court must act as a literary critic or at least engage in some form of literary analysis.¹³⁶ For example, the court pulled an entire paragraph of quotes from *Catcher* to present a general overview of Salinger's Holden Caulfield

¹²⁸ 17 U.S.C. § 107(1)–(4) (2006).

¹²⁹ *Salinger*, 641 F. Supp. 2d at 255.

¹³⁰ *Id.* at 256 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 257.

¹³⁴ *Salinger*, 641 F. Supp. 2d. at 258.

¹³⁵ *Id.*

¹³⁶ *See id.* at 258–60.

character.¹³⁷ Following these quotes, the court explained, “to the extent Colting and Defense experts contend that *60 Years* is attempting to accentuate how Holden’s emotional growth would ultimately be stunted by his unwillingness to compromise his principles or engage with ‘the phonies,’ they were again simply rehashing one of the critical extant themes of *Catcher*.”¹³⁸ Despite the fact that Colting explained his attempted comment on *Catcher*, the court instead interpreted *60 Years* to merely reiterate the same themes Salinger had expounded upon years earlier.¹³⁹

The court then commented that while analyzing creative works, it should not rationalize all commercial derivative works as “post hoc” parodies.¹⁴⁰ In a footnote, the court also noted that until the litigation began, Colting never asserted that *60 Years* was to be construed as a parody or critique; rather, he characterized the book as a sequel to *Catcher*.¹⁴¹ The court then addressed Colting’s argument that the inclusion of Salinger as a character in the novel was sufficiently transformative to qualify *60 Years* as a parody.¹⁴² The court did concede that using Salinger as a character in the novel was original, but held that a parody of a literary novel must comment on the work itself, not use the work to comment on something else, such as the author.¹⁴³ Further, the court explained that even if the Salinger character contains transformative qualities, Colting included this character in the novel not to further a critique of the novel, but rather to comment on Salinger and “his supposed idiosyncrasies.”¹⁴⁴

¹³⁷ *Id.* at 258–59. Following this overview, the court noted that “it can be argued that the contrast between Holden’s authentic but critical and rebellious nature and his tendency toward depressive alienation is one of the key themes of *Catcher*.” *Id.* at 259. By making this statement, the court was interpreting the original novel in order to assess Colting’s novel in light of this interpretation, which seems to be a form of literary analysis and comparison.

¹³⁸ *Id.* at 259–60.

¹³⁹ In fact, the court later commented, “*60 Years*’ plain purpose is not to expose Holden Caulfield’s disconnectedness, absurdity, and ridiculousness, but rather to satisfy Holden’s fans’ passion for Holden Caulfield’s disconnectedness, absurdity, and ridiculousness, which *Catcher* has ‘elevated into the realm of protectable creative expression.’” *Id.* (quoting *Castle Rock Ent. v. Carol Publ’g Group*, 150 F.3d 132, 143 (2d Cir. 1998)).

¹⁴⁰ *Salinger*, 641 F. Supp. 2d at 260.

¹⁴¹ *Id.* at 260 n.3.

¹⁴² *Id.* at 262.

¹⁴³ *Id.* at 261. *But see* *Elsmere Music, Inc. v. Nat’l Broad. Co.*, 482 F. Supp. 741, 746 (S.D.N.Y. 1980) (“[T]he issue to be resolved by a court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied song itself.”).

¹⁴⁴ *Salinger*, 641 F. Supp. 2d at 262.

