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Fixing Copyright in Characters: Literary Perspectives on a Legal Problem

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FIXING COPYRIGHT IN CHARACTERS: LITERARY PERSPECTIVES ON A LEGAL PROBLEM

Zahr K. Said[†]

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INTRODUCTION

Tarzan, Betty Boop, Sam Spade, Scarlett O'Hara, James Bond, Harry Potter, Holden Caulfield, Sherlock Holmes: the mere names of these once-litigated figures evoke the market power and popular significance characters can possess. Characters are "cultural heuristics," with the power to transport, amaze, horrify, and inspire.¹ Once readers come to know a character, they may want to spend time with her again and again. The experience of reading about a character may deliver many of the same sensations and emotions as a social interaction with her in a reader's real life would do.² Narrative fiction has a unique ability to provide a set of simulated experiences for a reader to live out in her mind.³ It is perhaps this signature feature that can make reading so intensely emotionally engaging.

Characters are central to that experience of engagement, for reasons that are not entirely understood. Readers can *know* a character even more profoundly than they can know a human being, perhaps because of narrative techniques that invite readers into characters' inner lives.⁴ Readers become deeply attached to "their" characters. In the words of one literary theorist, "[e]ven though readers know perfectly well that fictional characters are make-believe, they go on caring about them, lending them the bodies that they do not possess, feeling with them in emotional fusion that paradoxically calls into embodiment a psychic corporeality vouched for in readers' own bodily responses."⁵

It is not uncommon to hear readers complain that when a book ended, they were sorry to part with its characters, as though they had

¹ BLAKEY VERMEULE, *WHY DO WE CARE ABOUT LITERARY CHARACTERS?* 52 (2009).

² Annie Murphy Paul, *Your Brain on Fiction*, N.Y. TIMES, Mar. 18, 2012, at SR6.

³ *Id.* ("Fiction—with its redolent details, imaginative metaphors and attentive descriptions of people and their actions—offers an especially rich replica. Indeed, in one respect novels go beyond simulating reality to give readers an experience unavailable off the page: the opportunity to enter fully into other people's thoughts and feelings.")

⁴ Rita Felski, *Introduction*, 42 *NEW LITERARY HIST.* v, v–vi (2011) ("[V]ia the specifics of [a character's] formal shaping, it offers otherwise unattainable insights into the historical inflection of personhood.")

⁵ Suzanne Keen, *Readers' Temperaments and Fictional Character*, 42 *NEW LITERARY HIST.* 295, 309 (2011).

literally spent time with them as actual persons. As a function of that sense of connection, readers may compare themselves to a favorite character, emulate or critique her, empathize with her, or imagine her in new settings or stories.⁶ Readers who are also authors may subsequently struggle to situate a favorite character in their own works of fiction, perhaps in tribute or perhaps in defiance.⁷ In these ways, characters seem to exist autonomously, that is, apart from their original works and authors. Characters could be said to run—as a neuroscientist described the process of reading—“on minds of readers just as computer simulations run on computers.”⁸ In a fundamental way, then, characters lead independent lives in their readers’ imaginations, in subsequent works of literature, and in the public sphere.⁹ That a personality may be termed a Lothario, a Don Juan, or a Casanova attests to how fictitious characters can be so memorable and enduring—perhaps notorious, in these examples—that they become archetypes that circulate almost autonomously in the cultural economy.

Paradoxically, it may be this very autonomy that makes characters valuable to their creators as commodities in their own right, apart from the original works in which they appear.¹⁰ For authors, characters may be the most valuable aspects of an artistic work whose financial success is difficult to predict and may be fleeting.¹¹ Creating enduring characters

⁶ *Id.* at 306.

⁷ See, e.g., Anupam Chander & Madhavi Sunder, *Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597, 601–12 (2007) (describing and defending defiant uses); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 655–60 (1997) (describing, generally, fan uses as tribute and critique).

⁸ Paul, *supra* note 2.

⁹ Jacqueline Lai Chung, Note, *Drawing Idea from Expression: Creating A Legal Space for Culturally Appropriated Literary Characters*, 49 WM. & MARY L. REV. 903, 905 (2007) (“[L]iterary characters . . . exist within the narrative as the focal point for human identification. In the present cultural milieu, today’s readers, as tomorrow’s writers, are twisting and refashioning iconic literary characters to reflect their own insights and identities.”).

¹⁰ Leon Kellman, *The Legal Protection of Fictional Characters*, 25 BROOK. L. REV. 3, 3 (1958) (proclaiming that “[t]he fictional character today is perhaps the most important commodity in the entire field of entertainment in the United States.”). If this was true in 1958 at the time of this Article’s publication, it is even truer today. Benjamin A. Goldberger, *How the “Summer of the Spinoff” Came to Be: The Branding of Characters in American Mass Media*, 23 LOY. L.A. ENT. L. REV. 301, 302 (2003). Characters generate billions of dollars in revenue annually for intellectual property owners. Melanie Warner, *How a Meek Comic Book Company Became a Hollywood Superpower*, N.Y. TIMES, July 19, 2004, at C7; see also Michael Todd Helfand, Note, *When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623, 625 (1992).

¹¹ It would be more appropriate, of course, to refer to owners as well as (or instead of) authors, given the way copyright law structures its entitlements. However, this Article is concerned with the incentive effects on authors of protecting their characters, and the impact of such protection on subsequent authors. The Article thus uses “authors” in lieu of “owners” in most circumstances. Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc. 216 F.2d 945, 949 (1954) (finding that authors reused characters in order to generate readerly momentum (or “snowball”) in the reception for their works); Leslie A. Kurtz, *The Independent Legal Lives of*

increases the likelihood that audiences will buy subsequent works. Subsequent works in which characters star may change, but the characters themselves often remain effectively the same. Characters' value to authors derives in substantial part from their capacity for potential perpetual reuse in new works.¹² Yet their value to the reading public and to subsequent authors derives in large part from their ability to live multiple lives beyond the limited horizons of their original authors. Characters are, in a sense, unique among components of an artistic work because they can be removed from the work for the purposes of starring in other works.¹³ This may be the major reason that characters become the subject of copyright litigation: they appear to be leading lives in works beyond their original ones.¹⁴ Yet it is arguably the very ability of characters to lead lives separate from their original works that makes them such a valuable form of legally cognizable property, thus ironically threatening their independent legal existence as cultural signifiers. The law reflects this tension between characters as freely circulating cultural signifiers, and characters as legal property whose circulation is subject to their owners' granting permission.

Unfortunately, while copyright law plays an important role in allocating rights to the use of characters, the law in this area is very unclear. Character jurisprudence is thought to be muddled and "quixotic"; neither "predictable nor fair."¹⁵ Courts have been vague or

Fictional Characters, 1986 WIS. L. REV. 429, 432 ("Characters such as Sherlock Holmes, Tarzan, Falstaff, Superman, James Bond, Pogo, Peter Rabbit, the Bobbsey Twins, Nancy Drew, Travis McGee, and Mickey Mouse may be better known and more valuable than any particular work in which they appear.").

¹² Goldberger, *supra* note 10, at 302 ("Although other aspects of a work can be reused to create new works, it is the character that is most portable and most profitable. Characters such as James Bond, Hercule Poirot, and even Bart Simpson transcend any one work in which they appear. The thing that makes them so valuable is that they can appear over and over again in a variety of media. With these brand name characters, the ability to use them in derivative works is even more valuable than the right to sell any one particular work.").

¹³ 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 2.11.3, at 158 (1989) ("Unlike most paintings, photographs or novelty items, a character can take on a life of its own and thus may be protected against copies in postures, settings and attitudes far removed from any in the author's original depiction.").

¹⁴ Sometimes owners litigate characters because subsequent authors' characters are substantially similar, though not identical, to the original characters. But this typically happens when an entire work's ideas and structure are at issue. The situation in which independent character protection is at issue is when the characters alone have been borrowed and repurposed.

¹⁵ See, e.g., E. Fulton Brylawski, *Protection of Characters—Sam Spade Revisited*, 22 BULL. COPYRIGHT SOC'Y U.S.A. 77, 87 (1974); Kurtz, *supra* note 11, at 437 n.49; Leonard Zissu, *Whither Character Rights: Some Observations*, 29 J. COPYRIGHT SOC'Y 121 (1981); Kathryn M. Foley, Note, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide*, 41 CONN. L. REV. 921, 926 (2009) ("[C]opyright protection for fictional characters [is] . . . riddled with uncertainty and inconsistency as courts have struggled to fit fictional characters into the rubric of copyright law."); Helfand, *supra* note 10, at 651 (describing how doctrinal confusion undermines the policy goals of copyright law). The case law's problems receive fuller treatment *infra* Parts II, III.

mistaken in their decisions to adopt certain thresholds for character protect-ability, and conclusory in their determinations that characters are—or are not—copyrightable.¹⁶ Judgments often seem to reflect real-world factors or legal areas other than copyright, yet legal reasoning takes place on the terrain of copyright as though faithful to the law, thus entrenching the doctrinal confusion.

Beyond the confusion internal to copyright's protection of characters, a further source of confusion lies at the boundary between copyright and trademark, where sometimes character owners make claims for overlapping protection.¹⁷ Litigants typically bring claims under both sets of laws, whether or not the claims are equally meritorious. Trademark law extends to some characters, and though its protection is narrower in scope and more expensive, it is an important source of legal protection for characters, substantial enough doctrinally and economically to justify a fuller discussion elsewhere. By contrast, copyright protection benefits owners by being broad in scope, by arising automatically upon the character's fixation in a work of art that qualifies for copyright protection, and by being comparatively inexpensive.¹⁸ Many character cases feature both kinds of claims, and because courts have not historically paid enough attention to the differences between the two intellectual property regimes,¹⁹ the case law has evolved in a doctrinally haphazard fashion.

Although the problem of proper channeling, or the improper convergence of forms of intellectual property protection, is a serious issue muddying the doctrinal waters around characters, this Article focuses on problems arising internally within copyright protection alone. It does so in order to address fundamental antecedent questions of the nature of characters and the relationship between characters and their works. It also argues that a better understanding of the purpose and flaws in copyright protection for characters could help disentangle copyright from trademark, thus alleviating some of the tensions in the jurisprudence of both areas of intellectual property law.

Towards that end, this Article argues for the benefits of an interdisciplinary approach to the problem of copyright's internal

¹⁶ See, e.g., Brylawski, *supra* note 15, at 87; Foley, *supra* note 15, at 921.

¹⁷ In fact, characters can be protected under copyright law, trademark law, state law misappropriation law, unfair practices and deception law, and, in some cases, the right of publicity. In *Frederick Warne & Co. v. Book Sales Inc.*, the court held that a book's contents could merit both copyright and trademark protection. 481 F. Supp. 1191, 1196 (S.D.N.Y. 1979) (reasoning that "[b]ecause the nature of the property right conferred by copyright is significantly different from that of trademark, trademark protection should be able to co-exist, and possibly to overlap, with copyright protection"); Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429, 433 (1994); see also Foley, *supra* note 15, at 953–57; Helfand, *supra* note 10, at 651.

¹⁸ Kurtz, *supra* note 11, at 439–40.

¹⁹ Foley, *supra* note 15, at 964; Helfand, *supra* note 10, at 651.

inconsistencies. Character jurisprudence under copyright law misaligns with cultural and literary conceptions of character. Intellectual property law has taken insufficient account of important discrepancies among legal, cultural, and literary theories of character. Literature helps articulate what is at work in the doctrinal tensions in copyright's character jurisprudence over *which kind* of character, if any, to protect independently, and *how much* of it, if any, to protect separately from the text. At the heart of the doctrinal confusion over the proper scope of protection for characters are a series of questions that literature can help answer: what is a character, and how can the law identify it as such? Can characters truly be protected independently of the work that embeds them, and if so, how much of the character should the law protect as such? What method should courts use to separate characters from their texts, for the purposes of assessing whether unauthorized uses of characters in new creative works constitute infringement? To whom do characters belong, and when? What should the law make of the role readers play in constructing, completing, and resuscitating characters? As the confused case law makes plain, the law does not have good tools to answer these questions, even though the factual scenarios at stake in litigation continue to press courts for solutions.

The turn to literature yields insights into the proper scope not just of character protection, but also more broadly of the derivative work right, which scholars have cited as an important area for copyright reform.²⁰ In clarifying the law's doctrinal confusion, literary considerations can provide one piece in the larger puzzle of copyright reform. Ultimately, they can also help inform the inquiry into whether copyright or trademark, or neither, is proper for character protection.

Part I sets out the purpose and evolution of protection for fictional characters under copyright law.²¹ It describes the dominant tests used to

²⁰ See, e.g., Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 564 n.88 (calling for the clarification of the derivative work right); Tushnet, *supra* note 7, at 651.

²¹ This Article excludes from consideration protection for human characters, to which other forms of law such as the right of publicity, may attach. Fictional literature is not directly concerned with *human* characters, and this Article concerns itself with fictional characters. See Gregory Currie, *Narrative and the Psychology of Character*, 67 J. AESTHETICS & ART CRITICISM 61, 61 (2009) (bracketing human characters who appear in fiction so as to focus productively on fictional characters' role in narrative); Zissu, *supra* note 15, at 121 ("The historical or actual figure, living or dead, is not the subject of our inquiry. Such figures are not fictional even when presented fictitiously in the sense that the author gave unduly free rein to his imagination instead of adhering to facts."). For consideration of the intellectual property concerns involved with human characters, see, e.g., Leslie A. Kurtz, *Digital Actors and Copyright—From The Polar Express to Simone*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 783, 785 (2006) (exploring answers to the questions: "What is the legal status of . . . electronic actors . . . digital human actors? Unlike traditional cartoon characters, like Mickey Mouse, they are derived in some fashion from human beings. But they are created, in large part, by those employing digital technology. Who owns legal rights to these hybrid creations?"); Peter K. Yu, Note, *Fictional*

determine whether characters will be independently protected, and discusses the confusion that has arisen in the law. Part II addresses the proper scope of protection for characters by broadly tracing the evolution of characters through literary history. Literary history, theories, and texts demonstrate that the very factors that gave rise to characters' centrality to modern literature may be the factors that make protecting them independently under copyright unworkable. After providing this literary background, Part II frames what the Article terms the "entanglement" problem. Starting in the eighteenth century, characters began to become more important, for readers and for markets.²² As characters rose in importance, I argue, they also became harder to extricate from their texts, for the purposes of treating them as independent pieces of intangible property under copyright law. Their disentanglement is a necessary, but inconsistent and often conclusory, part of copyright analysis that invites too much manipulation of the substantial similarity analysis. Part III argues that in spite of copyright's stated commitment to aesthetic neutrality, the law surrounding characters is not neutral and will never be neutral. Copyright encourages and rewards the creation of visually rendered (or visually evocative) characters over literary (or purely verbal) ones. The law encourages the creation of what literary theory terms "flat" rather than "round" characters. Literary theory thus exposes the reductive nature of the law's treatment of characters, and its simplistic view of the proper scope and implementation of independent copyright protection. Literary theory also points to another legal problem regarding copyright protection for characters: to the extent that readers play an important role in receiving and construing characters, thus "mentally completing" them, perhaps such characters cannot be seen to have satisfied copyright's fixation requirement. Recent case law exploring the fixation requirement supports the idea that a work that undergoes constant change after the artist has completed it may fail to clear the fixation threshold. In the case of characters, the text in which the characters appeared would receive protection, in its fixed textual form, and its characters, as embedded in the work as mere collections of words, would be protected as part of that text. But the particular role readers play in adopting and engaging with and changing characters would effectively bar protection for characters independently of their originating texts. Thus, characters would no longer receive independent copyright protection. Part IV concludes by turning to alternatives the

Persona Test: Copyright Preemption in Human Audiovisual Characters, 20 *CARDOZO L. REV.* 355 (1998).

²² See, e.g., DEIDRE SHAUNA LYNCH, *THE ECONOMY OF CHARACTER: NOVELS, MARKET CULTURE, AND THE BUSINESS OF INNER MEANING* (1998); VERMEULE, *supra* note 1.

law might weigh in response to literature's insights, and it provides a brief overview of the possibilities in both copyright and trademark.

The Article concludes that copyright law would do well to take account of the ways in which literary texts and theories reveal characters to be much more complicated than copyright law currently contemplates. Although literary insights into character do not themselves require either expansion or contraction of protection—dependent as reforms are on policy concerns endogenous to copyright—they do fundamentally change the nature of the inquiry. These insights expand the law's understanding of characters and highlight theoretical and doctrinal implications of the confusion currently stymieing character protection under copyright law.

I. COPYRIGHT PROTECTS SOME CHARACTERS INDEPENDENTLY OF THEIR WORKS

This Part provides background on the scope and nature of current copyright protection for characters. It reframes the de facto purpose of protection for independent characters as a gap-filling measure to be used when regular substantial similarity tests between texts would fail to produce an accurate result. It describes the two dominant tests for character copyrightability, and argues that copyright law has set the stage for a systematic aesthetic bias in favor of protecting certain kinds of characters by relying on tests that are unclear, difficult to implement, and blind to the role characters actually play in fiction and in literary creation. Literature shows why copyright's current analytic structure with respect to characters is bound to remain flawed unless it changes.

A. *Copyright Protection for Characters*

The 1976 Copyright Act (hereinafter the Act) grants authors of "original works of authorship"²³ a bundle of rights in order to encourage them to "create and disseminate original expression."²⁴ Authors possess the exclusive right to copy, perform, distribute or display their works, and to create what the law terms "derivative works."²⁵ Derivative works are subsequent works of authorship that are based on preexisting works²⁶ or that incorporate characters or component parts from

²³ 17 U.S.C. § 102(a) (2012).

²⁴ Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996).

²⁵ 17 U.S.C. § 106(2).

²⁶ *Id.* § 101 ("A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version,

preexisting works.²⁷ Thus, parties may infringe the rights of original authors in their copyrighted works in a number of ways: by reproducing, displaying or performing the works verbatim, or distributing them without authorization. When character details in a story are borrowed verbatim as part of the unauthorized copying or distribution of the entire and exact preexisting work, courts do not need to reach the question of whether the characters are *independently* copyrightable.²⁸ This is because a subsequent work that is “substantially similar” to a preexisting work will be found to be infringing unless a successful defense is available.²⁹

By contrast, when character details from one work are used in the creation of an otherwise new work—such as an unauthorized sequel or spinoff—the allegedly infringing work would fail the substantial similarity test for purposes of proving copying because the old and new works would look too dissimilar. It is typically then that courts tackle the question of whether copyright subsists in the independent character, and has been infringed.³⁰ The only common feature in the two works is the character. The old character might be said to have taken on a life of her own in a new work.³¹ Copying characters can thus serve as the sole basis of an infringement claim, regardless of whether anything else in an allegedly infringing work is “substantially similar” to a preexisting work.

sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a ‘derivative work.’”). Using intellectual property terms of art—such as “original” and “derivative works”—unintentionally connotes subtle but unhelpful value judgments about the works under discussion. Thus, whenever possible, this Article has adopted the term “source work” or “preexisting work” where copyright law has tended to use “original work” and “subsequent work” rather than “derivative work.”

²⁷ *King Features Syndicate v. Fleischer*, 299 F. 533, 535 (2d Cir. 1924) (holding that copyright protection extends to all copyrightable component parts of a work in which copyright subsists).

²⁸ 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.03[2] (2013) (“Where there is literal similarity . . . it is not necessary to determine the level of abstraction at which similarity ceases to consist of an ‘expression of ideas,’ because literal similarity by definition is always a similarity as to the expression of ideas.” (footnote omitted)).

