

COPYRIGHT LAW AND THE MANAGEMENT OF J.D. SALINGER'S LITERARY ESTATE[♦]

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INTRODUCTION

J.D. Salinger's death in 2010 provides an occasion to consider three related questions: (1) does domestic copyright law now protect Salinger's personal interests; (2) if not, should it be amended or interpreted to do so; and, (3) if it does protect personal interests, should that protection be continuous throughout the full copyright term, or should it diminish or end at the writer's death? By personal interests, I mean Salinger's expressed preferences about matters such as personal privacy, publicity and reputation, access to and use of unpublished writings, and the subsequent treatment by others of published texts.¹ In

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¹ In describing "personal interests" this way, I am referring to a set of concerns specific to Salinger and trying to avoid complicating my analysis of the practical copyright issues that are likely to affect Salinger's estate with a digression into abstract, often confusing, and overlapping legal categories. There is a copious and still evolving legal scholarly literature discussing the notion of personality interests and whether copyright law protects them. The older literature

this Article, I argue that domestic copyright law does not and should not be interpreted to protect the first three interests—privacy, publicity, and personal reputation—during or after the author’s life. By contrast, domestic and international copyright laws clearly do protect the decision to publish initially and the right to license reproductions and derivatives works from the moment of creation to the end of the copyright term.² Thus, for several decades to come, the trustees of Salinger’s literary estate may enforce these copyrights to control access to Salinger’s unpublished texts and uses of his unpublished or published texts in new works. Significantly, however, the trustees’ control is somewhat constrained by domestic copyright’s fair use doctrine,³ which permits certain unauthorized uses of copyrighted texts. Salinger’s personal interests were not so constrained. His rights to privacy, publicity, and reputation during his life were not limited by a statutory doctrine such as fair use, and, to the extent that some of those rights survive his death, they are not so limited now. Thus, this distinction between copyrights and rights in personal interests will be important in defining the extent to which future biographers, scholars, and others may legally use Salinger’s texts despite the objections of his trustees.

During his life, however, Salinger and his attorneys succeeded in blurring this distinction by recruiting his well-known personal interests to bolster marginal claims of copyright infringement. In two cases, they managed to persuade the U.S. Court of Appeals for the Second Circuit to reject credible fair use defenses by emphasizing how the defendants’ uses of his texts would impinge on Salinger’s privacy, abhorrence of publicity, and devotion to maintenance of a small literary oeuvre

explored “rights of personality” or “personality interests.” See, e.g., Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988); Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L. J. 81, 82 (1998) (finding the sources for personality interests in intellectual property in “(1) creativity; (2) intentionality; and (3) identification as the source of the res.”). Contemporary intellectual property scholars, on the other hand, are more likely to discuss “moral rights”—a term that arises from the civil law traditions in Europe. Depending on the jurisdiction, moral rights may include variations on four basic rights: the right to disclose a work; the right to withdraw a work; the right of proper attribution for the work; and a right to maintain the integrity of the work. See, e.g., Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 5–6 (1985) [hereinafter *Copyright and the Moral Right*]. For a concise historical analysis of how some civil law traditions came to treat some rights of personality as “moral rights” within a codified copyright system while some common law systems, notably the United States, did not, see Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 73–76 (2007) and sources cited therein; see also Peter K. Yu, *Moral Rights 2.0*, in LANDMARK INTELLECTUAL PROPERTY CASES AND THEIR LEGACY 13–32 (Christopher Heath, et al. eds., 2011) (including a discussion of the effects of moral rights on developing countries, including its use by governments to suppress dissent); cf. Thomas Dreier, *Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?*; EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY 298–303 (Rochelle Dreyfuss, et al. eds., 2001) (presenting a different perspective on the correlation between U.S. law and “*droit d’auteur*”—another term that corresponds generally with “moral rights”).

² 17 U.S.C. § 106 (2006).

³ *Id.* § 107.

unadulterated by any derivative works. Two different panels of that court published opinions that, in my view, effectively protected Salinger's personal interests under the guise of protecting his right to publish⁴ and his right to prevent unlicensed derivative works.⁵ The question now is whether the Second Circuit or other courts will regard these two decisions as persuasive precedents if Salinger's trustees should decide to sue a would-be user of his published or unpublished texts for copyright infringement.

The courts should not follow these two precedents. In my view, they were poorly reasoned and wrongly decided, in part because Salinger's outrage over perceived invasions of his privacy and assaults on his literary reputation affected the judges' assessments of the equities. If a dispute over the estate's copyrights arises now, however, the courts should step back and hold the trustees to a more rigorous burden of proof on the issue of fair use than they did while Salinger lived.⁶

Salinger's life, works, litigation history, and now his literary estate, provide a test case for considering the appropriate intersection of copyright and personal interests. This is because Salinger made it clear that he valued his personal privacy and the integrity of his published works over the right to exploit his copyrights for money. In the middle of the last century, he gained renown for a small literary oeuvre, including, most notably, his 1951 novel, *The Catcher in the Rye*.⁷ Shortly thereafter, he withdrew from New York's publishing scene and moved to rural New Hampshire where he guarded his privacy and

⁴ *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (enjoining publication of Ian Hamilton's proposed biography of Salinger on the ground that Hamilton's quotations and paraphrases of Salinger's unpublished letters were not a fair use). See, e.g., Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1, 27–38 (1999) (discussing how a concern for Salinger's privacy infiltrated the court's fair use analysis); Benjamin Ely Marks, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade Reconsidered*, 72 N.Y.U. L. REV. 1376, 1404–10 (1997) (recommending, among other things, that the fact that a work is unpublished should have less salience in the fair use analysis after the writer is dead). I criticized the decision in Kate O'Neill, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication*, 89 CALIF. L. REV. 369, 428–35 (2001) [hereinafter *Against Dicta*].

⁵ *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (vacating a preliminary injunction Salinger had obtained against publication of Fredrik Colting's 60 YEARS LATER: COMING THROUGH THE RYE (2009) on procedural grounds and remanding for further proceedings, but agreeing with the trial court that Colting would not prevail on his claim of fair use). I have criticized this decision for, among other things, rhetoric that conflated Salinger's exclusive right to license derivative works with a dignitary "right not to speak." Kate O'Neill, *The Content of Their Characters: J.D. Salinger, Holden Caulfield and Fredrik Colting*, 59 J. COPYRIGHT SOC'Y U.S.A. 291, 341–343 (2012)[hereinafter *The Content of Their Characters*].

⁶ For a discussion of the effect of burdens of proof on fair use, see Crews, *supra* note 4; Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781 (2010).

⁷ J. D. SALINGER, *THE CATCHER IN THE RYE* (1951) [hereinafter *CATCHER*]. For a short description of Salinger and *CATCHER*'S literary legacy, see Louis Menand, *Holden at Fifty: The "Catcher in the Rye" and What it Spawned*, NEW YORKER, Oct. 1, 2001, http://www.newyorker.com/archive/2001/10/01/011001fa_FACT3.

copyrights assiduously. His aversion to publicity and to any commercially motivated alteration of his published works evidently caused him to reject several offers to make a film based on *Catcher*. As noted above, he sued twice for copyright infringement, apparently not to preserve the economic value of his copyrights but to preserve his privacy, the integrity of his most famous work, and perhaps his reputation. Altogether, Salinger's lifestyle and management of his copyrights suggest that he was at least as concerned about his personal privacy, the integrity of his work, and his literary reputation—personal interests—as he was in making money from his writings—the commercial interest at the center of domestic copyright law.⁸

Despite my empathy for Salinger (as a private person, if not a copyright plaintiff), I argue here that domestic copyright law does not and should not protect these personal interests in life or after death. Other bodies of law, such as privacy, publicity, unfair competition, trademark, and contract laws, protect these interests to varying degrees.⁹ Some commentators have faulted domestic law for an overly complex and incomplete protection of these personal interests, and they recommend that domestic copyright law protect some of these interests coherently and self-consciously.¹⁰ But there are good reasons why

⁸ For the most recent biography of Salinger, see KENNETH SLAWENSKI, *J.D. SALINGER: A LIFE* (2010)[hereinafter *J.D. SALINGER: A LIFE*]. For descriptions of his lifestyle, aversion to publicity, and lawsuits after the publication of *CATCHER*, see *id.* at 232–34, 241–53, 287–90, 351–59, 373–414. The idea that the principal goal of domestic copyright law is to provide an economic incentive to writers arises from the utilitarian language of the copyright clause in the U.S. Constitution that empowers Congress to make laws “[t]o promote the Progress of Science and the useful arts.” U.S. CONST. art. 1, § 8, cl. 8. See also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that copyright’s exclusive rights are “intended to motivate the creative activity of authors and inventors by the provision of a special reward”).