After analyzing whether *60 Years* contained sufficient transformative elements and concluding that it did not, the court then addressed the other fair use factors, and determined that they also “weigh[ed] against a finding of fair use.”¹⁴⁵ The district court held that because *60 Years* was to be sold for profit, the commercial nature of the novel automatically weighed against finding fair use.¹⁴⁶ Similarly, in discussing the “nature of the copyrighted work,” the court explained that it accords more leeway to a fair use claim when the work is “factual or informational” rather than “expressive or creative.”¹⁴⁷ The court implied that because Colting chose to write a novel, fair use would be more difficult to establish.¹⁴⁸ The court determined that in terms of the “amount and substantiality of the portion used,” Colting took “well more from *Catcher*, in both substance and style, than is necessary for the alleged transformative purpose of criticizing Salinger and his attitudes and behavior.”¹⁴⁹ In this analysis, the court again drew on particular language and excerpts from both novels to establish that Colting crossed the line.¹⁵⁰ Echoing language used in the *Suntrust* district court opinion, the court in *Salinger* held that “[d]efendants have taken much more from Salinger’s copyrighted works than is necessary to serve their alleged critical purpose,”¹⁵¹ but did not give any guidance as to how much material would be “necessary” to achieve that purpose.

Finally, the district court determined that because it had previously characterized the novel as a sequel to *Catcher*, *60 Years* falls within the purview of Salinger’s exclusive right to create derivative works and therefore interfered with the market for such derivative works.¹⁵² Because this novel may affect Salinger’s creation of a sequel to *Catcher*, the court held that this factor also weighed against fair use.¹⁵³

At the end of the opinion, the court briefly addressed the standard for injunctions. After reaching its conclusion that Salinger established a prima facie case of copyright infringement, the court determined that “irreparable harm may be presumed,” and granted

¹⁴⁵ *Id.* at 263.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Salinger*, 641 F. Supp. 2d at 263.

¹⁵¹ *Id.* at 267.

¹⁵² *Id.* at 268.

¹⁵³ *Id.* at 268.

Salinger the injunction.¹⁵⁴ Colting appealed the decision, and the United States Court of Appeals for the Second Circuit vacated and remanded the district court's judgment.¹⁵⁵ One of the major issues on appeal was the appropriateness of the district court's issuance of an injunction.¹⁵⁶ Several amicus curiae briefs were filed, and the focus of the briefs was largely on the First Amendment guarantee of free expression.¹⁵⁷ Notable organizations such as the American Library Association used their briefs to emphasize the important First Amendment ramifications of the district court's decision to issue the injunction,¹⁵⁸ which indicated that this subject would become an important issue in the Second Circuit's decision. Ultimately, the court found that the preliminary injunction standard applied by the district court, which presumed irreparable harm once a copyright plaintiff demonstrated a likelihood of success on the merits, was partly abrogated by the U.S. Supreme Court's opinion in *eBay, Inc. v. MercExchange, L.L.C.*¹⁵⁹

Although the *eBay* decision related to permanent injunctions in the patent context, the Second Circuit determined that *eBay*'s holding also applies in the context of preliminary injunctions in copyright actions.¹⁶⁰ In *eBay*, the Supreme Court determined that principles of equity require plaintiffs to satisfy a four-part test before being granted injunctive relief:

- (1) that [plaintiff] has suffered an irreparable injury;
- (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
- (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
- (4) that the public interest would not be disserved by a permanent injunction.¹⁶¹

Because the district court in *Salinger* did not consider all of these factors in issuing its preliminary injunction, the Second Circuit re-

¹⁵⁴ *Id.* at 269.

¹⁵⁵ *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

¹⁵⁶ Brief of Defendant-Appellant at 25, *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (No. 09-2878); Brief of Plaintiff-Appellee at 20, *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (No. 09-2878).

¹⁵⁷ See Brief of Am. Library Ass'n et al. as Amici Curiae Supporting Defendant-Appellants at 3, *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (No. 09-2878) [hereinafter Brief of American Library Association], available at <http://www.arl.org/bm~doc/salingeramicusbrief.pdf>.

¹⁵⁸ *Id.*

¹⁵⁹ *Salinger*, 607 F.3d at 76 (citing *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)).

¹⁶⁰ *Id.* at 77-78.