²⁹ Defenses might include, *inter alia*, independent creation or fair use. The doctrine of independent creation was summed up in Learned Hand’s classic formulation: “[I]f by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936); *see* 17 U.S.C. § 107 (2012) (codifying the doctrine of fair use); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (holding that fair use is an affirmative defense, thus placing the burden of proof with the proponent); 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:49 (4th ed. 2002) (“Fair use is an affirmative defense.”).

³⁰ 1 NIMMER, *supra* note 28, § 2.12; *see also* *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1450 (1988) (reaching substantial similarity analysis with respect to characters after stating that there was “little similarity” between the works at bar “in terms of overall plot, sequence, dialogue or setting”).

³¹ Kurtz, *supra* note 11, at 432.

For example, if Shakespeare's works were protected by copyright, an unauthorized "prequel" to *Hamlet*—in which he and Ophelia eloped to the Danish countryside before the revenge tragedy ever ignited, for instance—might contain a number of substantial similarities to the underlying work. A court might find that some protectable aspects of Shakespeare's expression were taken, as well as some protectable plot incidents. If, in a second hypothetical work based on *Hamlet*, Hamlet and Ophelia were instead imagined as college freshmen in Elsinore, Idaho, in a transposition of their thorny courtship into a setting and time far removed from its original context, substantial similarity analysis between this campus romance and the underlying play would likely fail to find copying on the basis of the works' structures and settings. The two works would look too different from each other.³² However, independent character protection under copyright might still reach this subsequent work.

One way of viewing character protection then, is as a de facto gap-filling measure: courts use it to fill what they may perceive as a gap in protection when subsequent uses of characters from preexisting copyrighted works extend beyond the bounds of substantial similarity analysis but a considerable use of preexisting materials has nonetheless taken place.³³ In this hypothetical, a court would return to *Hamlet* to assess, as always under copyright law, whether ownership of a valid copyright exists and whether defendants copied plaintiffs' work.³⁴ Direct evidence of copying is rarely available, so plaintiffs may show (a) that defendants had access to the copyrighted material from which they allegedly copied and (b) that "substantial similarity" existed between plaintiffs' and defendants' works.³⁵

A court that found no substantial similarity between the overall works would then likely ask whether Hamlet and Ophelia were copyrightable as independent characters, and if so, only then would ask whether the subsequent work had impermissibly borrowed protected parts of the underlying work's characters.³⁶ The inquiry into character copyrightability would begin, in most courts, with an examination of

³² *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (finding no infringement because "[t]he stories are quite different" from each other); *accord Olson*, 855 F.2d at 1450–51 ("The settings of the two works are too dissimilar to be relevant to the issue of substantial similarity.")

³³ Plaintiffs must show that defendants copied "a substantial, legally protectable portion" of plaintiff's work. *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1292 (C.D. Cal. 1995).

³⁴ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

³⁵ *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162–63 (9th Cir. 1977).

³⁶ *Olson*, 855 F.2d at 1451.

“the degree to which the character is developed.”³⁷ The analysis would consider the characters’ physical descriptions, linguistic tendencies or catchphrases, relationships with other characters, and emotional traits.³⁸ For example, does the western mountain Ophelia sing songs about “herbs” (or their modern-day pharmacological equivalent)? Does the contemporary Hamlet act moody, melancholic, and indecisive? Does he quote from or “remix” lines from the pre-existing Hamlet’s soliloquies?

The examples given above differ from the standard infringement case, in that they both borrow a recognizable element from an underlying work, to do something creative with it. Put otherwise, the hypothetical unauthorized prequel and college love story imagined above both differ in an important way from an infringing use that merely copied parts or all of Shakespeare’s work verbatim, to avoid working up something fresh. Scholarship has called for a clearer distinction between these two kinds of infringement: copying and creative reuse.³⁹ This Article adopts the distinction between copying and creative reuse, and concerns itself with the second kind of infringement alone: reuse of characters through the creation of original derivative works, which is important in its own right⁴⁰ and can usually be distinguished from mere copying quite easily.⁴¹

Creative reuse plays a much more important role in character jurisprudence than mere copying, which makes sense as a logical proposition. If a second author simply copies a work outright, he will have copied characters along with the rest of the work’s defining features. If a second author seeks to build something fresh using the

³⁷ *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Grp.*, 443 F. Supp. 291, 301 (1977).

³⁸ Note that the lack of clarity about precisely which aspects to include for the purposes of substantial similarity analysis is part of the doctrinal confusion, as discussed fully, *infra* Part II.

³⁹ See, e.g., Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2538, 2557 (2009) (recognizing that some “iterative copying” may be fair use but highlighting that such cases differ from regular copying because of their “orthogonal,” “speech-related purposes,” and arguing that fair use determinations ought to be built on such distinctions through the *ex ante* creation of “policy-relevant clusters”); Christopher Sprigman, *Copyright and the Rule of Reason*, 7 *J. ON TELECOMM. & HIGH TECH. L.* 317, 323 (2009) (arguing that a distinction should be drawn between the verbatim copying and distribution of preexisting works, and the creation of derivative works based on those preexisting works); cf. BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 25 (1967) (“It may be objected that Romantic literary ideas have little relevance to the class of pedestrian, nonimaginative works which was the main subject of copyright litigation. But this category cannot be marked off clearly from the other; and the courts traditionally have not been careful to distinguish the various classes of works on functional grounds.”).

⁴⁰ Kurtz, *supra* note 11, at 473 (“Allowing authors to make productive use of an existing character, for new artistic purposes, seems more important than allowing others to make copies of a work.”).

⁴¹ Cf. *id.* (“[I]t is difficult to separate the hack’s piracy of another’s character, aimed at nothing more than benefitting from the efforts of others, from the truly creative use of character to produce a new effect.”).

seeds of an earlier work, what he will frequently do is lift the characters out of the first work and begin from that starting point. Setting aside character licensing and termination of assignment cases, the typical character infringement case focuses on creative reuse, rather than copying, since that is the scenario in which independent protection might conceivably exist. Note though, that the emphasis on characters' independent copyrightability often bogs courts down in discussions of the characters themselves, as opposed to the similarities between characters, and the truly important inquiry: whether infringement has occurred.⁴² As a result, copyright protection for characters has expanded; as Jessica Litman has written: "It used to be said that characters were themselves uncopyrightable (and it was never really true, but it was often said); today nobody would even say it."⁴³

B. *Copyright's Competing Purposes and Internal Limitations*

Contemporary scholarship frames copyright's purpose in largely utilitarian terms.⁴⁴ The United States Constitution authorizes Congress to pass copyright legislation to "promote the Progress of Science and useful Arts."⁴⁵ The goal of such protection is thus forward-looking: it purports to provide incentives for authors to create works of art they might not create if they feared appropriation of those works for private gain by others.⁴⁶ Anthony Trollope wrote, "Take away from English authors their copyrights, and you would very soon take away from England her authors."⁴⁷ Trollope's hyperbolic sentiment calls attention to one of the central goals of copyright law: to provide incentives for

⁴² *Id.* at 440.

⁴³ Litman, *supra* note 17, at 430 (footnotes omitted).

⁴⁴ See Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 242 (1991). "[A] nod to economic incentives is obligatory in contemporary copyright scholarship, and the assumptions that underlie an incentive-based model have become part of the common language in which copyright scholars speak." *Id.* Though other theories justifying copyright exist, the utilitarian theory predominates. See also Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1610–12 (1982); cf. Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006).

⁴⁵ U.S. CONST. art. I, § 8, cl. 8.

⁴⁶ *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.15 (2003) (agreeing with the characterization of copyright law's purpose as a system that delivers "an incentive to create" by providing "assurance of fair compensation for [artists] and their heirs"); see also *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.").

⁴⁷ Kurtz, *supra* note 11, at 439 n.62 (citing 1 ANTHONY TROLLOPE, AN AUTOBIOGRAPHY 142 (1883)).

authors to create works. However, not all authors are treated equally under copyright, which prioritizes authors under a kind of first-in-time property rule. If authors use material from pre-existing works, copyright law presumptively requires that they seek permission or be prepared to offer fair use as an affirmative defense.⁴⁸

To counterbalance the preference for prior authors over subsequent authors, copyright law limits authors' rights in their works with respect to both duration and subject matter. These restrictions serve the public's constitutional interests and offer some protections for subsequent authors. The effective monopoly granted by copyright exists only for a limited duration, after which all rights in the work revert to the public, and the work falls into the public domain.⁴⁹ Inherent in copyright's system of incentives is that authors' rights must to some extent be weighed against subsequent authors' rights.⁵⁰ In its seminal creative fair use case, the Supreme Court referred to the balance of authors and subsequent authors as an "inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it."⁵¹ Fair use exists to provide some "breathing space" for authors who wish to build on preexisting building blocks in creating their works of art.⁵²

Copyright protection for characters similarly contains several internal limitations. These standards for legal protection may make sense at a distance, but when examined up close, they reveal that negotiating the contours of copyright protection in characters is a good deal more difficult than lawmakers and authors might wish.⁵³ For example, some uses of protected characters may qualify as "fair uses" and some characters will simply fail to qualify for copyright protection ab initio, perhaps because they are stock characters, uncopyrightable ideas rather than copyrightable expression.⁵⁴ Congress built important limitations into the subject matter of copyright in the form of the

⁴⁸ 17 U.S.C. § 106(2) (2012); *see also* *Micro Star v. FormGen, Inc.*, 154 F.3d 1107 (9th Cir. 1998) (holding that authors presumptively have the broad exclusive right to create sequels).

⁴⁹ PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* 7–8 (2d ed. 1981). Determining length of duration can be a complex matter that can vary with the work's date of creation and publication, as well as its ownership, but the general rule currently is that copyrighted works are subject to a term of protection for the life of the author plus seventy years. 17 U.S.C. § 302(a) (2012). This limited duration used to consist of fifty years, but Congress extended copyright protection by twenty years with the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 108, 203, 301–04) (hereinafter CTEA). The extension has been unsuccessfully challenged as making copyright unconstitutionally long. *Eldred*, 537 U.S. at 186.

⁵⁰ *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 245 (2d Cir. 1983).

⁵¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

⁵² *See generally* Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429 (2007).

⁵³ *See* Kurtz, *supra* note 11, at 462; Foley, *supra* note 15, at 927.

⁵⁴ 17 U.S.C. § 102(b).

idea/expression dichotomy and the related merger doctrine. Under the idea/expression doctrine, copyright will not subsist in anything that is merely an “idea, procedure, process, system, method of operation, concept, principle, or discovery.”⁵⁵ The Act limits protection to *expression* of an idea; the underlying idea itself is excluded from protection.⁵⁶ Relatedly, the *scènes à faire* doctrine stipulates that stock characters, plot devices, and textual incidents may not be protected.⁵⁷ For example, characters that are mere types, such as the clown, the Machiavel, the jealous husband, or the ingénue, will not be protected as such.⁵⁸ The merger doctrine limits copyright’s scope still further: if a particular work consists of expression that would otherwise be protected, the merger doctrine prevents its copyrightability if the expression is one of a very limited number of ways an idea may be expressed.⁵⁹ By extension, then, if a character consists of an idea whose expression is limited to one of very few possible modes of expression, those forms of expression will not be protectable even if they do go beyond being merely the stuff of “ideas.” A number of doctrines thus impose natural limits on protection for characters: unless they go beyond being mere stock characters, and can also survive review under the merger doctrine, they do not merit protection. They fall outside the statute’s scope because they are mere “ideas.”⁶⁰

Copyright’s scope and its purpose are meaningfully intertwined: to the extent that Congress was willing to grant authors a monopoly property right in the fruits of their labor, it did so only by attaching numerous limitations. These limitations, from constitutional text (“limited times”) to common law doctrines later codified (such as fair use and the idea/expression dichotomy) are important for the discussion of copyright in characters. Because characters live on beyond their works, creating inspiration for subsequent readers and authors, they give rise to what could be extraordinarily powerful rights with substantial impact on parties other than owners. Copyright should attend carefully to the proper scope of independent copyright protection

⁵⁵ *Id. See, e.g., Baker v. Selden*, 101 U.S. 99, 102–03 (1879) (holding that bookkeeping was a “useful art” or idea protectable by patent, but not by copyright, protection under which was limited to the expression of that idea).

⁵⁶ *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (holding that “[u]nlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself”).

⁵⁷ *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004); *see also* Leslie A. Kurtz, *Copyright: The Scènes à Faire Doctrine*, 41 FLA. L. REV. 79 (1989).

⁵⁸ *Gaiman*, 360 F.3d at 660 (“If a drunken old bum were a copyrightable character, so would be a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels, [and] a masked magician.”).

⁵⁹ *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 58–59 (D. Mass. 1990).

⁶⁰ 17 U.S.C. § 102(b) (2012); *Gaiman*, 360 F.3d at 650.

for these fictional figures. In particular, the threshold for character copyrightability is unclear, and benefits from sustained analysis.

C. *Tests for Character Copyrightability*

Copyright protection for characters *independent* of the protection for the works in which they appear arose at common law, with Judge Learned Hand's opinion in *Nichols v. Universal Pictures Corp.*⁶¹ The Copyright Act does not categorically protect characters as independent pieces of property the way it protects works such as literary works, musical works, dramatic works, pantomimes, choreographic works, pictorial, graphic and sculptural works, motion pictures, sound recordings, and architectural works.⁶² Instead, characters were historically protected as elements within a larger work.⁶³ Before *Nichols*, it was assumed that characters received copyright protection as part of the works in which they were embedded.⁶⁴ For example, if a first work (say, Herman Melville's *Moby Dick*) were copied in some respects by a second work (say, Sena Jeter Naslund's *Ahab's Wife*, or *The Star Gazer*), Melville might proceed against Naslund on the theory that her work infringed the copyright in his work. The elements infringed upon would be determined by the court's substantial similarity analysis. In this

⁶¹ 45 F.2d 119 (2d Cir. 1930).

⁶² 17 U.S.C. § 102.

⁶³ The Copyright Act does not provide specific protection for characters as a category independent of the works in which they appear. Under the Copyright Act of 1909, characters were found protectable as component parts of copyrightable works in which they appeared. Copyright Act of 1909, Pub. L. No. 60-349, § 5, 35 Stat. 1075, 1076 (referring to the protection extended to "all the copyrightable parts of the work copyrighted"); see 17 U.S.C. §§ 102, 103; see also *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754 (9th Cir. 1978) (citing § 3 of the Copyright Act of 1909 and describing characters as "copyrightable component parts of the work copyrighted"); Edmund Kitch, *Comment on Dennis S. Karjala, Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 41 (2006) ("The statute lists as examples of the protected works of an author literary works, musical works, dramatic works, pantomimes, choreographic works, pictorial, graphic and sculptural works, motion pictures, sound recordings and architectural works. The statute explicitly excludes from protection any 'idea, procedure, process, system, method of operation, concept, principal, or discovery.' Nothing about characters." (footnotes omitted)).

⁶⁴ *Nichols*, 45 F.2d at 121 ("Nor need we hold that the same may not be true as to the characters, quite independently of the 'plot' proper, though, as far as we know such a case has never arisen."). Although cases had in fact touched on the copying of characters, none had explored *independent* protection for characters. See, e.g., *Detective Comics, Inc. v. Bruns Publ'ns, Inc.*, 111 F.2d 432 (2d Cir. 1940) (finding cartoon character "Wonderman" infringing of "Superman" but assessing the similarities in terms of the characters and their surrounding texts, rather than as independent characters); *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914) (finding a dramatic performance featuring the characters "Nutt" and "Giff" to be infringing of a popular cartoon strip's characters, "Mutt" and "Jeff," but emphasizing the similarities between the two works overall rather than the similarities between the characters independently of their texts, and resting the bulk of its analysis on a market substitution theory).

instance, however, Naslund took less than a paragraph's worth of material directly from Melville's work.⁶⁵ Unless this paragraph can persuasively be claimed to comprise the heart of Melville's work, it will probably be insufficient to give rise to a finding of substantial similarity.⁶⁶ *Nichols* clarified that characters could merit protection independently of their works: here, Melville could sue even though *Ahab's Wife* is, as a work, dissimilar from *Moby Dick*, simply because Naslund had used and repurposed a character, Una Spenser, from *Moby Dick*.

Nichols created independent copyright for characters, but limited the scope of such protection to exclude poorly developed characters. Judge Hand held that to qualify for independent protection, characters would need to be "distinctively delineated."⁶⁷ The distinctive delineation test set out in *Nichols* has become the de facto majority approach in copyright's character jurisprudence. For all the opinion's importance, however, *Nichols* has never been adopted so completely as to eliminate other tests for character copyrightability. The main alternative approach, laid out half a century ago by the Ninth Circuit, has been critiqued possibly as roundly as the *Nichols* opinion has been praised.⁶⁸ In the "Sam Spade" case, the Ninth Circuit found that Dashiell Hammett (and Knopf, his publisher) had not impliedly assigned away rights to use of the famous detective he had created, Sam Spade.⁶⁹ In allowing Hammett to continue to use his best-known character in current and future works, the court rested mainly on contractual grounds.⁷⁰ Yet like the *Nichols* court, it also took the opportunity to reflect in dicta upon what sorts of works *should* give rise to independent copyright protection for characters.⁷¹ The court concluded that characters could not be independently copyrighted unless "the character

⁶⁵ Stacey D'Erasmus, *Call Me Una*, N.Y. TIMES, Oct. 3, 1999, at C7.

⁶⁶ Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985).

⁶⁷ *Nichols*, 45 F.2d at 121 ("[T]he less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.").

⁶⁸ On the view that the *Sam Spade* case got it wrong, see KAPLAN, *supra* note 39, at 51 n.44 (calling the case "wide of the present mark," and calling "some of its observations on the question of 'characters' . . . surely wrong"); see also Brylawski, *supra* note 15, at 87 (characterizing the analysis in the case as "productive of uncertainty and mischief," and as an "unintelligible verbal formula . . . the seed from which massive confusion has grown"). Indeed, in *Walt Disney Prods. v. Air Pirates*, the Court openly raises the critiques of its earlier case. 345 F. Supp. 108, 112 (N.D. Cal. 1972), *aff'd in part & rev'd in part*, 581 F.2d 751 (9th Cir. 1978).

⁶⁹ Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc., 216 F.2d 945, 949 (9th Cir. 1954).

⁷⁰ *Walt Disney*, 345 F. Supp. at 111.

⁷¹ The court was unclear, later, whether the "constitutes the story being told test" was properly part of its earlier holding, or only, as it stated, "arguably dicta." *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1451-52 (9th Cir. 1988) (quoted in 1 NIMMER, *supra* note 28, § 2.12 n.13.1). The *Air Pirates* Court treated this standard for copyrightability as "an alternative rationale," suggesting greater power over the court than if it found the language to be dicta. 1 NIMMER, *supra* note 28, § 2.12 n.13.1.

really constitutes the story being told.”⁷² Sam Spade and other characters from *The Maltese Falcon* were merely “vehicles” through which the story was conveyed; “if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.”⁷³

Subsequent courts and commentators have claimed that the *Sam Spade* case sets the bar for copyrightability so high that it effectively denies any characters independent protection,⁷⁴ and the author of perhaps the most highly respected copyright treatise calls the test “much too restrictive.”⁷⁵ At least one court cites it for the proposition that “characters *ordinarily* may not be copyrighted.”⁷⁶ Whether or not the test makes sense on its own merits, it would seem to have been ill-applied in the *Sam Spade* case, in which the court found that the detective did not constitute the story being told. One observes a certain irony in that the Court seems to have granted Hammett the right to use his characters, but potentially stripped all future characters of independent copyrightability in so doing.⁷⁷ Still, the “constitutes the story” dicta—if they are indeed dicta—linger in the case law despite the lambasting the relevant language has undergone.⁷⁸ Some courts have made a point of addressing both standards,⁷⁹ presumably to avoid reversal.⁸⁰

Independent copyright protection for characters thus requires that characters satisfy one of two main tests, the “distinctive delineation test” (used by a majority of courts) or the “constitutes the story being told” test.⁸¹ Besides these two formal tests courts use to determine characters’ independent copyrightability, there are numerous informal factors

⁷² *Warner Bros. Pictures*, 216 F.2d at 950.

