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PROTECTING THE PERFORMERS: SETTING A NEW STANDARD FOR CHARACTER COPYRIGHTABILITY

Mark Bartholomew *

I. INTRODUCTION

In 1990, James Hellwig, known in the ring as the Ultimate Warrior, became the first man ever to pin Hulk Hogan.1 But soon afterwards Hellwig found himself the victim of a legal piledriver that put his career on hold. Disagreements with his employer, the World Wrestling Federation ("WWF"), prompted him to leave the organization and try to perform for its competitor, World Championship Wrestling ("WCW").2 The WWF applied for a restraining order, arguing that it owned a copyright in Hellwig's "Ultimate Warrior" character.3

Hellwig's case was not the first of its kind. Just two years before, the WWF sued for copyright infringement when two of its wrestlers tried to leave and perform for WCW.4

* J.D., Yale Law School; B.A., Cornell University. The author is a law clerk to the Honorable Cynthia Holcomb Hall, Senior Judge for the Ninth Circuit Court of Appeals. The author would like to thank Professor Gideon Parchomovksy for his invaluable suggestions and encouragement with this article.

3. See id. A separate suit filed in Arizona state court dealt with breach of contract and trademark disputes between Hellwig and the WWF. See Warrior v. Titan Sports, Inc., No. CV-96-15377 (Ariz. Sup. Ct. 1997). The court found that Hellwig owned the distinctive trademarks of his character such as its name and face paint. For a discussion of trademark protection for characters and its inferiority to copyright protection, see discussion infra Part III.D.2. The copyright dispute continued to have great relevance for Hellwig after the Arizona trademark decision. Even though he won his trademark rights, an unfavorable ruling on the copyright claim would allow the WWF to sue him for infringement if he performed as the Ultimate Warrior for the WCW.
Millions of dollars are at stake in these disputes over character copyrightability. The WWF is worth an estimated $1.4 billion.\(^5\) Wrestling involves hundreds of live performances in arenas around the world, hours of original television programming, pay-per-view events, magazines, and a mountain of merchandizing.\(^6\) This income revolves around a stable of stars. Wrestling hopefuls try to latch onto the combination of personality traits, signature moves, and catch phrases that will resonate with the public and catapult them to stardom.

These issues are not confined to the world of wrestling. The entertainment industry continually tries to find characters that will excite the public. Lawsuits are fought over the difficult line between the acceptable borrowing from a general idea for a character and the illegal copying of a unique expression for a character previously developed by another artist. The cases involve some of the biggest movies of all time, such as *E.T.*,\(^7\) *Star Wars*,\(^8\) and the James Bond series,\(^9\) as well as literary creations such as Tarzan\(^10\) and detective Sam Spade.\(^11\) The law of copyright has not kept up with the explosion in character creation. Vague legal rules make it difficult for entertainment businesses to plan for the future. The status of characters like the Ultimate Warrior that are created through live performance is especially unsettled.\(^12\) This article describes the current law of character protection and offers a new paradigm for determining copyrightability, particularly in the case of

\(^10\) See Burroughs v. MGM, 683 F.2d 610 (2d Cir. 1982).
\(^11\) See Warner Bros. Pictures v. CBS, 216 F.2d 945 (9th Cir. 1954).
characters shaped through live performance. Human characters are often created and presented by stand-up comedians or stage performers before they are fixed in a "tangible medium of expression" such as a television broadcast or a film. I will refer to these types of characters as "human performance characters." Throughout the article, I use popular professional wrestlers as examples of typical human performance characters whose creators have become successful, and thus desire copyright protection.

Part II describes the two tests currently used by the courts to determine character copyrightability: the delineation test and the "story being told" test. Part III looks at the philosophical justifications for protecting characters via copyright. The Hegelian concept of personhood expressed through property ownership is especially important to understanding the need for character copyrightability. Finally, Part IV advances a new test to establish when a human performance character should be protected. Courts should ascertain if a performer's composite of physical attributes, story of origin, and behavior add up to a character whose behavior is predictable yet relatively distinctive. This predictability test is a new way to determine copyrightability that can remedy the unsettled state of character protection. It provides some much needed substance to the delineation test and fits in well with the Hegelian justification for intellectual property.

II. THE CURRENT LAW OF CHARACTER COPYRIGHTABILITY

Copyright law protects expressions of ideas, but not the idea itself.14 Legal disputes over characters arise in the continuum between an idea for a character that has not been expressed at all, and an idea that has been given complete form and shape. It is difficult to pinpoint where the dividing line between an undeveloped idea, and a sufficiently expressed character should be set. Setting the threshold for character copyrightability too low would discourage artistic creation. If all a writer needed to legally lock up her creation

13. See 17 U.S.C. § 102 (1994). This article does not deal with disputes over characters before they are fixed in a tangible medium of expression. For an argument that even non-fixed characters should be entitled to copyright protection, see Feldman, supra note 12, at 701.
was a non-specific description of a brave adventurer or a loving family, then other writers would find themselves precluded from using some of the basic building blocks of compelling storytelling. On the other hand, the standard should not be set so high as to prevent any artist from establishing a copyright to a character. If authors and performers believed that anyone could steal their thoroughly researched, painstakingly detailed characters, they might seek another occupation. The appropriate standard lies somewhere in between.