¹⁶¹ *eBay, Inc.*, 547 U.S. at 391.

manded the case to the district court to reassess whether an injunction would be appropriate under these circumstances.¹⁶² Unlike the Eleventh Circuit in *Suntrust*, the Second Circuit did not analyze the substance of Colting's fair use defense. Rather, in one paragraph, the Second Circuit determined that the district court's finding that Colting would not succeed in his defense was not clear error, and therefore would not be disturbed.¹⁶³ On remand, the parties entered a confidential settlement agreement, which resulted in a permanent injunction forbidding Colting "from manufacturing, publishing, distributing, shipping, advertising, promoting, selling, or otherwise disseminating any copy of the book *60 Years Later* . . . in or to the United States."¹⁶⁴ The result in *Salinger*, perhaps more than the result in *Suntrust*, demonstrates the importance of district court opinions in this context, and highlights the uncertainty literary parodists face.

District courts must often walk a fine line between protecting the economic interests of authors of fictional novels and protecting the First Amendment interests of authors of parodies or sequels. Although cases of unauthorized literary sequels are not litigated frequently, they do illustrate the difficulty district courts face in applying the fair use factors to this form of expression. Further, a possibility exists "that the risk of being held an infringer is deterring rewritings of texts that are still copyrighted and is steering authors to set their revisionary sights instead on public domain works."¹⁶⁵ Allowing the potential for litigation to deter creation produces a result irreconcilable with one of the goals Congress envisioned in codifying the Copyright Act.

Both *Suntrust* and *Salinger* demonstrate the difficulty that district courts face when confronted with the problem of fair use in parodic sequels. Because of the uncertainty in how a court will apply the factors in a given case, creators of parodic literary sequels may think twice before devoting the time and effort to a project that readers may never see. Ultimately, decisions such as *Suntrust* and *Salinger* may serve to chill the creation of such parodies or commentaries, which thwarts Congress's intention to promote artistic endeavors by enacting the Copyright Act.¹⁶⁶ The frequently subjective nature of the fair use factors gives district courts the ability to tailor the analysis to the

¹⁶² *Salinger*, 607 F.3d at 83.

¹⁶³ *Id.* at 83.

¹⁶⁴ Judgment on Consent at 1, *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (No. 09 Civ. 5095).

¹⁶⁵ Note, *Originality*, 115 HARV. L. REV. 1988, 1994 (2002).

¹⁶⁶ See, e.g., Warnken Van Hecke, *supra* note 71.

particular case at issue. But this subjectivity also gives district courts tremendous discretion to determine whether an author has fairly used material to create a parody or whether he or she should be held liable for copyright infringement. As the Eleventh Circuit has explained, “The law grants copyright holders a powerful monopoly in their expressive works. It should not also afford them windfall damages for the publication of the sorts of works that they themselves would never publish, or worse, grant them a power of indirect censorship.”¹⁶⁷ District court judges are not literary critics. Yet a careful reading of both *Suntrust* and *Salinger* demonstrates the ease with which a reasoned application of the fair use factors can lead to an assessment of the quality of the literary work being analyzed. Not all cases will make their way to the circuit courts. While defendants in cases like *Suntrust* may have the merits of their cases reassessed on appeal, not all defendants have this opportunity.¹⁶⁸ Further, even those who do make their way to the circuit courts do so only after lengthy, expensive litigation for a final result that is far from certain.¹⁶⁹ Rather than relying on circuit courts to resolve the discrepancies among the district courts, the problem should be resolved at the district court level.

VI. A SOLUTION TO THE PROBLEM

To more adequately protect the First Amendment rights of parodist-authors while still protecting the economic rights of original authors, district courts should implement three distinct, yet interconnected, changes to the fair use analysis. First, the analysis of a literary parody should begin with a presumption of fair use, which would shift the burden to the original author to disprove fair use in cases of parody. Second, district courts should standardize their application of the fair use factors by focusing their analysis on fair use factor four—the market effect of derivative works on the original. Finally, before issuing injunctive relief in cases of literary parody, dis-

¹⁶⁷ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1283 (11th Cir. 2001).

¹⁶⁸ This conclusion is bolstered by the fact that on appeal, the *Salinger* court opted not to interfere with the district court’s fair use analysis. *See Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010).

