Salinger and 'The Bell Jar':

What Do They

BY CAROL E. RINZLER

Two recent legal cases have little in common—except that they were on everyone's lips this winter. The first, *Salinger* v. *Random House*, involved a biography, *J. D. Salinger: A Writing Life*, that contained material from the reclusive author's unpublished letters. Salinger, who argued that the book infringed his copyright, won his lawsuit to stop publication. Unless the decision is reversed (Random House and author Ian Hamilton currently are seeking a rehearing), the opinion of the Second Circuit Court of Appeals will affect the outcome of future lawsuits as well as industry practice—and, of course, the Salinger biography, in its present state, will stay out of bookstores.

According to the opinion, Hamilton, without permission, quoted from or closely paraphrased 44 of Salinger's unpublished letters, which were written to various friends and associates and mostly donated by them to university libraries. Many people find the relevant rudiment of copyright law here hard to keep straight: although the person who receives a letter owns the piece of paper and may give someone permission to read it, or may donate or sell it, the copyright in the letter, and the ability to give permission to quote from it, remains with the writer. (Consider that writing letters isn't all that different from writing a book; no one thinks he can take with impunity unlimited quotations from *The Catcher in the Rye* simply because the author sent him a copy of the novel.)

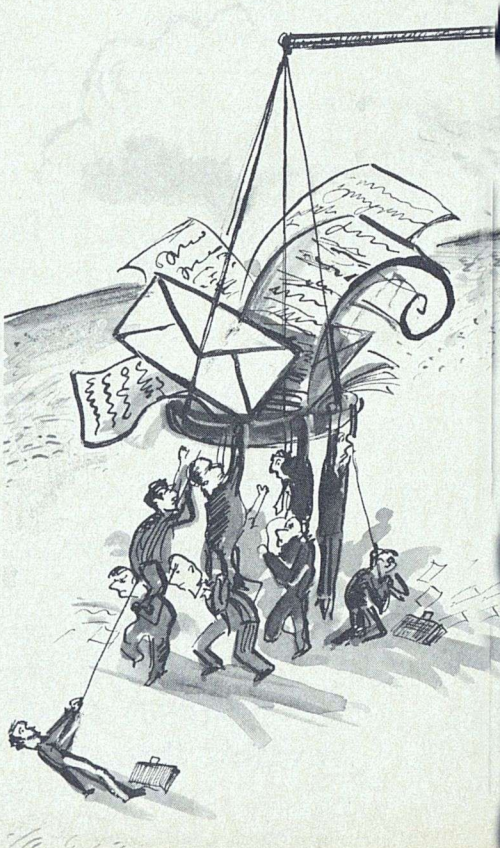
Galleys of an earlier version of the biography were sent to reviewers last May, containing, according to the court, "very substantial quotation" from about 70 letters. Salinger got hold of a set, and, after his lawyers complained to Random House, Hamilton produced a revised version, submitted to Salinger's attorneys in September, in which most of the verbatim quotes from the letters had been eliminated or paraphrased. Nonetheless, Salinger sued, but in November he lost in Federal District Court, where the judge found the use made of the letters did not constitute copyright infringement. In January, however, the Court of Appeals reversed, finding that Hamilton had copied, in some 59 places, "with some use of quotation or close paraphrase. . . . at least one-third of 17 letters and at least 10% of 42 letters." About 200 words were quoted verbatim, according to the court, and the Salinger correspondence was quoted or paraphrased in 40% of the 192 pages of the book.

The Rationale for 'Fair Use'

Two things make the Salinger case of particular interest. First, it is one of the few that deals with fair use—the privilege that permits limited use of expression from copyrighted material—in unpublished works. The rationale for fair use, simply put, is that the courts and Congress have decided it is better for the progress of knowledge if authors who come along afterward may use some of earlier authors' copyrighted words, in addition to having free access to the facts and ideas in their work.

Fair use is one of the thornier doctrines of copyright law. Although many people are convinced that there is an absolute number of words one can use before having to ask for permission—300 words from a book-length work, two lines of poetry, 10% of a letter are popular formulations—there is no legal rule of thumb. What comprises fair use depends not only on the number of words used but on several other factors as well, among them the kind of work quoted from, what it's being used for, how much economic damage that use does to the original work—all of which have to be looked at concurrently. Lawyers do the looking before a book is published; courts do the looking if the person whose work was copied sues; and, as *Salinger* shows, even judges often reach different conclusions about whether a particular use strikes them as "fair."