⁷³ *Id.*

⁷⁴ See DOROTHY J. HOWELL, *INTELLECTUAL PROPERTIES AND THE PROTECTION OF FICTIONAL CHARACTERS* 90 (1990) (stating that the *Sam Spade* case “is frequently cited to support the proposition that character is uncopyrightable”).

⁷⁵ 1 NIMMER, *supra* note 28, § 2-12 n.12; see also Kurtz, *supra* note 11, at 454 (calling the test “very restrictive, far more restrictive than the *Nichols* standard”).

⁷⁶ *Olson*, 855 F.2d at 1451 (emphasis added).

⁷⁷ David B. Feldman, *Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 CALIF. L. REV. 687, 694 (1990); Kurtz, *supra* note 11, at 455 (“The author [was] left free to use his character in new stories, but so [was] everyone else.”).

⁷⁸ Foley, *supra* note 15, at 930 (describing courts’ uncertainty over *Sam Spade*’s effective authority, and stating that it “has never been generally accepted”).

⁷⁹ “In an implicit acknowledgment of the unsettled state of the law, in considering the characters at issue in *Olson*, the circuit court evaluates the characters in the suit under *both tests*.” *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *7 (C.D. Cal. Apr. 25, 1989).

⁸⁰ Foley, *supra* note 15, at 930. “[O]ut of an abundance of caution this Court will determine the protectability of the Rocky characters under both tests.” *Anderson*, 1989 WL 206431, at *7.

⁸¹ *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945, 950 (9th Cir. 1954); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

courts may also consider.⁸² Some courts address both tests, producing confusion and unpredictability. The law in this area is inconsistent, unsettled, and unclear.⁸³

As the next two Parts show, the haphazard evolution of copyright protection for characters has culminated in uncertain and aesthetically non-neutral standards for protection. Courts routinely add elaborations of degree or actual additional factors as requirements for copyrightability.⁸⁴ This lack of clarity affects crucial aspects of the scope of protection. The next two Parts turn to the larger theoretical and cultural implications of copyright's current treatment of literary characters, and literature's capacity to shine light on the doctrinal confusion. Literature can show how copyright protection for characters is problematic in three ways: how much of the character is protected, which characters are protected, and whether characters should be protected at all, if they are not "fixed" for the purposes of copyright law.

First, the law is unclear in regards to the outer boundaries of the character it protects: the scope of protection is thus difficult to discern. This is the *character entanglement* problem. Framed another way, which parts of an independent character belong to the character, as opposed to the text? Which parts are plot, which parts are style (itself largely unprotected under copyright law if unaccompanied by other elements⁸⁵)

⁸² Under the "extrinsic test" for substantial similarity, courts look at whether subsequent works use the character's name, mannerisms, physical likeness (whether verbally or graphically rendered), signature props or disguises, patterns of speech, and so on: The analysis is based on objective qualities discernible to experts if not always to the average reader/viewer. *Anderson*, 1989 WL 206431, at *12. As part of their inquiry into the nature of the use made by defendants and the importance of the preexisting work to the subsequent work, courts also look at whether the characters are eponymous, whether the characters were borrowed in whole or in part, whether they were borrowed literally, figuratively, allusively, or transformatively, etc.

⁸³ See, e.g., *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1295 (C.D. Cal. 1995) ("The law in the Ninth Circuit is unclear as to when visually-depicted characters such as James Bond can be afforded copyright protection."); *Anderson*, 1989 WL 206431, at *7 (calling the law "unsettled"); Mark Bartholomew, *Protecting the Performers: Setting a New Standard for Character Copyrightability*, 41 SANTA CLARA L. REV. 341, 347 (2001) (referring to the "lack of clear standards" the case law evinces); Brylawski, *supra* note 15, at 77 (calling character doctrine "inconsistent, unclear, and quixotic"); Kurtz, *supra* note 11, at 437.

⁸⁴ *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988) (recognizing that characters in the Ninth Circuit had been granted protection but only when they were "*especially distinctive*") (emphasis added); *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1215-16 (1998); *Walt Disney Prods. v. Air Pirates*, 345 F. Supp. 108, 111 (N.D. Cal. 1972) (characterizing earlier cases as requiring that characters be "sufficiently distinctive and defined" to merit protection), *aff'd in part & rev'd in part*, 581 F.2d 751 (9th Cir. 1978).

⁸⁵ *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 711 (S.D.N.Y. 1987). I read *Steinberg* to stand for the proposition that style by itself will not suffice for a finding of infringement. In *Steinberg*, and other cases similarly focused on authorial style, there is usually a great deal of overlapping subject matter. In *Steinberg*, the movie poster and *The New Yorker* cover were stylistically similar, but a court did not need to decide whether style alone was protectable because what had been borrowed was much more than style: The two works

and which parts are distinctive character traits that constitute protected expression?⁸⁶ Second, characters are governed by legal standards that are not value-neutral, which in turn skews the outcome regarding which characters can and will be protected. We might call this the law's *selection* problem. Third, copyright law continues to protect characters independently even though theories of reading—and empirical evidence—show that literary characters actually change and evolve in the minds of readers. Awareness of character's evolution through reading would suggest that, beyond their existence in words on the page, characters may fail to meet copyright's fundamental requirement of fixation. This is the character *fixation* problem.

Together, the next two Parts demonstrate that using a literary lens to view the doctrine underpinning independent copyright for characters magnifies and clarifies the law's confusion, which in turn should allow legal regulators to focus more accurately effectively on ways to improve the law.

II. WHY THE SCOPE OF COPYRIGHT PROTECTION FOR CHARACTERS IS UNCLEAR

How much of a given character does—and should—the law protect? How can courts discern where the text leaves off and the character begins, for the purposes of substantial similarity analysis? Ultimately, the answers to these questions implicate the nature and scope of the derivative work right and could play a valuable role in copyright reform. However, they are important in their own right as procedural levers in copyright litigation.⁸⁷ This Part argues that literary insights should be brought to bear on considerations of the proper scope of protection for independent characters. Copyright can use literature to think through whether more, or less, of a character should be protected as a character, by inquiring into the extent to which characters *can* be easily separated from their surrounding works.

captured a provincial view of a big city, with many substantive similarities that went well beyond style. For more discussion, see *infra* notes 166–172 and accompanying text.

⁸⁶ *Steinberg*, 663 F. Supp. at 711–12; KAPLAN, *supra* note 39, at 51 (referring to the “trouble in extricating ‘character’ as a separately copyrightable element” and noting that some have viewed the extricability of various features of a text all too blithely).

⁸⁷ The amount and importance of the material taken from a work plays a role in courts' substantial similarity analysis as well as in the second prong of fair use analysis, the amount, and substantiality of the portions used.

A. *From Flat to Round to Unfixed: A Phylogenic Account of Characters*

Literary texts show us that characters, as a group, and authorial techniques used in representing characters, have evolved a great deal over time. Authors have found new narrative ways, since at least the early modern era, to show readers that characters may be conflicted or divided, or to step inside and then back outside characters' minds, in a process that Blakey Vermeule calls "mind-reading" and another canonical book on narrative refers to as "peering directly into the [character's] mind."⁸⁸ Some have argued that their evolutionary progress is (or was), stalled.⁸⁹ Still, no one would deny the tremendous change in what James Phelan calls characters' "dimensions" (characteristics) and "functions" over the many centuries of recorded literary representation.⁹⁰ The very techniques that make them highly complex-narrative forms that were once experimental, such as interior monologue, stream-of-consciousness, or free-indirect style-also make it much more difficult to disentangle characters from their texts.⁹¹ This Part offers a few representative examples of such narrative experiments and illustrates their relationship to the question of a character's disentanglement from her surrounding text.

Before launching into further discussion of character disentanglement, a disclaimer is in order. This Article necessarily uses broad historical brushstrokes rather than attempting in vain to convey the transhistorical, transgeneric particulars of characters. Conceding that it overgeneralizes in doing so, the Article nonetheless relies on a handy temporal division: characters before the early modern period were, with few exceptions, stock characters.⁹² The

⁸⁸ H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 67-82 (2d ed. 2008); see also VERMEULE, *supra* note 1, at 63, 75 ("The history of literary forms is punctuated by . . . changes designed to get inside the mind and go along for the ride. . . . Writers are always coming up with new ways of getting inside"). SCHOLES, PHELAN & KELLOGG, *infra* note 106, at 175. See generally DORRIT COHN, *TRANSPARENT MINDS* (1978).

⁸⁹ MARY MCCARTHY, *Characters in Fiction*, in *ON THE CONTRARY* 271, 275 (1961) (describing the evolution of narrative approaches to creating characters, and lamenting the crisis in representation she perceives: "[novelists] are stuck in the phylogenesis of the novel") (alteration in original).

⁹⁰ James Phelan, *Thematic Reference, Literary Structure, and Fictive Character*, 48 *SEMIOTICA* 345, 357 (1984).

⁹¹ ABBOTT, *supra* note 88, at 75, 78.

⁹² Consider as one significant example, Homer's *Iliad*, which presents a rich case for inferring historical differences in the representation of character. ("[B]ecause so many different personages figure in the *Iliad*, each attributed with a distinct psychological characterization, the *Iliad* is . . . a display of character and characterizations...and [an] intriguing text for tracing ancient personality."). Constantinos G. Passakos & Boele De Raad, *Ancient Personality: Trait Attributions to Characters in Homer's Iliad*, 7 *ANCIENT NARRATIVE* 75, 83 (2009). The work names over 700 characters (including gods). *Id.* at 82. Yet "Homer does not seem to be particularly interested in the psychological nature of man; there is no explicit psychology by

state of literary study is so diverse, and so rich in history, it would be impossible to capture the full range of critical perspectives that have existed. Recently, however, there has been a notable resurgence of interest in the topic of character, mobilized in part by theories of readers' responses, cognitive psychology, and a turn to affect in critical theory.⁹³ It is with full awareness of more recent critical moves, then, that this Article turns to a somewhat old-fashioned taxonomy, according to which, following E.M. Forster, characters could be classed as "flat," or round. The latter are more fully psychologized characters that tend to populate much contemporary literature and drama.⁹⁴

Forster defined flat characters as personalities "constructed round a single idea or quality: when there is more than one factor in them, we get the beginning of the curve towards the round. The really flat character can be expressed in one sentence"⁹⁵ Such characters are easy to recognize,⁹⁶ and easy to remember.⁹⁷ They remain comfortably similar despite changes in their circumstances, which help them to seem frozen in time as the book itself ages.⁹⁸ They may never be taken seriously, for though they make appeals to the emotions, they tend to prompt laughter and to be associated with comedy.⁹⁹

Round characters, by contrast, are unpredictable, difficult to summarize or recognize at a glance:

The test of a round character is whether it is capable of surprising in a convincing way. If it never surprises, it is flat. If it does not convince, it is flat pretending to be round. It has the incalculability of life about it—life within the pages of a book.¹⁰⁰

Characters such as these strike readers as more surprising, more complex, more dynamic, and more human. They are harder to fix in the mind, and harder to remember because they evolve throughout their works.¹⁰¹ Unlike flat characters, which appeal to the emotions, round

which Homer understands his characters. He seems to be an observer of the behavior of the heroes, describes what they do, which decisions they take, and what they accomplish." *Id.*

⁹³ Felski, *supra* note 4, at v–vi.

⁹⁴ MCCARTHY, *supra* note 89, at 277.

⁹⁵ E.M. FORSTER, ASPECTS OF THE NOVEL 67–68 (1955) (coining the terms "flat" and "round" characters).

⁹⁶ Flat characters are "easily recognized whenever they come in—recognized by the reader's emotional eye, not by the visual eye, which merely notes the recurrence of a proper name." *Id.* at 68.

⁹⁷ *Id.* at 69.

⁹⁸ *Id.* ("[T]hey were not changed by circumstances . . . which gives them in retrospect a comforting quality, and preserves them when the book that produced them may decay.")

⁹⁹ MARY E. RAGLAND, RABELAIS AND PANURGE 41 (1976).

¹⁰⁰ FORSTER, *supra* note 95, at 78.

¹⁰¹ A round character, unlike a flat one, exhibits change when difficult situations befall her. She "passe[s] through great scenes] and [is] modified by [them. In turn, readers] do not remember her so easily because she waxes and wanes and has facets like a human being." *Id.* at 69.

characters appeal to the intellect.¹⁰² They are perhaps rightly considered the hallmark of modern literature.

Though flat characters can appear in the modern era—indeed, they tend to populate mass-market literature—they constituted the dominant mode of representation during the earliest centuries of literary representation.¹⁰³ Some examples of individualized characters do predate the modern era: Odysseus stands out as a highly particularized figure whose famously recognizable scar is perhaps the outward manifestation of his uniqueness.¹⁰⁴ But examples of classical or pre-modern highly individualized or psychologically complex characters are rather more uncommon, and this is reflected in the narrative function assigned to them, to the names authors chose for them, and to the relationship they bore to their textual predecessors.¹⁰⁵

Another, slightly less stark way of distinguishing between earlier and modern characters is loosely to classify the former as static and the latter as dynamic. Early characters are often static: they do not evolve during the course of their narratives, even though they may undergo trauma or experience difficulty, as, say, Achilles and Odysseus do.¹⁰⁶ In this sense, they are flat in Forster's terminology. Modern characters are more dynamic. Dynamic characters undergo change, although they may do so in ways that are very predictable, and follow a path that conforms to external plot factors, or they may do so in idiosyncratic, psychological, or irrational ways. Dynamic characters that evolve according to the dictates of plot or moral allegory are known as "developmental" characters, and dynamic characters that evolve in individualized fashion across narrative time, are known as "chronological" characters.¹⁰⁷ The dynamic character category thus bifurcates into developmental characters, which are similar to flat characters that undergo change purely for plot purposes, and chronological characters, which are round, in that they evolve over time, as humans do. Developmental characters are simplistic; they may change during the course of their narrative, but only "so as to clarify

¹⁰² RAGLAND, *supra* note 99, at 41.

¹⁰³ IAN WATT, *THE RISE OF THE NOVEL: STUDIES IN DEFOE, RICHARDSON AND FIELDING* 15 (1957) (enumerating historical changes paving the way for the rise of the novel: "To begin with, the actors in the plot and the scene of their actions had to be placed in a new literary perspective: the plot had to be acted out by particular people in particular circumstances, rather than, as had been common in the past, by general human types against a background primarily determined by the appropriate literary convention.").

¹⁰⁴ ERICH AUERBACH, *MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE* 5, 476 (1971).

¹⁰⁵ See, e.g., JOEL FINEMAN, *SHAKESPEARE'S PERJURED EYE: THE INVENTION OF POETIC SUBJECTIVITY IN THE SONNETS* (1986); WATT, *supra* note 103, at 17.

¹⁰⁶ ROBERT SCHOLES, JAMES PHELAN & ROBERT KELLOGG, *THE NATURE OF NARRATIVE* 169 (2006).

¹⁰⁷ *Id.* at 169–70.

[their] progress along a plot line which has an ethical basis”¹⁰⁸ Chronological characters are complex, “highly mimetic,” and sophisticated. They represent the difference in narrative representations of, to borrow from Forster, “life by values” versus “life by time.”¹⁰⁹

It would be very difficult to summarize the full range of character taxonomies that have over time been proposed in literary scholarship, and trying to summarize all the critical responses to those would be more challenging still. The sheer number of approaches—mythic, structuralist, religious, allegorical, ethical, psychoanalytical, psychological, feminist, and so on—dazzles. The various taxonomies discussed here focus on classifying characters into groups that copyright law might be able to use as part of identifying its own foibles. These taxonomies can contribute value even if they only hint at the complex stratification that has evolved in literary theory in tandem with literary history. Characters have been considered many different things at many different times, and been variously pronounced of utmost interest, or of no interest, along the way. Though artificially simplifying, it is helpful to draw one particular line, between early characters and modern, or contemporary, characters.

For a considerable part of early literary history, characters were understood across many cultures and languages as stock tropes upon which small variations could be overlain.¹¹⁰ Their flatness did not make them lesser characters, or their readers “dupes;” these characters simply belonged to different forms of reading, different social and intellectual modes that can be more clearly understood outside the system of mimetic representation.¹¹¹ Indeed, in Aristotle’s *Poetics*, he subordinates them almost entirely to plot and structure.¹¹² One could say that characters were mere structures, or actors, within the work’s larger structures.¹¹³ Agents were necessary to carry out the plot, but individualization of any kind could be added after the fact.¹¹⁴ Characters were heroes or villains (or gods) mobilized into action by (other) gods, by externally dictated duties, or by dramatic imperatives.¹¹⁵ There was little of the self-exploration, vacillation, dividedness, or depth that the

¹⁰⁸ *Id.* at 169.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 164.

¹¹¹ LYNCH, *supra* note 22, at 10–11.

¹¹² ARISTOTLE, *POETICS* 24 (N.G.L. Hammond trans., Museum Tusculanum Press 2001) (Advising would-be authors: “[w]hen the general [plot] outline is completed and not before, one should add the names, expand the story and insert the episodes”); *see also* RONALD S. CRANE, *THE LANGUAGES OF CRITICISM AND THE STRUCTURE OF POETRY* 73 (1953).

¹¹³ The echo of the *Sam Spade* opinion’s “vehicles of the story being told” dicta bears mentioning, and receives fuller treatment. *See supra* Part I.C.

¹¹⁴ SEYMOUR CHATMAN, *STORY AND DISCOURSE: NARRATIVE STRUCTURE IN FICTION AND FILM* 109 (1978).

¹¹⁵ *Id.* at 108–10.

modern reader has come to associate with the depiction of characters.¹¹⁶ To be effective, classical characters did not need to be complex, only virtuous and consistent.¹¹⁷ During this pre-individualized era, characters were reducible to types—mere names even—to be inserted around the structural components of the story.¹¹⁸

However, between the Renaissance and the eighteenth century, characters evolved a great deal, with respect to both depth and complexity. Around the early modern period—some scholars have argued that Shakespeare deserves the credit or serves as a point of origin¹¹⁹—characters became more atypical, more introspective and sophisticated.¹²⁰ In other words, characters began to shift from being organized by “type” to being organized by “individual.”¹²¹ One sub-genre demonstrates this paradigm shift neatly: the character sketch.¹²² In the seventeenth century, a literary genre emerged in the form of the character sketch, which began to associate the meaning of “character” with the depiction of particular personalities, rather than merely with general virtues and vices of character associated with earlier classical literature.¹²³ The character sketch originated with Theophrastus, a student of Aristotle and author of a set of thirty brief but witty sketches

¹¹⁶ Recall by comparison that the early novel can be characterized as subordinating “plot to the pattern of the autobiographical memoir,” manifesting its insistence as an emerging genre on “the primacy of individual experience . . .” WATT, *supra* note 103, at 15.

