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PARALLEL NOVELS AND THE REIMAGINING OF LITERARY NOTABLES BY FOLLOW-ON AUTHORS: COPYRIGHTS ISSUES WHEN CHARACTERS ARE FIRST CREATED BY OTHERS

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Goodreads.com is a website that is well-known to both authors and readers.[1] Among the most interesting trends that one sees on that site is the publication of novels that draw characters from earlier literature and reimagine them from a different perspective or within a different story.[2] These "parallel novels" are created by "follow-on authors" who seek to reintroduce the public to characters with a new twist or from a new perspective. The technique used by follow-on authors is not in and of itself new—two of the top reimagined classics on Goodreads' list were written in the 1960s.[3] Other more recent examples of parallel novels that appear on the Goodreads website include ones that reimagine characters such as Dickens' Scrooge,[4] Cinderella's stepsisters,[5] and perhaps not surprisingly, characters from *The Odyssey*, from which one author draws to tell a story from Penelope's perspective,[6] from which a second author draws to reimagine that Homer

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1. GOODREADS, https://www.goodreads.com/ (last visited Feb. 22, 2018).

2. *The Best Parallel Novels or Reimagined Classics*, GOODREADS https://www.goodreads.com/list/show/43967.The_Best_Parallel_Novels_or_Reimagined_Classics (last visited Feb. 16, 2018).

3. Antoinette Cosway (Antionetta Mason) was reimagined in 1966 in Jena Rhys' novel *Wide Sargasso Sea*, and Shakespeare's Rosencrantz and Guildenstern, were reimagined in 1967 in Tom Stoppard's *Rosencrantz and Guildenstern are Dead*. *See Wide Sargasso Sea*, GOODREADS, https://www.goodreads.com/book/show/25622780-wide-sargasso-sea?from_search=true (last visited Feb. 16, 2018); *see also Rosencrantz and Guildenstern are Dead*, GOODREADS, https://www.goodreads.com/book/show/18545.Rosencrantz_and_Guildenstern_Are_Dead?from_search=true (last visited Feb. 16, 2018).

4. *On Top of the World: Until the Bell Chimes*, GOODREADS, https://www.goodreads.com/book/show/31700034-on-top-of-the-world (last visited Feb. 16, 2018).

5. *Confessions of an Ugly Stepsister*, GOODREADS, https://www.goodreads.com/book/show/18943.Confessions_of_an_Ugly_Stepsister (last visited Feb. 16, 2018).

6. *The Penelopiad*, GOODREADS, https://www.goodreads.com/book/show/17645.The_Penelopiad (last visited Feb. 16, 2018).

was a young woman and contemporary of Telemachus,[7] and from which a third author draws to revisit the journey of Odysseus himself.[8]

The authors of each of these parallel novels took characters from the public domain and to varying degrees other elements from the pioneering[9] works on which they are based, in order to create new stories. Although many of the original works predate the birth of the United States, the action of taking something from the public sphere and building upon it is consistent with the very purpose of the Copyright Act, which grants monopolies to authors for a limited time in order both to encourage those authors to publish and to profit from their publications, as well as after publication, to permit the public to use and to build upon the copyrighted works.[10]

As technology has lowered the hurdle for publishing stories,[11] new authors are increasingly looking to the past to bring the characters from older stories back to life and to offer new perspectives on them. This use of characters created by others brings with it many issues for the copyright law, including: When does a character become copyrightable? What happens to the pioneering author's rights if his or her character evolves over time? What is the scope of a copyright on a derivative character? And, what would be a fair use of someone else's characters that remain under copyright protection? The increasing prevalence of follow-on authors in the marketplace and the challenges that they present is underscored by the Court of Appeals for the Ninth Circuit's relatively recent creation of a three-part test for addressing the copyrightability of characters.[12] This article highlights that case and how the copyright law has been applied to follow-on authors and their works.

7. *Telemachus and Homer*, GOODREADS, https://www.goodreads.com/book/show/21233098-telemachus-and-homer (last visited Feb. 16, 2018).

8. *The Lost Books of The Odyssey*, GOODREADS, https://www.goodreads.com/book/show/2199365.The_Lost_Books_of_The_Odyssey (last visited Feb. 16, 2018). A tribute to the lasting impact of Homer another novel reimagines the *Iliad*. *See The Song of Troy*, GOODREADS, *https://www.goodreads.com/book/show/480173.The_Song_of_Troy?ac=1&from_search=true* (last visited Feb. 16, 2018).

9. Drawing a parallel to the language of the pharmaceutical world, where creators of new medicines are referred to as pioneers in contrast to manufacturers of generic pharmaceuticals, one may refer to authors of works from which follow-on authors draw characters as pioneer authors.

10. *See* 17 U.S.C. § 106.

11. Word processing technologies and the Internet have caused an explosion in self-publishing. However, as many aspiring authors can attest, although it is easy to self-publish, it is very difficult to become noticed when one is a self-published author.

12. DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015).

I. PUBLIC POLICY OF WORKS FALLING INTO THE PUBLIC DOMAIN

Copyright law provides authors with control of their works of authorship, and the right to prevent others from unauthorized copying of those works.[13] The utilitarian justification for granting monopolies to authors is that authors will be incentivized to create new works because during the time in which they, and their heirs, possess monopolies, they can exploit their works and financially profit from them.[14] The public in turn benefits in two ways, during the term of the copyright it has the option of accessing a work of authorship provided that it complies with the copyright owner's requirements, *e.g.*, paying for access, and after the term, the public is free to copy and otherwise use the no longer copyright protected work without the author's consent.[15]

II. COPYRIGHT RIGHTS IN CHARACTERS

Characters themselves are not listed in the Copyright Act as creations that are entitled to copyright protection, but courts now agree that they can

13. *See* 17 U.S.C. § 101 (2012) *et seq.*; Harper & Row Pub., Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); The Copyright Act also provides a number of affirmative rights, including the right to make copies of one's own work and the right to create derivative works. *See* 17 U.S.C. § 106 (2012).