⁹ See Damich, *supra* note 1, at 35–82 (discussing common law protections). The Lanham Act provides a cause of action for a party who believes that he is likely to be damaged by a “false designation of origin.” 15 U.S.C. § 1125 (2006). For a discussion of Salinger’s claim for unfair competition under New York State law, see *The Content of Their Characters* note 5.

¹⁰ See, e.g., ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 1–9, 147–65 (2010) [hereinafter *THE SOUL OF CREATIVITY*] (discussing the dignitary interests of creators in their expressions and advocating enactment within the domestic copyright statute of enhanced “moral rights” for visual and other artists, including writers, to better protect rights of attribution and integrity of works). Kwall does not advocate protection of privacy through copyright law, per se, but argues that privacy interests might be protected to some degree by safeguarding “persona texts.” *Id.* at 111–31. See also ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 3–5, 99–101 (2011) (conceding that utilitarian theories of intellectual property that protect only commercial interests are not sufficient and recognizing Kantian dignitary interests of a creator in his creative expression and also suggesting that a dignitary interest, such as the right to publicity, must have its source in the person because it has no intrinsic alienability); Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111 (2005); Damich, *supra* note 1; *Copyright and the Moral Right*, *supra* note 1; Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151 (2001) [hereinafter *Preserving Personality*]; Rigamonti, *supra* note 1. For a contrary view, unconcerned with the complexity of domestic law and actively opposing recognition of authorial moral rights in expressive works, see Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263 (2009) (criticizing those who advocate moral rights for visual artists for, among other things, failing to

domestic copyright law is not the proper regime for protecting such interests, even if one assumes they need more protection. The insistence that copyright law—which confers rights to exploit the value of fixed, original expression—also protects the expressor's preferences about subjective and idiosyncratic interests in matters of privacy and reputation probably stems from the congruence of two forces that should be incongruent. The first force is the relentless drive for domestic and international expansion of copyrights, a drive largely orchestrated by the holders of multiple, valuable copyrights.¹¹ Advocates for this expansion find it rhetorically expedient to say it is necessary to protect the financial and dignitary interests of individual authors. The second force reflects a sincere devotion to individual human rights and dignity.¹² The second force is sometimes recruited in the service of the first, a phenomenon that deserves no respect.¹³

In any case, whether proponents of an expansion of copyright to protect personal interests are sincere or manipulative, they are at odds with the fundamental principles of the U.S. Copyright law. Domestic copyright law can be understood as creating an in rem right of a sort. Copyright attaches to expression that is fixed in tangible form and creates rights in that expression and not in the author's persona (although, obviously, the author has standing to enforce the copyright). The distinction between a right in the expression and a right in the person has an important role in the constitutional and cultural traditions of the United States. This is not to deny that a writer feels that at least some of his writing is an essential component of his personhood. However, domestic law consigns protection of his rights in the writing to a delimited commercial regime and protection of his person and dignity to different regimes for a good reason—to preserve the interests of others in communicating about and creating with copyrighted works. The distinction between the commercial and personal right is key to the utilitarian compromise that informs a constitution containing both the Copyright Clause¹⁴ and the First Amendment.¹⁵

Attempts to conflate copyright with personal interests are also

recognize the subjectivity and cultural contingency of artists' own evaluations of their works).

¹¹ See, e.g., WILLIAM F. PATRY, *HOW TO FIX COPYRIGHT* 29–32, 87–90 (2011) (discussing copyright law's benefits to “gatekeepers” and “superstars”, rather than to the individual creator). For other sustained critiques of the effect of copyright law on creativity and community, see LEWIS HYDE, *COMMON AS AIR: REVOLUTION, ART, AND OWNERSHIP* (2010); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

¹² The Universal Declaration of Human Rights, Art. 27(2) provides in part: “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹³ Yu, *supra* note 1.

¹⁴ U.S. CONST. art I, § 8.

¹⁵ U.S. CONST. amend. I.

mistaken because they make it difficult for courts to discern public priorities. Conflating personal interests with copyright seems to pit one inviolable constitutional right—the author’s right to speak or not to speak—against another inviolable right—the right of someone else to speak.¹⁶ It is often said that the fair use defense is the exception to copyright that accommodates others’ First Amendment rights to engage in speech about the copyright holder’s texts, but I think the copyright statute’s initial grant of a copyright in expression, rather than in personal interests, reflects a policy, not just to accommodate, but to subordinate an author’s copyright to others’ First Amendment rights. It is not only copyright’s fair use doctrine and (not so) limited time period that preserves the public domain and free expression, it is the distinction between an expressor’s commercial rights in his fixed expression and his rights as a human being. The limited exclusive rights to exploit the work enable the expressor to extract some compensation from fixing and selling the expression while preserving the superior First Amendment rights of others to make use of the fixed expression without violating the First Amendment and other personal interests of the expressor.¹⁷ In a sense, under the domestic regime, the price a copyright holder pays for the ability to exploit his written expression is that the holder must permit others to use that expression to some extent in their own expressions.

To the extent that copyright law sometimes appears to protect personal interests, it does so only incidentally as it furthers its utilitarian goals. For example, copyright law affords a writer an exclusive right to determine whether to publish a work.¹⁸ Although this right enables an author to withhold his expression from public view, the utilitarian, statutory purpose is not to protect the author’s privacy but to protect the author’s incentive to produce his best work for public consumption.¹⁹ The statutory purpose has implications for the copyrights in Salinger’s

¹⁶ One recent writer has taken this point to its logical conclusion, arguing that personal letters shouldn’t be subject to copyright at all because the writer’s interest in privacy is inconsistent with the goals of copyright. See Jeffrey L. Harrison, *Privacy, Copyright, and Letters: Transparency, Secrecy, and the Internet—Striking a Balance between the Ideals of Privacy and Accountability in the Digital Age*, 3 ELON L. REV. 161, 168–70 (2012). The writer would limit the duration of the privacy interest to the writer’s life with some exceptions and suggests that that limited duration would accommodate others’ First Amendment interests. *Id.* at 176–78.

¹⁷ See, e.g., W. Ron Gard & Elizabeth Townsend Gard, *Marked by Modernism*, in MODERNISM & COPYRIGHT 155–70 (Paul K. Saint-Amour ed., 2011) (discussing the need to accommodate consumer use of copyrighted texts in a digital age); Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831 (2010) (faulting recent copyright decisions for under-protecting users’ First Amendment rights); William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417 (2010) (arguing for a more liberal application of fair use to expressive works to promote the “flourishing” of users and consumers).

¹⁸ 17 U.S.C. §§ 106, 201(a) (2006).