¹⁶⁹ Litigating copyright issues may also be more costly than bringing many other types of suits because of the possibility for fee-shifting and attorney’s fees allowed by the Copyright Act. *See* 17 U.S.C. § 505 (2006). “In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.” *Id.*

strict courts should engage in a more stringent analysis of the effects of allowing the parody to be distributed; this more stringent test would ensure that parodist-authors' free speech rights are not being unduly restrained.

A. *Presumption of Fair Use*

A presumption of fair use in cases of parody furthers the original goals of copyright law while still serving to protect the First Amendment rights of parodists. As the Eleventh Circuit noted in its *Suntrust* decision, the three main goals of copyright law are (1) the promotion of learning, (2) the protection of the public domain, and (3) the granting of an exclusive right to the author.¹⁷⁰ The court explained that copyright law promotes learning by "guarding against censorship" and encouraging the dissemination of ideas.¹⁷¹ Similarly, the protection of the public domain ensures that the public will eventually have access to and will be able to use others' creations in novel and important ways,¹⁷² while allowing an author a copyright over a work gives the author a right to exclusively use the work for a limited period of time.¹⁷³ Presuming fair use in cases of parody protects all of these goals while still ensuring the protection of others' First Amendment rights.

One argument against the current statutory treatment of copyright is the term for which the author or artist owns the right. Copyrights were originally intended to be limited economic monopolies, but owners of copyrights are now given these monopolies for a fairly extensive period of time. The first Copyright Act (of 1790) used the Statute of Anne's fourteen-year copyright period and allowed for another fourteen-year renewal.¹⁷⁴ By contrast, the Copyright Act of 1976 extended the copyright period to the life of the author plus fifty years.¹⁷⁵ Congress further extended the period in 1998 to the life of

¹⁷⁰ *Suntrust Bank*, 268 F.3d at 1261–62.

¹⁷¹ *Id.* at 1261.

¹⁷² *Id.* at 1262.

¹⁷³ *Id.* at 1262–63.

¹⁷⁴ Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790), available at <http://www.copyright.gov/history/1790act.pdf> ("[T]he author and authors of any map, chart, book or books already printed within these United States . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording the title thereof in the clerk's office . . .").

¹⁷⁵ 17 U.S.C. § 302(a) (1976), amended by 17 U.S.C. § 302(a) (Supp. IV 1998).

the author plus seventy years.¹⁷⁶ Presuming fair use in cases of parody can alleviate the free speech impediments put in place by the lengthy term of ownership. Essentially, rather than requiring a creator of a transformative derivative work to assert “fair use” as a defense, a copyright owner would be required to disprove fair use.¹⁷⁷ This presents less of a burden to creators of transformative works and furthers the intention that copyright be a limited economic right.¹⁷⁸ Although some court decisions have emphasized that a finding of parody should not be construed as presumptive fair use,¹⁷⁹ such a determination would eliminate much of the subjective analysis courts currently engage in when assessing how much use is “fair.” Some scholars have even gone so far as to advocate a presumption of fair use in all cases of transformation.¹⁸⁰

Similarly, presumptive fair use for parodies furthers the intention of the Constitution’s Copyright Clause that copyright “promote[s] the Progress of Science and useful Arts,”¹⁸¹ or as the Eleventh Circuit explained, encourages protection of the public domain.¹⁸² Copyright-holders are still given the economic incentive to produce original, creative works because they can still obtain copyrights over their novels, bring suit against those who have infringed on their originals, and choose to award licenses to and be paid by those who want to use their original material. Allowing parodists the privilege of a presumption of fair use, however, will also serve to promote

¹⁷⁶ Act of Oct. 27, 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified at 17 U.S.C. § 302(a) (2006) (amending the duration of copyright period)); see also Murphy, *supra* note 15, at 572.

¹⁷⁷ See Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1311 (2008); Maureen McCrann, Note, *A Modest Proposal: Granting Presumptive Fair Use for Musical Parodies*, 14 ROGER WILLIAMS U. L. REV. 96, 101–02 (2009).

¹⁷⁸ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (“The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”).