14. U.S. CONST. art. 1, § 8, cl. 8 ("Congress shall have Power . . . [t]o promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings."). Congress has repeatedly extended this term to the point that some would argue is inconsistent with the Constitution's explicit reference to authors receiving monopolies for a limited time. Nevertheless, even when the most recent extension was challenged, the U.S. Supreme Court deferred to Congress to determine what length of time is appropriate for the duration of a copyright. Eldred v. Ashcroft, 537 U.S. 186, 206–07 (2003) ("Congress passed the CTEA [Copyright Term Extension Act] in light of demographic, economic, and technological changes . . . and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works."); Adjmi v. DLT Entm't Ltd., 97 F. Supp. 3d 512, 528 (S.D.N.Y. 2015) ("In practice, achieving that goal is an exercise in balancing the grant of property rights that incentivizes work, and the corresponding limits on the ability of the community draw upon those ideas."): Joseph P. Fishman, Creating Around Copyright, 128 HARV. L. REV. 1333, 1334 (2015) ("Although the grant of exclusive rights incentivizes some to produce new information, it also limits other's ability to use that information as raw material for follow-on expression").

15. Different commentators offer varying descriptions of the tradeoffs between the public and authors. *See, e.g.*, Amanda Schreyer, *An Overview of Legal Protection for Fictional Characters: Balancing Public and Private Interests*, 6 CYBARIS AN INTELL. PROP. L. REV. 50, 52 (2015) (Copyright law affords authors exclusive rights, including to original characters contained in there works, but it also limited these rights by protecting only characters that are fully developed, allowing others to create and to exploit similar, but non-infringing characters that share common traits and stock or genre characteristics; permitting third parties to make fair use of those characters and ensuring that at some point the copyright will expire.).

be afforded protection, if they are sufficiently delineated.[16] Courts have, for example, recognized copyright protection in Dorothy, the Tin Man, the Cowardly Lion, and the Scarecrow from *The Wizard of Oz*, as well as in Scarlett O'Hara and Rhett Butler from *Gone With the Wind*.[17] However, one should note that the Copyright Office registers an author's *expression* of a character and not the character itself.[18] Thus, an author does not have a copyright in a character's name or the concept of the character; instead, the right protects "the artistic rendition of the character in visual form, or the literary delineation of the character's specific attributes in textual form."[19] Accordingly, one should not be surprised that the U.S. Copyright Office will not permit applicants to apply for registrations in "characters;" the Office requires applicants to register, for example, 2-D artwork, photographs, or text that delineates the character.[20]

There was not always consensus as to the copyrightability of characters, even very delineated ones, and an unfortunate decision by the Court of Appeals for the Ninth Circuit more than sixty years ago provided the impetus for many courts to spend hours engaging in legal gymnastics in order to get the copyright law to where it is today on this issue. In 1954, in *Warner Bros. Picture, Inc. v. Columbia Broadcasting, System, Inc.*,[21] the Court of Appeals for the Ninth Circuit held that Sam Spade of Dashiel Hammett's *The Maltese Falcon* was not copyrightable because he did not constitute the story being told.[22] Implicitly recognizing the problematic nature of that conclusion, more

16. *See* DC Comics v. Towle, 802 F.3d 1012, 1019 (9th Cir. 2015) ("Although comic book characters are not listed in the Copyright Act, we have long held that such characters are afforded copyright protection"; Batmobile is copyrightable), *cert. denied*, 136 S. Ct. 1390 (2016); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (literary characters that are sufficiently delineated are copyrightable); Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co. Ltd., 149 F. Supp. 3d 1167, 1173 (N.D. Cal. 2015) (copyright protection is available for distinctive characters); Silas v. Home Box Office, 201 F. Supp. 3d 1158, 1177 (C.D. Cal. 2016) (characters may be copyrightable); Danjaq LLC v. Sony Corp., No. CV97-8414-ER (MCX), 1998 WL 957053 (C.D. Cal. 1998) ("Copyright protects literary characters, apart from works in which they appear, where the character constitutes the story being told."), *aff'd*, 165 F.3d 915 (9th Cir. 1998); Silverman v. CBS Inc., 632 F. Supp. 1344, 1354 (S.D.N.Y. 1986) ("Literary characters, if sufficiently delineated, have been found copyrightable."), *aff'd in part vacated in part*, 870 F.2d 40 (2d Cir.), *cert. denied*, 492 U.S. 907 (1989); United Features Syndicate, Inc. v. Sunrise Mold Co., Inc., 569 F. Supp. 1475, 1480 (S.D. Fla. 1983) (holding Peanuts characters copyrightable).

17. *See* Warner Bros. Entm't, Inc. v. X One X Prod., 644 F.3d 584, 597 (8th Cir. 2011).

18. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(H).

19. *Id.*

20. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 911. Registration is not a prerequisite to having copyright rights, but it is a prerequisite to enforcing rights that are not protected by the Berne Convention. *See* 17 U.S.C. § 411 (2008). Additionally, when registration proceeds infringement, with it comes the availability of attorneys' fees and statutory damages. *See* 17 U.S.C. § 412 (2008).

21. 216 F.2d 945, 949–50 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955).

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

than two decades later, in *Walt Disney Productions v. Air Pirates*,[23] the Ninth Circuit carved out an exception that held that comic book characters are entitled to copyright protection. Since that time at least one court has held that one could interpret *Air Pirates* as implicitly holding that in contrast to Sam Spade, Disney's graphic characters constituted the story being told or that it applied a less stringent test for the protectability of graphic characters.[24] However, now most courts and practitioners recognize that the 1954 decision was problematic, and the Court of Appeals for the Seventh Circuit went so far to denote that decision as "wrong."[25]

Thus, case law today recognizes that the copyright law protects authors' creations in original characters. However, there is an important exception—stock characters. For example, "a drunken old bum . . . 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, a masked magician, and . . . 'a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who become amorous and his mistress'" are not copyrightable.[26] Because stock characters, which are by

23. 581 F.2d 751, 755 (9th Cir. 1978).

24. *See* MGM, Inc. v. American Honda Motor Co., 900 F. Sup. 1287, 1295 (C.D. Cal. 1995).