The courts have wrestled with this question without coming up with a clear answer. The case law reveals a consensus, however, that copyright law does afford at least some protection to characters.\(^{15}\) In 1924, the Second Circuit found that a second party’s reproduction of the image of a character from a copyrighted comic strip was just as much a violation of the copyright law as a reproduction of the entire comic strip.\(^{16}\) Six years later, Judge Learned Hand acknowledged that it was possible for copyright protection to be granted to literary characters.\(^{17}\) The courts have traditionally been much more likely, however, to extend protection to pictorial characters than to characters developed through “word portraits.”\(^{18}\) In fact, while “courts have had little trouble extending protection to characters in copyrighted cartoon strips,” judges have been “bedeviled” by the question of when to protect literary characters.\(^{19}\) The judges have fashioned two tests, the delineation test and the “story being told” test, in an attempt to set an appropriate threshold for copyright of fictional characters.

\(^{15}\) According to the standard treatise on copyright, “it is clearly the prevailing view that characters \textit{per se} are entitled to copyright protection.” MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12, at 2-172.33; see also CRAIG JOYCE ET AL., COPYRIGHT LAW 138 (4th ed. 1998) (crediting the case of Silverman \textit{v.} CBS, Inc., 870 F.2d 40 (2d Cir. 1989), with finally establishing that literary characters are copyrightable). \textit{But see} Miller \textit{v.} CBS, 209 U.S.P.Q. 502, 504 (C.D. Cal. 1980) (“Ideas, themes, locale or characters in an author’s copyrighted works are not protected by the law of copyright.”).

\(^{16}\) \textit{See} King Features Syndicate \textit{v.} Fleischer, 299 F. 533, 536 (2d Cir. 1924) (“A reproduction in materials of the copyrighted cartoon character, it would seem, is equally a violation of the copyright of the cartoon.”).

\(^{17}\) \textit{See} Nichols \textit{v.} Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

\(^{18}\) \textit{See} 1 NIMMER & NIMMER, supra note 15, § 2.12, at 2-175; \textit{see, e.g.}, Walt Disney Prods. \textit{v.} Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978).

\(^{19}\) JOYCE ET AL., supra note 15, at 138.
A. The Delineation Test

The first effort to define the moment when a character becomes entitled to copyright protection came in the case of *Nichols v. Universal Pictures Corporation.* In *Nichols,* the plaintiff claimed that the defendant's screenplay and film called "The Cohens and The Kellys" had copied from her copyrighted play, "Abie's Irish Rose." The plays were similar. They both involved quarrels between a Jewish father and an Irish father, the marriage of their children, the birth of their grandchildren, and a reconciliation.

Writing for the *Nichols* court, Judge Learned Hand explained that the copyrightability of the "Abie's Irish Rose" characters hinged on how far they had been fleshed out for the audience: "[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." Hand admitted that he had not uncovered a single case where a character had been sufficiently delineated to be copyrightable, but the above statement suggests that he thought such a situation might exist. To make his point more clear, Hand gave the following example:

If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress.

Hand argued that the characters in "Abie's Irish Rose" were, like the riotous knight and the foppish steward, not drawn distinctly enough to merit copyright protection. For example, the children of the feuding fathers were "so faintly indicated as to be no more than stage properties." All that could be said of them is that they were "loving and fertile," and any author should be within his rights to put a loving and fertile couple in his play without worrying that he had

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20. 45 F.2d 119 (2d Cir. 1930).
21. See id. at 120.
22. See id. at 122.
23. Id. at 121.
24. Id.
25. Id. at 122.
infringed on someone else’s copyright. 26

Judges and scholars cite Nichols for the proposition that copyrightability depends on how far a character has been delineated, i.e., in what detail the character has been described by its creator. 27 The problem is that the Nichols decision offers little in the way of clear guidance for how much delineation is required. Like detectives searching a crime scene, the courts have combed through the Nichols decision looking for clues to determine when a character has been sufficiently developed to deserve copyright protection. The case offers only one clear suggestion: stock fictional figures are not copyrightable. According to Hand, the plaintiff in Nichols must have been aware “of those stock figures, the low comedy Jew and Irishman” when she wrote the play. 25 Characters that are overly familiar without distinctive attributes are not original enough to deserve protection. As a result, Hand found that the “Abie’s Irish Rose” characters were not copyrightable, and, hence, there had been no infringement.

