Judging Fiction – The Wind Done Gone, Star Trek and Salinger in Defining Boundaries of Preliminary Injunctions after Ebay

Elizabeth Townsend-Gard

In April 2010, the Second Circuit applied the new preliminary injunction standard from the 2006 Supreme Court Case, *Ebay v. MercExchange*. In some instances, the new standard is a drastic departure from previous standards, especially in the Second Circuit, where before the plaintiff need merely show infringement to have irreparable harm presumed. In other circuits, including the Eleventh Circuit, the standard articulated by the Supreme Court had been in place for years.

This work will look at the cases and fiction behind three twin texts: *Gone with the Wind* and *The Wind Done Gone*; *Star Trek* and *The Joy of Trek*; *Catcher in the Rye* and *Sixty Years Later*. What can we take away from these three cases? How should we understand the role of fictional facts within a fair use context? What elements should a judge take into consideration when judging fiction? What are the boundaries for using fictional facts and fictional works within another context? Could it be infringement to discuss the plot of *Terminator* or *Ponyo* on a Wikipedia site? How do we judge which works garner First Amendment protection under fair use and those that are seen as market replacement derivative works? The rise of fan fiction has played a role in questioning previous assumptions. In the end, the paper tries to analyze what guidance the courts might need in implementing the new preliminary injunction standard with regard to other original fictional works?

In reviewing the trilogy of cases best known for analyzing the preliminary injunction standard, I noticed something peculiar. In all three cases, the appeals judges had been asked to assess a fair use claim where the original works were fictional. In two, the courts came back with the ruling of no fair use, one where the work was a goofy self-help book for people in relationships with Star Trek fans, and the other, a self-proclaimed sequel to a known author whose controlling hand had sued before. The justification for the Star Trek was market substitution—or the fourth factor in fair use. The rational for the Salinger case was the work didn't satisfy the requirements of parody sufficiently to reach the bar of fair use, and also, the European version had called itself a "sequel." Contrast this to the Suntrust's *Wind Done Gone* case, where the Eleventh Circuit found a likelihood of fair use.

There is a troubling notion afoot that courts are using their literary sense of the world (what is "good" or "important" literature to determine whether fair use applies in preliminary junction stage. When the court does want to grant an injunction, finding no sufficient fair use, they appear to focus on the nature of the works as fictional facts, which are copyrightable. It appears, using these three cases, there are incompatible standards of how fictional facts are to be judged within copyright law. Where trademark has developed the concept of nominative use, copyright law must now also develop stronger protections for the building blocks of our culture, while at the same time finding a balance of a copyright holder's exclusive rights under the law. The paper ends with the playful hope that the estate of J.D. Salinger will find it in their hearts to sue once again, and in the process become our champion for the inclusion of fictional facts within a rubric of fair use.