25. *See* Gaiman v. McFarlane, 360 F.3d 644, 660 (7th Cir. 2004) (*Warner Bros. v. CBS* was wrong, "though perhaps understandable on the 'legal realist' ground that Hammett was not claiming Sam Spade—on the contrary, he wanted to reuse his own character but to be able to do so he had to overcome Warner Brothers' claim to own the copyright."); *see also* DC Comics v. Towle, 989 F. Supp. 2d 948, 966 (C.D. Cal. 2013) (noting that cases had cast into doubt *Warner Bros. v. CBS*), *aff'd*, 802 F.3d 1012, 1019 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1390 (2016). Other reported cases have tried to thread the needle by interpreting *Warner Bros. v. CBS* as allowing for copyright protection only when characters are sufficiently distinctive or are the story being told. *See, e.g.*, Halicki Films, LLC. v. Sanderson Sales and Marketing, 547 F.3d 1213, 1224 (9th Cir. 2008) ("This Court has also recognized copyright protection for characters that are especially distinctive); Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003) ("While characters are not ordinarily afforded copyright protection, . . . characters that are 'especially distinctive' or the 'story being told' receive protection apart from the copyrighted work."); Olson v. NBC, Inc., 855 F.2d 1446, 1452 (9th Cir. 1988) (even if *Warner Bros.* is dicta, the characters are not protectable because they are lightly sketched); Basile v. Warner Bros. Entm't, Inc., No. CV 15-5243-DMG (MRWX), 2016 WL 5867432, *7 (C.D. Cal. Jan. 4, 2016) (only especially distinctive characters a protected by copyright law), *aff'd*, 678 Fed. Appx. 604 (9th Cir. 2017); Gallagher v. Lions Gate Entertainment Inc., No. 2:15-CV-02739-ODW(EX), 2015 WL 12481504, *7 (C.D. Cal. Sept. 11, 2015) ("Ordinarily, characters are not afforded copyright protection . . . but 'characters that are 'especially distinctive' or the 'story being told' receive protection apart from the copyrighted work.'" quoting Rice v. Dox Board, Co., 330 F.3d 1170, 1175 (9th Cir. 2003)); Azaria v. Bierko, No. CV 12-9732 GAF (RZX), 2014 WL 12561611, *4 (C.D. Cal. Feb. 21, 2014) ("A character may be protected if it constitutes the story being told or if the character has 'displayed consistent, widely identifiable traits' that make it particularly distinctive" (quoting Halicki Films, LLC v. Sanderson Sales and Mktg., 547 F.3d at 1225)); TMTV Corp. v. Broad. of San Juan, 490 F. Supp. 2d 228, 236 (D.P.R. 2007) (stock characters are not copyrightable, but ones that are depicted audiovisually that are especially distinctive or the story being told are protectable). As discussed in *infra* in 2016, the Ninth Circuit articulated a new test for the copyrightability of characters.

26. *See Gaiman*, 360 F.3d at 660–61 (quoting Nichols v. Universal Pictures, Corp., 45 F.2d 119, 121 (2d Cir. 1930)); Culver Franchising Sys., Inc. v. Steak N Shake Inc., 16 C 72, 2016 WL 4158957, *6

definition characters who are used to describe a scene, are viewed as part of "scènes à faire,"[27] the copyright law does grant protection to an author's use of them.[28] Thus, stock characters do not receive protection because they are so "rudimentary, commonplace, standard or unavoidable that they do not serve to distinguish one work within a class of works from another."[29]

Conversely, additional features such as a character's specific name, appearance, age, title, and what the character knows and says can combine to create a distinctive character.[30] Thus, if a character that is created from a

(N.D. Ill. Aug. 5, 2016) (butchers functioning as stock characters are not entitled to copyright protection); DaVinci Editrice S.R.L. v. Ziko Games, LLC, 183 F. Supp. 3d 820, 832–33 (S.D. Tex. 2016) (sheriffs, deputies, outlaws and renegades were stock characters in spaghetti westerns but appearance and names of specific characters contain expressive qualities): Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co., Ltd., 149 F. Supp. 3d 1167, 1174 (C.D. Cal. 2015) (video game characters not copyrightable when plaintiff made only conclusory allegations that characters were distinctive with names, distinctive physical appearances, clothing, weapons, traits, abilities, and ongoing stories); Shame on You Prod., Inc. v. Elizabeth Banks, 120 F. Supp. 3d 1123, 1164 (C.D. Cal. 2015) ("The concept of an attractive blond 'good girl' is in the public domain and cannot be copyrighted."), *aff'd*, 690 Fed. Appx. 519 (9th Cir. May 3, 2017); Braddock v. Jolie, No. CV 12-05883 DMG (VBKX), 2013 WL 12125754, *9 (C.D. Cal. Mar. 29, 2013) (generalized character types are not protectable by copyright law); Alexander v. Murdoch, No. 10 CIV. 5613 (PAC)(JCF), 2011 WL 2802899, *7, *11 (S.D.N.Y. 2011) (stock characters are not copyrightable; character with only eight lines of dialogue was not a developed character, "but rather a stereotype of a Latina woman"), *aff'd*, 502 Fed. Appx. 109 (Nov. 16, 2012); Bernal v. Paradigm Talent and Literary Agency, 788 F. Supp. 2d 1043, 1069 (C.D. Cal. 2010) (generalized character types are not protectable by copyright law); Lewison v. Henry Holt and Co., LLC, 659 F. Supp. 2d 547, 567–68 (S.D.N.Y. 2009) ("The scenes a faire doctrine also prevents 'stock characters' from receiving copyright protection."); Blakeman v. The Walt Disney Co., 613 F. Supp. 2d 288, 308–09 (E.D.N.Y. 2009) (Reagan Republican type, liberal democrat challenger, and the scheming political strategist are stock characters that were not protectable).

27. The scènes à faire doctrine bar certain otherwise copyright expression from protection against infringement because it is standard, stock or common to a topic or it necessarily follows from a common theme or setting. Oracle America Inc. v. Google, 750 F.3d 1339, 1363 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015).

28. *Gaiman*, 360 F.3d at 659; Real View, LLC v. 20-20 Technologies, Inc., 683 F. Supp. 2d 147, 152 (D. Mass. 2010) ("In a literary work, the scenes a faire doctrine acts to shield from copyright protection 'stock characters'"); Betty v. PepsiCo., No. 16-CV-4215 (KMK), 2017 WL 4311037, *11 (S.D.N.Y. Sept. 26, 2017) (characters that as a practical matter are indispensable are not protectable under copyright law); Lewison v. Henry Holt and Co., LLC, 659 F. Supp. 2d 547, 567 (S.D.N.Y. 2009) ("The scenes a faire doctrine . . . prevents stock characters' from receiving copyright protection.").

29. *Gaiman*, 360 F.3d at 659 (quoting Bucklew v. Hawkins, Ash, Baptie & Co., LLP, 329 F.3d 923, 929 (7th Cir. 2003); Willis v. HBO, No. 00 CIV. 2500 (JSM), 2001 WL 1352916, *2 (S.D.N.Y. Nov. 5, 2001) (character that is bottom-dwelling talent agents are commonplace and not protectable under copyright law).