¹⁹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985) (noting a writer’s interest in polishing his work for “public dissemination”).

estate. Its important corollary is that the exclusive right to polish a work until the author chooses to publish should terminate upon the author's death because he can no longer polish the work. That is why the unpublished works in Salinger's, or any literary estate, should be subject to the same unlicensed fair uses as any published work in the estate.²⁰

In making this argument, I overlook neither the United States' legal obligation to enforce authors' moral rights under the terms of the Berne Convention²¹ nor the wisdom of civil law traditions which gave rise to moral rights doctrines. In general, moral rights give the creators of expressive works three or four basic rights: the right to disclose; the right to proper attribution; the right to preserve the integrity of a covered work; and occasionally the right to withdraw the work.²² A detailed analysis is beyond the scope of this Article, but I concede that moral rights implicate some personal interests—such as the right not to disclose a writing—and thus must be protected in some fashion domestically. The point is that, with the exception of the right to withdraw a published work, the United States does protect analogous rights through a motley of state and federal laws, including privacy, publicity, unfair competition, trademark, and copyright laws.²³ Although some scholars have criticized domestic law for complexity, overlapping rights, and omissions,²⁴ the possible inconvenience to writers of protecting personal interests through multiple claims is more than offset by the cultural consistency of limiting copyright's scope in order to accommodate other writers' and the public's interest in free expression.²⁵

In sum, I argue that literary executors, trustees, heirs, publishers, cultural commentators, legislators, and courts ought to resist the emotional appeal of trying to protect the personal interests of a writer like Salinger via copyright simply because he felt particularly private about himself and committed to preserving his published writings exactly as he had authorized them. In particular, I deplore casual or imprecise moral rights rhetoric to do so. The executors of literary estates and the courts, in cases of dispute, have no positive legal

²⁰ For articles expressing similar views about unpublished works, *see supra* note 4.

²¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1986, S. TREATY DOC. NO. 99-27 (entered into force for the United States March 1, 1989), *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

²² For a comprehensive, comparative description of moral rights laws in multiple countries, *see* MIRA T. SUNDARA RAJAN, MORAL RIGHTS (2011).

²³ One part of the Copyright Act of 1976 expressly protects the moral rights of artists in certain visual works. 17 U.S.C. § 104A.

²⁴ *See, e.g.,* Austin, *supra* note 10; Damich, *supra* note 1; *Preserving Personality*, *supra* note 10; *Copyright and the Moral Right*, *supra* note 1; Rigamonti, *supra* note 10.

²⁵ *See* Adler, *supra* note 10 (criticizing those who advocate moral rights for visual artists for, among other things, failing to recognize the subjectivity and cultural contingency of artists' own evaluations of their works).

authority in the United States for conflating a writer's personal interests with his copyrights. Such conflation poses a significant threat to the public's interest in information and free expression by overprotecting a writer's subjective preferences within the copyright regime and suppressing legitimate claims of fair use that would otherwise be available.²⁶

The occasion of an author's death, and the passage of his copyrights into an estate or literary trust, provides opportunities for all interested parties and advocates to step back. I hope this Article helps decision makers consider which of the author's interests deserve legal protection in life under copyright's regime, which continue to deserve protection after his death, and which should cede to the public interest.

I. BACKGROUND

Shortly after attaining literary celebrity, Salinger strenuously tried to avoid its consequences. As most readers know, Salinger gained renown for a small literary oeuvre, including the best-selling novel, *The Catcher in the Rye* (1951). Publishing for the last time in 1965, however, Salinger withdrew both physically and professionally from New York's social and publishing scene and retreated to rural New Hampshire, shunning journalists and avoiding fans. He guarded his unpublished writings zealously and refused to sanction any alteration of his published works even at the risk of losing royalties. Thus, Salinger was a writer who appeared to prefer personal privacy and creative integrity over the pursuit of money and celebrity. If there was ever a writer who, by common decency, ought to have been let alone in life, he seems to have been the one.

Of course, sadly but predictably, Salinger was not let alone, in part because he had pursued personal obscurity and creative integrity only after attaining fame and fortune. His attempt to withdraw from the glare of publicity only fueled the fire—including the interest of biographers and other novelists. He did, however, succeed in persuading the Court of Appeals for the Second Circuit to rule in his favor by rejecting fair use defenses in two important copyright cases.²⁷ In 1987, the court enjoined Ian Hamilton and Random House from publishing a biography

²⁶ See *id.* Adler attacks moral rights scholarship that emphasizes the importance of maintaining the "integrity" of unique visual works. Even if one were to disagree with her, integrity is not a concern for printed works—at least if there are multiple, fungible copies and at least one is unaltered.

²⁷ *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (vacating a preliminary injunction Salinger had obtained against publication of Fredrik Colting's *60 YEARS LATER: COMING THROUGH THE RYE* (2009) on procedural grounds and remanding for further proceedings, but agreeing with the trial court that Colting would not prevail on his claim of fair use); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (enjoining publication of Ian Hamilton's proposed biography of Salinger on the ground that Hamilton's quotations and paraphrases of Salinger's unpublished letters were not a fair use).

that included excerpts and paraphrases of some of Salinger's unpublished letters that Hamilton had accessed in university archives. In 2010, in a case Salinger filed before he died, the court summarily rejected Fredrik Colting's defense of fair use for a novel depicting Salinger as a mean-spirited character who suffered from writer's block as he tried unsuccessfully to kill off his famous fictional character, Holden Caulfield, now 60 years older than he was in *Catcher*.

In my view, Salinger's chief reason for suing was to protect his personal interests, rather than his commercial interests. Neither defendant's work threatened Salinger's actual or potential royalties, but the first would have exposed some of his personal correspondence, and the second assailed him with a caricature of himself trying to write the sequel to *Catcher*. As noted in the Introduction to this Article, I believe Salinger achieved his litigation goals in part because the court sympathized with his perception that the works affronted his personal interests. In my view, on both occasions, the Second Circuit was persuaded to construe the fair use doctrine too narrowly at some cost to the logic of the opinions, the coherence of fair use doctrine, and the defendants' and public's interests in free expression.²⁸

Salinger presents an especially clear example of a writer who, at least in his maturity, recoiled from the consequences of celebrity. He strove to protect his privacy and to limit the publication and use of his writings. He used every means available to protect his interests, including litigation, and was largely successful. A key question now is whether the assets in his literary estate should be conflated with his persona, should be managed as he would have done, and in case of dispute, should be given the same broad scope of copyright protection.

II. THE ESTATE AND LITERARY TRUST

By statutory definition, at the time of his death, Salinger's estate would have held copyrights on all his works of original expression that were fixed in tangible form,²⁹ provided that he had not previously transferred ownership of a given copyright.³⁰ On its face, the statute extends the same scope of copyright protection to both published and unpublished works except in one important respect—the copyrights on published works expire sooner. For example, the copyright on *The Catcher in the Rye* will expire at the end of 2046,³¹ whereas all of

²⁸ My critiques of both decisions can be found in: *Against Dicta*, *supra* note 4, at 428–35 (faulting the decision in Salinger's suit against Hamilton for use of unpublished correspondence); *The Content of Their Characters*, *supra* note 5 (faulting the decision in Salinger's suit against Colting for attempting to publish a metafictional sequel to *CATCHER*).

²⁹ 17 U.S.C. § 102(a) (2006).

³⁰ *Id.* § 201(a), (d).

³¹ *Id.* § 304 (a)(1)(C), (b). The current statute provides a copyright term of up to ninety-five years for published works that were in their first or renewal term of copyright as of 1978. THE

Salinger's unpublished works created after 1978 will remain under copyright protection until the end of 2080 (seventy years after his death in 2010).³²

Salinger created a literary trust in 2008 that owns all his copyrights, including the rights to *The Catcher in the Rye* (1951).³³ We know that the trustees are his wife Colleen and son Matthew because they were substituted as plaintiffs in Salinger's suit against Fredrik Colting for infringing Salinger's copyrights in *Catcher*.³⁴ It seems reasonable to assume that Salinger transferred to the trust not only all of his copyrights, but also title to and possession of any tangible writings he retained at his death.

To date, however, the content and terms of the trust have not been made public. It has been suggested that Salinger had a "pour over" will under which his copyrights and papers would automatically become trust assets upon his death.³⁵ The trust document, unlike a will, is a private one, and so the terms are not available to the public.³⁶ The use of such a device is consistent with Salinger's lifetime aversion to publicity. The fact that the trust terms have not become public in the two-plus years since his death suggests that Salinger structured his bequests strategically to guard his privacy and that his trustees have so far honored that intent.

The trustees have not disclosed their intentions with respect to management of Salinger's copyrights,³⁷ but there are indications that they may try to maintain Salinger's approach. In 2010, they continued as plaintiffs in the case against Colting. More recently, Matthew Salinger attempted to secure posthumous protection for Salinger's "identity" under New Hampshire state law.³⁸ He sought legislation that

CATCHER IN THE RYE was copyrighted in 1951, and the copyright was renewed with the result that its copyright will endure ninety-five years, or through the end of 2046. Salinger's last published work, HAPSWORTH 16, 1924, was copyrighted in 1965 with the result that its copyright will endure through the end of 2060.