The Second Circuit applied this principle again in Detective Comics, Inc. v. Bruns Publications, Inc. 29 In that case, the owner of the copyright to the Superman comic book sued a rival comic publisher for infringement. The rival had published a comic featuring Wonderman, a superhero who had many of the same attributes as the “Man of Steel.” The Wonderman publishers argued that the attributes that made up the Superman creation were as old as the heroes of Greek mythology and hence not copyrightable. 30 The court agreed that if Superman was just a “general type,” he could not be copyrighted. 31 Without explaining why, however, the court found that Superman was more than a stock character, and thus, protected by copyright. 32

26. See Nichols, 45 F.2d at 122.
28. Nichols, 45 F.2d at 122.
29. 111 F.2d 432 (2d Cir. 1940).
30. See id. at 433.
31. See id.
32. See id.
Modern courts have applied the Nichols comments on stock figures to deny protection to stereotypical characters. As one court explained, "Basic character types are not copyrightable." A voodoo priestess failed the delineation test. So did a "city boy" in a rural environment. One court stressed that a character whose only significant feature was his race would not be protectable.

B. The "Story Being Told" Test

Perhaps out of frustration with the lack of clear standards under the Nichols delineation test, the Ninth Circuit proposed a competing test for character protection in 1954. Author Dashiell Hammett assigned the entire copyright in the book The Maltese Falcon to Warner Brothers to make a motion picture. Years later, Hammett signed a deal giving CBS the right to use several of The Maltese Falcon characters, including private detective Sam Spade, for a radio show. Warner Brothers cried foul and sued CBS, claiming that when it bought the rights to The Maltese Falcon, it acquired the exclusive rights to its characters.

The Warner Brothers court began by affirming that the 1909 Copyright Act protects characters. The question was where to draw the line for when a character becomes protected by copyright. The court held that it would only be protected when "the character really constitutes the story being told." Here Sam Spade and the rest of the characters from The Maltese Falcon were mere "vehicles" for the telling of the story of a mysterious jeweled bird and the adventures of a hard-boiled detective. The court explained that "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

34. See id.
36. See id.
37. See Warner Bros. Pictures, Inc. v. CBS, 216 F.2d 945 (9th Cir. 1954).
38. See id. at 946-48.
39. Note that Warner Brothers' reasoning is just as applicable to today's cases since "[t]he status of the copyrightability of characters under the 1909 Act, whatever it may have been, remains unchanged under the current Act." 1 NIMMER & NIMMER, supra note 15, § 2.12 n.8, at 2-172.34.
40. Warner Bros. Pictures, 216 F.2d at 950.
41. See id.
the copyright."\(^{42}\)

This so-called "story being told" test has been criticized for being too high of a bar to copyright protection for characters.\(^{43}\) To avoid creating a story where the characters are mere "chessmen," it would seem that an author would have to write a story devoid of plot, a story where everything revolved around exploring the personality of one character. Since Warner Brothers, the Ninth Circuit has limited application of the "story being told" test,\(^4\) but never officially called for its replacement with the delineation test. Some courts continue to apply the "story being told" test while applying the delineation test at the same time.\(^5\)

Like the delineation test, the "story being told" test can be criticized for its lack of specifics. How does one tell when a character is so central to a story that she deserves to be protected in copyright? The district courts have suggested three ways of fleshing out the vague Warner Brothers test. First, a character may satisfy the test if her name is mentioned in the title of the work.\(^6\) In a case concerning the movie character "E.T.,” the court found that the character was “central” to the story and therefore protected by copyright.\(^7\) The court explained, “[p]laintiffs contend, and the Court believes, that 'E.T.' is more than a mere vehicle for telling the story and that 'E.T.' actually constitutes the story being told. The name 'E.T.' is itself highly distinctive and is inseparable from the identity of the character."\(^{48}\)

\(^{42}\) Id.

\(^{43}\) See Niro, supra note 12, at 365; see also DOROTHY J. HOWELL, INTELLECTUAL PROPERTIES AND THE PROTECTION OF FICTIONAL CHARACTERS 90 (1990) (“[The Warner Bros. decision] is frequently cited to support the proposition that character is uncopyrightable.”).

\(^{44}\) See Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978).


\(^{46}\) Cf. 1 NIMMER & NIMMER, supra note 15, § 2.12, at 2-177 (“Although copying of a character's name is not in itself decisive, it is a factor to be considered in determining whether the character as appropriated is sufficiently distinctive to constitute an infringement.”); see also Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108, 110 (N.D. Cal. 1972) (highlighting that infringer used same character name as used in original work), aff'd in part, rev'd in part, 581 F.2d 751 (9th Cir. 1978).


\(^{48}\) Id. at 1165.
Other aspects of the movie were important to the court's decision to award copyright protection, including a story line that revolved around the "E.T." character. Nevertheless, the court found it significant that the "E.T." character's name was the same as the title of the movie. In another case, a court found Rocky Balboa delineated in the movies *Rocky*, *Rocky II*, and *Rocky III*, although it did not mention in its opinion that the title character's name was also found in the title of the movie series.