30. *See* Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496, 503 (7th Cir. 2014) (authors may copyright a character that has a specific name and appearance; other factors that weigh in favor of copyrightability of a character are specifics such as age, phony title, what a character knows and says as well as age and facial features), *cert. denied*, 135 S. Ct. 458 (2014); *see also Gaiman*, 360 F.3d at 660 ("A Stock character is a stock example of the 'scènes faire' doctrine."); *Nichols*, 45 F.2d at 121; Jenna Skoller, *Sherlock Holmes and Newt Scamander: Incorporating Protected Nonlinear Character Delineation into Derivative Works*, 38 COLUM. J.L. & ARTS 577, 580 (2015) (fictional characters are guaranteed copyright protection apart from the work in which they appear if they are sufficiently delineated, the more idiosyncratic authors make their characters the more likely they will cross the threshold from idea into expression,

stock character is sufficiently delineated, it may be entitled to copyright protection; however, other authors can still use the same underlying stock character.[31]

The Ninth Circuit has recently created a three-part test to determine whether characters are copyrightable: (1) the character must have physical as well as conceptual qualities; (2) the character must be sufficiently delineated; and (3) the character must be especially distinctive.[32] Under this new test, at least one court that has applied it held that physical and conceptual qualities may, for example, be shown in a video trailer.[33] With respect to the second prong, the court noted that sufficient delineation may, for example, come from the use of catchphrases and manner of dress to show that the characters possess sufficient consistent identifiable traits.[34] Finally, that court noted that under this test, when a character's totality of traits is considered, he or she may be copyrightable if he or she is sufficiently distinctive to show that he or she is more than a stock character.[35]

cartoon and graphic representations of characters, in contrast with word portraits are more likely to command higher copyright protection).

31. *Gaiman*, 360 F.3d at. at 661 ("As long as the character is distinctive, other authors can use the stock character out of which it may have been built without fear (well, without too much fear) of being accused as infringers."); *see also* Marcus v. ABC Signature Studios, No. 17-CV-00148-RSWL-AJWX, 2017 WL 4081885, *10 (C.D. Sept. 13, 2017) (character trait of teenage daughters being too busy on their cell phones is too abstract and does not render either daughter distinctive).

32. *See* DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015); Silas v. Home Box Office, Inc., 201 F. Supp. 3d 1158, 1177 (C.D. Cal. 2016); *see also* Paramount Pictures Corp. v. Axanar Prods., Inc., No. 2:15-CV-09938-RGK-E, 2017 WL 83506, *4 (C.D. Cal. Jan. 3, 2017) (applying Ninth Circuit three-part test to conclude that Garth of Izar from Star Trek original series was entitled to copyright protection).

33. *Silas*, 201 F. Supp. at 1177.

34. *Id.*

35. *Id.* The test announced by the Ninth Circuit is more precise than other tests that have been articulated. In 1980 Nimmer articulated a more general test that was combined with an infringement prong and adopted by the United States District Court for the Southern District of New York:

> In determining whether any given appropriation of another's character constitutes an infringement, the problem is twofold. First was the character as originally conceived and presented sufficiently developed to command copyright protection, and if so, secondly did the alleged infringer copy such development and not merely a broader and more abstract outline.

Warner Bros., Inc. v. American Broadcasting Companies, Inc., 530 F. Supp. 1187, 1193 (S.D.N.Y. 1980) (quoting MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 2.12 at 2-169 (rev. ed. 1980) ("The Greatest American Hero" did not infringe copyright in Superman), *aff'd*, 720 F. 2d 231 (2d Cir. 1983). At the court, like all copyright matters, the key issue for infringement is substantial similarity. *See, e.g.*, Cabell v. Sony Pictures Entertain., Inc., 714 F. Supp. 2d 452, 460 (S.D.N.Y. 2010) (plaintiff failed to identify sufficient similarities in characters to warrant finding of copyright infringement). Ultimately, when a copyright holder alleges infringement of characters, the copyright holder may have a combination of defenses of lack of copyrightability due to some characters being stocks characters and no infringement due to lack of similarities. *See, e.g.*, Counts v. Meriwether, No. 2:14-CV-00396-SVW-

Other circuits have used and continue to rely on a general test of whether a character is sufficiently delineated.[36] However, because Hollywood is located in the Ninth Circuit, and the Ninth Circuit is very familiar with claims of copyright infringement, one would expect other circuits to consider adopting the aforementioned three-part test. Thus, one would expect courts to require copyright holders to identify physical and conceptual qualities of their characters, and explain how they both delineate the character and render the character distinctive.

III. EVOLVING CHARACTERS WHO GRADUALLY FALL INTO THE PUBLIC DOMAIN

For most works that were or are created by individual authors after January 1, 1978, the copyright term expires 70 years after an author's death.[37] In the simplest of cases, an individual author creates a character and even if that character were to evolve over time, all copyrights would expire on the same day, the term not being tied to the date of creation. But the first of these copyrights (those governed under the Copyright Act of 1976) would not expire until at the earliest 2048 (70 years after the death of an author who created the work in 1978), and outside of this simple scenario, the issues of when copyrights expire on characters, particularly ones that evolve over time becomes more complex.

For all other types of characters, when and which iteration of them falls out of copyright protection can be a complex issue. For example, even for works that have been created after January 1, 1978, if they are joint works, the copyright will expire 70 years after the death of the last surviving author.[38] One can easily imagine the challenge in defining when a character and which aspects of a character fall into the public domain when an individual creates a character, but in combination with one or more other individuals she creates a derivative work in which the character has evolved or taken on a new incarnation. If the author who originates the character were

CW, 2015 WL 9594469, *12–13 (C.D. Cal. Dec. 30, 2015) (generalized character types are not protected by copyright law but especially distinctive ones are).

36. *See* Silverman v. CBS Inc., 870 F.2d 40, 50 (2d Cir. 1989) (copyrightability of characters focuses on delineation), *cert. denied*, 492 U.S. 907 (1989); CBS Operations Inc. v. Reel Funds Int'l, Inc., No. 3-06-CV-0588-L, 2007 WL 2325218, *1, *5 (N.D. Tex. Aug. 13, 2007) (characters that are sufficiently delineated are entitled to copyright protection); JB Oxford & Co. v. First Tennessee Bank Nat'l Ass'n, 427 F. Supp. 2d 784, 798–99 (M.D. Tenn. 2006) (focusing on sufficiency of delineation of characters); Titan Sports, Inc. v. Hellwig, No. 3:98-CV-467 (EBB), 1999 WL 301695, *13 (D. Conn. Apr. 26, 1999) (copyright protection is available if a character is sufficiently delineated).