¹¹⁷ ARISTOTLE, *supra* note 112, at 27 (stating, in his chapter 14, entitled “Character”: “[i]n regard to character the playwright should have four aims . . . the characters should be good . . . characters should be appropriate . . . characters should be like to those which tradition portrays, and this is different from making the character good and appropriate in our sense of the words . . . [and] characters should be consistent. Even when the subject of the representation is inconsistent and affords an inconsistency of character, he should still be consistently inconsistent.”).

¹¹⁸ Uri Margolin, *Characterization in Narrative: Some Theoretical Prolegomena*, 67 NEOPHILOLOGUS 1, 2 (1983) (referring to instances in which characters were plot devices, or mere “architecture”).

¹¹⁹ WATT, *supra* note 103, at 17 (arguing that such individualized representation could be but was not always found in Shakespeare; by contrast, it was everywhere to be found in the “narrative manner of [modern novels]”).

¹²⁰ HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* xxvii–xxviii (2d ed. 1997) (“Falstaff, Hamlet, and Iago are creators of language, while Shakespeare, by their means, created us . . . [M]ore than any other writer, or any other person that we know of, thought everything through again for himself. Shakespeare did not think one thought and one thought only; rather scandalously, he thought all thoughts, for all of us . . . The issue is not belief but our human nature, so intensified by Shakespeare as to be his re-invention.”).

¹²¹ David Venturo, *The Satiric Character Sketch*, in *A COMPANION TO SATIRE: ANCIENT AND MODERN* 561 (Ruben Quintero ed., 2007) (describing why the character sketch began to lose its force as a form of typology).

¹²² The character sketch originated with the ethical parables of the ancient Greeks, including Tyrtamos of Lesbos, commonly known as Theophrastus. *CHARACTER WRITINGS OF THE SEVENTEENTH CENTURY* (Henry Morley ed., 1891).

¹²³ ARISTOTLE, *supra* note 112, at 27.

that marked a new form of “literary portraiture.”¹²⁴ The Theophrastan sketch served as the model for many generations of authors of character writings, and it held particular interest for writers in England and Europe during the Enlightenment.¹²⁵

The evolution of the character sketch based on general and abstracted virtues or vices to the more particularized biographical character portrait reflected a significant epistemological change. What Ian Watt has called the rise of “[t]he concept of realistic particularity” came with narrative features that, as the Article shows below, have important implications for copyright policy.¹²⁶ David Venturo notes the “shift from constructing character sketches deductively, in order to illustrate a trait or ethos, to constructing them inductively, based on a writer’s knowledge, preferably direct and empirical, of the individual he is seeking to draw.”¹²⁷

This epistemological shift from deductive to inductive character rendering attests to the greater importance placed on individualizing aspects of character.¹²⁸ It also underscores the new kind of work being done by characters, and the new sorts of expectations with which readers increasingly encountered characters.¹²⁹ Characters became newly individualized. From texts populated by figures described in terms of structural roles, exterior surfaces, or discernable attributes—such as the Icelandic sagas, for example—narrative witnessed a shift to the evocation of particularized figures with increasingly developed

¹²⁴ Jeffrey Rusten, *Introduction to THEOPHRASTUS, CHARACTERS* 5, 8, 9 (Jeffrey Rusten & I.C. Cunningham, eds., 2002). His characters typically began “X man is the sort who” and then described a personality flaw with vivid examples drawn from fourth-century BCE Athens. As an example of the sort of portrait Theophrastus drew, under “Overzealousness,” Theophrastus offers eleven annoying character traits, including: “(1) You can be sure overzealousness will seem to be a well-intentioned appropriation of words and actions. The overzealous man is the sort (2) who gets up and promises to do things he won’t be able to carry out . . . (5) He tries to stop fights even between strangers to him. (6) He leads the way down a path, but then can’t find the way to where he is going.”). *Id.*

¹²⁵ See J.W. SMEED, *THE THEOPHRASTAN ‘CHARACTER’* 47 (1985) (dedicating a monograph to the influence Theophrastus had on writers including, among many others, Thomas Overbury, Joseph Hall, John Earle (in seventeenth-century England), and La Bruyère (whose *Les Caractères De Théophraste Traduits Du Grec, Avec Les Caractères Ou Les Mœurs De Ce Siècle* (1688) is an acknowledged classic and an influential work in its own right)).

¹²⁶ WATT, *supra* note 103, at 17.

¹²⁷ Venturo, *supra* note 121, at 561.

¹²⁸ Earlier models of deductive character analysis had drawn on general traits or didactic principles of behavior to create composites that stood for a given personality. These moved from the general, to the specific. Later models in the inductive tradition moved from specific personalities to depictions of character that could be used to adduce something more general about human nature, or a given moment in history. In other words, they harnessed the specific to gesture to the general.

¹²⁹ LYNCH, *supra* note 22, at 6.

interiors that were hidden from view, but knowable, in part, by readers.¹³⁰

By the eighteenth century, characters had assumed a singular importance in their works¹³¹ and in the literary market.¹³² Character sketches were used as political satires in fiction, but they had also become a “staple” in non-fiction narrative works.¹³³ The role for characters to play in narratives of all sorts had by the eighteenth century grown quite significant. Characters, it would seem, were everywhere to be found. Public reception magnified the role characters did and could play.¹³⁴ Whether characters dominated the title and plotlines, or simply found themselves, even as bit players, to be the focus of newly detailed descriptions (“sketches”) novelists began to place throughout their works, characters and their personalities had taken on new importance.¹³⁵ Some works of fiction consisted solely of compilations of character portraits.¹³⁶

The rise of the novel, and especially the psychological novel, correlated with the growing interest in character, since this form was perhaps uniquely interested in exploring personality.¹³⁷ In turn, the emphasis on characters may also be traceable to the rise of mimesis, or realism, in literary representation, and the new forms of narrative

¹³⁰ SCHOLES, PHELAN & KELLOGG, *supra* note 106, at 172 (“Saga characterization is an almost pure and perfect example of the external approach to character. . . . But the sagas never attempt to penetrate inside the character. Only words and actions are described; thoughts are never analyzed.”). The monolithic nature of this characterization holds true for the epic genre also. *Id.* at 173.

¹³¹ VERMEULE, *supra* note 1, at 50.

¹³² See also LYNCH, *supra* note 22, at 5 (describing the rise of a new “economy of characters” thus: “Literary character’s history thus converges . . . with a history that sees writing and reading themselves become commercialized, fashionable activities. In this same period, rival syndicates of booksellers went to court over literary property, the first circulating libraries made books available for hire, and books came to be numbered among the possessible keepsakes and knickknacks that people had to learn to use as they learned to personalize the interior spaces of their homes and their selves.”).

¹³³ VERMEULE, *supra* note 1, at 51; Venturo, *supra* note 121, at 561.

¹³⁴ For example, Samuel Richardson’s *Clarissa*, became a publishing event that permeated society, and literary creation, thoroughly. It had been preceded by Richardson’s equally loved, imitated, and mocked, *Pamela*. VERMEULE, *supra* note 1, at 50–51.

¹³⁵ *Id.*

¹³⁶ *Sketches By Boz* (1836), by Charles Dickens with illustrations by George Cruikshank, provides one such example. CHARLES DICKENS, *SKETCHES BY BOZ: ILLUSTRATIVE OF EVERY-DAY LIFE AND EVERY-DAY PEOPLE* (Oxford Univ. Press 1957). *The Impressions of Theophrastus Such* (1879), by George Eliot, provides another. It takes its eponymous character’s name from the classic character sketch author, Theophrastus. GEORGE ELIOT, *THE IMPRESSIONS OF THEOPHRASTUS SUCH* xix (Everyman 1995) (“Theophrastus, a Greek philosopher of the late third century BC, is regarded as the inventor of ‘character writing’: moral portraits of sundry human types . . .”).

¹³⁷ W.J. HARVEY, *CHARACTER AND THE NOVEL* 23 (1965) (“[M]ost great novels exist to reveal and explore character.”).

discourse it popularized.¹³⁸ The works of modern authors, such as Anton Chekhov, for instance, feature more investigation of characters' inner selves than major plot events.¹³⁹ Henry James and Edith Wharton are another two modern authors who similarly emphasized psychological states rather than actions with regard to their characters. James's prioritization of character was, for example, distinctly anti-Aristotelian.¹⁴⁰ For James, one might say, plot was an excuse to showcase character; for Aristotle, recall, the opposite had been true.¹⁴¹ Though these modern authors clearly owe a good deal to literary precursors with an interest in exploring the representation of selfhood, they mark the modern period as a time of considerable emphasis on the development and portrayal of character.¹⁴² As a function of the growing interest in exploring—and reading about—selfhood in narrative, new techniques and genres with which to portray personhood arose.

Seeing the evolution in authorial representations of selfhood through a literary lens helps address an underlying symptom of copyright's confusing treatment of characters. That is, as characters became more important, they became harder to disentangle from their texts, in ways that have consequences for copyright law.

¹³⁸ AUERBACH, *supra* note 104, at 23 (describing Odysseus's homecoming as a starting point for a particular kind of "literary representation of reality in European culture" but showing how Homer's characterization consisted of largely external details); WATT, *supra* note 103, at 12–13 ("Modern realism . . . begins from the position that truth can be discovered by the individual through his senses . . . The novel is the form of literature which most fully reflects this individualist and innovating reorientation. Previous literary forms had reflected the general tendency of their cultures to make conformity to traditional practice the major test of truth . . . [for] the novel, whose primary criterion was truth to individual experience—individual experience . . . is always unique and therefore new.").

¹³⁹ Margolin, *supra* note 118, at 6; *see also* CHATMAN, *supra* note 114, at 113 ("One could . . . argue that character is supreme and plot derivative, to justify the modernist narrative in which 'nothing happens,' that is, the events themselves do not form an independent source of interest . . .").

¹⁴⁰ "[I]t was almost always character, and not story, that presented itself first to his imagination. But then began the task of shaping and refining the 'germ' of his characters so that they might fulfill their task persuasively in a story with a certain emotive power." MARY DOYLE SPRINGER, *A RHETORIC OF LITERARY CHARACTER: SOME WOMEN OF HENRY JAMES 6* (1978).

¹⁴¹ *See supra* note 112 and accompanying text.

¹⁴² Chaucer, Boccaccio, and Dante, among many others in the western tradition alone, offered versions of character sketches through which Theophrastan influence can be traced, but they are also important in the phylogeny of character development in their own right. *See, e.g.*, GIOVANNI BOCCACCIO, *THE DECAMERON* (Mark Musa & Peter E. Bondanella, eds. & trans., W.W. Norton & Co. 1977); GEOFFREY CHAUCER, *THE CANTERBURY TALES: FIFTEEN TALES AND THE GENERAL PROLOGUE* (V.A. Kolve & Glending Olson eds., W.W. Norton & Co. 2d ed. 2005).

B. *Innovation, Complexity, and the Rise of Characters' Inextricability*

Narrative experiments with form produced several techniques and new genres that would be recast as mainstream modes of representation by the early twentieth century. These techniques include, among others, the soliloquy (or dramatic aside); the dramatic monologue; the interior monologue; stream-of-consciousness narration; first-person narration; and free indirect discourse.¹⁴³ All of these arguably heighten the reader's experience of an individualized character; these techniques make characters feel more *real*.¹⁴⁴ Authors' experiments with innovative narrative techniques created characters that seemed more nuanced, more individualized, and more complex; these characters were rounder, to borrow from Forster's terminology. Narrative techniques, in short, made characters more human.¹⁴⁵

In turn, however, these techniques complicated whether copyright law can disentangle a character from his text, can distinguish between a character and the language used by, about, and around her. Modes of creating interiority knitted the character more thoroughly through the text and made her less easily extricated from it. In one of the most important character cases of the present decade, *Salinger v. Colting*, the court noted the entanglement problem in passing: "It is difficult, in fact, to separate Holden Caulfield from the book."¹⁴⁶

These more complex, more "real" characters could be crafted in ways that resisted narrative conventions and seemed to subvert conventional types found in earlier literature. Such characters defied, or at least played with, readers' expectations and narrative conventions. They often displayed awareness of themselves as characters in a larger narrative.¹⁴⁷ For example, consider the opening of *The Catcher in the Rye*, narrated by Holden Caulfield:

¹⁴³ ABBOTT, *supra* note 88, at 70. Free indirect discourse or style consists of

[t]hird-person narration in which a character's thoughts or expressions are presented in the character's voice without being set off by quotation marks or the usual addition of phrases like 'he thought' or 'she said' and without shifting into grammatical first-person discourse: 'It was a hot day. What on earth was she doing lugging stones on a day like this?' Here, the second sentence is marked by [the speaker's] intonations, but it is cast in the third person and in the past tense, neither of which she would use, were she speaking or thinking this question.

Id. at 234; *see also* SCHOLES, PHELAN & KELLOGG, *supra* note 106, at 177–78.

¹⁴⁴ WATT, *supra* note 103, at 22.

¹⁴⁵ *Id.* at 27 ("The various technical characteristics of the novel described above all seem to contribute to . . . the production of what purports to be an authentic account of the actual experience of individuals.").

¹⁴⁶ *Salinger v. Colting*, 607 F.3d 68, 73 (2d Cir. 2010) (quoting District Court Hearing (June 17, 2009) (Hr'g Tr. 24)).

¹⁴⁷ LAURENCE STERNE, TRISTRAM SHANDY 78 (1966) ("You see as plain as can be, that I write as a man of erudition; that even my similies [sic], my allusions, my illustrations, my metaphors,

If you really want to hear about it, the first thing you'll probably want to know is where I was born, and what my lousy childhood was like, and how my parents were occupied and all before they had me, and all that David Copperfield kind of crap, but I don't feel like going into it, if you want to know the truth. In the first place, that stuff bores me, and in the second place, my parents would have about two hemorrhages apiece if I told anything pretty personal about them. They're quite touchy about anything like that, especially my father. They're *nice* and all—I'm not saying that—but they're also touchy as hell. Besides, I'm not going to tell you my whole goddam autobiography or anything.¹⁴⁸

Holden addresses his allusion directly to the reader, anticipating familiarity with *David Copperfield*. He signals his unwillingness to participate in the Dickensian narrative tradition, with its conventions of sentimentality, flat characters, and recitation of a character's background.¹⁴⁹ Yet in spite of his critique, he delivers such background details even as he disavows them. He does so by hinting to the reader about his relationship to his parents, revealing his adolescent prickliness,¹⁵⁰ and undercutting his own words about his father's "touchiness" through his emotionally quicksilver and defensive remarks.¹⁵¹ The first-person voice here allows the speaker to situate himself within a literary genre, but then to reject its demands. Comparing *David Copperfield* with his own "lousy childhood" creates a strong sense of irony and prepares readers for the intermittently tough, sarcastic tone with which Holden has become associated in the cultural imagination. Precisely because of this exterior toughness, Holden's departures into sincerity and vulnerability constitute the other side of his appealing emotional coin. First-person narration allowed authors to meld narrative and drama in effective and surprising new ways that innovated literary form and offered more highly tailored, individualistic depictions of fictional characters.

Individualizing characters in this way relied on narrative experiments that, over time, earned legitimacy as mainstream modes of narrative discourse. These techniques, however, also blurred the boundaries between text and character. Such narrative innovations

are erudite,—and that I must sustain my character properly, and contrast it properly too,—else what would become of me? Why, Sir, I should be undone . . .").

¹⁴⁸ J.D. SALINGER, *THE CATCHER IN THE RYE* 3 (2001).

¹⁴⁹ *Id.* ("[T]hat stuff bores me"). See generally VALERIE PURTON, *DICKENS AND THE SENTIMENTAL TRADITION: FIELDING, RICHARDSON, STERNE, GOLDSMITH, SHERIDAN, LAMB* (2012).

¹⁵⁰ SALINGER, *supra* note 148, at 3 ("I'm not going to tell you my whole goddam autobiography.")

¹⁵¹ Note the italics on: "They're *nice* and all" and the em-dashes setting off "I'm not saying that" as if someone has suggested he has said precisely that. The book shows us, before its end, that Holden himself is in fact "touchy as hell." *Id.*

central to representing character interiority as the soliloquy, first-person narration, and the dramatic monologue have many literary benefits, but all of them lead to a problem for copyright law. Where does the text end and the character begin, if independent copyright protection will cover that character? How should courts treat subsequent uses of a character whose existence in the original work is first described through means that conflate—or seem to conflate—the character with the text?

Authors sometimes use these self-oriented narrative techniques because of the distance they can create between the character and the work. Yet sometimes the opposite obtains, and techniques such as these actually collapse the distance between character and text. A case in point: the soliloquy in Shakespeare's plays has been shown, at different places in his oeuvre, and at different moments in literary interpretation, both to reveal a character's selfhood and to obscure it. Sometimes the soliloquy poses as a moment of truth personal to the speaker but represents "just those moments when the speaker steps out of character to make an expository utterance, to speak not for his own particular perspective but for the general perspective of the play."¹⁵² The dramatic monologue, in Robert Browning's hands, notoriously puts readers in an uncomfortable position as they try to retreat from the moral ugliness discernible in his protagonists to higher narrative ground, but find nowhere to go.¹⁵³ Readers find themselves caught between "sympathy" for and "judgment" of the speaker.¹⁵⁴ To read "Porphyria's Lover,"¹⁵⁵ or "My Last Duchess," is to listen to an unpleasant (homicidal) man rationalizing his savagery.¹⁵⁶ The pull towards sympathy created by the

¹⁵² ROBERT LANGBAUM, *THE POETRY OF EXPERIENCE: THE DRAMATIC MONOLOGUE IN MODERN LITERARY TRADITION* 160–61 (1957).

¹⁵³ ALAN SINFIELD, *DRAMATIC MONOLOGUE* 3–5 (1977) (describing readers' responses to Browning's monologues as falling somewhere between "perplexity and discouragement").

¹⁵⁴ LANGBAUM, *supra* note 152, at 182–209.

¹⁵⁵ ROBERT BROWNING'S *POETRY* 83–84 (James Loucks & Andrew Stauffer eds., 2d ed. 2007). In "Porphyria's Lover," a speaker describes the emotional power his lover has over him, and confesses to having murdered her so as to keep her close to him:

[A]t last I knew/Porphyria worshipped me; surprise/Made my heart swell, and still it grew/While I debated what to do./That moment she was mine, fair,/Perfectly pure and good: I found/A thing to do, and all her hair/In one long yellow string I wound/Three times her little throat around/And strangled her. No pain felt she;/I am quite sure she felt no pain.

Id. The speaker then describes opening her eyes, holding her and kissing her, and staying up all night with her in his arms.