³² 17 U.S.C. § 302.

³³ Complaint at ¶ 11 *Salinger v. Doe*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (No. 09 Civ. 5095), 2009 WL 1529592.

³⁴ Salinger's trustees were substituted as plaintiffs during the pendency of the appeal. *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *vacated* 607 F.3d 68 (2d Cir. 2010).

³⁵ *J.D. Salinger's Estate, Part II*, THE LAW OFFICE OF ALEXANDER HAKOPIAN, ESQ. (Feb. 1, 2010), <http://www.hakopianlaw.com/2010/02/j-d-salingers-estate-part-ii/>.

³⁶ An *inter vivos* trust does not pass through probate, and the trust document does not need to be filed with the court. Thus, only the settlor and beneficiaries may know the disposition of the assets. See, e.g., MYRON KOVE ET AL., THE LAW OF TRUSTS AND TRUSTEES §§ 231, 233 (3d ed., rev. 2008); Michael Baldwin & Brad Korell, *Privacy Preservation Planning in the Digital Age*, 2 EST. PLAN. & COMMUNITY PROP. L. J. 393 (2010).

³⁷ But see, e.g., *Authorised Biography of JD Salinger 'Will Not Be Allowed'*, GRAPH, Jan 27, 2011, <http://www.telegraph.co.uk/culture/books/booknews/8283973/Authorised-biography-of-JD-Salinger-will-not-be-allowed.html> (an unverified report that Salinger's agent does not anticipate that the trustees will authorize a biography); *J.D. Salinger's Son Threatens Legal Action Against Memorabilia Dealer*, Gary Zimet, *For Posting Letter*, HUFFINGTON POST (Nov. 9, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/09/09/jd-salinger-letter_n_955871.html.

³⁸ See *Salinger's Son Stunned by Veto of NH Bill*, CBS NEWS (June 14, 2012, 8:25 AM), <http://>

would make an interest in “identity” inheritable and provide that the interest would endure for life plus seventy years—coinciding, but I think not coincidentally, with copyright’s basic term.³⁹ Both actions suggest that the trustees intend to maintain Salinger’s stance toward publicity and commerce, at least for the time being. If so, scholars and biographers may have difficulty accessing unpublished papers, they may not succeed in obtaining licenses to use published or unpublished texts in their own works, and they may properly fear lawsuits if they quote or paraphrase Salinger’s texts without the trustees’ permission.

The most important assets in the Salinger estate might be his unpublished writings. Salinger may have written a lot. These manuscripts and copies may be protected by contractual arrangements that preserve the trustees’ rights to title or possession and limit others’ access or use. Some of these unpublished writings, however, may be beyond the trustees’ contractual control, except of course with respect to the copyrights in the contents. In addition, Salinger wrote many letters,⁴⁰ some of which are already held by libraries. Others may well emerge as researchers unearth them, or as recipients and their heirs choose to make them available. We also know that Princeton’s Firestone Library owns copies of some story drafts.⁴¹ Unless the owners of those physical copies are under an obligation to Salinger’s estate to deny access, researchers may be able to access the content.

At this point, however, the most intriguing question—because the answer is so uncertain—is whether the trustees have possession of, will preserve, and will provide access to writings that Salinger kept at his home. There is some evidence that Salinger continued to write regularly even though he stopped publishing after 1965.⁴² Allegedly, he stored his writings in a fireproof safe at his home.⁴³ If that is true, we

www.cbsnews.com/8301-505245_162-57453007/salingers-son-stunned-by-veto-of-nh-bill. The veto withstood a legislative override. See *Veto of NH Bill to Protect Salinger Privacy Stands*, HUFFINGTON POST (Jun. 27, 2012, 1:28 PM), <http://www.huffingtonpost.com/huff-wires/20120627/us-veto-salinger-bill>.

³⁹ *Id.*

⁴⁰ See J.D. SALINGER: A LIFE, *supra* note 8, at 390 (describing how Salinger’s would-be biographer Ian Hamilton found some correspondence at the Ransom Center at the University of Texas and at Princeton University). Salinger blocked publication of the biography on the ground that Hamilton’s quotations and paraphrases of the letters violated his copyrights. See *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987); see also Dinitia Smith, *J.D. Salinger’s Love Letters Sold to Entrepreneur Who Says He Will Return Them*, N.Y. TIMES, June 23, 1999, <http://partners.nytimes.com/library/books/062399salinger-auction.html>.

⁴¹ See Samantha Pergadia, *Salinger Trove in Firestone*, PRINCETON ALUMNI WEEKLY, Feb. 24, 2010, <http://paw.princeton.edu/issues/2010/02/24/pages/0232/index.xml>.

⁴² See, e.g., Kenneth Slawenski, *What Was J.D. Salinger Working On?*, SALON (Jan. 16, 2012, 8:00 PM), http://www.salon.com/2012/01/17/what_was_j_d_salinger_working_on [hereinafter *What Was J.D. Salinger Working on?*] (describing letters indicating that Salinger continued to write after his last published story, HAPSWORTH 16, 1924, was published in *The New Yorker* in 1965); see J.D. SALINGER: A LIFE, *supra* note 8, at 370.

⁴³ See, e.g., *J.D. Salinger’s Secret Safe: Still Secret*, CBS NEWS (Jan. 29, 2010, 12:50 PM), http://www.cbsnews.com/2100-201_162-6153397.html; Ruth Franklin, *The Read: J.D. Salinger’s Private Letters*, NEW REPUBLIC, Apr. 21, 2010, <http://www.tnr.com/article/books-and-arts/the->

can hope that is some indication that he would not have directed his trustees to destroy his papers after his death. If he did not so direct, the trustees presumably have a fiduciary duty to maintain and manage the papers for the benefit of the trust's beneficiaries—likely themselves as Salinger's next of kin.⁴⁴ This likely dual status may lead to some conflicts of interest. Since Salinger's wife and son are co-trustees and probably also heirs, there is a potential for some disunity in their approach, as their emotional commitments, principles, and financial interests may diverge over time.

In any event, at present, we can only speculate about the extent of the trustees' discretion and how they may ultimately manage Salinger's literary assets. Kenneth Slawenski, author of a recent comprehensive biography of Salinger,⁴⁵ reports rumors that the trust directed the trustees to "wait a number of years" before publishing anything new.⁴⁶ As to previously published work, some journalists speculated—shortly after Salinger's death—that the trustees might be tempted by a proposal to license a movie based on *Catcher* because of the possibility that the federal tax on Salinger's estate, which was zero in 2010, might be increased retroactively.⁴⁷ That no longer seems likely, and there is no indication that a movie deal is in the works. At best, we can see that Salinger shielded his work and his person from public scrutiny in death as he had in life, and so far, the trustees seem to be following his example. This could be because the trust so directs them, because they choose to do so in deference to his memory, or due to personal reasons.

It should also be noted that, whatever their powers and preferences may be, the trustees may need to work through large amounts of materials before they can reach any decisions about how to proceed with the unpublished materials if, in fact, Salinger continued writing at a steady pace after he ceased publishing. In addition, it may be years before researchers discover whether any other individuals have physical possession of correspondence and other writings by Salinger and whether these individuals are willing to make them available.

Nonetheless, we can assume that there are now many people

read-jd-salingers-private-letters (describing letters displayed by the Morgan Library); Sarah Weinman, *Will J.D. Salinger's Manuscripts Be Published?*, DAILY FINANCE (Jan. 28, 2010, 5:16 PM), <http://www.dailyfinance.com/2010/01/28/will-j-d-salingers-unpublished-manuscripts-be-published> (asserting that Harry Ransom Center at University of Texas has papers acquired indirectly from rare book and manuscript dealers).