37. 17 U.S.C. § 302(a) (1998).

38. 17 U.S.C. § 302(b) (1998).

to die first, the copyright in the derivative character would survive for a longer term, *i.e.*, until 70 years after the death of the joint author. For members of the public, this would mean that if they want to use the character at any time between the expirations of the two copyrights, then they would need to be careful to ascertain what exactly fell into the public domain upon expiration of the first copyright.

Similarly, for works made for hire and for works that were entitled to copyright protection beginning prior to January 1, 1978, the issue of different expirations for different iterations of a character can be complex.[39] The current term of a work made for hire expires 95 years from publication or 120 years from creation, whichever occurs first,[40] and again one can easily imagine that characters evolve under work made for hire arrangements and thus derivative works and their derivative characters may expire later than the original incarnations.[41]

Because as noted above, works created after January 1, 1978, currently remain under copyright protection, one must look to the case law pertaining to works created prior to that date and thus governed by the Copyright Act of 1909 to appreciate the effects of the staggered expiration of copyright rights in characters.

In general, "[w]hen a story falls into the public domain, story elements—including characters covered by the expired copyright—become fair game for follow-on authors."[42] "Where an author has used the same character in a series of works, some of which are in the public domain, the public is free to copy story elements from the public domain works."[43] The later works are derivative works of the earlier works and copyright law affords protection to the "incremental additions" of originality contributed by the authors of the derivative works.[44] Unfortunately, as many commentators have noted,

39. For example, because during certain periods of copyright law, publication would affect whether a copyright was abandoned, one might need to revisit when a particular action, decades ago, rendered a work published, and if so, whether publication was done with notice. *See e.g.*, TCA Tel. Corp., 151 F. Supp. 3d 419, 427–28 (S.D.N.Y. 2015) (considering whether certain radio and vaudeville performance were publications), *aff'd*, 839 F.3d 168 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2175 (2017).

40. 17 U.S.C. § 302(c) (1998).

41. 17 U.S.C. §§ 302, 303(a) (1998).

42. Klinger v. Conan Doyle Estate Ltd., 755 F.3d 496, 500 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 458 (2014). The concept of follow-on authorship is also known in other industries such as the music industry. *See, e.g.*, Bridgeport Music Inc. v. 1C Music, 154 F. Supp. 2d 1330, 1335 (M.D. Tenn. 2001) ("Follow-on artists and recording companies should 'ascertain' and 'investigate' that their music is original.").

43. Klinger v. Conan Doyle Estate, Ltd., 988 F. Supp. 2d 879, 889 (N.D. Ill. 2013), *aff'd*, 755 F.3d 496, 500 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 458 (2014).

44. *See* Silverman v. CBS Inc., 870 F.2d 40, 49 (2d Cir. 1989); *see also Klinger*, 755 F.3d at 500 ("The copyrights on the derivative works, corresponding to the copyrights on the ten last Sherlock Holmes

it is not always easy to determine what the incremental additions are and which elements have fallen into the public domain.[45]

In the seminal case *Silverman v. CBS*,[46] a playwright brought a declaratory judgment action against the copyright holder of rights in the famous "Amos 'n' Andy" radio programs, requesting judgment that programs that were broadcast between March 1928 and March 1948 were in the public domain.[47] The declaratory judgment plaintiff had begun writing a script for a Broadway musical based on the "Amos 'n' Andy" characters, and Amos 'n' Andy works were created both before and after March 1948.[48] However, the court held that CBS's copyright protection for works created after March 1948 was limited to only the increments of expression beyond what is contained in the pre-1948 radios scripts, including with respect to works that provided further delineation of characters.[49] Consequently, because the characters were "sufficiently delineated" in the pre-1948 radio scripts, the characters were deemed to have been in the public domain; however, the plaintiff could not use any further delineations created by CBS.[50] The sequels in which the further delineated works appear were derivative works within the meaning of the Copyright Act, and out of this case came the precedent of applying the "increments of expression" standard to determine whether characters used by follow-on authors violated any still-existing copyright rights of the previous author. Thus, *Silverman v. CBS* set the framework for copyright issues as applied to parallel novels and the reimaging of characters.[51]

Similar issues arose in the context of the ability of follow-on authors to use Sir Arthur Conan Doyle's Sherlock Holmes. In *Pannonia Farms, Inc. v. USA Cable*,[52] USA Cable had broadcast a two-hour motion picture entitled

stories, were not extended by virtue of the incremental additions of originality in the derivative works."); Warner Bros. Entm't, Inc. v. X One X Prod., 644 F.3d 584, 589 (8th Cir. 2011) ("the freedom to make new woks based on public domain materials ends where the resulting derivative work comes into conflict with a valid copyright"); Dr. Seuss Enters., L.P. v. Penguin Books, USA, Inc., 924 F. Supp. 1559, 1565–67 (S.D. Fla. 1996) (despite being in the public domain, Dr. Seuss' *Horton the Elephant* and *The Cat in the Hat* retained rights to exclude others from increments of expression that he added in creating his later works).

45. *See, e.g.*, Jenna Skoller, Sherlock Holmes, & Newt Scamander, *Incorporating Protected Nonlinear Character Delineation into Derivative Works*, 38 COLUM. J.L. & ARTS 577, 578 (2015) (it is common for writers to reveal prequel details in subsequent works, which can present an issue for follow-on authors to know what they may include).

46. 870 F.2d at 43.

47. *Id.* at 43.

48. *Id.*

49. *Id.* at 49–50.

50. *Id.* at 50.

51. *See generally* Silverman v. CBS Inc., 870 F.2d 40 (2d Cir. 1989).

52. 2004 WL 1794504 (S.D.N.Y. Aug. 10, 2004), *aff'd in part dismissed in part on other grounds*, 426 F.3d 650, 653 (2d Cir. 2005).

