

*Catch 22 in the Rye:
Copyright Essentialism and the Performativity of Remedies*

Andrew Gilden

Fellow, Stanford Law School
agilden@law.stanford.edu | [Bio](#)

A long line of scholarship has sought limitations on the availability of copyright injunctions. Invoking the First Amendment as both a substantive and procedural limit on the reach of copyright, numerous scholars have emphasized both that statutory rights must be limited in scope to protect free expression and that the provision of rights is distinct from the provision of any particular remedy.

Although efforts to use the First Amendment to reign in the substantive reach of copyright have been largely unsuccessful, courts in recent years have seized upon a rights/remedy distinction in copyright to erect new barriers to injunctive relief. For example, in *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010), the Second Circuit vacated a preliminary injunction against a critical reinterpretation of *The Catcher in the Rye*, setting forth a new preliminary injunction standard that expressly requires a court to consider the First Amendment interests of the parties and the public. In the same opinion, however, the court in a single paragraph affirmed the district court's widely-derided rejection of Fredrik Colting's fair use defense.

This Article suggests that this "split-the-baby" approach in *Salinger* was no coincidence, and it argues that the interrelationship between rights and remedies has been largely underappreciated in copyright law and scholarship. Scholars working within a First Amendment framework have largely followed a strict two-step sequence to the rights/remedy determination, whereby (1) the merits determination occurs first-in-time and in isolation from pragmatic concerns and (2) the remedies determination serves the subsidiary role of implementing a given ruling in light of real-world interests. Although law & economics-minded scholars have given much greater attention to the role of remedies in structuring copyright-related transactions, they have been relatively agnostic to the nature and scope of the substantive copyright entitlement.

This Article critically examines the interrelationship between substantive copyright protections and the remedies available for infringement. Drawing from constitutional remedies scholarship and post-structural theories of performativity, it argues that a court's awareness of its likely remedy award in a particular dispute—combined with its normative view of how future actors should address similar disputes—"reaches back" and shapes the determination of the parties' respective rights. A performative approach to remedies suggests that the realignment of rights and remedies in *Salinger* manifests an embedded preference for commodification and efficiency, notwithstanding the court's repeated invocation of free speech values. By sequestering rights from remedies and embracing First Amendment limitations solely as to remedies, the decision adds a new veneer of fairness to the copyright system at the same time that it further entrenches the industrial, permissions-based norms long-derided by scholars and advocates.