⁴⁴ The trustees, Colleen and Matthew Salinger, are Salinger's wife and son, respectively. Interestingly, Salinger's daughter, Margaret, is not a trustee. It's unknown whether she is a beneficiary of the trust or other assets in the estate. Margaret (known as Peggy) wrote a memoir that included very disturbing descriptions of her father's behaviors. See MARGARET A. SALINGER, *DREAM CATCHER: A MEMOIR* (2000). For a review, see Ron Rosenbaum, *The Flight from Fortress Salinger*, N.Y. TIMES, Oct. 8, 2000, <http://www.nytimes.com/books/00/10/08/reviews/001008.08rosenbt.html>.

⁴⁵ J.D. SALINGER: A LIFE, *supra* note 8.

⁴⁶ *What Was J.D. Salinger Working On?*, *supra* note 42.

⁴⁷ See, e.g., Allen, *infra* note 49.

interested in accessing Salinger's unpublished writings, and making use of both his published and unpublished works.⁴⁸ Accordingly, we can imagine potential areas of negotiation or conflict with the trustees. First, we know that there has been interest in licensing Salinger's work, especially *Catcher*, for adaptation as a movie.⁴⁹ Second, Salinger's publisher has an interest in maximizing the value of its catalogue by reissuing his works and licensing derivatives, if possible. Third, like Fredrik Colting,⁵⁰ someone may attempt to copy or make a derivative work with or without a license. Fourth, like Ian Hamilton, biographers and scholars will continue to examine Salinger's archived correspondence and seek additional correspondence that may be held by the original recipients. Because Salinger has passed away, some of those recipients, or their heirs, may be more inclined to sell, donate, or otherwise provide access now that they no longer need to fear offending Salinger personally. Fifth, researchers are also likely to press the trustees for access to any unpublished papers that they hold.

All in all, Salinger's death has no doubt sparked fresh interest in his life and works and perhaps a hope that the trustees will be more generous in providing access and licenses than he was. As a result, we might suspect that the trustees, if they are authorized by the trust terms, will seek to capitalize on Salinger's current interest before it fades. They may also seek to bolster the trust's commercial copyright interests by registering and licensing authorized biographies and new compilations of published and unpublished works. Researchers can hope that the trustees can and will provide access to unpublished works upon reasonable terms and that they will grant licenses at reasonable prices for fair uses of Salinger's expression without censorship of the user's message, genre, or style.

It seems just as likely, however, that the trustees will either be, or feel themselves to be, bound to protect Salinger's privacy posthumously, preserve his literary reputation, and shield his life, character, concerns, and writing habits from further public examination. In addition, they may wish to guard their own privacy, which they have a right to do under privacy laws.

⁴⁸ See, e.g., Helen Trinca, *It's Tough Trying to Break Down the J.D. Salinger Copyright Wall*, THE AUSTRALIAN, Jan. 29, 2011, at 3 (reporting excitement over the revelation that the University of East Anglia holds newly discovered letters written by Salinger).

⁴⁹ See, e.g., J.D. SALINGER: A LIFE, *supra* note 8, at 290; Nick Allen, *The Catcher in the Rye 'to be Made into Hollywood Film'*, TELEGRAPH, June 19, 2010, <http://www.telegraph.co.uk/culture/books/7837625/The-Catcher-in-the-Rye-to-be-made-into-Hollywood-film.html>; Julie Garber, *J.D. Salinger's Estate—Does Hollywood Yearn for the Estate Tax to Return?*, ABOUT.COM (June 22, 2010), <http://wills.about.com/b/2010/06/22/j-d-salingers-estate-does-hollywood-yearn-for-the-estate-tax-to-return.htm>. Interest in making a movie based on CATCHER is long-standing.

⁵⁰ See *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (vacating a preliminary injunction against Colting and remanding for further findings of fact, but noting that Colting's novel 60 YEARS LATER: COMING THROUGH THE RYE was not likely a fair use).

III. PRECEDENTS ON FAIR USE OF SALINGER'S COPYRIGHTS

Since no legal dispute has yet arisen involving Salinger's literary trust, I can only suggest the kinds of issues that may arise and how they should be analyzed in general terms. If the trustees are stingy with licenses and aggressive in pursuing unlicensed users, a key question is whether the federal courts will follow the Second Circuit's rationales in Salinger's two infringement actions and thus be inclined to reject colorable fair use claims if the proposed use would have offended Salinger's expressed personal interests. Since those precedents were poorly decided with respect to the rights of the living writer, they should not be extended to the assets in his literary trust.

Salinger's two copyright infringement cases⁵¹ had a baleful effect on copyright doctrine and publishing practice because they unduly narrowed the fair use defense.⁵² In 1987, the Second Circuit enjoined publication of Ian Hamilton's biography of Salinger on the ground that Hamilton's use of some quotes and many paraphrases of Salinger's unpublished letters did not constitute fair use and infringed Salinger's copyrights in the letters. Critics of that decision, including myself, deplored the court's reasoning for enabling Salinger, and other copyright holders, to protect privacy interests under the guise of enforcing copyrights.⁵³ The decision arguably discouraged legitimate biographers and scholars from documenting their findings with specific quotations and paraphrases of copyrighted works for the full copyright term—then fifty years and now seventy years after the writer's death—and pointed to a copyright regime in which materials that the writer didn't intend to copyright enjoy greater copyright protection than materials that the writer intended to publish. To the extent that copyright has a utilitarian rationale in the United States to disseminate information and new works, these were arguably perverse outcomes.⁵⁴

In 1992, Congress responded to pressure by academics, publishers, and other interested groups by amending § 107 of the statute, which governs fair use, to override any judicial presumption against fair use of unpublished works.⁵⁵ Nevertheless, scholars continue to debate the intersection of a writer's copyrights, privacy interests, and fair use.⁵⁶ Although Congress eliminated a formal presumption against fair use of unpublished materials, it did not remove the inference that use of materials whose content the writer preferred to keep private would be

⁵¹ *Id.*; *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).

⁵² *See Against Dicta*, *supra* note 4; *The Content of Their Characters*, *supra* note 5.

⁵³ *See Against Dicta*, *supra* note 4, at 428–40.

⁵⁴ *See id.* at 438 n.250.

⁵⁵ Fair Use of Unpublished Works, Pub. L. No. 102-492, 106 Stat. 3145 (1992) (adding to 17 U.S.C. § 107(4) (2006) the sentence: “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”).

⁵⁶ *See, e.g.*, Harrison, *supra* note 16; Marks, *supra* note 4.

less fair precisely because of an offense to the writer's dignitary, rather than commercial, interests. Because most writers and publishers fear being sued, the decision likely persists in chilling the use of copyrighted materials where the user has reason to fear the holder's personal preferences.

In the second case, filed in the year before he died, Salinger again sued for copyright infringement, but this time for infringement of his famous published novel, *The Catcher in the Rye*.⁵⁷ Salinger alleged that, by writing and publishing a novel in England, *60 Years Later: Coming Through the Rye*, Fredrik Colting infringed Salinger's copyrights in the character of Holden Caulfield, *Catcher's* first-person narrator, and in the novel as a whole. Salinger also alleged unfair competition under New York State law because Colting published his novel under a pseudonym, "J.D. California", and had advertised it as a "sequel." Although the district court did not make any findings of fact on the unfair competition claim, both the district and appellate courts seemed to accept Salinger's implication that Colting was free-riding on Salinger's reputation because his marketing tactics might have duped some consumers into thinking Salinger was the writer of, or had at least authorized, *60 Years Later: Coming Through the Rye*.

It is worth noting that this unfair competition claim would have protected a right of proper attribution that is analogous to the attribution right in moral rights regimes. For Salinger, I think the claim would also have advanced his concern for the integrity of his *Catcher* text, not in the sense that Colting had physically damaging the original, of course, but in the sense that Colting's novel had the potential to damage *Catcher's*—and Salinger's—reputations. In any event, however, Colting mooted the unfair competition claim by removing the pseudonym and the word "sequel" from copies of the book destined for sale in the U.S. As a result, the merits of this claim were not explicitly argued nor resolved in the subsequent judicial proceedings.⁵⁸

At first, one might say that these two cases have little factual or legal commonality except that Salinger sued for infringement and the defendants claimed fair use. Obviously, Salinger could not argue that Colting's use of his published novel, unlike Hamilton's use of unpublished letters, infringed his right to bring unpublished work to market or withhold it for whatever motive. Upon reflection, however, one can see that the emotionally salient facts in both of Salinger's claims presented the defendants' writings as affronts to his dignity, his reputation, and particularly, his desire to avoid any publicity.