Second, a character is more likely to pass the "story being told" test if she is in a work that focuses on character development and has a correspondingly simple story line. The title character "Rocky Balboa" from the *Rocky* films satisfied the "story being told" test because the movies focused on relationships instead of intricate plots. Another court found that the James Bond character was protected because his success comes from the strength of his character, not the plots of his movies.

Finally, a character may be found strong enough to survive the "story being told" test when several actors have played the same character. Copyright law protects James Bond because people go to James Bond films for the character, not for the actor playing him. "[B]ecause many actors can play Bond is a testament to the fact that Bond is a unique character whose specific qualities remain constant despite the change in actors." James Bond may be a special case since he has been portrayed in nineteen movies. Most characters do not have the same established track record to show their lasting importance over plot or story line.

49. *See id.*
50. *See Anderson*, 11 U.S.P.Q.2d at 1167. Perhaps the Sam Spade character could have been copyrighted if Hammett had titled his work *The Adventures of Sam Spade* instead of *The Maltese Falcon*.
51. *See id.*
52. *See MGM v. American Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) ("[A]udiences do not watch Tarzan, Superman, Sherlock Holmes, or James Bond for the story, they watch these films to see their heroes at work.").
53. *Id.*
54. *See id.* The MGM opinion lists 16 James Bond films, but since 1995, there have been three more: *GOLDEENEY (Metro-Goldwyn-Mayer 1997), TOMORROW NEVER DIES (Metro-Goldwyn-Mayer 1998), and THE WORLD IS NOT ENOUGH (Metro-Goldwyn-Mayer 1999).*
55. Although I could not find any cases on the subject, this rule of thumb for the "story being told" test could have strong implications for protecting characters in plays and musicals where a particular actor is more likely to be
III. JUSTIFYING COPYRIGHT IN CHARACTERS

A. The Utilitarian View

One justification for copyright law is that it maximizes the amount of creativity in society. The utilitarian philosopher Jeremy Bentham believed that the only justifiable end of government was "the greatest happiness of the greatest number." Taking a utilitarian approach requires the government to ask two questions in setting an appropriate standard for copyrighting characters. First, does providing protection for characters maximize the good provided to society? Second, if it does, then where should the line for character protectability be set so as to promote the most social good?

If no protection at all were offered to characters, then their original creation would be discouraged. Of course, any system that places restrictions on secondary performers who wish to use characters from an original performer's work limits the inventive output of secondary performers. It seems obvious, however, that there will be little creation by any author or performer unless the law encourages the creation of characters in the first place. The free market cannot put an appropriate price on character creation. Characters are imperfect public goods, i.e., they are difficult to create, but easy to copy. Secondary artists can imitate an original character without much trouble; the original artist will not be rewarded adequately for her labors if anyone can steal her character.

There are some free market incentives for artists to create characters. Captivating characters can make the books, television shows, and movies in which they appear more popular. Thus, artists have an incentive to create

characters that will help sell their works. And although characters are not copyrightable in themselves, they are copyrightable in the context of the works in which they appear.58

But, by itself, this is not enough of an incentive for character creation. A character’s commercial appeal extends far past the character’s role in the original work.60 Movie studios seek out stories with characters that they can turn into bankable franchises.60 Performers want to create an on-stage persona that will appeal to fans night after night.61 An artist’s desire to achieve sales of her first work is not enough incentive; the artist must know that her character cannot be appropriated by someone else at the very point at which it reaches its highest commercial appeal.62

Thus, an author or performer who creates a popular

58. See JOYCE ET AL., supra note 15, at 140 (“The Copyright Office . . . will not register a description or drawing of a character as such, although it will, of course, accept registrations of literary or pictorial works embodying characters.”); Cathy J. Lalor, Copyrightability of Cartoon Characters, 35 IDEA 497, 499 (1995) (“While characters enjoy copyright protection within the context of the works in which they appear, they are not independently copyrightable.”). But cf. Walt Disney Co. v. Powell, 897 F.2d 565, 570 n.10 (D.C. Cir. 1990) (counting each protected Disney cartoon character in the movie Steamboat Willie as a separate infringement for the purpose of assessing damages). Some propose amending the Copyright Act to create a separate category of protection for fictional characters. See Feldman, supra note 12, at 712. Feldman argues that creating a separate copyright in characters would allow performers to give their characters legal status before they are included in any “work.” See id. This would serve “the public interest in encouraging a variety of artistic creations.” Id. at 715. Such a regime, however, would ignore copyright law’s fixation requirement: “Copyright protection subsists fixed in any tangible medium of expression . . . .” Copyright Act of 1976, 17 U.S.C. § 102(a) (1994) (emphasis added). See also White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1 (1908).

59. See 1 NIMMER & NIMMER, supra note 15, § 2.12, at 2-172.33 (discussing the increasing prevalence of sequels in movies, novels, and television); Feldman, supra note 12, at 687 (explaining that new forms of entertainment media allow a successful character to be seen in many different venues).


61. See CBS v. DeCosta, 377 F.2d 315, 316, 320 (1st Cir. 1967) (describing the process by which an artist fashions a character that can attract a following).

