

# Fair Use of Unpublished Works

A comic for Fair Use Week 2017

Cornish, NH, home of author J.D. Salinger.

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Copyright legislation involves a balancing of many interests: those of the public, authors of unpublished works, and authors seeking to use portions of other authors' unpublished works — all of which is critical to a healthy and vibrant 'marketplace of ideas.' This work is often complicated.

For example, until 1976, unpublished works enjoyed perpetual copyright protection under common law.

The owner of a work had the right to exclude all others from using it and, as long as said works never escaped their sealed boxes in attics across America, not even fair use could be made.

There was a catch, however: the author and future heirs or assignees could not profit from it. Many of these works remained 'lost' as long as they were withheld.

The Copyright Act of 1976 codified the fair use doctrine and abolished the common law distinction between 'published' and 'unpublished.'

But what of these untouched works still 'in the attic'? Would they enjoy the same perpetual copyright protection under the new Act, or would they be subject to the new fair use codification?

Initially there was great uncertainty in the field and the courts, and this posed a particular challenge for one scholar named **Ian Hamilton**.



Libraries, museums, and archives house many collections of old unpublished works, which historians and biographers rely upon to create new scholarship.

Fair use quotations from those kinds of manuscripts are essential to what they do.

Hamilton used excerpts from J.D. Salinger's personal correspondence in a biographical study of the author.

Over the years since Salinger had written and sent these letters to their original addresses, they had made their way to libraries and archives across the country where any researcher could reference them.

Hamilton's manuscript featured 200 to 300 words of direct quotation, all excerpts limited to no more than 10% of each letter, often no more than 10 words each. He also paraphrased some parts.

Hamilton attempted to stay within the parameters of fair use, but there was a complication:

J.D. Salinger objected to anyone writing his biography while he was still alive. He refused to cooperate with Hamilton.

Non-cooperation escalated to obstruction. Although Salinger had lost physical possession of these letters, he still retained some rights as the letters' author.

Salinger obtained a galley copy of Hamilton's book, proceeded to copyright the material Hamilton quoted, and demanded the book not be published until all of the unpublished material was removed.

Hamilton revised the manuscript to drastically reduce the amount of direct quotation.

Revised proofs were submitted to Salinger pursuant to an agreement.

Salinger sued.





# SALINGER v. RANDOM HOUSE

Salinger's lawsuit included a list of 59 instances of alleged infringements and cited language from an earlier case that stated unpublished works were still not subject to fair use (Harper & Row).

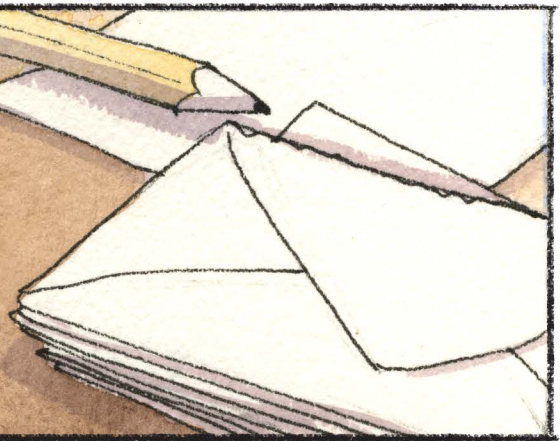
The lower court initially denied his claim. They found that Hamilton had taken copyrightable material from approximately 30 of 59 letters that he'd utilized, and all fell under fair use.



## The APPEAL:

On appeal, the Second Circuit disagreed with the lower court. They referenced Harper & Row:

"The fact that a work is unpublished is a critical element of its nature". / "[T]he scope of fair use is narrower with respect to unpublished works."

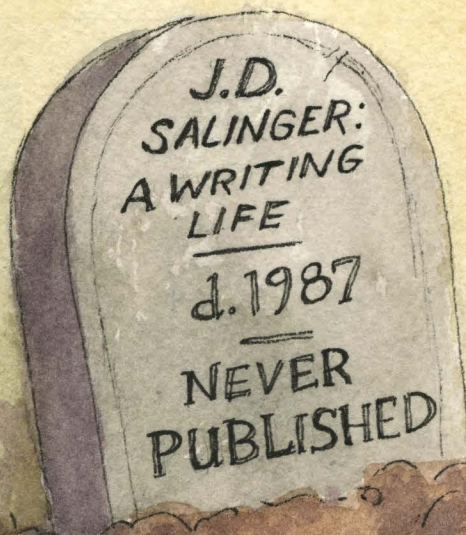


Ultimately, in January 1987, they found in Salinger's favor.

"[W]e think that the tenor of the [Supreme] Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression."