Notably, neither suit contained the slightest factual allegations to

⁵⁷ See *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

⁵⁸ I have described the effect of the unfair competition claim on Colting's fair use defense in detail elsewhere. See *The Content of Their Characters*, *supra* note 5, at 3–4.

support the claim that use of his work impinged on any actual or potential market for that work.⁵⁹ Instead, Salinger's allegations emphasized harms to his personal interests. This is clear on the face of the case against Hamilton because Salinger admitted that he had no intention of publishing his letters,⁶⁰ and Hamilton's proposed quotes and paraphrases of those letters were clearly designed to illuminate Salinger's emotions and judgments about other people.⁶¹

It is a little harder to see Salinger's personal interests in the case against Colting, but they are there. First, one can sense that the core of the unfair competition claim was Salinger's distress that anyone might associate the upstart Colting's meta-fiction with Salinger or his most acclaimed work. Second, Colting did something far more insulting than that—in his novel, he portrayed Salinger as a crank and a washed-up novelist. Colting's novel seemed designed to hurt this sensitive author's feelings and undermine his literary reputation.⁶²

Different as they are, both Second Circuit's decisions rejected substantial fair use defenses for implicit reasons—solicitude for Salinger's undoubtedly genuine feelings of injury to his personal interests—rather than protection of the commercial value of his copyrights. My point here is not that the decisions on fair use were incorrect, though I think they were. Rather, my point is to minimize these precedents' vitality by identifying a flaw that is more insidious because it is harder to see—judicial rhetoric that camouflages the real grounds for decision by pretending that emotionally salient facts—such as Salinger's pride and his aversion to publicity—did not affect the judges' analysis of fair use.

The courts' stated rationales did not adequately consider the balance of interests that the fair use doctrine expressly requires, and the opinions were not frank about how much sympathy for Salinger's other interests in privacy, reputation, and publicity influenced the outcomes. Those interests are, in theory, protected under common law and unfair competition statutes. If Salinger was unable to meet the elements of those other claims, the weakness of his claims only bolsters the argument that they should not have affected the fair use analysis. Instead, the Second Circuit twice watered down and muddied the fair use defense in rulings peculiarly tailored to protect this high profile

⁵⁹ Both courts struggled to overcome Salinger's admission that he had no intention of publishing his letters or of licensing derivative works. Both courts found that there could nonetheless be an impact upon the market for his work because he had the right to change his mind. I discussed the courts' use of this rationale in detail in *The Content of Their Characters*, *supra* note 5.

⁶⁰ See *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987).

⁶¹ See *id.* at 93 n.2 (discussing Hamilton's paraphrase of Salinger's description of Charlie Chaplin).

⁶² I have offered this analysis of the trial and appellate decisions in detail elsewhere. See *The Content of Their Characters*, *supra* note 5, at 306-16 (describing Colting's novel and its description of the Salinger character).

author.

The question, now that Salinger has died, is whether courts will persist in rejecting plausible fair use claims if copyright disputes arise between his trustees and would-be users. Now that Salinger is no longer able to express his outrage over perceived invasions of his privacy and his dignity, will the courts follow these two precedents, or can they be persuaded to return to a less idiosyncratic application of the fair use doctrine?

In this regard, it may be worth noting that media and entertainment interest groups opposed Matthew Salinger's proposed legislation to protect identity interests, and that the bill was subsequently vetoed.⁶³ The successful opposition illustrates how diverse commercial entities' interests are and how fleeting rhetorical deference to individual authors' rights may be after the author has died. Even the author's own publisher's interest may diverge from the author's when the publisher no longer fears that the author will convey his copyrights elsewhere. Paradoxically, for advocates of fair use, these commercial motives may be helpful because it may mean that potential unlicensed users of Salinger's writings will have some deep-pocketed support in case the trustees sue. Clear-eyed business persons will see that the trustees' devotion to the writer's dignitary interests is far less persuasive than the writer's own devotion once was.

In any event, if the Second Circuit bent copyright laws to protect Salinger's personal interests while he was alive, those decisions can perhaps be limited to their particular facts, and attributed to those judges' understandable impulse to provide some remedy for the dignitary insults that Salinger felt keenly. Now that he is dead and can no longer feel those insults, the courts should seize the opportunity to confine those decisions and think afresh about fair use.

IV. POTENTIAL DISPUTES WITH SALINGER'S LITERARY TRUST

Let's imagine some possible disputes in which the trustees sue for copyright infringement and the would-be user defends with a colorable claim of fair use. Because we have no specific facts, we can only think through the scope of Salinger's copyrights and of the fair use defense post-mortem. To begin, it is helpful to distinguish among the copyrighted works likely owned by the trust. The first distinction must be between published and unpublished writings. The second distinction must be between various types of unpublished writings. These distinctions are necessary not because copyright attaches differently according to genre or publication status,⁶⁴ but because the fair use

⁶³ See *supra* note 38.

⁶⁴ I am not addressing the policy question of whether copyright ought to extend to works that the writer would have composed regardless of the supposed incentive provided by copyright

defense requires, among other things, consideration of the nature of the copyrighted work, the actual or potential market for it, the user's purpose for copying, and (possibly) the copyright holder's motives for withholding permission.⁶⁵

The application of these factors may vary depending on whether a work was published during the writer's life. Within the works that remained unpublished as of his death, it is helpful to distinguish further, recognizing that the following categories may not always be distinct from one another. Unpublished writings include casual writings and correspondence, which may range from fairly impersonal business letters and notes to more intimate letters where a writer revealed ideas, attitudes, feelings and judgments, or distinctive writing styles. Unpublished writings may also include diaries or journals in which even more intimate information is found, and manuscript drafts.

A. *Published Works*

This is the easiest category to analyze. Clearly, the trustees cannot prevent access to published works. The usual rules governing infringement and fair use should apply in cases of dispute, and I would hope that the courts would be more open to claims of fair use. In

protection. It may be that, in automatically attaching copyright to any original work of authorship fixed in tangible expression without regard to the writer's motives, Congress arguably ignored the instrumentalist mandate of the Copyright Clause in Article I, Section 8 of the U.S. Constitution, which seeks to promote creation. There is little point in arguing about the issue here, first because there is not the slightest indication that Congress will revise this aspect of the statute in the foreseeable future. Moreover, the U.S. Supreme Court has recently deferred to Congress's wisdom in amending the statute to conform it to the requirements of international treaties even though the amendments retroactively conferred copyright protection on writers who could not have been incentivized to create by a right they would not have enjoyed at the time. *See Golan v. Holder*, 132 S. Ct. 873 (2012) (approving restoration of copyrights to foreign nationals that were forfeited for failure to comply with copyright formalities that have now been repealed); *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (approving extension of copyright term to works that had already been created). By analogy, the Court would certainly find that this long-standing conferral of copyright to all original work is justified by Congress's decision to simplify the law and to remove formal obstacles to copyright protection. *See H.R. REP. NO. 94-1476*, at 52-53, 129-30, 158 (1976). Nevertheless, the automatic conferral of copyright under the Copyright Act of 1976 has increased the difficulty of distinguishing between writings an author intends to keep private and those the author hopes to exploit. *See, e.g.,* Laura A. Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 844-45 (2009); Stefan Hubanov, *The Multifaceted Nature and Problematic Status of Fixation in U.S. Copyright Law*, 11 INTELL. PROP. L. BULL. 111, 121-24 (2006); Joshua C. Liederman, *Changing the Channel: The Copyright Fixation Debate*, 36 RUTGERS COMPUTER & TECH. L.J. 289, 296-97 (2010); *see also* Harrison, *supra* note 16 (arguing that personal letters ought not be copyrightable).

