

BEBCHICK LAW

Law Alert

July 2009

Welcome from Bebchick Law

Dear Clients, Colleagues and Friends,

This Alert is intended to briefly update you about recent legal developments ranging from copyright law to corporate compliance. We also follow-up on an article about "finders" (persons engaged to solicit potential investors) in our last Alert, further to a recent SEC Administrative Order regarding this subject.

We hope that you will find this Alert instructive, and we look forward to any feedback you might have.

Sincerely yours,

Baruch M. Bebchick

Fair Use Determination

Earlier this month, the U.S. District Court for the Southern District of New York upheld the copyright infringement claim of J.D. Salinger, well-known author of the classic *The Catcher in the Rye*, against Fredrik Coltin, author of an unauthorized derivative work based on *Catcher* entitled *60 Years Later: Coming Through the Rye*. Finding that *60 Years* did not meet the criteria for "fair use" under the U.S. Copyright Act (the "Act"), the Court ruled that *60 Years* was an infringement of Salinger's copyright and granted a preliminary injunction preventing publication of the work in this country. The Court's action is now under appeal.

The Act does permit the limited use of copyrighted materials for news reporting, criticism or comment (including parody), scholarship, research, or teaching as a "fair use" of such materials. However, "fair use" hardly provides a blanket exemption from infringement claims, and the determination of whether a use of copyrighted materials will qualify as a "fair use" or violate the rights of a copyright holder revolves around an analysis of four factors: (1) purpose of the use (i.e., whether the nature of the work is

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transformative and therefore provides a new purpose, expression, meaning or message), (2) nature of the work (i.e, whether the work is factual or creative, with a greater chance for finding a "fair use" for factual or informational works), (3) proportion of material used (i.e, whether copying of the original work for "fair use" was greater than necessary), and (4) effect on marketability (i.e, the extent of harm the proposed "fair use" will have on the original work or on other derivative works).

In this case, Coltin's primary argument was that *60 Years* should qualify as a "fair use" because it was intended to be a parody of *Catcher*. In reviewing the validity of this claim, the Court focused primarily on two legs (factors 1 and 3) of the "fair use" test. Regarding purpose of use (factor 1), the Court determined that while *60 Years* did have a limited transformative character, it could not be deemed to be a parody since its "parodic content" was "not reasonably perceivable". And regarding the proportion of original material used (factor 3), the Court held that an unnecessarily large proportion of the original material was used by Coltin in *60 Years*. The Court also briefly analyzed factors 2 and 4, and found that none of the four factors led to a determination of a "fair use" by Coltin. As no "fair use" exemption was found, Coltin was held to be infringing Salinger's rights in *Catcher* and the Court quickly moved to grant a preliminary injunction against distribution of *60 Years*.

As with most infringement claims, the outcome here was dependent upon the Court's analysis of the particular facts presented, including the text, characters and setting of the two works as illuminated by affidavit testimony from literary experts. The Court also noted that until suit was filed, Coltin and his publisher never had claimed that *60 Years* was a parody of Salinger's work but rather that it was a tribute and sequel to *Catcher*.

For more information about the "fair use" doctrine, copyright law in general or any of the other items discussed in this Alert, please contact Baruch M. Bebchick at (646) 688-4375 or [Email Us](#).

Amendments to DGCL

Several recent amendments (the "Amendments") of the Delaware General Corporations Law (the "DGCL") will go into effect on August 1, 2009. The following is a brief summary of the Amendments which address various corporate governance matters:

1. Indemnification. The Amendments provide that a Delaware entity's written obligations to indemnify or advance expenses to directors, officers or employees cannot be eliminated or modified by amending such provisions after the occurrence of an event which triggers their application. However, an amendment negating or modifying such obligations will succeed if the original written provisions imposing these obligations on the entity (usually found in its formation documents) contain an express statement permitting

stages of development. We regularly counsel clients how to most effectively organize and reorganize, structure entrepreneurial ventures, and commercially protect and exploit their intellectual property and other assets, and we negotiate and draft the full spectrum of agreements necessary to effectuate these and related transactions.

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such post-event action.

2. Access to Proxy Solicitation Materials. Under the current statutory regime, shareholders seeking to elect board members other than those nominated by the existing board must navigate a rather lengthy and costly proxy solicitation process. The Amendments state that a corporation may ease this mechanism by including a provision in its by-laws providing that stockholder nominations of directors may be included in a company's proxy statement and proxy card nominees. The Amendments further permit a corporation to adopt a by-law to reimburse a stockholder for expenses incurred in soliciting proxies in connection with the election of directors. However, both the undertaking by a shareholder to solicit proxies and the payment of corresponding expenses incurred by the corporation are subject to the specific details of by-laws provisions regulating such matters.

3. Record Date. As a departure from existing DGCL provisions, the Amendments permit a board of directors to establish a record date for voting at a shareholder meeting that is separate from, and later than, the record date for notice of such meeting. This change is intended to prevent certain former shareholders from voting at a meeting although they hold no company stock at the time the meeting is held. While this change will go into effect automatically, certain changes to a corporation's by-laws may be advisable to avoid conflicting provisions.

4. Judicial Removal of Directors. Under the Amendments, the Delaware Court of Chancery may now remove a director if (i) s/he has been convicted of a felony in connection with her/his corporate duties or (ii) s/he has been judged to have committed a breach of her/his duty of loyalty, and the Court determines that the director did not act in good faith and removal is necessary to avoid irreparable harm to the corporation.

For more information about the Amendments, the DGCL or any of the other items discussed in this article, please contact Baruch M. Bebchick at (646) 688-4375 or [Email Us](#).

Update on Finders

In our last Alert, we discussed pitfalls to avoid when engaging a "finder" to solicit funds from prospective investors or acquirers in exchange for a percentage of the financing secured. One of the issues we highlighted was the importance of engaging only those finders who are duly registered as a broker/dealer. We noted that failure to engage a finder who is a registered broker/dealer can result in significant penalties, including the recipient of the financing being compelled to return to investors all monies raised by such a finder.

The SEC recently issued an Administrative Order (the "Order")

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regarding finders who were found to be in willful violation of the broker/dealer registration provisions set forth in Section 15(a) of the Securities and Exchange Act. That provision prohibits any person other than a registered broker/dealer from engaging "in the business of effecting transactions in securities for the account of others". The SEC found that Ram Capital Resources LLC ("Ram") and two of its principals (none of whom were registered broker/dealers), improperly effected securities transactions as unregistered finders by identifying, soliciting and structuring investors for third parties.

Pursuant to the Order, the SEC imposed sanctions on Ram and its principals, including suspension from being involved in any broker/dealer activities or from otherwise having any association with a broker/dealer, and directed the Ram principals to pay disgorgement and penalties in the amount of \$364,721 each.

Note: The principals in Ram were not alleged to have engaged in either fraud or misconduct (elements which have been present in most SEC actions against finders). Thus, the Order may signal more stringent SEC policing and an increased willingness to pursue and sanction those involved in unregistered broker/dealers activities.

If you have any questions about finders or any of the items discussed in this Alert, please contact Baruch M. Bebchick at (646) 688-4375 or [Email Us](#).

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Our core practice involves intellectual property and corporate matters, with a focus on business formation & restructuring, Internet & e-Commerce, M&A, media, licensing, marketing & advertising, employment, software, entertainment and privacy. Bebchick Law regularly counsels clients about how to most effectively organize and reorganize, structure entrepreneurial ventures, and commercially protect and exploit their intellectual property and other assets.

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