¹⁵⁶ In "My Last Duchess," the speaker, poised before a portrait of his late wife, describes having had her murdered, citing her happiness and gratitude towards the world as the reason. His words reveal that his psychopathic jealousy, not the stated (and implausible) cause, were responsible for the killing. "She had/A heart—how shall I say?—too soon made glad,/Too easily impressed; she liked whate'er/She looked on, and her looks went everywhere" (l. 21–24). "[A]ll and each/Would draw from her alike the approving speech,/Or blush, at least. She thanked men,—good! but thanked/Somehow—I know not how—as if she ranked/My gift of a nine-

first-person voice, coupled with the judgment elicited by the horrific nature of the cruelty described, produces a deep irony in the poem.¹⁵⁷ This complexity is a function of the blurring between the character and the text, the voice of the Duke and, one suspects, Browning's own restrained judging of him.¹⁵⁸

Likewise, first-person narration blurs the boundaries between character and text in ways that exacerbate the problem of entanglement for character law in copyright. In first-person narration, a gap opens often immediately, between the statements the speaker makes, and the extent to which a reader takes those statements at face value. In the excerpt from *Catcher in the Rye*, above, the reference to the "lousy childhood" raises a question for the first-time reader of the novel: was Holden's childhood actually "lousy" (is the speaker sincere, and bitter) or was his childhood not in reality lousy (thus depriving him of the stated justification for his posture of bitterness, and ironizing the reference to David Copperfield, whose childhood genuinely was pretty lousy)? Authors derive narrative force from manipulating their narrators' capacity to inspire belief as well as disbelief in readers, that is, from exploiting that continually arising gap between what the narrator purposely "tells" and what he inadvertently "shows."¹⁵⁹

Through this narrative strategy, authors force readers to continue to renegotiate their relationships to characters, in turn complicating how copyright law can be expected to analyze characters' autonomous existence. An author may use first-person narration to highlight that (speaking) character, or to highlight other characters through a one-step-removed-from-center sort of consciousness.¹⁶⁰ Alternatively, the first-person narrator may be a "ficelle" character, an expository device often found in the works of Henry James, sometimes used to structure the narrative by allowing proportionately arranged observations to dictate the story, rather than allowing the story to proceed based on the inner world of a character whose (perhaps disproportionately) emotional life might require a different (and aesthetically messy) structure.¹⁶¹ Mary Doyle Springer writes (quoting James) that the device spares readers "the heavy-handed narrator . . . [and] 'the terrible *fluidity* of self-revelation' in first-person narration" but the ficelle does not

hundred-years-old name/With anybody's gift. . . /This grew; I gave commands;/Then all smiles stopped together. There she stands/As if alive" (l. 29-34). *Id.*

¹⁵⁷ SINFELD, *supra* note 153, at 6.

¹⁵⁸ *Id.* ("My Last Duchess' is continuously and radically ironic, for every line consists simultaneously of the Duke's statements and Browning's implications which we must work to realize in ourselves.")

¹⁵⁹ WAYNE C. BOOTH, *THE RHETORIC OF FICTION* 16 (1961).

¹⁶⁰ SPRINGER, *supra* note 140, at 165.

¹⁶¹ *Id.* at 166. This was James's reason for adopting the *ficelle*; he abhorred what he thought of as narrative "looseness" or undisciplined form. *Id.* at 1.

eliminate “possible confusion about just how central or ‘main’ [readers] are to take him to be.”¹⁶² Hence even literary criticism finds itself occasionally confounded by the existence of a character that uses first-person narration, and unable to ascertain the character’s actual importance to the text (whether his centrality is actual or ironic, for instance). For copyright law to be able to determine which parts of the text ought to be associated with—treated as independent property that “belong” with—certain characters for the purposes of independent character protection in substantial similarity analysis, seems an improbably difficult task, destined to inspire bad case law.

C. *Disentangling Character from Text and Style*

In its most sophisticated forms, then, the contemporary character is frequently difficult to separate from its text. Literature exposes the need for clear-eyed focus on the definitional boundaries of a character so long as copyright continues to give these boundaries such implicit force in making distributional determinations. How courts define characters plays a crucial role both in determining whether independent copyright protection subsists, and whether it has been violated. Literature also reveals the complexity in any attempt to define character. The difficulty need not mean the task is not worth undertaking, but literature helps show what is at stake if copyright ignores the entanglement problem, and it cuts in favor of finding an approach that does not require dependence on the outer boundaries of a character for fair adjudication.

Copyright has implicitly struggled with characters’ entanglement with their texts in its attempts to define character, but it has yet to think through the consequences of this definitional difficulty. Often, a court’s attempts to reason its way to a solid definition of “character” fall flat. The definition may be tautological, unclear, or simply wrong, even at times in a thoughtful, otherwise well-reasoned opinion offered up by a court with plenty of experience adjudicating artistic property issues. For example, consider this judicial attempt to grapple with a definition of character, and a supporting rationale for that definition: “The characters from ‘Star Wars’ are elements in a drama; they have ‘character’ because they are part of a plot in which they interact with each other. Thus, they have attributes which are suggested by the movie itself.”¹⁶³ The definition here is a moving target: first the characters are merely constitutive parts in a larger work; then they are thought to derive their

¹⁶² *Id.* at 166–67.

¹⁶³ *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Grp.*, 443 F. Supp. 291, 302 (S.D.N.Y. 1977).

“character” from their role in a plot, perhaps because of or through their interactions with other such characters; then it is their “attributes” which can be traced to the larger work. The thinking here is manifestly unclear. It highlights an important problem in character jurisprudence, namely, that it is not easy to distinguish between a character and her surrounding work, and that courts, even in copyright-savvy jurisdictions, struggle in their efforts to define a character’s scope vis-à-vis the surrounding text.

Leonard Zissu, a commentator on character law—and a leading attorney in character case law¹⁶⁴—provides a helpful starting definition though he defines character very broadly:

[A] character comprises some or all of such elements as (and principally) the name, physical appearance and attributes, mannerisms, speech and expressions, habits, attire, setting and locale. His association with the other designated characters and his outlook or view of life (subjective indicia) may also be regarded as within the composite which denotes the character.¹⁶⁵

Zissu’s inclusion of “setting” and “locale,” as well as a character’s “association” with other characters, attests to the breadth of scope imagined for characters under one view of copyright law. To the extent that Zissu’s character is so broad as defined, it practically does “constitute the story being told.” Only other characters, or narrative commentary, appear to be excluded. Still, those exclusions are an important one, which involve complex line-drawing.

Copyright law has no accurate tools for such line-drawing, that is, for determining which parts of the character consist of protected expression that—in the property-rights logic that copyright seems to adopt in thinking of structuring and allocating entitlements—“belong” to one character rather than another, or to the separable character rather than the text.

In many contemporary forms of narrative, it can be difficult indeed to distinguish between narrative commentary and the interior monologue of a given character. In fact, this is arguably the point of free indirect discourse. Literary scholars disagree over whether such narrative intertwining is hostile to characters¹⁶⁶ or can be friendly to them,¹⁶⁷ but under either view, what is clear is that a purposeful

¹⁶⁴ Zissu served as Hammett’s attorney in the *Sam Spade* case and also litigated the *Tarzan* case before the Southern District in 1981.

¹⁶⁵ Zissu, *supra* note 15, at 122.

¹⁶⁶ VERMEULE, *supra* note 1, at 72 (“Free indirect discourse holds the narrative voice somewhere in between the first and the third person. But it is not benign. Writers use it to slice the heads off their characters. . . . No character ever comes off well when free indirect discourse tries to lend a hand.”).

¹⁶⁷ Daniel P. Gunn, *Free Indirect Discourse and Narrative Authority in Emma*, 12 *NARRATIVE* 35, 35 (2004).

commingling of voices takes place.¹⁶⁸ When information about characters can be gleaned, it may reach the reader through any number of different formal devices. Ought the law to consider this information as representing the character, or the text, for the purposes of character disentanglement analysis?¹⁶⁹ Narrative's technical complexity frustrates this aspect of copyright analysis.

Note that literature does not purport to hold easy answers to character's entanglement.¹⁷⁰ Although in theory, a character's *functions* might be separable from her *dimensions*, in practice, such distinctions are exceedingly difficult to draw for literary scholars, let alone for courts.¹⁷¹ For copyright, however, real-world consequences may attach when the definition of the character expands or contracts. For example, a character borrowed for unauthorized use in a subsequent work may be recognizable to readers, even if the surrounding subsequent work differs greatly from the preexisting work, such that substantial similarity analysis between the two works would fail. Courts would proceed to analyze substantial similarity between characters alone. But where they draw the line around the character will matter. Courts have protected characters' names (when accompanied by at least some other characteristics); characters' catchphrases; visual depictions of characters; and so on. What literary understandings of character show is the oversimplification of this view of characters' easily discernible relationship to their texts.

For the purposes of copyright, an additional problem lies in the extent to which aspects of character should more properly be characterized as artistic style, which by itself is not copyrightable. In *Steinberg v. Columbia Pictures Industries, Inc.*, at issue lay a promotional movie poster mimicking the work of Saul Steinberg, a New Yorker magazine cartoonist famed for his illustration depicting a New Yorker's

¹⁶⁸ *Id.*

¹⁶⁹ SPRINGER, *supra* note 140, at 42 ("Modern fiction is a highly narrative art (though it is a highly delicate and necessary task to decide which parts are truly narrative and which inherently dramatic And we must not discount what we can learn about character through the rhetoric of diction, of narrative reports, descriptions, quotations, and lyric outbursts by a narrator or secondary characters, information often colored by a single strong point of view.").

¹⁷⁰ John Frow, *Spectacle Binding: On Character*, 7 *POETICS TODAY* 227, 227 (1986) ("The concept of character is perhaps the most problematic and the most undertheorized of the basic categories of narrative theory. It is also perhaps the most widely-used of all critical tools, at all levels of analysis; and its sheer obviousness disguises the conceptual difficulties it presents.").

¹⁷¹ Phelan provides helpful framing for considering the form and role of characters throughout literature.

A dimension is any aspect, feature, or quality a character may be said to possess when that character is considered in isolation from the work in which he or she appears. A function is any aspect, feature, or quality of a character that fulfills some purpose in connection with the other elements of the work. Every function depends upon a dimension but not every dimension will necessarily correspond to a function.

Phelan, *supra* note 90, at 357.

parochial view of the world.¹⁷² Defendants allegedly copied the concept behind the poster and its execution, in promoting their upcoming film “Moscow on the Hudson.”¹⁷³ Both works present a myopic view of the horizon, suggesting New York’s inflated sense of its importance to the world.¹⁷⁴ Several elements could potentially have been elided, but the court’s careful attention to style, as against the idea of the posters, their actual subject matter, and finally their expression, was thoughtful and thorough.¹⁷⁵ After describing the two works, the court recognized that “defendants cannot be held liable for using the *idea* of a map of the world from an egocentrically myopic perspective.”¹⁷⁶ It turned to the modes of executing the idea used in both posters, focusing on the print; the “sketchy, whimsical style” of the renderings; the vantage point; the particular scene used to express New York’s self-satisfied viewpoint; the colors and their symbolic attributes (blue: sky; red: horizon); and the perspective on New York city traffic.¹⁷⁷ The court concluded that plaintiff’s poster had depicted more than merely *scènes à faire*, and described the depiction of both the particular view of New York and the means of capturing it as far from inevitable.¹⁷⁸

Yet in grappling with what precisely it might be protecting, the court struggled to determine whether style was an integral part of the work, something that permeated it, or something extricable from it, a small quantum that could be evaluated apart from the work’s other elements. The court stated: “[T]his case involves the entire protected work and an iconographically, as well as proportionately, significant portion of the allegedly infringing work.”¹⁷⁹ In thinking of the “iconographically significant” elements borrowed, the court comes dangerously close to protecting style. *Steinberg* seems to have been trying to stress that in fact not only style was appropriated here; defendants copied plaintiff’s style in addition to the subject matter he chose. Thus the case might have been a closer one.¹⁸⁰

Steinberg presents a helpful parallel for analyzing character protection. The court concluded that it could parse style from content and suggested that style is not, by itself, protectable. Literary evidence shows us that in many instances, characters may embody authorial style, making such parsing difficult. How characters are imagined in

¹⁷² *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

¹⁷³ *Id.* at 708.

¹⁷⁴ *Id.* at 710.

¹⁷⁵ *Id.* at 710–11.

¹⁷⁶ *Id.* at 712.

¹⁷⁷ *Id.* at 710, 712–13.

¹⁷⁸ *Id.* at 712–13.

¹⁷⁹ *Id.* at 713.

¹⁸⁰ Without conceded access, a higher degree of similarity could have been required, for instance. *Id.* at 714.

relationship to their surrounding texts informs whether style will inadvertently be protected. If characters can be conceived of as comprising textual components that include stylistic features (such as point of view, narrative devices, manner of rendition), then downstream users who use the verbal equivalent of many “iconographically significant” elements of the work may find that they have impermissibly borrowed a character. This could be true even though the subsequent work is dissimilar from the preexisting work, and, absent characters, nothing but (theoretically uncopyrightable) style has been borrowed.

Literature illustrates that this fine distinction presents a clear line-drawing problem for the law. Returning to the example of *The Catcher in the Rye*, consider the following passage, which describes Holden’s late-night visit to his former teacher. Mr. Antolini gives Holden advice late at night, and as he listens, Holden gets sleepier and sleepier:

I don’t know if you’ve ever done it, but it’s sort of hard to sit around waiting for somebody to say something when they’re thinking and all. It really is. I kept trying not to yawn. It wasn’t that I was bored or anything—I wasn’t—but I was so damn sleepy all of a sudden. . . . Then all of a sudden, I yawned. What a rude bastard, but I couldn’t help it! . . . I could’ve slept standing up I was so tired. . . . I got in bed with just my shorts on. It was way too short for me, the couch, but I really could’ve slept standing up without batting an eyelash. I laid awake for just a couple of seconds thinking about all the stuff Mr. Antolini’d told me. About finding out the size of your mind and all. He was really a pretty smart guy. But I couldn’t keep my goddam eyes open, and I fell asleep.¹⁸¹

The passage evokes Holden in his iconic specificity. Yet trying to distinguish between the character-related aspects of the passage (potentially copyrightable) and the merely stylistic ones (theoretically not copyrightable) is difficult indeed. Many of the details that make Holden who he “is” are hard to distinguish from authorial choices attributable to “style.” For example, Holden addresses an unseen second person (“you”). He uses slang that dates him to the 1940s and displays noticeable verbal tics (including heavy use of the following words or phrases: “and all,” “it really is” “It wasn’t that” “damn,” and “goddam” [sic]). He uses hyperbole (“could’ve slept standing up”) and anaphora (by returning to the phrase in a different form: “could’ve slept standing up without batting an eyelash”). Lastly, he uses free indirect discourse, or thoughts reported by the narrative voice as though communicated directly from within the private consciousness of the character himself (“what a rude bastard!”) Consequently, what makes Holden unique is not the amalgam of visually evocative details that

¹⁸¹ SALINGER, *supra* note 148, at 246–49.

characterize certain kinds of very flat characters, or that bring to life superheroes and graphic or visual characters.

Holden's uniqueness lies in a combination of verbal and stylistic choices that are inextricable from the copyrightable expression associated with Holden as a character. Copyright seeks to protect and reward authors for their investments in characters' development, without crossing over into protecting authorial style and thus limiting future authors in terms of adopting certain styles. Thus the character entanglement problem frustrates the law's purposes.

Indeed, how much of the work is protected under the ambit of "the character" as differentiated from uncopyrightable style is directly relevant to how copyright shapes the derivative work right. As such, character entanglement could play a potentially significant role in copyright reform with respect to literature and the scope of authors' derivative work rights. If the law allows the scope of the character to expand to include whatever references subsequent authors make, then copyright law will proscribe more downstream expression even if there would or should be a gap between use of a protected character and use of unprotected stylistic elements from a work. Literature provides insights that help militate against that doctrinally unjustified expansion.

III. HOW COPYRIGHT ERRS IN DECIDING WHICH CHARACTERS TO PROTECT

Literary theories and texts help to demonstrate that the law's selection of characters for copyright protection is not neutral. Copyright law thus contravenes, at least in theory, its own aesthetic non-discrimination principle.¹⁸² This Part shows that aesthetic decisions about what sorts of art are worth protecting filter into character copyright jurisprudence in three interrelated ways.¹⁸³ First, copyright makes aesthetic determinations by protecting visual characters more readily than literary characters.¹⁸⁴ Second, literature illustrates the

¹⁸² *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

¹⁸³ Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 *COLUM. J.L. & ARTS* 1, 1 (2001); Yen, *infra* note 227, at 298.

¹⁸⁴ It ought to be noted that in fact the very dichotomy between literary and visual is problematic on numerous levels for literary scholars. Suffice it to say that erecting such a barrier presupposes that literary texts are not visual when in fact the volume and quality of scholarship on the history of the book, and the reinvigoration of the notion of the text as a material object, strongly suggest the distinction is a false one. See, e.g., *A COMPANION TO THE HISTORY OF THE BOOK* (Simon Eliot & Jonathan Rose eds., 2009); DAVID FINKELSTEIN & ALISTAIR MCCLEERY, *THE BOOK HISTORY READER* (2d ed. 2010); *THE CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN* (2009) (which spans six volumes and more than 1,300 years of bibliographic vicissitudes). Moreover, for scholars of manuscript even more than for scholars of print culture and its texts, interpreting a work is deeply intertwined with the text's visual dimensions. See D.F. McKenzie, *The Book as Expressive Form*, in *THE BOOK HISTORY READER*,

problems flowing from copyright's unclear terminology: by concluding that "word portraits" are not protectable, without a rigorous definition of "word portrait," the law has reified a distinction between visual and literary media that ought never to have arisen.¹⁸⁵ Third, copyright incorporates aesthetic valuation implicitly through the law's "distinctive delineation" standard, which encourages and rewards the creation of a particular sort of character. Copyright law encourages and values flat characters over round ones, despite the way that doing so aesthetically privileges—at significant and unjustified expense—one set of literary and cultural conceptions of character over another. Perhaps most problematically of all, copyright law has not taken into consideration the theoretical and empirical evidence that readers do a great deal of work with characters when reading. In some fundamental sense, readers can be said to "complete" characters in their minds. This view has appeared in at least one important copyright case, and it represents a significant body of scholarship in literature. Yet if characters can be said to be incomplete, and to require completion by readers, it may be that they fail to satisfy the fundamental requirement of fixation. In ignoring the literary theories of a reader's engagement with texts that point to characters' lives beyond their texts, in readers' minds, copyright law misses a chance to calibrate the scope of its protection as accurately as it could.

A. *Copyright's Preference for the Visual over the Verbal Character*

A distinction between visually and verbally rendered characters, whether justified or not, is now entrenched in copyright case law.¹⁸⁶ An opinion by Judge Richard Posner affirmed the distinction between

supra, at 39 (2006) ("The persistent example of fine printing and the revival of the calligraphic manuscript, and numerous recent studies of the sophisticated displays of text and illumination in medieval manuscript production also share a basic assumption that [visual] form affects sense.").

¹⁸⁵ The distinction between cartoon or visual characters and literary ones arises because the earliest (pre-*Nichols*) cases were brought by owners of copyrights in cartoon characters. *Air Pirates* then solidified the distinction, and *Gaiman* and other modern cases have affirmed it. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978) (holding that its own prior cases appearing to preclude copyright protection for literary characters did not apply to visually depicted characters, because "a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression"); *Gaiman v. MacFarlane*, 360 F.3d 644, 660 (7th Cir. 2004) ("The description of a character in prose leaves much to the imagination, even when the description is detailed . . . Even after [reading *The Maltese Falcon*], one hardly knows what Sam Spade looked like. But everyone knows what Humphrey Bogart looked like." Posner attributed that to "the difference between literary and graphic expression.").