⁶⁵ See 17 U.S.C. § 107 (2006) for the four factors courts must consider in weighing a fair use defense. For recent, useful scholarship on the courts' application of the fair use doctrine, including the significance of unpublished works, see Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008); Timothy Hill, *Entropy and Atrophy: The Still Uncertain Status of the Fair Use of Unpublished Works and the Implications for Scholarly Criticism*, 51 J. COPYRIGHT SOC'Y U.S.A. 79 (2003); Peter B. Hirtle, *Unpublished Materials, New Technologies, and Copyright: Facilitating Scholarly Use*, 49 J. COPYRIGHT SOC'Y U.S.A. 259 (2001); Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135 (2011).

particular, we can hope that courts will not follow the Second Circuit's decision in *Salinger v. Colting* and will confine that case to its facts. More specifically, we can hope that without Salinger to plead his particular aversion to publicity, his yearning for privacy, and his desire for absolute control over the use of his works, courts may be less inclined to continue to protect his personal interests under the guise of copyright law.

As to the trustees, we may hope that, in granting licenses and deciding whether to tolerate unlicensed uses, they will do no more than exploit the financial interests that copyright's exclusive rights enable and that they will not try to suppress or manipulate perspectives on Salinger or his work that they dislike. We can only hope that future courts will be alert to the possibility that, if the trustees feel legally or emotionally obligated to enact Salinger's preferences, they may file copyright infringements to suppress works that are critical or disrespectful of Salinger or his work. It is worth noting that, even if the trust severely limits the trustees' powers to license, the trustees' fiduciary obligations ought not to trump a user's legitimate fair use defense. That is because the trust asset at issue—the copyright in a work—cannot be more extensive than the copyright statute permits. Thus, the trust's copyright never includes a right to bar a use that would be fair without a license.

In any event, with Salinger gone, his personal interests are less salient, precisely because they were personal to him. I hope that the courts will be less inclined to constrict fair use to protect such personal interests after death. If the courts were to be more rigorous in their analysis, this could persuade the trustees and others similarly situated that the odds of prevailing in a copyright infringement case should be lower once the author's privacy and other personal interests are formally and emotionally irrelevant at least to the author.⁶⁶ That in turn could open up more space for biographies, scholarship, take-offs, fan-fictions, and other derivative works.

⁶⁶ *But see* Harrison, *supra* note 16, at 176–77 (suggesting that failure to protect privacy interests via copyright after a writer's death might decrease how much a writer will write or increase the likelihood that she will destroy writing). However, even Harrison admits that the empirical evidence demonstrating that copyright incentivizes creation is weak. It would seem that the risk that embarrassing writings may become public after one's death through lack of copyright protection is unlikely to effect communication habits. After all, the facts that employees know that their employers can store and access their emails and that users know that compromising information posted on Facebook may be accessible by a large, unintended audience have apparently not suppressed imprudent communications. One would think that the possibility that a recipient will disclose an embarrassing writing to an unintended audience in real time would be a more potent deterrent to sending a communication. And, if there is, in fact, some suppression of expression that one would later regret because it is not protected by privacy interests or copyright, why is that necessarily a detriment to the writer or the public? The discipline of thinking about consequences before one sends a message may in the end produce more public good than loss.

B. *Unpublished Works*

At first impression, the proper copyright treatment of unpublished works might seem more complicated, but I do not believe it should be once the writer has died.⁶⁷ In particular, the right of first publication should weaken, and the arguments for fair use should grow stronger. The following analysis treats casual and business writings, then more intimate correspondence, and then drafts and manuscripts that reflect self-conscious creative effort.

It is commonly said that a person's privacy rights die with her.⁶⁸ As a result, a paradox seems to arise when a writer dies. The explicit protections for personality interests afforded by privacy laws generally cease, but the implicit protection for the privacy of unpublished writings, which derives from the exclusive right to authorize first publication, might continue because it is attached to the writing and not to the author's persona.⁶⁹

This illustrates the confusion that can arise from a tendency to conflate personality interests with copyrights. The paradox disappears if one considers the utilitarian purpose behind the right of first publication, however. As noted earlier, if the writer is still living, there is always the theoretical possibility that the writer might revise the work and authorize first publication, effectively waiving a privacy interest in the writing's content and signaling the wish to have the writing attributed to him. That right, which protects the incentive to revise and publish, should be protected while the writer can still exercise it.

C. *Casual and Business Writings*

With respect to casual or business writings, the first utilitarian objection to making it harder to prove a fair use of unpublished writings than of published ones is that the writer is very unlikely to have any interest in revising the writing once the occasion for its composition has passed. The second objection is that a deceased writer can no longer indulge in such a hypothetical project. Copyright's utilitarian incentives no longer operate on the deceased writer. The writings left behind after death are simply artifacts—like published works—where the claims of

⁶⁷ One recent article suggests that the analysis ought to be simpler after death because copyright's utilitarian purpose to provide incentives for creation can no longer operate after a writer's death. See Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219 (2011) (arguing that the extension of copyright protection to works after the creator has died is unjustified).

⁶⁸ The exact nature of a privacy interest is uncertain, and so is its exact duration. See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006); see also Damich, *supra* note 1, at 93 (noting that common law copyright provided perpetual protection for unpublished works). See generally RESTATEMENT (SECOND) OF TORTS § 652I (1977).

⁶⁹ Jeffrey Harrison makes this point about the divergence between the term of a privacy interest and that of copyright, pointing out that the longer copyright term is a disadvantage even to those who prefer regulating letters within the copyright regime because of the availability of fair use. See Harrison, *supra* note 16, at 176.

others to fair use should apply equally without regard to whether the writer might have withheld the work or polished it further before publishing. The user's right to use an unpublished work should not vary from her rights to use a published one under the fair use doctrine. The only special obligation arises from ethics and possibly from unfair competition principles: the user must disclose that the first writer had not chosen to publish the work, although that would probably be obvious from its nature.

Some might object that copyright's implicit deference to certain personal interests while the writer is still alive should persist after death because, for example, an expectation of some privacy post-mortem is necessary to the well-being and creative expression of the living.⁷⁰ That is probably true, but there are two responses that minimize the argument's significance. First, the person who wishes to maintain her privacy during and after her life is in the best position to protect private information either by destroying its physical embodiment or by securing enforceable agreements with the recipients of writings. Limiting fair use of unpublished materials is a blunt and costly instrument to securing such an author's personal interests because it presumes that every author had an unexercised desire to withhold an unpublished work that should trump a legitimate fair use claim. Most people are probably indifferent about the uses to which most of their scribbles might be put.

D. *Correspondence*

The analysis of whether a use of unpublished correspondence is fair ought to be similar whether the writer is living or dead. The right of first publication should weigh in the fair use analysis so long as the author lives if only because the author might choose to compile a collection of letters. After death, the right should diminish and end if heirs and trustees demonstrate no interest in publishing collected letters. Privacy interests of living persons, including the letter writer and persons described in the letters may be protected via privacy and associate laws.

The argument that the writer is in the best position to prevent unwanted disclosure of letters does not apply with the same force as it does with unpublished materials still within the writer's possession at death. Correspondence, in any medium, poses particular issues because ownership of the artifact and ownership of the copyright usually diverge, and the two owners' interests may differ. The recipient of a famous writer's letters may have a significant financial interest in selling the physical copies and, absent a contractual prohibition, has the

⁷⁰ See *id.*

right to do so.⁷¹ The letter-writer retains the copyrights, however, and she or her heirs may have both personal and copyright interests in restricting access to and use of the contents.

The basic point, however, remains that the letter-writer assumes a risk of disclosure by sending the communication because the recipient will own the copy. Thus, the writer is still in the best position to decide whether the value of communicating exceeds that risk, and whether it is necessary to require any moral or contractual obligations from the recipient. If, subsequently, a would-be user of the content obtains access to the correspondence lawfully, the initial disclosure of private information will be the act of the recipient. This may or may not mean that the recipient violated some legal duty to the writer; in our age, it seems doubtful that correspondents (including those who use email, text messaging, and Facebook) can have any reasonable expectation of privacy unless they have taken affirmative steps to protect it. In any event, however, the person who obtains lawful access to the content and seeks to copy or otherwise use the writer's expression should be legally limited by the bounds of fair use and not by the deceased writer's privacy or other personal interests. In making this point, however, I do not mean to discourage the civic and cultural virtues of discretion, respect, and good taste when non-recipients of a deceased author's private correspondence wish to make use of it; I mean only that such virtues should not be covertly enforced through copyright.