"Case of Evil" that featured Sherlock Holmes and Dr. Watson. Sir Arthur Conan Doyle had authored approximately sixty stories in which he featured the characters of Sherlock Holmes and Dr. Watson,[53] and at the time of the litigation, nine of the stories remained protected by copyright law while the remainder had fallen into the public domain.[54] The United States District Court for the Southern District of New York applied the "increments of expression" test to determine whether the plaintiff still had relevant copyright rights in Sir Arthur Conan Doyle's characters Sherlock Homes and Dr. Watson, and asked whether the plaintiff's complaint had alleged any infringement upon any embellishments and additions to the Holmes and Watson characters that were contained within the subset of Sir Arthur Conon Doyle's characters that had not already fallen into the public domain.[55] The plaintiff failed this test and was unable to pursue a claim.[56]

Subsequent to the *Pannonia Farms* case, other follow-on authors were able to establish the right to reinvent Sherlock Holmes. For example, in *Klinger v. Conan Doyle Estate*,[57] the plaintiff brought a declaratory judgment action against the estate of Sir Arthur Conan Doyle, seeking a declaration that various characters, character traits, and other elements from Sir Arthur Conan Doyle's Sherlock Holmes stories were in the public domain.[58]

In that case, two editors created an anthology, *A Study in Sherlock*, which contained new and original short stories by contemporary authors, and which was published by Random House.[59] These stories were inspired by Sir Arthur Conan Doyle's novels and short stories in which Sherlock Holmes was a character.[60] The same two editors were preparing a sequel to *A Study in Sherlock*, entitled *In the Company of Sherlock Holmes*, which was to be another collection of new and original short stories that featured various characters and story elements from the works created by Sir Arthur Conan Doyle, but this book was to be published by Pegasus Books.[61]

Following the reasoning of the Second Circuit in *Silverman*, the United States District Court for the Northern District of Illinois emphasized: "Where

53. *Pannonia*, 2004 WL 1794504, at *1.

54. *Id.* at *4.

55. *Id.*

56. The plaintiff, Pannonia Farms, also faced issues with respect to standing. *See* Pannonia Farms, Inc. v. Re/Max., Inc., 407 F. Supp. 2d 41, 44 (D.D.C. 2005) (standing issue decided by collateral estoppel and attorneys' fees awarded); Pannonia Farms, Inc. v. USA Cable, No. 03 CIV. 7841 (NRB), 2004 WL 1276842, *2–3 (S.D.N.Y. June 10, 2004 (plaintiff lacked standing).

57. *See, e.g.*, Klinger v. Conan Doyle Estate, Ltd., 988 F. Supp. 2d 879, 879 (N.D. Ill. 2013).

58. *Id.* at 882.

59. *Id.* at 882–883.

60. *Id.*

61. *Id.*

an author has used the same character in a series of works, some which are in the public domain, the public is free to copy story elements form the public domain works."[62] However, the further delineations retained copyright protection.[63] Consequently, the court granted the declaratory judgment with respect to the plaintiff's right to use pre-1923 story elements, but not post-1923 story elements.[64]

Although the cases in which copyrights have gradually fallen into the public domain might at first blush implicate issues that are more likely to be found in a law school classroom than in a courtroom, one should remember that the world is only a few short years away from when *Steamboat Willy* will fall into the public domain. If the current statutory framework for determining the term of a copyright in a work does not change, the copyright on that animated film will expire in 2023.[65]

In that cartoon, Mickey Mouse, who is perhaps among the most valuable characters in the world, appears. Thus, one can expect the 2020s be an era in which there is an explosion in the number of parallel novels that involve Mickey Mouse. However, these follow-on authors should beware that they are not permitted to use original elements from derivative works in which Mickey Mouse appears until the copyrights on those derivative works expire.

IV. BREADTH OF RIGHTS OF AUTHORS OF PARALLEL NOVELS

When an author of a parallel novel uses a character that has fallen into the public domain, regardless of whether the creator of the character is still creating derivative works, the author of the parallel novel "is not limited solely to making exact replicas of public domain materials, but rather is free to use public domain materials in new ways (*i.e.*, to make derivative works by adding to and recombining elements of the public domain materials)."[66] Thus, the author of the parallel novel and in fact "any individual is entitled to develop this work in new ways,"[67] and it is important to appreciate when a follow-on author creates a derivative work.

62. *Id.* at 889.

63. *Id.* at 890.

64. *Id*. at 893.

65. Steve Schlackman, *How Mickey Mouse Keeps Changing Copyright Law*, ARTREPRENEUR (Oct. 18, 2017) https://artlawjournal.com/mickey-mouse-keeps-changing-copyright-law/ (last visited Feb. 16, 2018). Many skeptics suspect that Disney will launch a lobbying effort to extend this term. *Id.*

66. Warner Bros. Entm't, Inc. v. X One X Prods., 644 F.3d 584, 595 (8th Cir. 2011).

67. Pannonia Farms, Inc. v. USA Cable, No. 03 CIV. 7841 (NRB), 2004 WL 1276842, at *9 n.20 (S.D.N.Y. June 8, 2004).

By statute, a derivative work is defined as:

> a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, 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.'[68]

If a follow-on author does not have permission of the pioneering author and the pioneering author's work is still subject to copyright protection, then the pioneering author may sue the original author for copyright infringement.[69] Thus, it would be "an unauthorized derivative work."[70]

Within parallel novels, the scope of the increments of expression would be of the same scope as when films adapt books, such as when a filmmaker adapted *The Wizard of Oz* or *Gone With the Wind*.[71] However, when books are adapted, as a matter of practicality, "a book's description of a character generally anticipates very little of the expression of the character in film."[72] Further, incremental changes such as in characters' ethnicities and relationships may be protectable.[73] Thus, "if material related to certain characters is in the public domain, but later works covered by copyright add new aspects to those characters, a work developed from the public domain material infringes the copyrights in the later works to the extent that it incorporates aspects of the characters developed solely in those later works."[74]

Furthermore, if a follow-on author's work is copied, then the person or entity that copies the follow-on author's work infringes that work to extent that the follow-on author added material, and potentially infringes the rights

68. 17 U.S.C. § 101 (2010).

69. *See* DC Comics v. Towle, 802 F.3d 1012, 1023 (9th Cir. 2015).

70. Sobhani v. @Radical.Media, Inc., 257 F. Supp. 2d 1234, 1238 (C.D. Cal. 2003); Anderson v. Stallone, No. 87-0592 WDKGX, 1989 WL 206431, *8 (C.D. Cal. Apr. 25, 1989) ("Anderson's bodily appropriation of these characters infringes upon the protected expression in the Rocky characters and render his work an unauthorized derivative work.").

71. *Warner Bros.*, 644 F.3d at 599.

72. *Id.* at 597.