¹⁷⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994) (“Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners’ suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair.”); *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268 (11th Cir. 2001) (“The fact that parody by definition must borrow elements from an existing work, however, does not mean that every parody is shielded from a claim of copyright infringement as a fair use.”).

¹⁸⁰ See, e.g., Cotter, *supra* note 177, at 1311 (“Put another way, in cases involving transformative uses, the cost of fair use false positives is less than the cost of false negatives, insofar as the latter threaten to undermine important free-speech values.”).

¹⁸¹ U.S. CONST. art. I, § 8, cl. 8.

¹⁸² *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262 (11th Cir. 2001).

progress in the arts by conveying some measure of stability to parodists seeking to legitimately contribute critical commentary of the original. By presuming that parodies entail fair use, courts will no longer easily engage in ad hoc decision-making; it will be more difficult to manipulate the classification of whether or not a given work constitutes parody in order to reach a finding of infringement or fair use.¹⁸³ For this reason, a presumption of fair use will further another of copyright's intended goals: stimulating public debate with creative expression.¹⁸⁴

Presumptive fair use also serves to promote learning and more fully protect a parodist's First Amendment rights. One important function of the First Amendment is to allow citizens to contribute to the "marketplace of ideas."¹⁸⁵ Presuming fair use in the case of parodies solves the potential problem of stifled public debate.¹⁸⁶ Parodies are particularly vulnerable to censorship because those being parodied have the ability to do the censoring. Because parodies often criticize or comment negatively on the original work, authors are not likely to approve the use of their original material.¹⁸⁷ Even criticism

¹⁸³ See Paul Tager Lehr, Note, *The Fair-Use Doctrine Before and After "Pretty Woman's" Unworkable Framework: The Adjustable Tool for Censoring Distasteful Parody*, 46 FLA. L. REV. 443, 460 (1994) ("While the Copyright Act is content neutral, the cases reveal that courts have used the discretion inherent in the fair-use framework to deny protection to sexually explicit or distasteful parodies.").

¹⁸⁴ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 582 (1985) (Brennan, J., dissenting).

The 'promotion of science and the useful arts' requires this limit on the scope of an author's control. Were an author able to prevent subsequent authors from using concepts, ideas, or facts contained in his or her work, the creative process would wither and scholars would be forced into unproductive replication of the research of their predecessors. This limitation on copyright also ensures consonance with our most important First Amendment values.

Id. (citation omitted).

¹⁸⁵ See *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n*, 475 U.S. 1, 8 (1986) ("By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information.").

¹⁸⁶ See *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1519 (9th Cir. 1993) (Kosinski, C.J., dissenting) ("The First Amendment isn't just about religion or politics—it's also about protecting the free development of our national culture. Parody, humor, irreverence are all vital components of the marketplace of ideas.").

¹⁸⁷ See Geri J. Yonover, *Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 103–04 (1996).

To obtain permission from an artist who may assert personal, moral rights would seem to be virtually impossible. Further, we may well wonder how parody could function effectively as commentary and critique if the authority to satirize, criticize, ridicule, or jibe is given. Permission connotes approval—few parodists wish that blessing, and

or negative commentary, however, contributes to the public debate and allows the parodist to express himself or herself creatively. As one scholar notes, “With the recent copyright term extension, one wonders how many more canonical works will be shielded by long copyright terms, and how many rewritings will not be produced because authors cannot get permission to create them.”¹⁸⁸ By the time the copyright period has expired and the original passes into the public domain, relevant commentary or critique may also have expired. Parodists should not be discriminated against because of the form of critique they have chosen to use; censorship of critical commentary in scholarly journals or news articles is not so prevalent.¹⁸⁹ “Fair use, therefore, provides a valuable right to those compelled to challenge a prior work—the right to make reasonable use of the work in their criticism.”¹⁹⁰

Presuming fair use in cases of parody, perhaps along with allowing works to enter the public domain more quickly by reducing the statutory period of copyright protection, will ultimately benefit would-be parodists. As scholars have noted, “[T]he public domain provides the building blocks from which individuals can construct their own speech. But as the scope of intellectual property expands, the scope of available speech diminishes.”¹⁹¹ Granting a presumption of fair use, however, does not completely solve the problem of inconsistent application of the fair use factors. A presumption of fair use does not equate to automatic determination of fair use; courts will still be required to analyze the transformed work in the context of the fair use factors when the copyright-holder attempts to rebut the presump-

few artists whose moral rights of integrity are at risk would wish that curse.