62. Cf. Warner Bros. Pictures v. CBS, 216 F.2d 945, 950 (9th Cir. 1954) (“Authors work for the love of their art no more than other professional people work in other lines of work for the love of it. There is the financial motive as well.”); Kaplan, supra note 27, at 820 (describing the growing group of authors who want to write sequels based on pre-existing ideas).
character needs some incentive to create besides the incomplete rewards of the market. If this premise is accepted, then some legal protection should be afforded to characters. To provide an incentive to create and provide good for society, copyright law needs to be generous enough in scope to safeguard characters in original works so their creators can use them again in the future. The courts seem to agree with this view and recognize that at least some characters are protected by copyright.63

The second question is more difficult to address. Where should the line for copyright protection be set? If we want to encourage character creation, then we must protect original authors and performers. But what if the original performer suddenly decides to stop working with a particular character? One might argue that if we want to maximize social welfare, then if a performer refuses to continue to use her character, this is a market failure and copyright law should allow another performer to use the original performer's character.64

But it is not clear that such a regime would ensure the greatest good for the greatest number. As George Priest argues, economic theory offers little guidance for fine-tuning the law of intellectual property.65 Priest explains that there is no normative consensus about the welfare implications of inventive activity. This is in contrast to other areas of social policy where economic analysis can be helpful. Most of us can agree that pollution and crime are bad things that the law should curb. But we do not have the same normative guideposts to determine how much intellectual invention there should be in society. As a result, even though economic analysis might tell us how an intellectual property law would effect the author or performer, it does not tell us whether the current law of copyright maximizes social utility or should be recalibrated.66 While I have argued that there is a consensus on the desirability of protecting characters in some fashion, there is no majority view on how far this protection should

63. See 1 NIMMER & NIMMER, supra note 15, § 2.12, at 2-172.33.
64. See Kaplan, supra note 27, at 835.
66. See id. at 22-23.
go.  

We need to look to another philosophical justification for intellectual property to come up with an answer.

B. Property as Personhood

Property is not only valuable for its social utility. The philosopher Georg Hegel defended property as a way for an individual to manifest her will on the external world. According to Hegel, a person does not have a concrete existence until she forms a relationship with something external. Self-actualization occurs by acting on an object. Property rights insure that people continue to express themselves through objects instead of retreating from the world because they fear that someone else will appropriate their object for her own self-expression.

Hegel did not believe that a person should gain an ownership right in property because of a wish or desire. There has to be some external manifestation of the will in the property; otherwise the property is not really reflective of the owner. One way to manifest one's will in property is to impose a form on the property: "When I impose a form on something, the thing's determinant character as mine acquires an independent externality and ceases to be restricted to my presence here and now and to the direct presence of my awareness and will."

Margaret Jane Radin builds on Hegel's property theory to make moral distinctions in property disputes. She explains that "personal property" is bound up with a person. Its loss causes pain that cannot be relieved by replacement. "Fungible property," on the other hand, is perfectly replaceable with other goods of equal market value. The law

67. See Wendy J. Gordon, A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property, 102 YALE L.J. 1533, 1573 (1993) ("It is far from clear that all intellectual property rights add to society's total wealth . . . .").


69. See GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 40 (T.M. Knox trans., 1953).

70. See id.

71. Id. at 47.


73. See id. at 959.

74. See id. at 959-60.
should not recognize strong rights over fungible property, she argues, because it is only held for instrumental reasons; it has no bearing on the possessor's personhood. Zealous enforcement of property claims should be reserved for personal property. ⁷⁵ Social consensus already deems some property worthier of protection than other property. Radin argues that it is this distinction between personal and fungible property that explains why we enforce some property claims more strongly than others. ⁷⁶

The personhood justification and Radin's moral scale for property rights apply to intellectual property. The ideas of artists and performers are not immediately apparent to others like possession of forty acres of land or a solid gold airplane are. But when an artist expresses ideas, her personality is externalized to the outside world. Ownership, even when the owner is no longer acting on the property she created, still fulfills an expressive component. When someone owns something she created—a song, a computer program, or a character—the public recognizes that person as the inventor of a particular thing. ⁷⁷ By continuing to hold onto a bundle of rights in her expression, the artist continues to make an affirmative act of personhood. ⁷⁸ The author of a great work of literature may ignore public demands for a sequel. Nevertheless, just by being considered the author of that great work, the author shapes her personality. Royalty payments from continuing sales of the work show that others