¹⁸⁶ *Walt Disney Prods.*, 581 F.2d at 754; Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012).

literary and visual characters emphatically.¹⁸⁷ The opinion is worth sustained attention, both because it represents a number of views that predominate in copyright, and because Judge Posner is an important figure in American jurisprudence, indeed, especially so in the areas of intellectual property and law and literature.¹⁸⁸ The passage below sets up another important issue for copyright's treatment of characters, which has to do with reader reception of characters and its implications for the fixation requirement, which the Article takes up more fully below. The opinion, quoted below, thus makes two interventions. The first is to cast the reader as passive when viewing images or television and active when reading texts, which, per Posner, require a higher level of semiotic participation. The second is to suggest that this difference in medium thus determines, in a sense, the copyrightability of the work in question: visual characters are more easily protected than verbal ones, which can too easily be deemed uncopyrightable "word portraits."

It is crucial first to understand the reader's engagement with a character as playing a crucial role, in Posner's view, in differentiating the visual and the textual.¹⁸⁹ He justifies the distinction thus:

The reason is the difference between literary and graphic expression. The description of a character in prose leaves much to the imagination, even when the description is detailed—as in Dashiell Hammett's description of Sam Spade's physical appearance in the first paragraph of *The Maltese Falcon*. "Samuel Spade's jaw was long and bony, his chin a jutting v under the more flexible v of his mouth. His nostrils curved back to make another, smaller, v. His yellow-grey eyes were horizontal. The v motif was picked up again by thickish brows rising outward from twin creases above a hooked nose, and his pale brown hair grew down—from high flat temples—in a point on his forehead. He looked rather pleasantly like a blond satan." Even after all this, one hardly knows what Sam Spade looked like. But everyone knows what Humphrey Bogart looked like. A reader of

¹⁸⁷ *Gaiman*, 360 F.3d at 660 (distinguishing the *Sam Spade* case, even if it were good law, on account of the "difference between literary and graphic expression").

¹⁸⁸ Kate O'Neill, *Rhetoric Counts: What We Should Teach When We Teach Posner*, 39 SETON HALL L. REV. 507, 507–08 (2009) (surveying and building on the literature on why Posner's opinions are widely taught in the academy). On the substantiality of Posner's substantive contributions to these two legal areas, see, e.g., RICHARD A. POSNER, *LAW & LITERATURE: A MISUNDERSTOOD RELATION* (1988); see also Teresa Huang, *Gaiman v. McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material*, 20 BERKELEY TECH L.J. 673, 693–700 (2005).

¹⁸⁹ It is in many respects a false dichotomy, to oppose the visual and the textual. Many textual critics pay a great deal of attention to the visually discernible aspects of a text, such as lineation, font, pagination, binding, paper choice and quality, and so on. Zahr Kassim Said, *Only Part of the Picture: A Response to Professor Tushnet's Worth a Thousand Words*, 16 STAN. TECH. L. REV. 349, 354 (2013).

unillustrated fiction completes the work in his mind; the reader of a comic book or the viewer of a movie is passive.¹⁹⁰

Posner's reasoning embeds outdated assumptions about the way readers process images and engage with imaginative content.¹⁹¹ Still, Posner's view does map onto one set of views governing literary interpretation, known variously as reception studies, reader response theory, or the implied reader theory, which holds that readers create or actualize the meanings in the texts they consume.¹⁹² Posner's theory of active readerly engagement with character is thus not necessarily at odds with literary theory.¹⁹³ However, Posner then suggests that readers of comic books and viewers of film and television are not engaged in the way readers are. This notion runs very much counter to contemporary media studies and literary theories of interpretation and consumption.¹⁹⁴ Posner's view purports to explain a way in which literary characters are different from visual characters. Yet reader response theorists would argue that cartoon characters and other visually rendered images also require construction and decoding by readers to deliver meanings.¹⁹⁵ In other words, such theories of reception are medium-neutral.

Posner's take on the visual/verbal distinction may also be framed in terms of the ease with which courts can recognize infringement of visual characters, in contrast with the difficulties attendant on substantial similarity analysis for literary characters.¹⁹⁶ Other courts also reflect the attitude expressed in Posner, that images clearly reveal infringement, and words do not.¹⁹⁷ The logic implies that visual images create a kind of short cut, from "mind to mind"; they are treated, according to one influential view, as though they are transparent.¹⁹⁸ If copyright premises

¹⁹⁰ *Gaiman*, 360 F.3d at 660–61.

¹⁹¹ JOHN FISKE, TELEVISION CULTURE 62, 65–66 (1987).

¹⁹² Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 736–37 (1993).

¹⁹³ Margolin, *supra* note 118, at 1 (“[R]eaders as readers (not as poeticians [sic]) do create characters from texts); see also WOLFGANG ISER, THE IMPLIED READER: PATTERNS OF COMMUNICATION IN PROSE FICTION FROM BUNYAN TO BECKETT (1974) (re-characterizing the reader as an engaged entity who must work actively to produce the text's meanings); HANS ROBERT JAUSS, TOWARD AN AESTHETIC OF RECEPTION (Timothy Bahti trans., 1982).

¹⁹⁴ For one among many such accounts of the engaged consumer of audiovisual content, see, e.g., FISKE, *supra* note 191, at 62–83 (“The audiences participate in the meanings of the program,” and “Meanings are determined socially: that is, they are constructed out of the conjuncture of the text with the socially situated reader.”).

¹⁹⁵ Zahr Said, *Embedded Advertising and the Venture Consumer*, 89 N.C. L. REV. 99, 124 (2010) (“As Wolfgang Iser, Stanley Fish, and Hans Robert Jauss have variously argued, . . . texts—such as films and television programs—[must be understood] in terms of their own interpretation, construction, and reception [by readers (or viewers)] through an active process of decoding and encoding.”).

¹⁹⁶ Helfand, *supra* note 10, at 631.

¹⁹⁷ Tushnet, *supra* note 186, at 719.

¹⁹⁸ *Id.* at 686–87. Tushnet persuasively argues that courts tend to treat images in polarized fashion:

its protection on what are effectively mental shortcuts, however, surely it begins trespassing on the territory of trademark, which is the proper legal regime for protecting symbols that signify source and create shortcuts for consumers interested in the symbol's related goods and services.¹⁹⁹

Literary theories undercut the various rationales expressed or implied in *Gaiman* for distinguishing between visual and verbal characters, and legal principles under both copyright and trademark suggest that the distinction does not justify itself doctrinally either.

B. *Literary “Word Portraits” and the Idea/Expression Dichotomy*

Literature suggests that the distinction between unprotectable “word portraits” and protectable portraits composed of images, if resting on nothing more, is untenable. Moreover, the distinction courts have drawn between literary and visual representation obscures the important work that can and must be done by the idea/expression dichotomy.²⁰⁰ At present, visual characters are deemed more readily copyrightable than literary ones.²⁰¹ Consequently, what copyright law terms “word portraits” of characters are not—at least in theory²⁰²—copyrightable.²⁰³ The law is non-neutral because it more readily accords protection for visual characters than for verbal ones, as is made clear in the withholding of protection for “word portraits.” In fact, the proper standard for copyrightability should not be the medium of rendition, but the results of the rendition, filtered through the idea/expression dichotomy.²⁰⁴

At present, copyright law holds that what it refers to as “word portraits” are uncopyrightable. Yet copyright law should distinguish

Copyright oscillates between two positions on nontextual creative works such as images: they are either transparent, or they are opaque. When courts treat images as transparent, they deny that interpretation is necessary, claiming that images merely replicate reality, so that the meaning of an image is so obvious that it admits of no serious debate. When they treat images as opaque, they deny that interpretation is possible, because images are so far from being susceptible to discussion and analysis using words that there is no point in trying.

Id.

¹⁹⁹ Kurtz, *supra* note 11, at 474.

²⁰⁰ *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 711–12 (S.D.N.Y. 1987).

²⁰¹ *Gaiman v. McFarlane*, 360 F.3d 644, 650 (7th Cir. 2004); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978).

²⁰² *Cf. Salinger v. Colting*, 607 F.3d 68, 73 (2d Cir. 2010) (quoting District Court Hearing (June 17, 2009) (Hr'g Tr. 24)) (describing J.D. Salinger's Holden Caulfield as “quite delineated by word,” “a portrait by words” and then going on to protect him as an independent character).

²⁰³ 1 NIMMER, *supra* note 28, § 2-12.

²⁰⁴ *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 450–52 (S.D.N.Y. 2005).

between the “word portrait” *as a generic form*, and contemporary renderings, in words, of characters, through expression that may well be protectable even if it is verbally, rather than visually, rendered. Copyright does not explicitly define “word portrait,” but the phrase “word portraits,” appears in case law to be synonymous with unprotected “ideas” rather than protected “expression.”²⁰⁵ This parallel seems mistaken, from the literary perspective, because it collapses idea into expression. Furthermore, it incorporates an unclear, non-standard understanding of the meaning of “word portrait.”

Literature possesses at least one form recognized to consist of a portrait in words. Known as a “blazon” and associated with a flourishing of late Renaissance poetry, it is a genre commonly composed of stock images and conventional modes of describing physical features, albeit in highly idealized, symbolic form.²⁰⁶ An example of a blazon likely to be familiar to readers is Shakespeare’s Sonnet No. 130.²⁰⁷ Rather, it is more accurate to say that it is an *anti-blazon* or a blazon subverting its generic conventions. It begins: “My mistress’ eyes are nothing like the sun;/Coral is far more red than her lips’ red./If snow be white, why then her breasts are dun[.]”²⁰⁸ Translated into legal terms, the blazon as a generic form is uncopyrightable, under the *scènes à faire* doctrine.²⁰⁹ In this sense, it aligns with copyright’s vision of a “word portrait.” The blazon is an artistic form whose rules make the prescribed elements “indispensable” for all who would grapple with it.²¹⁰ On the one hand, Shakespeare’s anti-blazon *as a genre* would similarly be uncopyrightable: making fun of the form must be available as an option for future authors, and “the anti-blazon” had, in any event, existed for centuries before Shakespeare composed this one.²¹¹ On the other hand, the expressive details used in executing the idea of the anti-blazon, such as comparing a lover’s bosom to the dull, dingy color of donkey hair, might well constitute protected expression.²¹²

²⁰⁵ 1 NIMMER, *supra* note 28, § 2-12.

²⁰⁶ See, e.g., Grant Williams, *Disarticulating Fantasies: Figures of Speech, Vices, and the Blazon in Renaissance English Rhetoric*, 29 RHETORIC SOC’Y Q. 43, 46 (1999) (“[T]he blazon is exclusively a figurative phenomenon: it is not only epitomized by a single figure . . . but also comprised of any number of individual figures, both tropes and schemes; for instance, metaphors, similes, synecdoches, anaphoras, isocolons, divisios, [sic] and hyperboles, to name but a few.”).

²⁰⁷ JONATHAN BATE, *THE GENIUS OF SHAKESPEARE* 52 (1998) (describing the blazon as a genre in which the lover “enumerate[s] the beauties of their beloved from top to toe”).

²⁰⁸ *THE NORTON SHAKESPEARE* (Stephen Greenblatt et al. eds., 1997).

²⁰⁹ Kurtz, *supra* note 57, at 108, 114.

²¹⁰ *Id.* at 91.

²¹¹ BATE, *supra* note 207, at 52.

²¹² *Dun Definition*, OXFORD UNIV. PRESS, http://www.oxforddictionaries.com/us/definition/american_english/dun (last visited Oct. 20, 2013) (defining “dun,” an adjective, as “of a dull grayish-brown color”).

Literature highlights the limits of copyright's understanding of the "word portrait." Compare, for example, the operation of an (uncopyrightable) blazon (as a generic vehicle for praising the idealized form of the beloved through a collage of conventional metaphors and images) to a contemporary description of a character from a bestselling novel, Stieg Larsson's *The Girl with the Dragon Tattoo*.²¹³

[She] was a pale, anorexic young woman who had hair as short as a fuse, and a pierced nose and eyebrows. She had a wasp tattoo about an inch long on her neck, a tattooed loop around the biceps of her left arm and another around her left ankle. On those occasions when she had been wearing a tank top, Armansky also saw that she had a dragon tattoo on her left shoulder blade. She was a natural redhead, but she dyed her hair raven black. She looked as though she had just emerged from a week-long orgy with a gang of hard rockers. . . . She had simply been born thin, with slender bones that made her look girlish and fine-limbed with small hands, narrow wrists, and childlike breasts. She was twenty-four, but she sometimes looked fourteen. She had a wide mouth, a small nose, and high cheekbones that gave her an almost Asian look. Her movements were quick and spidery, and when she was working at the computer her fingers flew over the keys. . . . Sometimes she wore black lipstick, and in spite of the tattoos and the pierced nose and eyebrows she was . . . well . . . attractive.²¹⁴

It would be difficult to claim that the portrayal above is not "distinctively delineated" under a range of possible meanings for that phrase. Notice, however, that proclaiming Lisbeth distinctively delineated as a character does little to distinguish idea from expression as copyright law requires; it merely presumes the existence of a dividing line, somewhere. Concededly, the line-drawing required by the dichotomy presents significant difficulty, as others have noted. Nonetheless, no test or tool has superseded it yet.²¹⁵ The character described above can be framed as a broad idea (young sexy female punk who has a job) which would provide a broader scope of protection against subsequent uses,²¹⁶ or as a narrowly drawn idea (counter-cultural young female detective/hacker with puckish sexuality who defies professional and societal expectations), which would provide narrower future protection for the work since many of its expressive elements could arguably fall around the very specifically tailored "idea" at the heart of the work. The passage above clearly possesses some

²¹³ STIEG LARSSON, *THE GIRL WITH THE DRAGON TATTOO* (Reg Keeland trans., 2008).

²¹⁴ *Id.* at 32.

²¹⁵ *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 712 (S.D.N.Y. 1987).

²¹⁶ The broader the idea animating a given work, the more of the work can conceivably be deemed copyrightable expression. In turn, proportionately less of the work will be presumptively available for downstream users.

protected expression, even if the scope of that protection is subject to debate; determining how much protection is part of the difficult but constitutionally required work for judges adjudicating copyright decisions.²¹⁷ Unlike the blazon, it grounds its figure not, for the most part,²¹⁸ in figurative language and symbols (such as the sun and coral)²¹⁹ but in concrete markers (such as specific tattoos, hair color, bone structure, and numerous other precisely tailored details). It might be called a very “visual” description for a literary character.

Copyright law should dispense with the unclear terminology of the “word portrait” and instead focus attention on the idea/expression dichotomy. Literary descriptions of character, mistakenly termed “word portraits,” should be considered through copyright’s idea/expression analysis, just as any other rendering of an artistic character is. Indeed, the Copyright Act requires this sort of filtering as between protected and unprotected elements of expressive works.²²⁰

In light of literary traditions and theories, the law’s distinction between visual and literary characters should not be maintained. Whether the rationale is ease of evidentiary process (and the imagined transparency of images)²²¹ or aesthetic preference (for graphically rendered or visually evocative characters), the result is the same. If the incentives theory of copyright protection is accurate—and scholarship and law both behave as though it is—the law incentivizes the creation of characters that, though rendered in words, consist of descriptions that are as graphic or as visually evocative as possible.²²² In other words, authors who create literary renderings of character that leave very little to the imagination would, under the Posner rationale stated above, merit stronger protection of their characters, because these figures would be more like visually rendered characters than like “word portraits.” Copyright scholarship has yet to take stock of what this may

²¹⁷ *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 455 (S.D.N.Y. 2005); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work’s “Total Concept and Feel”*, 38 EMORY L.J. 393, 400 (1989).

²¹⁸ The passage contains some figurative language, including: the similes “hair short as a fuse,” and the phrase “[s]he looked as though she had just emerged from a week-long orgy,” and the metaphor of “spidery” movement. Nonetheless, the dominant mode of discourse here is not figurative but quite concretely grounded. LARSON, *supra* note 213, at 32.

²¹⁹ See *supra* note 208 and accompanying text (discussing Shakespeare’s Sonnet No. 130, which embeds figurative language drawing on images of the sun and coral).

²²⁰ 17 U.S.C. § 102(b) (2012).

²²¹ Tushnet, *supra* note 186, at 686–87.

²²² *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (dismissing the argument that copyright necessarily restricts First Amendment freedoms, because copyright is itself responsible for incentivizing the creation of a considerable amount of speech); see also Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 606–27 (1996); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000).

imply for literary production. The next Part argues that these incentives translate into privileging one aesthetic mode over another and could lead to the creation of flat, rather than round, characters.

C. *Characters in Search of a Neutral Copyrightability Standard*

The distinctive delineation standard set out in *Nichols* skews protection towards a particular kind of artistic production that, in theoretical terms, could be said to privilege the visual, and the flat, over the verbal, and the round.²²³ Indeed, the very phrase “distinctive delineation,” first introduced in *Nichols*, contains within it hints of copyright’s valorization of the visual over the literary discussed in the previous Part: the idea of delineation comes not from verbal creation but from the realm of drawing or painting, and means to create by drawing lines.²²⁴ Yet the distinctive delineation test moves beyond mere preference for the visual. It encourages and rewards literature that features characters that are easy to recognize as “distinctive,” and thus much likelier to be flat characters rather than round. To understand the aesthetic implications of the distinctive delineation test, it is important first to grasp the role it plays in copyright opinions.

Copyright infringement analysis generally features two stages (assuming plaintiffs have proven ownership of a valid copyright). Plaintiffs must first show copying.²²⁵ Plaintiffs must then prove that the copying was impermissible, that is, that defendants not only copied, but copied material that was protectable.²²⁶ Copyright infringement analysis with respect to independent characters proceeds along two further

²²³ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

²²⁴ *Deliniation Definition*, ACADEMIC DICTIONARIES AND ENCYCLOPEDIAS, http://useful_english.enacademic.com/35244/delineation (last visited Nov. 15, 2013) (The first definition for “delineation” provides: “The action of tracing out something by lines; the drawing of a diagram, geometrical figure, etc.; . . . a drawing, diagram, or figure.” The second and third definitions establish even more strongly the visual nature of delineation’s mode of representation. They state, respectively: “The action of tracing in outline something to be constructed; a sketch, outline, plan, rough draft. Usually *fig.*” and “The action or manner of representing an object by a drawing or design; pictorial representation, portraiture; . . . a portrait, likeness, picture.”).

²²⁵ Proof of copying may be provided through direct evidence, or through the presumption of copying which arises if plaintiffs can prove (1) that defendants had *access* to the copied work and took advantage of that access, and (2) that the works in question are “substantially similar.” *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1169–70 (7th Cir. 1997) (“The issue of copying can be broken down into two subissues. The first is whether the alleged copier had access to the work that he is claimed to have copied; the second is whether, if so, he used his access to copy.”).

²²⁶ *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977) (“The real task in a copyright infringement action . . . is to determine whether there has been copying of the expression of an idea rather than just the idea itself.”).

tiers.²²⁷ First, the court inquires whether the character was copyrightable.²²⁸ Under the *Nichols* test, once characters are deemed sufficiently expressive to be “distinctively delineated,” they may be copyrightable apart from the works that surround them.²²⁹ Second, the court asks whether the defendant copied the protected aspects of the character’s expression, or “merely a broader and more abstract outline.”²³⁰

One way of viewing the threshold inquiry into character copyrightability is as an example of the idea/expression dichotomy in action.²³¹ A second way of seeing this test is as a regrettable diversion from the matter at hand: the focus on the character’s copyrightability and “distinctiveness” shifts attention away from the copying analysis, where attention properly belongs.²³² A third way of seeing it is as the law’s imposition of an aesthetic requirement to qualify for copyright protection.²³³ The first and second views seem right, but they are insufficient.²³⁴ The third view arguably reveals the problem behind the “distinctively delineated” standard: it masks evaluative work that necessarily takes place in the course of its determination. In other words, the test offers a legal conclusion posing as a standard, and incorporates aesthetic preferences without doing so explicitly.