Id.

¹⁸⁸ Note, *Originality*, *supra* note 165, at 1994.

¹⁸⁹ See *Salinger v. Colting*, 641 F. Supp. 2d 250, 263 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

A key distinction that has emerged in the decisions evaluating the second factor [of fair use] is whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational.

Id. (internal quotation marks omitted).

¹⁹⁰ Jeffrey D. Grossett, Comment, *The Wind Done Gone: Transforming Tara into a Plantation Parody*, 52 CASE W. RES. L. REV. 1113, 1127 (2002).

¹⁹¹ John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1208 (2005).

tion.¹⁹² Thus, although a presumption of fair use might help to alleviate the problem, it does not completely resolve it.

B. Standardization of Factor Application

If parodies were presumed to be fair use, a copyright-holder would have the burden of demonstrating why the use was actually an infringement. In their analyses of these arguments, courts would then be required to engage in traditional fair use analysis by applying the statute's four factors. To remedy the confusion and uncertainty associated with application of the fair use factors, however, district courts should instead use more clear-cut, bright-line rules in their application of the factors. One possibility for how courts may achieve a more definitive, predictable result is to collapse the factor analysis into a discussion of how a derivative work affects the market for the original or the market for derivative works created or authorized by the original author—fair use factor four. Collapsing the four-factor test into one factor eliminates much of the subjective analysis that makes court determinations of fair use so unpredictable, but it also still promotes the three major goals of copyright law as discussed by the Eleventh Circuit in *Suntrust*.

Because copyright law in the United States is largely concerned with providing an author or artist with a limited economic monopoly over his or her creation, analyzing the market effects of a derivative work seems like a logical starting place.¹⁹³ If a derivative work is likely to serve the same market as an original and may be viewed as a market substitute for that original, a fair use defense will likely fail; arguably, one major goal of copyright law is to prevent such direct encroachment upon an author's market for his work. Thus, relying solely on the market factor adequately protects authors' economic interests, one of the major purposes of copyright.

Some scholars see this market-based test as a way to analyze more objectively the extent of transformation in a derivative work compared to the original.¹⁹⁴ When two works are substantially similar, they are likely to serve similar markets and act as substitutes for one another. If the works are serving different markets, the derivative work is more likely transformative in character. "Thus, the market analysis balances incentives for authors to create against the public's

¹⁹² See Andrew S. Long, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, 60 OKLA. L. REV. 317, 363 (2007).

¹⁹³ See Topper Gonzalez, *supra* note 4, at 250.

¹⁹⁴ See, e.g., Warnken Van Hecke, *supra* note 71, at 494.

desire for intellectual enrichment.”¹⁹⁵ In cases of parody, the new work is unlikely to serve the same market as the original because the works effectively have different goals. Even in situations in which the market for an original and the market for a parody are the same, the parody is unlikely to become a market substitute for the original. In other words, people will not likely opt to purchase a parody over the original work.¹⁹⁶ Therefore, relying on an analysis of the economic effect of a derivative work on the original will also serve the two other goals of copyright—promoting learning and protecting the public domain.