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⁷⁵. See id. at 960.
⁷⁶. See id. at 979.
⁷⁷. Under Radin's scheme, these works might not enjoy the same amount of legal protection. As discussed below, a character is a particularly personal creation. See infra notes 84-89 and accompanying text. Moreover, it is much easier for others to tie a human performance character to its creator than it is for them to link a computer program, or even a song, to its originator. Of course, it can also be argued that writing the code for a computer program is a creative feat also bound up with the author's personality. See Atari Games Corp. v. Oman, 888 F.2d 878, 880, 886 (D.C. Cir. 1989) (remanding the decision of the Register of Copyrights that the video game BREAKOUT did not contain "sufficient original visual or musical authorship to warrant registration"). Still, if property protections are distributed according to the recognized personhood interests in the property, then characters would deserve greater protection than some other intellectual works. See Radin, supra note 72, at 1008 ("[I]t is important to realize that in a larger scheme that accords special recognition to core personhood interests in general, some personhood interests not embodied in property will take precedence over claims to fungible property.").
⁷⁸. See Hughes, supra note 68, at 343.
recognize the author's claim on the property and recognize the work as an external manifestation of her personality.\footnote{79. See id. at 349.}

The most valuable property a person can hold is her own personality.\footnote{80. See Hegel, supra note 69, at 45 ("[P]roperty is the embodiment of personality . . . .").} One's personality is synonymous with the person in one sense, but in another sense it is defined only in its relation to society. "[A] person has a natural existence within himself and partly of such a kind that he is related to it as an external world," Hegel explained.\footnote{81. Id. at 40.} An individual's persona – the individual's public image – is a receptacle for her personality.\footnote{82. See Hughes, supra note 68, at 340.} Some people work on creating a public persona more than others. By endowing the individual with property rights in her persona, the law gives the individual economic protection for the most obvious external expression of her personality. The right of publicity protects celebrities from attempts by others to appropriate their personas.\footnote{83. See discussion infra Part III.D.3.}

Characters can be almost as personal to their creators as a public image might be to a celebrity. Creators often feel a special relationship with their characters\footnote{84. See Michael Todd Helfand, Note, When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Law to Protect Fictional Literary and Pictorial Characters, 44 Stan. L. Rev. 623, 627-28 (1992).} and infuse them with their personality in a way they cannot with other more tangible forms of property. As one author argues: "Creators and owners often identify so closely with their characters, intermingling their own personalities with those of their creations, that they become quasi-parents."\footnote{85. Id.} Thus, characters are particularly strong candidates for Radin's category of "personal property" that should be protected. More of the person is bound up in a character creation than in other "fungible" objects. This is especially true of human performance characters. For example, wrestlers create characters based on their own perceived personality attributes.\footnote{86. See John Leland, Our Man Goes to the Mat, Newsweek, Feb. 7, 2000, at 55 [hereinafter Leland, Our Man Goes to the Mat] (explaining that part of what makes a successful wrestler is a "good gimmick [that] exaggerates one facet of a wrestler's real personality"); Dan McGraw, The Long, Hard Road to Fame: Making It, U.S. News & World Rep., May 17, 1999, at 58 (describing}
The Rock, defines his character as "Duane Johnson with the volume turned up to its highest level, and then some." "Stone Cold" Steve Austin describes his wrestling character in much the same way, as basically a louder and brasher version of himself. James Hellwig, the man who wrestled as the Ultimate Warrior, even changed his name to Warrior out of a personal affinity with the character he created.

When someone else appropriates a character that a performer has created, the performer suffers more than an economic injury. Unauthorized use hampers that person's efforts to control the public projection of her identity, or at least the part of her identity that is manifested in her character. Copyright protects the individual's autonomy interest in controlling her persona through property. When the Hegelian rationale for intellectual property ownership is accepted, establishing copyright protection for characters created through human performance becomes all the more important. While the utilitarian argument cannot guide policymakers in setting an appropriate level of protection, viewing property as personhood dictates strong protection for characters created by artists and performers. The personhood rationale cannot show exactly where to set the line between unprotected ideas for characters and protected

independent wrestling training academies where would-be wrestlers are given advice on how to pick a "wrestling personality"). When a wrestler signs a contract with a professional wrestling corporation, the amount of control exerted over the wrestler's selection of a ring persona varies. Some wrestlers are assigned a basic character and left to develop their own style, while other performers are solely responsible for their character's creative origin. See Larson, supra note 1, at E1. Compare MICK FOLEY, MANKIND! HAVE A NICE DAY 48 (1999) (describing how Foley himself came up with the character "Dude Love") and John Leland, STONE COLD CRAZY!, NEWSWEEK, Nov. 23, 1998, at 60, 62 [hereinafter Leland, STONE COLD CRAZY!] (explaining how Steven Austin created his own character by combining his own personality with an HBO program on serial killers), with Maria Blackburn, Sky's Limit for WCW's Nitro Girl, BALT. SUN, Dec. 20, 1999, at 1E (relating that it was the decision of WCW writers to turn a female wrestler's character into "a heel").

87. Flaherty, supra note 5, at 30.

88. See Leland, STONE COLD CRAZY!, supra note 86.

89. See Titan Sports, Inc. v. Hellwig, No. 3:98-CV-467, 1999 WL 301695, at *1 (D. Conn. Apr. 26, 1999); see also Larson, supra note 1, at E1 (explaining that Hellwig created the character and developed the costume and persona for the Ultimate Warrior on his own).