73. Canal+Image UK Ltd. v. Lutvak, 773 F. Supp. 2d 419, 431 (S.D.N.Y. 2011).

74. *Warner Bros. Entm't, Inc.*, 644 F.3d at 596-97.

of the pioneering author to the extent that his or her work was copied.[75] However, when the follow-on author enforces his or her copyright, he or she must have his or her own registration, and cannot rely on the pioneer author's registration for newly added matter that does not appear in the original work.[76]

Instructive of the types of issues that follow-on authors will face when seeking to enforce their copyrights is *Canal+ Image UK Ltd. v. Lutvak*.[77] Roy Horniman published his novel *Israel Rank* in 1907, and the novel was written in the form of the prison memoirs of a man who was condemned to death.[78] In 1949, Ealing Studios released a film entitled *Kind Hearts and Coronets*, which was a comic adaption of Horniman's novel.[79] The plaintiff owned the copyright to the film.

The defendants were a lyricist and songwriter.[80] On April 1, 2003, the plaintiff and the defendants entered into a licensing agreement to adapt the film for a musical performance; however, ultimately, the plaintiff decided not to produce it.[81] Nevertheless, the defendants proceeded with developing their adaptation, and the plaintiff sued for copyright infringement.[82]

The plaintiff's work possessed both protectable and non-protectable elements, and the court was required to address whether there were similarities in the protectable elements.[83] In doing so, the court acknowledged that the task would be clumsy because in Hollywood there is rarely anything new under the sun.[84] Ultimately, the court asked whether the defendants have misappropriated the original way in which the author of the plaintiff's work had selected, coordinated, and arrange the elements of that work, looking at the total concept and feel. [85] In making its assessment, the court compared the film to the novel that was in the public domain and then the protectable elements of the film to the musical.[86]

75. SimplexGrinnell LP v. Integrated Sys. & Power, Inc., 642 F. Supp. 2d 206, 213–14 (S.D.N.Y. 2009) ("unauthorized copying of a derivative work infringes the derivative work itself only to the extent of the newly added material; any infringement of the preexisting material infringes the pre-existing work, rather than the derivative work from which the pre-existing material may have actually been copied").

76. Pearson Educ., Inc. v. Ishayev, 963 F. Supp. 2d 239, 248 (S.D.N.Y. 2013) ("an unregistered derivative work is protected from infringement only to the extent to which that unregistered work has reproduced protected matter from the underlying registered work").

77. 773 F. Supp. 2d 419 (S.D.N.Y. 2011).

78. *Id.* at 425.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 426.

83. *Id.* at 428.

84. *Id.*

85. *Id.* at 429.

86. *Id.* at 436.

When examining the film, the court considered its characters, the theme, the setting and the use of a composite victim, i.e., one actor playing all of the victims. [87] With respect to the characters, the court noted that they were the largely the same and that only the small differences, such as the ethnicity of the protagonists and the familial relationships between characters could be protectable.[88] Unfortunately for the copyright holder, these small original elements were not included in the musical and thus could not be the basis for copyright liability.[89] Thus, when follow-on authors enforce their copyright rights, they must appreciate the limits on those rights and how those rights are tied to their own originality.

V. FAIR USE: PARODY THROUGH REJOINDER AND SPECIFIC CRITICISMS

As a defense to copyright infringement, an accused infringer may seek to avail itself of the statutory fair use defense.[90] The fair use defense excuses copyright infringement when a second work does more than supersede a prior work and instead adds something new with a further purpose or different aspect, and to what extent it is transformative.[91] However, a new use is not necessarily a fair use, and the placement of the same character in a new

87. *Id.* at 430–32.

88. *Id.* at 431. Similarly, with respect to the plot, the film and the novel were the same basic story, so only the small differences could be protectable. *Id.* Moreover, the general adaptation of the novel to a comedy in the film was not copyrightable because to allow it to be copyrightable would violate the idea/expression dichotomy of copyright law. *Id.* at 432. Further, the novel and the film had the same setting, which rendered the setting of the film not subject to copyright protection. *Id.* Additionally, the use of a dramatic device of one actor playing multiple roles was not copyrightable because it was not original. *Id.*

89. *Id.* at 433–34.

90. 17 U.S.C. § 107 provides:

> [T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (to include multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

91. *See* Adjmi v. DLT Entm't Ltd., 97 F. Supp. 3d 512, 528 (S.D.N.Y. 2015) (noting that fair use "protects secondary creativity as a legitimate concern of copyright" law).

time period or setting does not in and of itself a fair use. [92] Additionally, the fair use doctrine is applied on an ad hoc basis and not a part of bright line test.[93]

A follow-on author may find himself or herself trying to invoke the fair use defense when facing a charge of infringement by a pioneering author or when refuting the defense when the follow-on author tries to enforce its own copyright is being invoked. An example of the availability of this defense is described in *Suntrust Bank v. Houghton Mifflin Co.*,[94] which involved an appeal of an injunction against Alice Randall's use of characters from *Gone With the Wind* in her novel *The Wind Done Gone*. The plaintiff was the trustee of the Mitchell Trust, which holds the copyright in *Gone With the Wind*. As with many cases in which follow-on authors use characters of pioneering authors, when accused of infringing a copyright the focus was on whether the follow-on author created a parody of the pioneering author's work and thus was entitled to a defense of fair use.[95]

Randall claimed that her novel was a critique of *Gone With the Wind's* depiction of slavery in the Civil-War era of the American South.[96] In doing so, Randall used characters, plot and major scenes from *Gone With the Wind* in the first half her book, but she asserted both that there was no substantial similarity between the two works and in the alternative that her work was protected under the fair use doctrine.[97]

On an appeal of a grant of a motion for summary judgment, the Court of Appeals for the Eighth Circuit held that there was substantial use of *Gone With The Wind*, including the appropriation of numerous characters, settings, and plot twists, even though many of the characters were renamed, *e.g*., Scarlett O'Hara becomes "Other" and Rhett Butler become "R.B."[98] The defendant argued that there was no substantial similarity because the retelling was an inversion of *Gone With the Wind.* [99] However, the Eighth Circuit held that

92. *See* Salinger v. Colting, 641 F. Supp. 2d 250, 262 (S.D.N.Y. 2009) ("Nor do the mere facts that Holden Caulfield's character is 60 years older, and the novel takes place in the present day make [the unauthorized derivative work] *60 Years* 'transformative.'"), *vacated on other grounds*, 607 F.3d 68 (2d Cir. 2010).

93. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577; TCA Television Corp. v. McCollum, 151 F. Supp. 3d 419, 433 (S.D.N.Y. 2015) (noting that fair use to be applied on case by case basis), *aff'd*, 839 F.3d 168 (2nd Cir. 2016), *cert. denied*, 137 S. Ct. 2175 (2017); *Adjmi*, 97 F. Supp. 3d at 528.