C. *A More Stringent Test for Administering Injunctive Relief*

A major point of contention for defendants in copyright infringement suits is the standard for injunctive relief applied by the district court. In *Salinger*, briefs written in support of the defendant’s appeal emphasize the short shrift given to the defendant’s First Amendment rights and the presumption of irreparable harm applied to the plaintiff.¹⁹⁷ Applying a more stringent test for issuing injunctions in copyright suits involving parodies, more specifically in cases of parodic literary sequels, would also serve to protect the three fundamental goals of copyright that the Eleventh Circuit highlighted in *Suntrust*: the promotion of learning, the protection of the public domain, and the protection of the exclusive rights of the author.¹⁹⁸

Employing a stricter standard for issuing injunctions serves to promote learning by permitting a greater number of transformative, creative works to be shared and discussed. This ultimately prevents “censorship” by requiring district courts to thoroughly consider how injunctive relief for a copyright-holder may affect a parodist’s contribution to the public debate. In awarding injunctive relief to bar publication and distribution of an allegedly infringing work, courts should also consider the extent to which the public has the right to receive the information contained in the work or the work’s message.

¹⁹⁵ Topper Gonzales, *supra* note 4, at 251.

¹⁹⁶ One could argue that the creation of a parody might actually *bolster* the market for the original; especially in cases of literary parodies, a reader might have difficulty understanding the parody if he or she had not read the original already, which may cause the audience to go out and purchase the original novel.

¹⁹⁷ See Brief of Public Citizen, Inc. as Amicus Curiae Supporting Defendant-Appellants at 14, *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (No. 09-7878), available at <http://cyberlaw.stanford.edu/system/files/Public%20Citizen%27s%20Amicus%20Brief.pdf>; Brief of American Library Association, *supra* note 157, at 1–3.

¹⁹⁸ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261–62 (11th Cir. 2001).

One fundamental purpose of the Copyright Act is to further the public welfare; situations may exist in which the public welfare would be furthered by allowing a work to be published rather than hidden from public view forever—or at least until the copyright period expires.¹⁹⁹ Raising the bar for injunctions helps protect the public domain by allowing works with a unique message or comment to be available for public response. As Colting noted in his brief to the Second Circuit, the public should be able to decide whether a message is worthwhile rather than let the message be preemptively shielded by a court's injunction.²⁰⁰

Raising the standard for injunctive relief in cases of parody also does not conflict with copyright's goal of protecting the rights of an original author. In some circumstances, especially in cases in which a parody becomes a market substitute for an original or contains outright piracy, injunctive relief may be appropriate to best protect the original author's economic claim to his creation. In most cases of parody, however, an original author will not suffer "irreparable harm" by a district court's decision not to issue an injunction, so such irreparable harm should not be presumed.²⁰¹ Requiring district courts analyzing parody cases to assess the balance of hardships and the impact of an injunction on the public interest will also ensure that in addition to taking into consideration economic harm caused to the original author, the courts consider the effect of this remedy on others involved. Further, in some situations, monetary damages, rather than preventing the publication of a transformative comment on the

¹⁹⁹ See Oakes, *supra* note 89, at 989–91.

²⁰⁰ Brief for Defendant-Appellant, *supra* note 156, at 32.

The District Court did not even consider the harm to the public in being denied the opportunity to read [*60 Years*] and to decide for themselves whether Colting's work adds to or alters their understanding of [*Catcher*], Holden and Salinger. The harm to the public's right to receive information, and even entertainment, is perhaps the most compelling factor in weighing the balance of interests in a case of prior restraint.

Id.

²⁰¹ See, e.g., *id.* at 30–31.

On the first prong, absent the presumption, there is no evidence in the record that Plaintiff will suffer any harm whatsoever, much less irreparable harm, from the publication of [*60 Years*]. Plaintiff's representatives admit that Salinger has not written a sequel, and will never permit one either. But even if Salinger were to change his mind, there is no evidence in the record that the market for an authorized sequel, a motion picture based on [*Catcher*] or any other authorized derivative work would be harmed in the slightest by Colting's commentary.

Id. (citation omitted).

original, can better protect an original author's rights over his work.²⁰² In such situations, monetary damages, rather than injunctive relief, should be awarded.