90. Cf. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 836 n.11 (1979) (en banc) (discussing the noneconomic harms that can come from violations of a character actor's right of publicity).
expressions of characters, but it does demonstrate the need for character ownership once a character has been so richly drawn that its creator forms a personal attachment to its use.

C. Personhood and the Lockean Justification for Property

Several philosophers grappled with the question of property rights before Hegel.\footnote{See Jesse Dukeminier & James E. Krier, Property 24 n.6 (4th ed. 1998) (collecting citations).} English philosopher John Locke grounded his argument for property in labor. His theory of property rights is worth a close look. The U.S. Constitution's framers were familiar with Locke's writings,\footnote{See Gordon, supra note 67, at 1540.} and gave expression to some of his ideas in the Declaration of Independence and the Constitution.\footnote{See Thomas P. Peardon, Introduction to John Locke, The Second Treatise of Government at vii, xx (Thomas P. Peardon ed., Bobbs-Merrill Co. 1952) (1694).} The courts today continue to cite Locke, both explicitly and implicitly, in cases of intangible property rights.\footnote{See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002-03 (1984) (holding that trade-secret rights are "property" protected under the Takings Clause and quoting Locke). Locke's argument that property rights should be tied to labor is a precursor of the common law doctrine of unjust enrichment. Unjust enrichment involves the general principle that one person should not be allowed to unjustly enrich himself at the expense of another, but should be required to make restitution for property or benefits received. See Robert E. Scott & Douglas L. Leslie, Contract Law and Theory 182-90 (1988).}

Locke believed that the preeminent tenet of natural law was that all persons have a duty not to harm others.\footnote{See John Locke, Two Treatises of Government, pt. II, § 7, at 289 (Peter Laslett ed., 2d ed. 1967) (1698) ("[N]o one ought to harm another in his Life, Health, Liberty, or Possessions.").} He also believed that each individual has a right of ownership to her own labor. When the individual appropriates materials in the public domain and creates something new, she has mixed her labor with those materials:

The labor of his body and the work of his hands, we may say, are properly his. Whosoever then he removes out of the state that nature has provided, and left it in, he has mixed his labor with, and joined it to something that is his own, and thereby makes it his property.\footnote{Id., pt. II, § 27, at 305-06.}

If someone else later takes this new product, this person
harms the individual and thereby violates the first tenet.\textsuperscript{97} Therefore, the individual deserves a legally enforceable property right to protect the fruits of her labor.\textsuperscript{98}

Locke was unclear as to when someone has signaled her appropriation of property through her labor, i.e., when she has mixed her labor with material from the public domain and thereby created an enforceable right.\textsuperscript{99} Some argue that appropriative labor requires altering materials in the public domain in a way "that makes [them] usable and thus more valuable to humanity."\textsuperscript{100} Locke did indicate that property ownership should only attach when it benefited, or at least did nothing to harm, the common good: "Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough and as good left in common for others."\textsuperscript{101}

But a "common good" requirement for property ownership still leaves a lot of room for interpretation. Wendy Gordon interprets Locke narrowly:

Locke argues that one person's joining of her labor with resources that God gave mankind ("appropriation") should not give that individual a right to exclude others from the resulting product, unless the exclusion would leave these other people with as much opportunity to use the common as they otherwise would have had.\textsuperscript{102}

Such an interpretation of Locke's writing fuels arguments for an "individualized" public benefits approach to intellectual property.\textsuperscript{103} For example, Gordon argues that the

\textsuperscript{97} See Gordon, supra note 67, at 1544-45.
\textsuperscript{98} See Locke, supra note 95, pt. II, § 27, at 305-06 ("[E]very Man has a Property in his own Person . . . . The Labour of his Body, and the Work of his Hands, we may say, are properly his."); Gordon, supra note 67, at 1545 (summarizing Locke's argument).
\textsuperscript{99} See Gordon, supra note 67, at 1547 ("Locke himself offered no precise definition of the kind of appropriative labor that could give rise to a property claim . . . ."); Karl Olivecrona, Appropriation in the State of Nature: Locke on the Origin of Property, 35 J. Hist. Ideas 211, 225 (1974) ("Locke never states with exactitude how the act of appropriation is to be performed.").
\textsuperscript{100} Gordon, supra note 67, at 1547; LAWRENCE BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 50 (1977).
\textsuperscript{101} Locke, supra note 95, pt. II, § 27, at 288 (emphasis added).
\textsuperscript{102} Gordon, supra note 67, at 1562.
\textsuperscript{103} See id. at 1570; cf. Howard Abrams, The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright, 29 WAYNE L. REV. 1119, 1134 (1983) (arguing that copyright must serve the common good since authors lack common law rights that would independently

\textsuperscript{103} See id. at 1570; cf. Howard Abrams, The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright, 29 WAYNE L. REV. 1119, 1134 (1983) (arguing that copyright must serve the common good since authors lack common law rights that would independently
“fair use” doctrine should do more to shelter parodists from infringement suits so long as they are serving an audience struggling to deal with the original work. She states, “[A] later arrival on the cultural scene should be at liberty to use an existing creation if prohibiting his own use would make him worse off individually.”