94. 268 F.3d 1257 (11th Cir. 2001).

95. *See* CCA and B, LLC v. F + W Media Inc., 819 F. Supp. 2d 1310, 1318 (N.D. Ga. 2011) (noting that parody is a defense under the fair use doctrine that allows the use of characters of others).

96. 268 F.3d at 1259.

97. *Id.*

98. *Id.* at 1267.

99. *Id.*

although the characters, settings and plot had new significance in Randall's book, they were nonetheless the same copyrighted characters, settings and plot from Mitchell's work.[100]

The Eighth Circuit then turned to the issue of whether Randall's use of the characters as well as the plot and the setting were fair use because her work was a parody, which is a form of comment and criticism.[101] Ultimately, the Eighth Circuit held that Randall's work would likely be entitled to a fair use defense, emphasizing that it would not likely have a market harm on *Gone With the Wind* and noting that it was "not a general commentary upon the Civil-War-era American South, but a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and white in [*Gone With the Wind*]."[102]

In addition to finding parody rooted in critique and rejoinder, parody may also appear when follow-on authors deconstruct a pioneering author's work.[103]

However, despite Randall's success, follow-on authors should be cautious about relying too heavily on the parody-fair use exception to copyright infringement. The case law is replete with examples in which these types of authors struggled in invoking the defense. For example, in *Salinger v. Colting*,[104] a follow-on author, Fredrik Colting, wrote *60 Years Later: Coming through the Rye*, an unauthorized derivative novel of *The Catcher in the Rye*. Not surprisingly, J.D. Salinger alleged that it and Colting's use of a character named Mr. C. infringed Salinger's work.

The trial court recognized that Salinger has a copyright in his work and that his character Holden Caulfield was sufficiently delineated to merit copyright protection.[105] The court also concluded that there was substantial

100. *Id.*

101. *Id.* Although section 107 of the Copyright Act does not explicitly refer to parody, the Supreme Court has noted that parody can have a have transformative purpose and thus, unlike satire, which broadly critiques and comments on society, parody focuses on the work from which it borrows. *See Campbell*, 510 U.S. at 579. In order for parody to be effective, the parodist must be able to use some of the elements of the prior author's composition in order to create a new one. *Id.* at 580. However, the commentary must have some critical bearing on the substance or style of the original composition. *Id.*

102. *Id.* at 1267–1274.

103. *See, e.g.*, Lombardo v. Dr. Seuss Enters., L. P., 16 CIV. 9974 (AKH), 2017 WL 4129643, *1 (S.D.N.Y. 2017) (noting that *Who's Holiday*, a comedic play that made use of Dr. Seuss's characters from *How the Grinch Stole Christmas!* was fair use); *see also* Adjmi v. DLT Entm't Ltd., 97 F. Supp. 2d 512, 531 (S.D.N.Y. 2015) (play that was deconstruction of television show *Three's Company* was a parody, turning the original show into a nightmarish version of itself, reimaging familiar in dark and vulgar context).

104. 641 F. Supp. 2d 250, 253 (S.D.N.Y. 2009), *vacated on other grounds*, 607 F.3d 68 (2d Cir. 2010).

105. *Id.* at 254.

similarity between the two works at issue and between the two characters to constitute copyright infringement.[106] At issue was whether the fair use defense would save Colting. In order to address this issue, the court considered whether the threshold element of a defense of parody was met. This prong asks whether the parodic character would reasonably be perceived.[107] Contrasting the case before it with that of Randall, the court noted that Colting's work contained no reasonably discernable rejoinder or specific criticism of any character or theme of *The Catcher in the Rye* or Holden Caulfield.[108] Consequently, Colting was not able to successfully invoke the fair use defense.

Colting's failure to prevail on the fair use defense is a warning to follow-on authors who pull from works for which the copyright remains in force. Fair use is a limited defense and in order to rely on it, the follow-on author must do more than transplant a character in time and space, and must do more than accent the very traits that the pioneering authors developed in the character.

VI. CONCLUSION

Little could be more in line with the Copyright Clause of the U.S. Constitution than what parallel authors do when they use, explore from another perspective, and reimagine characters that are not protected by copyright rights. But what the founding fathers might not have imagined was how technology such as the personal computer and means of publication such as by dissemination through the internet would make the work of writing and publicizing exponentially easier than it was in 1788. Because the technologic

106. *Id.*

107. *Id.* at 256.

108. *Id.* at 256–62. The court went into great detail to explain why Colting's "post hoc rationalizations," which were employed "vague generalizations about the original, rather than reasonably perceivable parody." *Id.* at 258. For example, Colting took the position that a purpose of his work was to critically examine the character of Holden Caulfield as presented by Salinger as an authentic and admirable person, and to look at him at age 76, 60 years after *The Catcher in the Rye*. But as the court noted, Colting's attempt to accentuate how Holden's emotional growth would have been stunted over 60 years by his unwillingness to compromise or to engage with phonies, was a rehash of one of the critical themes of Salinger's work. *Id.* at 258–260. Colting had also recast Salinger as a character within his unauthorized derivate work, but the court noted that this was only a tool for criticism the author and not the work, and therefore did not qualify as parody. *Id.* at 260–61. There are certain cases that have allowed parody of fair use of authors as characters; however, in those cases, the authors were also celebrities. *See, e.g.*, Burnett v. Twentieth Century Fox, 491 F. Supp. 2d 962, 968–69 (C.D. Cal. 2007) (noting that use of Carol Burnett as animated character in TV show *Family Guy* resembling the Charwoman played by Carol Burnett in a different show was parody that poked fun at Carol Burnett herself and it was immaterial whether the target of the joke was Carol Burnett herself, the Carol Burnett show, the Charwoman, Carol Burnett's them music, or all four).

burdens of writing as well as the hurdles of accessing the works of others are each so low, one can only expect the number of persons who experiment with being follow-on authors to increase.

This provides the public with the opportunity to revisit classics and for follow-on authors to easily make what is old, new again. However, follow-on authors must be mindful that if they build upon the works of previous authors whose works remain under copyright protection, they are potentially exposed to liability. Additionally, they as well as authors who build upon characters from works that are not subject to copyright protection need to sufficiently delineate their own characters such that their contribution of originality protects them against copying by third generation authors, while at the same time appreciating that other follow-on authors may draw inspiration from the same original text.