The district court decision in *Salinger* highlights the danger in easing the standard for injunctive relief in copyright infringement cases. The court devotes one paragraph to discussing the presumed irreparable harm that J.D. Salinger would face if *60 Years* were allowed to be published in the United States. The court does not even mention the balance of equities or potential harm to the public interest; perhaps if the district court had weighed these factors more closely, the outcome would have been different.²⁰³ Regardless of whether the outcome of the case would be different, requiring district courts to assess the other balancing factors before issuing injunctions would ensure that authors of unauthorized literary sequels have their original, transformative expression protected and that the public is not deprived of a valuable critique or commentary. District courts are guided by the standard for injunctive relief used in their respective circuits. In cases of copyright infringement, different circuits will apply different standards for injunctive relief depending on whether or not they take a parodist's First Amendment rights into consideration.²⁰⁴ This will ultimately cause great variation in the outcomes of parody cases and great uncertainty for parodists.

This uncertainty can be alleviated to a large degree by presuming fair use in cases of parody, limiting subsequent fair use analysis to the parody's effect on the market for the original or licensed derivative works, and heightening the standard used to issue preliminary injunctions in cases of parody. These steps, when taken in conjunction, will more closely bring a court's fair use analysis into an equitable balance between two viable interests: the economic interests of a copyright-holder and the First Amendment interests of a literary parodist.

VII. CONCLUSION

Since the early days of this country, copyright has been considered a necessary legal protection to safeguard the economic interests of authors and artists. These rights, however, have never been

²⁰² *Id.* at 31 (“[I]f this Court were to find that Plaintiff has shown harm, such harm may be remedied by monetary damages and therefore is not irreparable.”).

²⁰³ See Brief of American Library Association, *supra* note 157, at 4.

²⁰⁴ See generally *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (highlighting First Amendment concerns in overturning an injunction issued by the district court); *Tehrani*, *supra* note 191, at 1226.

absolute. Early on, courts recognized that society's need for free debate should require that some appropriation of another's work be considered fair use. Although Congress eventually codified this "fair use" doctrine, courts retained their authority to use discretion in considering which factors should be important to determine fair use and how heavily courts should weigh each of those factors.

Parody is one vehicle through which an author has the ability to fairly use another's work to make a critical commentary. Authors or other creators of original works, however, frequently bring copyright infringement suits against their parodists, claiming that the parodist appropriated too much of the author's original creation. Courts are then required to balance the interests of the two parties, but in doing so they may be forced to tacitly assess whether or not the parody was successful in conveying its message or if it was of good quality. Depending on the form the parody took, as in a novel, a piece of visual art, or a musical work, the court may engage in either a quantitative or a qualitative analysis to determine whether the use was fair. In doing so, the court is forced to balance two sets of competing rights: those of the original creator and those of the parodist.

This balancing act frequently calls into question which rights should prevail, and the stakes are high for the parties involved. Because copyright holders have a statutory right to request injunctive relief, a parodist may unfortunately realize that a work he or she had put time, effort, and money into may no longer be distributed to the public. This problem is most evident in cases of literary parodies, where the court, to resolve the dispute before it, is left to parse the language carefully selected by two authors, trying to determine the extent of overlap and whether the parody unduly infringes on the original. The current formulation of the fair use test gives judges this freedom to weigh these issues, but this flexibility comes at the expense of certainty.

In Justice Story's words, "No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection."²⁰⁵ The question that must be answered is whether district courts, and courts in general, are the appropriate bodies to analyze this "genius or reflection." As is evidenced in both *Suntrust* and *Salinger*, one man's creativity is another man's copyright infringement. In applying the cur-

²⁰⁵ Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436).

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rent fair use analysis, courts are put in the unsavory position of analyzing literature; similarly, authors of these unauthorized derivative novels are put in the unsettling position of devoting time and energy to an arguably original creation without knowing if it can ever be published. Although fair use analysis is designed to be flexible in application, this flexibility may ultimately serve to chill the production of artistic creation it was designed to promote. A combination of a presumption of fair use in cases of parody, standardization of the fair use factors based upon the market effect of the derivative, and a more rigorous standard for issuing injunctive relief in copyright cases would improve the protection of a parodist-author's First Amendment rights. Further, the combination of these changes would still protect the copyright-holder's economic rights. Instead of being a complete monopoly over the material, however, the monopoly would be limited, as originally intended.