E. *Unpublished Drafts and Diaries*

Finally, we come to the question of whether a post-mortem fair use analysis should vary based on whether unpublished writings are manuscripts or drafts that appear to represent the writer's deliberate creative effort. As noted above, the unauthorized use of a writing intended for publication during the writer's lifetime poses special problems. As the Supreme Court noted, permitting the premature use of a writer's work in progress would violate not only the writer's exclusive right to publish, but also the writer's interest in polishing his expression.⁷² If such premature use of unfinished expression is properly attributed to the first writer—i.e. if it is not plagiarized—then such an attribution might misrepresent the writer's expressive intent. During the writer's life, this might violate the First Amendment "right not to

⁷¹ See 17 U.S.C. § 202 (2006).

⁷² See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985) (holding that verbatim quotation of an about-to-be published manuscript was not fair); cf. *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194 (4th Cir. 1998) (permitting as fair extensive use of a manuscript over a literary executor's objections); *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991) (permitting use of Richard Wright's unpublished works in a biography over his widow's objections). See also *Against Dicta*, *supra* note 4, at 436–45 (discussing the *Sundeman* and *Wright* cases in more detail).

speak", and it might constitute a form of unfair competition in which the user attributes to the writer a product—unfinished expression—to which the writer was not yet committed. Moreover, as noted above, the premature disclosure of unfinished expression might diminish the incentive for a writer to present his best ideas and writing to the public.

These concerns should not survive the writer's death, however, and should not affect a fair use analysis. After death, the writer can no longer alter the writing. It has become the writer's final expression, even if the writer didn't intend this to be the case. This may seem unfair, but the possible damage to copyright assets or inheritable publicity rights, if any, can be mitigated by accurate attributions indicating that the writer didn't choose to publish the expression.⁷³ Moreover, the alternative is worse. To say that no use is fair because the writer might have polished the expression further would be to withdraw valuable information from scholars and biographers, among others, and ultimately deprive the public of useful commentary about the writer or her works.

Once again, there is the possibility that a writer might create less expression out of concern that imperfect expression might see the light of day after death. That seems a remote risk compared with the desire to express oneself either for personal satisfaction, for money, or for public recognition during life. There is also, I suppose, a possibility that the risk that imperfect works might be disclosed would give a writer an incentive to destroy drafts and other documents that might be interesting to biographers and scholars. I suspect, however, that if a writer is concerned about disclosure of imperfect work, the writer will likely destroy the work anyway, rather than worry about a potential fair use.

Finally, the writer is in the best position to protect personal interests posthumously, if she chooses to do so, by selection of and directions to a trusted literary executor or trustee. Nothing prevents trustees from denying access to materials in their control and avoiding copyright issues altogether (unless such behavior would constitute mismanagement or possibly waste of the trust assets). In addition, the trustees may exploit the value of the copyrights in the works. Provided that the trust grants them the power, they may, if they so choose, license derivative works to the creators of their choosing and attach whatever contractual controls they negotiate. The key point, however, is that if some unlicensed user wants to present an alternative interpretation or presentation of materials to which that user had lawful access—and the use otherwise satisfies the criteria for fair use—then the courts should not be swayed to reject the fair use on the basis that a deceased author would have objected.

⁷³ See, e.g., THE SOUL OF CREATIVITY, *supra* note 10, at 61–65 (recommending use of disclaimers by users to protect the first writer's interests in attribution and integrity).

There is one respect in which the right of first publication might legitimately extend for some short period of time after the author's death. That is where the author left drafts of a work-in-progress. In that situation, heirs or literary executors might properly wish to enhance the estate assets by hiring an editor or writer to attempt to finish the work as he or she believes the author intended. An unlicensed use that would pre-empt the market for such a posthumous publication would plainly be unfair. If the estate officials reveal no interest in such a project, however, then the fact that papers are unpublished should have no special weight in the fair use analysis.

To summarize, I believe that the courts should operate from two basic premises if disputes arise over the use of Salinger's copyrighted works in his literary trust and estate. They should first eschew the implicit solicitude for Salinger's concerns about privacy, reputation, and integrity. Those concerns should not have affected the fair use analyses in the two cases Salinger brought during his life, and they should certainly not extend to a fair use analysis after his death. Second, the courts should now analyze the fair use of Salinger's copyrighted works without regard to whether the works are published.

CONCLUSION

The question is whether Salinger and his literary estate should, by decency or by operation of law, be let alone post-mortem. I think not. I don't think decency requires it anymore, and I'm sure the law should not.

The first reason is that, in this culture, we do not have the right to dictate what others may find worth writing and learning about us. If we fail during life—or fail to direct our executors and trustees—to destroy copyrighted expression, then the expression is artifact, not personhood, and the price we pay for copyright protection for all of our fixed expression, and the right to exploit any of it at our whim, is the public's limited right to make fair use of the expression, whether we chose to exploit it or not. If this is a bad deal for some authors, its source lies in Congress' choice to abandon formalities of copyright publication and registration and to attach copyright automatically to any fixed expression, and its remedy also lies with Congress. In the meantime, to the extent that an author has stronger protectable personal interests during life under laws, other than copyright, she essentially waives their extension post-mortem if she fails to take action to deprive access to the artifacts she leaves behind.

The second reason is more theoretical and global. With the United States' nearly complete implementation of the Berne Copyright Convention—and two decisions by the Supreme Court holding that, in attempting to harmonize domestic law with that of other countries,

Congress has acted within the power conveyed to it by the Copyright Clause⁷⁴—we have reached a juncture where advocates of moral rights for authors can argue not only that such rights should be recognized as a matter of justice and human rights, but also that such rights should be recognized in the U.S. as a matter of pragmatic harmonization in the pursuit of economic globalization. These arguments may be sincere, but advocates should beware lest the rhetoric of authors' human rights advances the interests of corporate owners of multiple, valuable copyrights more than it advances the rights of individuals.

So far, U.S. courts have steadily denied that European-style moral rights are formally protected under the domestic copyright statutes with one exception.⁷⁵ Yet, as a practical matter, the two Salinger cases came close to affording Salinger, under the name of domestic copyright law, some rights that could easily be confused with, perhaps even deliberately equated with, the rights of disclosure, integrity, and attribution that are core aspects of civil law moral rights.

My point is not that recognition of rights of disclosure, integrity, and attribution—properly understood—is a bad thing. To a large degree, domestic U.S. law already protects comparable interests through the laws of privacy, publicity, and unfair competition. Domestic copyright law should not protect those interests any more than it already does, and it is important to keep the distinctions among the areas of law clear because each body of law has important elements that have been developed over time, many of which balance the dignitary and proprietary interests of one party against the free speech interests of the other party and the general public. If courts fail to keep the domestic claims separate and begin to import some vague sense of personal or moral right—as I think they did in the two cases Salinger brought—they are more likely to enable a writer or his successors who wish to censor a work to plead and advocate sloppy claims—alleging facts that do not quite add up to an invasion of privacy or publicity, unfair competition, trademark infringement, or copyright infringement—to win on some blurry sense that expression that offends a high-status author must be a copyright infringement. This sloppiness is designed to camouflage a key feature of domestic law in which the values protected by the First Amendment take precedence over copyright owners' desire to suppress others' expression.

Finally, if I'm right and courts listen, the trustees of writers' estates should recalibrate the odds of prevailing in a given type of dispute. A colorable fair use defense made during a writer's life may be even stronger after his death. As a result, even if they wish to adhere to the deceased writer's express or implicit preferences, trustees will need

⁷⁴ See *Golan v. Holder*, 132 S. Ct. 873 (2012); *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁷⁵ 17 U.S.C. § 104A (2006).

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to carefully consider the beneficiaries' interests if costly litigation is less likely to succeed post-mortem.