The distinctive delineation test is an unclear and subjective one that leads to conclusory legal analysis. Perhaps because courts do not know how to implement a standard like this, characters are often simply

²²⁷ This analysis operates apart from the prior analysis of whether the work as a whole was (a) copied and (b) copied impermissibly. Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998) (describing substantial similarity analysis at the first stage of proving copying).

²²⁸ *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1451 (1988).

²²⁹ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). No court has relied solely on Sam Spade’s “constitutes the story being told” test.

²³⁰ 1 NIMMER, *supra* note 28, § 2.12.

²³¹ See KAPLAN, *supra* note 39, at 51 (“As Malvolio’s analogue (with a different name) was moved through different surroundings and episodes, the pattern common to both characters would tend to describe only a stock figure, ‘idea’ not ‘expression’”); see also *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1304 (C.D. Cal. 1995) (reasoning that under *Nichols*, 45 F.2d at 121, “copyright protection is granted to a character if it is developed with enough specificity so as to constitute protectable expression”).

²³² 1 NIMMER, *supra* note 28, § 2.12; Kurtz, *supra* note 11, at 927.

²³³ Helfand, *supra* note 10, at 631 (“Determining whether a character is ‘sufficiently delineated’ to be eligible for copyright protection involves, in effect, assessing the character’s ‘inherent worth.’”).

²³⁴ If character copyrightability were merely about the idea/expression dichotomy, it would be unnecessary. Thus something else is needed to account for its tenacity in the case law. Kurtz and Nimmer may be right in commenting that character copyrightability is a diversion, but so long as courts continue to engage in it, its implications bear considering.

declared to be highly delineated with little argument or evidentiary support, along these lines:²³⁵

Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle and strong. He is Tarzan.²³⁶

The description hardly amounts to a carefully reasoned legal finding,²³⁷ though the court did conclude that Tarzan was copyrightable.²³⁸

Again and again, the distinctive delineation test produces inconsistent, aesthetically non-neutral results.²³⁹ The alternative, the constitutes-the-story-being-told test has little power as a meaningful alternative, despite never having been overruled.²⁴⁰ Thus the distinctive delineation test ends up playing an important role in determinations of

²³⁵

The Rocky characters are one of the most highly delineated group [sic] of characters in modern American cinema. The physical and emotional characteristics of Rocky Balboa and the other characters were set forth in tremendous detail in the three Rocky movies before Anderson appropriated the characters for his treatment. The interrelationships and development of Rocky, Adrian, Apollo Creed, Clubber Lang, and Paulie are central to all three movies. Rocky Balboa is such a highly delineated character that his name is the title of all four of the Rocky movies and his character has become identified with specific character traits ranging from his speaking mannerisms to his physical characteristics. This Court has no difficulty ruling as a matter of law that the Rocky characters are delineated so extensively that they are protected from bodily appropriation when taken as a group and transposed into a sequel by another author. Plaintiff has not and cannot put before this Court any evidence to rebut the defendants' showing that Rocky characters are so highly delineated that they warrant copyright protection.

Anderson v. Stallone, No. 87-0592 WDKGX, 1989 WL 206431, at *7 (C.D. Cal. Apr. 25, 1989). Note that the court points only to producers' decision to title the films after the character, and to his "specific character traits" such as "speaking mannerisms [to his] physical characteristics." *Id.* At this level of generality, the court's statements seem far more conclusory than carefully reasoned. Even if they could have pointed to details to prove the matter asserted—Rocky's "highly delineated" status—the *Anderson* court did not feel the need to do so.

²³⁶ *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982).

²³⁷ Kurtz, *supra* note 11, at 458. Kurtz elaborated,

Nothing in this description indicates why Tarzan was distinctively delineated. The description is of little more than a type. Surely another author could write a non-infringing story about an individual in tune with a jungle environment and able to communicate with animals, who is athletic, innocent, youthful, gentle, and strong. Indeed, the description seems to fit Kipling's Mowgli as well as Tarzan. The court's difficulty in explaining why Tarzan was distinctively delineated illustrates the problem inherent in attempting to make such a determination without comparing the characters in the allegedly infringed and infringing works.

Id.

²³⁸ *Burroughs*, 519 F. Supp. at 391 ("It is beyond cavil that the character 'Tarzan' is delineated in a sufficiently distinctive fashion to be copyrightable.").

²³⁹ See, e.g., Brylawski, *supra* note 15, at 77; Kurtz, *supra* note 11, at 456.

²⁴⁰ *Id.*

the fact and scope of independent copyright protection. In case after case pertaining to copyright in characters, aesthetic determinations necessarily take place on or below the surface, despite the well-settled principle that courts should not assess aesthetic value in the course of copyright adjudication.²⁴¹ These aesthetic valuations are sometimes outcome-determinative. Theoretically, copyright law is premised on the notion that aesthetic neutrality is necessary, possible, and good.²⁴² Yet the reality does not play out that way, as scholarship has noted, in an effort to begin to evaluate the theoretical consequences of non-neutrality for artistic production.²⁴³

The problem of inartful application of the distinctive delineation test arose again in recent litigation.²⁴⁴ J.D. Salinger (and his estate, after he died during litigation) brought suit over an unauthorized sequel to Salinger's *The Catcher in the Rye*, called *Sixty Years Later: Coming Through the Rye*, by "J.D. California" (the pseudonym of Swedish-American author Fredrik Colting). The sequel starred a fictionalized version of Salinger himself and an aged version of Salinger's Holden Caulfield, the protagonist from *The Catcher in the Rye* and arguably one of the most iconic literary figures of the twentieth century.²⁴⁵ The lower court found the subsequent work infringing of its source work, and issued a preliminary injunction barring the sequel from distribution in the United States.²⁴⁶ In finding Caulfield protectable, the lower court jumbled the copyright doctrine:

Holden Caulfield is quite delineated by word. It is a portrait by words.²⁴⁷ It is something that is obviously seen to be of value since the effort is made [by defendants] to recall everything that the character in the book does . . . It is difficult, in fact, to separate Holden Caulfield from the book.²⁴⁸

The court in *Salinger I* found Holden "quite delineated," suggesting itself to be on the way to a finding of copyrightability under its articulation of the *Nichols* test, though without reasoning its way

²⁴¹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

²⁴² *Id.* at 251; *cf.* Yen, *supra* note 227, at 248.

²⁴³ See, e.g., Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L. REV. 175, 231-32 (1990); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1232 (1997); Yen, *supra* note 227, at 248.

²⁴⁴ *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

²⁴⁵ Menand, *infra* note 256.

²⁴⁶ *Salinger*, 607 F.3d at 73. The Second Circuit reversed on procedural grounds, but noted with approval the Southern District's copyright analysis.

²⁴⁷ *Id.* An additional point of confusion that undermines confidence in the court's reasoning: it identified Holden as a "portrait by words," which sounds like the "word portrait" that under copyright has historically not been protectable. See 1 NIMMER, *supra* note 28, § 2-12.

²⁴⁸ *Salinger*, 607 F.3d at 73 (quoting District Court Hearing (June 17, 2009) (Hr'g Tr. 24)).

through to its conclusion.²⁴⁹ The court then implied that Holden's value derives from Colting's decision to appropriate Holden. That is, the choice to copy, and the number of Holden's actions copied, served as the measure of whether Holden was sufficiently distinctively delineated for protection. Clearly, this circular reasoning does not provide a proper measure of a character's protectability.²⁵⁰ That the court should *conclude* delineation based on a character's market value or artistic interest to downstream authors, rather than reasoning its way towards a sound analysis of copyrightability, may suggest the difficulty of the copyrightability determination for independent characters. Based on this and other similarly conclusory case law, then, it would be difficult to develop a formula for arriving at distinctive delineation, which, in turn, poses a problem for those who wish to use preexisting characters in new works.

By and large, copyright law and scholarship assume that incentives matter to authors, and following thereon, will take copyright law into account when making artistic decisions. Because the law is presupposed to create meaningful incentives for creators, we can assume, at least *arguendo*, that creators may create so as to optimize their copyright protection. If this is so, the distinctive delineation test will skew characters in the direction of distinctiveness that is easily perceived, which the case law suggests is truer of visual than verbal characters.²⁵¹

Lisbeth Salander, the tattooed cyber-sleuth mentioned above, might be an overdetermined example of the way contemporary literature offers up very visually detailed characters.²⁵² Yet it sets up a

²⁴⁹ *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

²⁵⁰ Litman, *supra* note 17, at 429 (stating that merely because something is copied does not make it valuable). Otherwise, as a matter of logic, copyright would collapse the idea/expression analysis: merely because something had been taken, it would make it protectable. Thus anything borrowed would be de facto infringing, as a default. Clearly, copyright law could not be correctly construed to reach that result.

²⁵¹ *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004).

²⁵² Another, perhaps more convincing parallel exists in the transition from the "vermin" Gregor Samsa becomes in Franz Kafka's story (vermin being, apparently, the most authoritative English translation of Kafka's original "ungeziefer") to Gregor Samsa's appearance in a later adaptation of the story, Marc Estrin's *Insect Dreams*. Per Kafka:

When Gregor Samsa woke up one morning from unsettling dreams, he found himself changed in his bed into a monstrous vermin. He was lying on his back as hard as armor plate, and when he lifted his head a little, he saw his vaulted brown belly, sectioned by arch-shaped ribs, to whose dome the cover, about to slide off completely, could barely cling. His many legs, pitifully thin compared with the size of the rest of him, were waving helplessly before his eyes.

FRANZ KAFKA, *THE METAMORPHOSIS* 3 (Stanley Corngold trans., W.W. Norton & Co. 1996) (footnotes omitted). Estrin's vermin:

He was five feet, six inches from the top of his head to the tip of his tegmina, not counting his cerci, which, because of the need to wear clothing, were most often

helpful parallel nonetheless. Consider her in juxtaposition with Salinger's Holden Caulfield. By contrast with Lisbeth Salander, Holden Caulfield is much more difficult to fix in the mind's eye²⁵³ in the way Posner imagines readers doing with cartoon characters in *Gaiman*.²⁵⁴ Holden is not a character easily recognizable in a paragraph's visually descriptive language. Very few physical details characterize Salinger's depiction of him. Readers learn of a red hunting hat to which Holden grows attached, and which he keeps folded in his pocket, but very little else makes Holden visually distinctive.²⁵⁵ He could have been played, in a film version, by James Dean, or James Franco, or James Spader, without a reader's protesting, on the basis of textual evidence, that the film had failed to cast Holden faithfully.

Holden Caulfield is round. He is an extraordinarily memorable character,²⁵⁶ but what makes him unique arguably has less to do with the amount of imagination needed to conjure him, or the number of concrete details associated with his looks, and more to do with the iconoclastic tenor of his moods, his laconic dialogue, and his sardonic

strapped to his abdomen underneath. . . . His most striking features—the most upsetting, at least to strangers—were his eyes, two huge compound eyes, seven inches across, of two thousand lenses each. In the faintest light they would glister, iridescent, ever-changing. Vision for those with compound eyes is both less—and more—exact than for those of us with mammalian organs. While the overall image was somewhat blurry, a mosaic of soft focus like the surface of a Seurat, his perception of motion was vastly more acute. . . . so his peripheral vision was immense. . . . His mouth was far more adept than our own, with hard, chitinous jaws for chewing from side to side, maxillae with both soft and stiff bristles for grooming. . . . His ears, so to speak, were subgenual organs located in each knee joint. . . .

MARC ESTRIN, *INSECT DREAMS: THE HALF-LIFE OF GREGOR SAMSA* 11–12 (2002). The emphasis on greater visual perception and the translation of his experience into visual terms through reference to a Seurat painting may suggest a number of reasons for which characters may be more visually rendered now (in Estrin) than then (in Kafka). This has nothing or little to do with copyright law, and more to do with modernity, shifts in readers' taste and artistic techniques, a greater interest in phenomenological narrative, etc. But it does not disprove the argument that characters may often find expression in more visually vivid and detailed ways than they once did, and that copyright consequences may flow from that increased attention to the visual.

²⁵³ Cf. Jennifer Paull, *J.D. Salinger Style—Tipping Our Hats to Holden Caulfield*, STYLELIST (Jan. 19, 2010, 5:50 PM), <http://www.stylelist.com/2010/01/29/j-d-salinger-style-tipping-our-hats-to-holden-caulfield> (“Caulfield, the narrator of Salinger's novel “The Catcher in the Rye” is such a vivid character that you can practically hear, smell and touch him.”).

²⁵⁴ Cf. Posner's discussion of the reader's engagement with literary versus visual characters, in *Gaiman*, discussed *supra* note 57 and accompanying text.

²⁵⁵ SALINGER, *supra* note 148, at 17 (“It was this red hunting hat, with one of those very, very long peals. I saw it in the window of this sports store when we got out of the subway, just after I noticed I'd lost all the goddam foils. It only cost me a buck. The way I wore it, I swung the old peak way around to the back—very corny, I'll admit but I liked it that way, I looked good in it that way.”).

²⁵⁶ Louis Menand, *Holden at Fifty: “The Catcher in the Rye” and What It Spawned*, THE NEW YORKER, Oct. 1, 2001, at 82.

interior monologue.²⁵⁷ In particular, his sensitivity to artifice and “phoniness” of almost any kind marks him as very particularized.²⁵⁸ These, however, are not elements easily separated from the text itself, as shown in the discussion above, at pages 31-32. To the extent that they can be grouped into categories, it is not clear why Holden’s traits make him something other than an unprotectable word portrait. Holden’s conceptual characteristics make him “round” in ways that have attracted hundreds of articles, scores of books, and millions of readers.²⁵⁹ Yet these qualities are harder to muster in concise textual evidence and harder to separate from the text for the purposes of infringement analysis. Perhaps for these reasons, the court made a point of citing to articles on how culturally important Holden had become, almost as if preempting critiques of its cursory copyrightability analysis.²⁶⁰ In light of its own copyright standards, the law should not have found it so easy to protect Holden independently of *The Catcher in the Rye*.²⁶¹ Copyright’s standards of independent character protection make it easier to protect flat than round characters.

The implications of copyright’s valorization of flat characters are especially troubling in light of the incentives theory of copyright. The visual nature of Stieg Larsson’s description of the eponymous “girl with the dragon tattoo” in words could be attributable to a number of factors, aesthetic, cultural, legal, or otherwise. For instance, Larsson may have anticipated the film’s development into a film; much popular literature styles itself as though screenplay-ready.²⁶² Indeed, the novel feels filmic in many respects, not just in its descriptions of character.²⁶³ He may

²⁵⁷ Posner may have been correct in asserting that some literary characters leave more to the imagination than others, but the juxtaposition of Holden and Lisbeth calls into question whether it is right to accord greater protection on the basis of this difference.

²⁵⁸ Duane Edwards, *Holden Caulfield Suffers from Unresolved Sexual Conflict, in DEPRESSION IN J.D. SALINGER’S THE CATCHER IN THE RYE* 89 (Dedria Bryfonski ed., 2009) (“What does make him extraordinary is his special ability to detect phoniness everywhere (except in himself).”).

²⁵⁹ Menand, *supra* note 256.

²⁶⁰ Indeed, one might say that the court adjudicated the matter as though Holden were, by analogy, a trademark, a thing whose fame did actually matter in determining the way the law should proceed.

²⁶¹ Recall that, absent independent copyright protection, Holden would be protectable insofar as he is synonymous with the text: subsequent authors’ uses would be measured against whether the text (not Holden as a character) had been impermissibly copied.

²⁶² Zahr K. Said, *Novels for Hire* (2013) (unpublished manuscript) (on file with the author).

²⁶³ I have in mind the way the narrative feels cinematic in its cuts between scenes, and in its attention to details of framing scenes visually, as though imagining them as tableaux or storyboards. There are also numerous brands mentioned with regularity, which I have argued elsewhere is often a signal to sponsors and audiovisual producers of a literary work’s adaptability for the screen. *Id.* at 36 (“Placing brands in literature need not be motivated by formal sponsorship agreements because such authors may embed brands so as to make it easy to convert their literary works into viable screenplays or tv scripts for which it then becomes easy to secure sponsors’ involvement. Sponsors can see their name in literary lights and determine ahead of time whether they will like the role created for their brand.”).

have used such expressive and detailed language to emphasize Lisbeth Salander's difference from earlier literary detectives and signal his subversion of the generic conventions of detective fiction. Or he might have done so to maximize the amount of independent copyright protection she would receive as a character, against subsequent uses. While this last explanation is, intuitively, the most farfetched, it aligns with copyright scholarship's treatment of authors as economic actors. Indeed: copyright's dominant discourse today is arguably utilitarian, and it relies on the incentives theory as a justification.²⁶⁴ If scholars continue to take the incentives theory of copyright seriously, they must consider that this is one possible outcome of the distinctive delineation test: the characters that will be created will display "physical" rather than "conceptual" qualities, and will be characters that can be most easily imagined in concrete terms.²⁶⁵ Creating flat characters is arguably much easier than creating round ones.²⁶⁶ Had Salinger conceived of Holden so as to maximize his copyright protection in him, he might well have ended up much less intricate and emotionally compelling to the generations who have followed. He might have ended up more caricature than character.

Literature draws attention to the fact and impact of copyright's protection of characters that are flat rather than round.²⁶⁷ Though the court found Holden, a round character, copyrightable, it did violence to copyright analysis in so finding. The distinctively delineated standard skews protection for characters who exhibit characteristics more common to popular literature, suggesting a bias against other modes of representation, such as "conceptual," psychologically complex, or round characters.²⁶⁸ While flat characters are important in their own right, they ought not to receive favored treatment under copyright law.²⁶⁹

In conclusion, both the preference for visual over literary characters outlined in Parts III.A and III.B and the "distinctive delineation" test push literary production in the direction of being as visually memorable as possible, even if characters are to be rendered solely through words. Copyright law's protection for characters imports aesthetic preferences for particular kinds of characters in several discrete ways. The preference for visual over verbal works is unjustified, and the

²⁶⁴ Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746 (2012).

²⁶⁵ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754 (9th Cir. 1978).

²⁶⁶ JAMES WOOD, *HOW FICTION WORKS* 96 (2008) (describing the tendency to portray characters in flat, lifeless manner: "The unpracticed novelist cleaves to the static, because it is so much easier to describe than the mobile: it is getting these people out of the aspic of arrest and mobilized in a scene that is hard.").

²⁶⁷ FORSTER, *supra* note 95, at 103–04.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 108.

terminology used to express that preference (“word portraits”) is unclear and misguided. Further, the “distinctive delineation” requirement for independent character protection creates incentives for characters that will skew towards a particular aesthetic and will result—at least in theory—in the creation of characters that are more flat than round. It may be that copyright should revisit *Bleistein*’s aesthetic non-discrimination principle as part of a systematic reform of the scope and purpose of the derivative work right, where it does (or claims to do) a great deal of work.²⁷⁰ Unless and until such review transpires, however, literature helps illuminate the ways in which copyright law overtly and subtly encourages the creation of particular forms of artistic creation despite its claim to aesthetic neutrality.