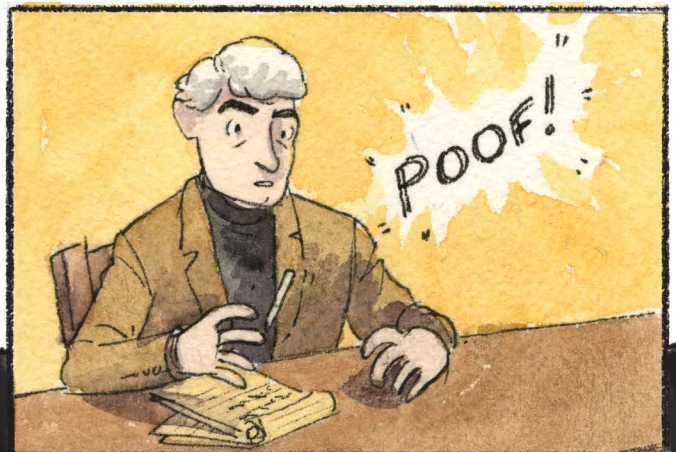
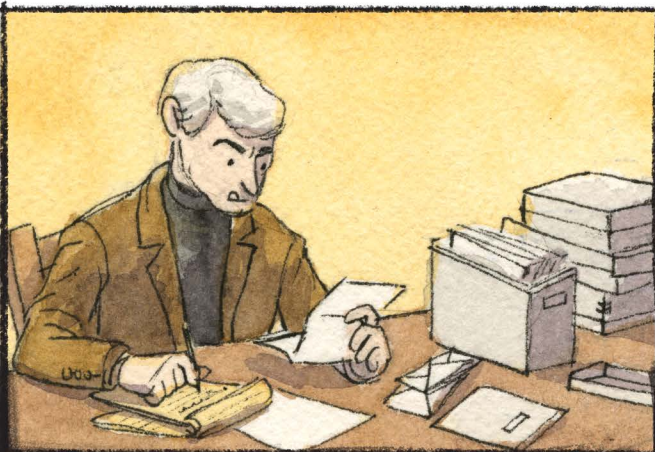
The court barred not only reprinting and quoting from the letters, but also detailed paraphrasing.



Hamilton was out of luck.



Resulting from this decision, along with several companion cases in the late '80s to early '90s, anyone who wished to include quotations from unpublished materials without permission was at great risk. The Salinger opinion represented a ban of sorts, even on paraphrasing!



These cases stirred fear of litigation.

Publishers dreaded liability when publishing biographies, histories, political studies, or other topical works.

Some libraries and archives restricted use of their materials to avoid litigation, despite decades of access.

Some authors restricted significant material that could aid their scholarly argument, while others opted to not publish their work at all.

In effect, the Salinger ruling even restricted public access to archival information. This was especially troubling for the fair use tenet of promoting "the progress of the useful arts" through "research and scholarship."



Historians, librarians, archivists, publishers, authors, scholars, and educators from all disciplines suddenly found themselves on the same side of a critical fair use issue. Authors and publishers agreed that the language of the Second Circuit decisions came far too close to creating a per se rule that blocked all fair use of unpublished materials.




The community responded with lobbying efforts and testimony. Congress acted by offering a legislative solution, which became the Fair Use Amendment of 1992.

An illustration of the United States Capitol dome. A large, stylized hand emerges from the left, holding a large white rectangular sign. The sign contains text about the Fair Use Amendment. In the background, a crowd of people is visible, some holding red balloons and a sign that says "FAIR USE".

Congress singled out the Salinger opinion, noting:

"The Committee agrees...that the Second Circuit in *Salinger* went astray in its treatment of the unpublished nature of the work as leading to a diminished likelihood that the fair use defense, as a whole, will in every case not be available."

The bill added a new final sentence to section 107 of the Copyright Act:

An illustration of a forest path. On the left, a man in a blue sweater and tan pants stands looking at two wooden signs. The top sign is a diamond shape and says "EXISTING SCHOLARSHIP TRAIL". The bottom sign is a rectangular arrow pointing right and says "UNPUBLISHED WILDERNESS AREA". A red cardinal is perched on top of the first sign. In the background, a path leads into a forest with trees showing autumn foliage. Several people are on the path: one is sitting on a log, another is pushing a wheelbarrow, and a group is gathered around a large tree stump. A small signpost with a wheelchair symbol is also visible.

"The 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."

The goal of the Fair Use Amendment is to direct the courts to strike the correct balance on the facts before it, free from any per se rules.

By amending the fair use provision of the Copyright Act, Congress freed new lines of inquiry and scholarship, ensuring the continued prominence of fair use for purposes such as criticism, comment, news reporting, teaching and research.

As for Ian Hamilton, he turned his process researching Salinger and his experience in *Salinger v. Random House* into a different book, *In Search of J.D. Salinger*.

Created for Harvard Library OSC for Fair Use Week 2017.