However much fair use there is in published works, there's less in unpublished works. The Supreme Court made that clear when it decided *Harper & Row* v. *The Nation* in 1985. In that case, the *Nation* had quoted about 300 words and



Mean to Publishers?

paraphrased quite a few more from the manuscript of President Ford's memoir, *A Time to Heal.* The Supreme Court found the *Nation* guilty of infringing Ford's copyright and based its decision in large part on the limited use it held could be made of unpublished works. In terms of the language contained in the opinion, *Salinger* appears to go even further than *Harper & Row.*

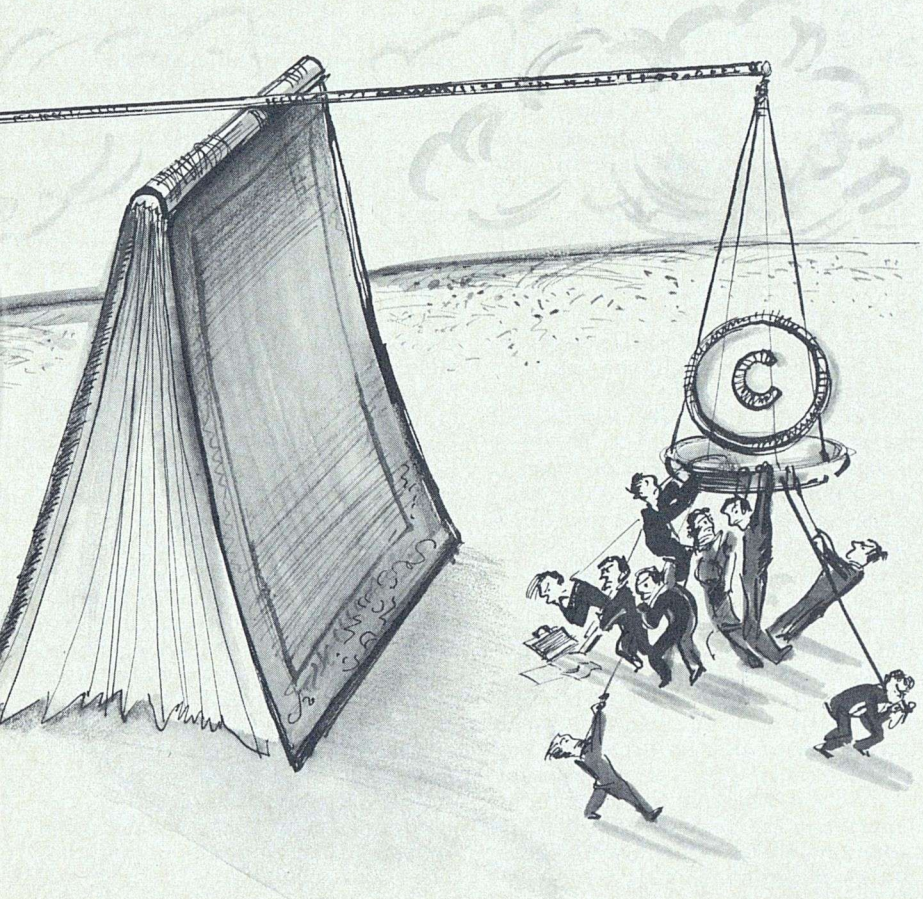
The second and more broadly applicable aspect of *Salinger* is the court's approach to paraphrasing. There is a fundamental distinction in copyright law between "facts" and "ideas" on the one side, which may be freely taken, and "expression" on the other, which the author owns absolutely, subject to the fair-use privilege. Paraphrasing represents an effort to use the facts without using the expression. Generally, when authors are worried that too much verbatim copying may result in copyright infringement, they resort to paraphrase. Generally the courts have gone along with that approach, unless the paraphrase constitutes what's known as "close paraphrase"; for example, "I raced swiftly to the store to purchase some yummy chocolate cookies for tea," is changed to, "He wrote that he raced swiftly to the store to buy some yummy chocolate cookies for tea," where expression, rather than merely fact, clearly has been taken. In *Salinger*, however, the Second Circuit characterized as close paraphrase examples like the following:

Salinger: "Like saying, She's a beautiful girl, except for her face."

Hamilton: "How would a girl feel if you told her she was stunning to look at but that facially there was something not quite right?"

In another example, the court considered a lengthy passage in a colorful Salinger letter about Oona O'Neill's marriage to Charlie Chaplin. (Salinger began: "I can see them at home evenings. Chaplin squatting grey and nude, atop his chiffonier . . . ") Hamilton had tortured Salinger's prose as much as in the passage above. ("At one point in [the letter], he provides a pen portrait of the Happy Hour Chez Chaplin: the comedian, ancient and unclothed . . . ") Most lawyers would have passed Hamilton's paraphrase as acceptable, taking fact and not expression, but the court did not. The sort of paraphrase that might have been okay, the Second Circuit said, was something like, "Salinger was distressed that O'Neill had married Chaplin . . . in his mind he imagined how disastrous their life together must be."

Although the case concerned unpublished letters, the court's view of paraphrase relates to all paraphrasing, whether of published or unpublished material, letters or not. By ruling virtually all paraphrase to be the equivalent of verbatim copying, the Court of Appeals came to a very different conclusion from



***Rinzler** is a contributing editor. She was one of the attorneys in the* Nation *case cited in this article.*