D. *Acknowledging the Fixation Hurdle*

Judge Posner’s view in *Gaiman* suggests that literary images admit of a number of different modes of *recognition* with respect to characters; they are unstable signs. To put it in semiotic terms, literary characters, under the Posner view, offer textual signifieds whose signifiers may be quite mobile or allow a great deal of “play.” A number of different actors, after all, have played James Bond, and in so doing they prove that the literary James Bond whom Ian Fleming created can and must conjure one image (indeed many images) for his readers, while the visually rendered “Bonds” are merely additional, permissible visual interpretations (signifiers) of the literary signified.²⁷¹

Indeed, Posner’s view of characters as requiring interpretation or completion by readers suggests legal arguments that could arise under copyright apart from literary theories, though the two strands of scholarship intersect here. If the literary character must, in fact, be conjured up by the reader mentally, one might say the character has, in

²⁷⁰ Yen, *supra* note 227, at 253, 266–97 (arguing that courts should take explicit stock of aesthetic judgments made in the process of copyright infringement determinations).

²⁷¹ *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995). Alternatively, one might argue that in our culture, the immediacy of the film James Bond has overshadowed the literary one, and that the semiotic systems are now separate but complementary. LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 68 (2008) (“It is through text that we elites communicate (look at you, reading this book). For the masses, however, most information is gathered through other forms of media: TV, film, music, and music video. These forms of ‘writing’ are the vernacular of today. They are the kinds of ‘writing’ that matters most to most.”). In that case, one might say that the Bond films create, all together a single signified (this was the argument in *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *6–8 (C.D. Cal. Apr. 25, 1989)). Various different actors from Roger Moore to Daniel Craig then incarnate the role, becoming the changing signifiers that embody the signified afresh with each new casting decision.

a deeper sense, never met copyright's fixation requirement.²⁷² That the verbal rendering, in words, has been fixed, is of course not in question.²⁷³ Its career in the world of ideas and culture, however, depends if not on its "semiotic disobedience," at least on its semiotic autonomy, its very lack of conceptual fixation.²⁷⁴ If Posner's theory of character completion is pursued to its logical conclusion, literary characters (and any characters requiring mental completion by those who perceive them) should perhaps be viewed as not properly "fixed" for the purposes of copyright protection, and thus not independently copyrightable.²⁷⁵ The very existence in both law and literature of two ways to approach the texts at issue—external and internal, in literary terms; extrinsic and intrinsic, in legal terms—further implies the work done subjectively in the course of apprehending characters.²⁷⁶ There is no one natural way to "read" a character. Thus a verbally rendered character might be fixed in words as part of a literary text that is copyrightable as a *text*. However, that text's *character* might be said to lack the necessary fixation to qualify for independent copyright protection since how a reader interprets the verbal text to produce a mental image of that character is largely particular to the reader, and not fixed anywhere.

Recall that a threshold requirement for copyright protection is that a work be "fixed in any tangible medium of expression."²⁷⁷ To be considered "fixed," a work must be "sufficiently permanent or stable . . . to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."²⁷⁸ Complex issues arise when a work is fixed in only fleeting fashion, or when a work changes, as a part of its nature or design. For example, in their earliest days, computer games posed a doctrinal puzzle: were ephemeral audiovisual displays

²⁷² 17 U.S.C. § 102(a) (2012) ("Copyright protection subsists, in accordance with this title, in original works of authorship *fixed* in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." (emphasis added)).

²⁷³ H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665 ("Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device 'now known or later developed.'").

²⁷⁴ Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489 (2006).

²⁷⁵ Indeed, under one literary view of characters, making any meaning at all out of characters requires acts of interpretation and relies on "the audience's accustomed expectations regarding components of a narrative," which suggests that in fact characters achieve their fullest signification only in the minds of readers and viewers. Ira Newman, *Virtual People: Fictional Characters through the Frames of Reality*, 67 J. AESTHETICS & ART CRITICISM 73, 75–76 (2009).

²⁷⁶ *Id.* at 75; *see also* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977).

²⁷⁷ 17 U.S.C. § 102(a).

²⁷⁸ 17 U.S.C. § 101.

produced by videogames not copyrightable because they failed to satisfy the fixation requirement?²⁷⁹ In *Williams Electronics, Inc. v. Artic International, Inc.*, the Third Circuit answered that question in the negative, holding that the audiovisual displays of video games were protected under the 1976 Copyright Act.²⁸⁰

Yet the court's reasoning emphasized that it was the repetitive nature of these transient displays that led it to conclude that they were "sufficiently permanent or stable . . . to be perceived, reproduced, or otherwise communicated for more than [a] . . . transitory" period.²⁸¹ Similarly, in *Stern Electronics*, it was the "repetitive sequence of images" that led to a finding of sufficient fixation to justify copyright protection.²⁸² In some sense, these courts turned to repetitiveness as a proxy for fixation; the displays recurred with sufficient regularity that they might as well have been considered fixed. Put another way, one could conclude that these images were constructively fixed.

The courts in *Stern* and *Williams* were not troubled by the fact that these products were ones designed to change to some degree every single time the games were played, because the displays were changing from game to game only very little, if at all. The emphasis was on repetition and predictability. By contrast, in a more recent copyright decision, a court decided the issue of whether a work of art could be said to be fixed given that it had been designed with awareness and expectation of the work's undergoing subsequent changes. The work was a garden designed by Chapman Kelley for the city of Chicago. *Kelley v. Chicago Park District* raised the question of whether a garden can be considered a work of authorship, and, whether it can properly be considered fixed.²⁸³ At issue there was also whether the garden was a "visual work" for the purposes of VARA (the Visual Artists Rights Acts) or a copyrightable sculpture, or possibly neither.²⁸⁴ Yet the Court backed away from the VARA claim by insisting that the garden was not copyrightable *ab initio*. The Seventh Circuit resolved the case largely on the fixation point, holding that a garden could not be deemed to have been fixed because the garden's elements were "alive and inherently changeable, not fixed." That is, the garden would change based on forces of nature beyond the artist's control or intention. The court discussed this changeability in some detail, stating that the garden's

appearance is too inherently variable to supply a baseline for determining questions of copyright creation and infringement. If a

²⁷⁹ *Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 873–74 (3d Cir. 1982).

²⁸⁰ *Id.* at 874.

²⁸¹ *Id.* (quoting 17 U.S.C. § 101).

²⁸² *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 857 (2d Cir. 1982).

²⁸³ *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011).

²⁸⁴ *Id.* at 291–92.

garden can qualify as a “work of authorship” sufficiently “embodied in a copy,” at what point has fixation occurred? When the garden is newly planted? When its first blossoms appear? When it is in full bloom? How—and at what point in time—is a court to determine whether infringing copying has occurred?²⁸⁵

For the Seventh Circuit, it was important that the forces of nature could and did have a significant impact on the work’s ability to remain in its original state, and again, the opinion is worth quoting at length:

Of course, the forces of nature—the varying bloom periods of the plants; their spread habits, compatibility, and life cycles; and the weather—produced constant change. Some wildflowers naturally did better than others. Some spread aggressively and encroached on neighboring plants. Some withered and died. Unwanted plants sprung up from seeds brought in by birds and the wind. Insects, rabbits, and weeds settled in, eventually taking a toll.²⁸⁶

Unlike the audiovisual displays in *Williams*, the changing, unfixed aspects of the work were not ones that were repetitive and predictable over time. Here, parts of the original work actually did not survive while others thrived and changed shape and size.

The *Kelley* opinion is well-reasoned and nuanced. Yet its implications are potentially considerable. It suggests that other works that also, by their nature, change after the author has created them, may not meet copyright’s fixation requirement.²⁸⁷

Under *Kelley*, it is possible to argue that though a novel’s *text* is clearly fixed, its characters, beyond their expression as a mere collection of words, are not fixed. Characters, like a garden’s blooms, undergo “constant change” in the minds of readers. As the *Kelley* court put it: “gardens are planted and cultivated, not authored. A garden’s constituent elements are alive and inherently changeable, not fixed.”²⁸⁸ Characters—though clearly authored—are themselves in a deeper sense both “alive and inherently changeable.”

The analogy between a novel’s characters and a garden design’s physical expression is not perfectly apposite, but it suggests some commonalities that could help clarify copyright in characters. Like characters in a novel, the garden in its final artistic state was one that continued to evolve over time, in unpredictable ways. Its origins, like those of characters, were fixed. A character’s origins lie in a novel comprising the author’s fixed expression of a variety of authorial influences, ideas, and experiences. The character’s text is fixed. Yet the things created by the text—perceptions and memories in the minds of

²⁸⁵ *Id.* at 305.

²⁸⁶ *Id.* at 294.

²⁸⁷ HOWARD ABRAMS, *THE LAW OF COPYRIGHT* § 2:27 (2012).

²⁸⁸ *Kelley*, 635 F.3d at 304.

readers—the way the characters are brought to life by readers, those are not and cannot be fixed. Recall the neuroscientist’s description of reading: characters run “on minds of readers just as computer simulations run on computers.”²⁸⁹

Similarly, the garden’s final state exists only because of its origins in a design that was fixed in a drawing or set of plans. That design or drawing may have reflected both copyrightable aspects and noncopyrightable aspects (such as what sorts of flowers can grow in what kinds of conditions; or where the light is strongest in parts of the park; these are facts, and not copyrightable creative expression). Yet the design is clearly a work distinct from the garden just as the book of accounting forms in *Baker v. Selden* was a distinct (and copyrightable) work even though the underlying accounting system was not copyrightable. That design was then executed in three dimensions in the actual physical space the garden would occupy. Upon the garden’s completion, from the time it was subject to external forces such as weather, other flora, and fauna, it lost any claim to being fixed because it became subject to change that would not be repetitive and predictable. Just as, per Robert Frost’s poem, “nothing gold can stay,” no garden will stay in its original designed form unless it is rigorously policed for change.²⁹⁰ Gardens grow, and growth is the antithesis of fixedness.

Yet the militant horticultural grooming necessary to prevent change to a garden marks the end of the usefulness of the analogy between a garden’s changing blooms and a novel’s evolving characters. It would be not only impossible to guard against changes to characters, it would make novels incomprehensible. Characters can live in readers’ minds *only because* readers take them and internalize them and make them their own.

In her work on characters in literary theory, Suzanne Keen has advocated for greater reliance on reader response theory and greater engagement with actual readers in terms of their emotional engagement. Keen shows that very little is needed in terms of character clues to begin a process of engagement from which readers imagine and complete their characters, in a process she describes as “the gap-filling fantasizing by which most readers flesh out fictional characters from scant verbal cues.”²⁹¹ By that same token, readers will experience a range of heterogeneous responses when they make affective judgments about characters: they “will make a variety of judgments about the same fictional character: some will find a character more whole, while others will see a fragmented figure; some will make a case for a stylized,

²⁸⁹ Paul, *supra* note 2 (internal quotation marks omitted).

²⁹⁰ ROBERT FROST, *Nothing Gold Can Stay*, in *THE POETRY OF ROBERT FROST: COLLECTED POEMS* 222 (Edward Connery Lathem ed., 2002).

²⁹¹ Keen, *supra* note 5, at 308.

symbolic reading, while others recognize a natural, literal rendering of the very same character.”²⁹² Keen’s view builds, of course, on the theoretical foundations of reader response theory, which was the school of literary studies responsible for shifting focus onto the reader as an agent of textual interpretation. The insights from reader response theory make sense of how it could be that different readers can have such different experiences reading the same text, by suggesting that readers engage in a heterogeneous textual process of meaning making.²⁹³

In short, readers do a lot of work to make characters make sense for themselves. A cynical (or theoretically outmoded) view of characters is that they are merely mimetic structures that reflect humans’ base desires to see themselves.²⁹⁴ They thrive on our recognition and they cater to our narcissism. Hélène Cixous writes:

By definition, a “character,” preconceived or created by an author, is to be *figured out*, understood, read: he is presented, offered up to interpretation, with the prospect of a traditional reading that seeks its satisfaction at the level of a potential identification with such and such a “personage,” the reader entering into commerce with the book on condition that he be assured of getting paid back, that is, recompensed by another who is sufficiently similar to or different from him—such that the reader is upheld, by comparison or in combination with a personage, in the representation that he wishes to have of himself.²⁹⁵

Whether that view, rooted in psychoanalytical analysis, tells the right story about the work readers do in making their characters, it is certainly right in its point that characters do require some decoding and some recognition on the part of their readers. That readerly work turns out, just as Judge Posner’s intuition in *Gaiman* hinted, to hold important insights for copyright law.

The distinction between characters fixed in a copyrightable text and characters in their post-textual afterlife is not simply academic. In the case of the latter, independent copyright protection should not attach because characters would seem to fail to satisfy copyright’s fixation requirement. In turn, the fixation requirement is no mere formality; it serves two crucial purposes: increasing evidentiary ease for proof of creation and subsequent infringement, and distinguishing

²⁹² *Id.* at 306.

²⁹³ Wolfgang Iser, *The Reading Process: A Phenomenological Approach*, in *READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM CRITICISM* 50, 54 (Jane P. Tompkins ed., 1980) (“The fact that completely different readers can be differently affected by the ‘reality’ of a particular text is ample evidence of the degree to which literary texts transform reading into a creative process that is far above mere perception of what is written.”).

²⁹⁴ Hélène Cixous, *The Character of “Character”*, 5 *NEW LITERARY HIST.* 383, 385 (1974).

²⁹⁵ *Id.*

federal copyright protection from state common law protection (the latter extends to some unfixed works).²⁹⁶

The evidentiary rationale for the fixation requirement is paramount for characters. How can a subsequent author be sure to avoid copying from an earlier author, given the independent lives characters live, and the additional and multiple meanings characters may accrue, in their post-textual instantiations? If Author 2 reads a work by Author 1 and finds Author 1's character, Jones, deeply compelling, nothing in the law of copyright would stop him from naming his own original character Jones. Borrowing a name is not, by itself, infringing on an author's copyright.²⁹⁷ If Author 2 were to borrow from Author 1 not simply the name, but many details from the text including verbatim descriptions of the character, or many textual details that embed the character, Author 2 would be infringing on the copyright of Author 1. The question for independent copyright protection lies at neither end of the spectrum, however. Somewhere in the middle, Author 2, perhaps deeply influenced by Author 1's work, borrows something from Author 1's character. Not enough to land him at the end of the spectrum where he would be clearly infringing Author 1's text. Yet he infuses into his borrowing of that character considerable new life, and, more importantly, many more layers of interpretation that bring that character to life outside the original text. To do so, he proceeds from an amorphous view of that character, one that lives outside the text and inside Author 2's mind. Returning to the evidentiary problem, it becomes clear how fixation plays an important role by providing bright line rules about what counts as copyrightable subject matter on its own, and when. Outside the text, in the minds of their readers, characters should not be independently copyrightable because, in a very real sense, they fail to satisfy copyright's fixation requirement once they have been removed from their texts.

IV. CONCLUSION: IMPLEMENTING LITERARY INSIGHTS

Recalibration of copyright protection for independent characters could come in a number of forms, all of which could conceivably ease the problems in copyright doctrine that literary considerations highlight. Answers to copyright's current confusion could address the convergence of trademark and copyright; the implications of the character entanglement and authorial style problem; the lack of medium neutrality in copyright's preference for the visual over the verbal; the inconsistency bedeviling the threshold tests for character

²⁹⁶ 2 WILLIAM PATRY, *PATRY ON COPYRIGHT* § 3:22 (2013).

²⁹⁷ *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989).

copyrightability; or the fixation dilemma raised by verbal characters who require mental “completion” by readers. Correcting the doctrinal mess in which character law finds itself could help to shape the derivative work right, which is a subject ripe for copyright reform. Though the foundation of this Article, and its evidentiary buttresses, are plainly not meant to hold up an argument primarily about copyright reform, some implications for reform do flow from using literary tools and texts as the Article has argued, and these implications are worth pursuing in future scholarship.

If copyright’s selection of characters is biased, and it rewards or incentivizes certain kinds of characters over others, copyright could theoretically be adjusted to try harder to be aesthetically neutral. Alternatively, since aesthetic neutrality seems implausible, copyright law could seek to be more explicit in its aesthetic biases. If it sought to eliminate biases, it could evolve in the direction of greater inclusion or exclusion of characters, in other words, by providing more or less protection. If it sought simply to be more explicit in its aesthetic proclivities and interpretive choices, copyright protection would more likely contract. By forcing courts to bring aesthetic motives to the surface, legal reasoning could give voice to factors that have in fact been at play without courts’ saying so. This airing of the doctrinal laundry would have salutary effects on the case law and could exert collateral influence on the interrelated spheres of artistic production and the public domain. It could help incent more authors to create works that feature characters that are aesthetically variegated (rather than merely flat), and it could free more downstream authors to use more preexisting characters to create new works.

If the scope of copyright’s protection for independent characters is unclear, it could be clarified in ways that understood characters broadly or narrowly. But the broader the protection for the character (that is, the more the character can conceivably comprise, and thus the more of its surrounding work it can bootstrap for protection against subsequent uses), the more confusing and inequitable the law will become. Characters that comprise large amounts of the underlying work can eventually be collapsed into the text, thus vitiating the utility of protecting the independent character as such. This may cut in favor of minimizing the scope of protection in characters.

Theoretically speaking, it is easy to suggest that copyright protection expand or contract, but of course the mechanisms used to achieve changes in scope are themselves not free from costs and potential aesthetic externalities. That said, a number of possibilities could be explored, either endogenous or exogenous to copyright law. Exogenously, the selection problem might be addressed through recourse to trademark law. If the distinctive delineation test remains in

place, copyright law could look to trademark law, which after all, has already internalized “distinctive” as a term of art, and has a set of established tools and doctrines for identifying it. Pushing that idea further, copyright law could insist that independent intellectual property protection for characters should in fact be limited to trademark law. Given that copyrightable *works* would still be protected under copyright, this might represent more of a doctrinal clarification than a practical one, but it could ease chilling effects around characters that are not also trademark-protected.

Endogenously, another possible mechanism to explore is the rehabilitation of the Sam Spade, “constitutes the story being told” test. Though the test is much maligned, there are reasons for which it might actually present a more workable, clearer, and more aesthetically explicit standard for copyrightability, if courts are to continue to apply a threshold copyrightability test at all in cases concerning independent copyright in characters. It could be yoked to a kind of entanglement analysis: if a character constitutes the story being told, perhaps it is no longer separable from the work in which it stars. A character might merit independent protection if he constitutes the story being told because he is no longer merely a vehicle, or a functional aspect of the work. Then perhaps the standard could be introduced at a second stage of analysis as well: does the subsequent work’s allegedly infringing character also constitute the (subsequent) story being told? If so, the use might be subject to a more rigorous standard of substantial similarity analysis, or a rebuttable presumption against it might arise, that fair use analysis could address.

Normatively, the Article has made two overarching claims, the first mainly methodological, and the second substantive. The first argues for the value of an interdisciplinary approach to copyright law. Literature can do much etiological work in diagnosing why copyright law is muddling character jurisprudence. It also helps with the prognosis: literary considerations predict continued confusion in the law unless the underlying issues—such as character entanglement and hidden aesthetic preferences—rise to the surface. The Article’s second contribution is more clearly substantive, and it suggests why courts may be confused and inconsistent about how to distinguish character from text in determining the proper scope of independent character protection. It also argues that the law of literary characters improperly contains aesthetic preferences in terms of which characters it selects for protection. Misunderstandings about characters contribute to the law’s doctrinal inconsistency and confusion. Literature suggests that it can make a case for its own value in the discussion of copyright law and policy, and that what it has to say could play a small but important role in copyright reform.