The problem with the above interpretation is that it strays from the personhood justification for property rights. Locke’s writings on the subject are sparse. As a result, Locke’s common good requirement can just as easily be interpreted as a concern with public welfare in the aggregate; the requirement is satisfied if a system of property rights for laborers leaves the population better off as a whole than if there were no property rights. The labor justification for property rights does not have to clash with the personhood justification. A better way to interpret Locke’s reasoning is to look at what the laborer is hoping to achieve through her work.

Appropriative labor is that which causes the laborer to psychologically identify with her work. Karl Olivecrona argues that Locke perceived the fruits of labor to be an extension of the laborer’s personality. “By Property I must be understood here, as in other places, to mean that Property which Men have in their Persons as well as Goods,” Locke explained. Locke defined appropriation as using labor to make an object a part of one’s self. Olivecrona writes that

entitle them to protection from copying).

104. See Gordon, supra note 67, at 1603. Gordon would overturn the decision in Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), a case in which the Ninth Circuit found that a parody that depicted Mickey Mouse and other Disney characters as members of a promiscuous, drug using counterculture infringed on Disney’s copyright in the original work. Gordon complains that granting Disney a copyright that prohibits other individual artists from reusing their characters to make an opposing philosophical statement is too much of a restriction on the common. See id.

105. Gordon, supra note 67, at 1570.


107. See Gordon, supra note 67, at 1547.


[T]here must of necessity be a means to appropriate to [Men] some way or other before [the fruits of nature] can be of any use, or at all beneficial to any particular Man. The Fruit, or Venison, which nourishes the wild Indian . . . must be his, and so his, i.e., a part of him
Locke unequivocally "express[ed] the idea that the personality is extended to encompass physical objects." Moreover, appropriative labor could encompass intangibles as well. Locke's seventeenth-century contemporaries understood property to include abstract things like an individual's religious faith.

If this is true, it seems consistent with Locke's philosophy to protect artists from unauthorized copying because it is harmful to take away a part of someone's personality. When an object has been appropriated and becomes part of the possessor's "sphere of personality," writes Olivecrona, "it will be an injury to the possessor to deprive him of it. . . . For his own person is exclusively his own."

Thus, Locke's theory of property ownership is consistent with the views of Hegel and Radin. The products of labor are an extension of the laborer's personality. Appropriation, the point at which an individual's property right should be recognized, requires the infusion of the possessor's personality into an object by spending some labor on it.

Similarly, Hegel and Radin also argue that property ownership should be linked to personal expressions in objects. Because characters are especially rich in personal expression, their creators deserve protection so they will continue to act on the outside world and not suffer harm from another party's misappropriation of their personal expression.

D. Objections to Strong Copyright Protection for Characters

Even if the personhood justification for property ownership is accepted and applied to characters, copyright law is not necessarily the best way to protect characters. Some scholars argue that the current application of copyright law provides too much protection for characters, or even before it can do him any good for the support of his Life.

Id. at 304-05.

111. Olivecrona, supra note 99, at 223.

112. See Peter Laslett, Introduction to JOHN LOCKE, TWO TREATISES OF GOVERNMENT 3, 101 (Peter Laslett ed., 2d ed. 1967) (1698); see also Gordon, supra note 67, at 1558-59 ("Applying Locke's analysis to the intangible realm would not do violence to his thought.").

113. Olivecrona, supra note 99, at 223.

114. See id. at 224.

that characters are not deserving of copyright protection at all.116 These scholars make four main arguments: (1) copyright protection takes too many characters out of the public domain and away from secondary artists; (2) the word "character" does not appear in the Copyright Act; (3) sufficient safeguards for original characters exist under trademark law; and (4) specific to human characters, the right of publicity provides adequate protection. The first argument has been dealt with above. Given the lack of a consensus on the appropriate amount of intellectual property creation the government should sponsor, it is impossible to justify this argument under the utilitarian view.117 Moreover, the personhood justification for property rights should entitle characters strong copyright protection because they are closely linked to the personalities of their creators.118 The other three arguments against copyrighting characters are addressed below.

1. The Text of the Copyright Act Does Allow for Character Copyrights

The Copyright Act enumerates eight categories of copyrightable subject matter.119 Though the Act does not explicitly list characters, they should still be eligible for copyright because the eight categories are only meant to be "illustrative and not limitative."120 In a 1965 report, the Register of Copyrights recognized that some characters are developed in enough detail to be copyrightable in themselves.121 There have been no changes in copyright law

would argue that copyright already gives more than enough protection to the characters embodied in works of authorship.").

116. See, e.g., Francis M. Nevins, Jr., Copyright + Character = Catastrophe, 39 J. COPYRIGHT SOC'Y U.S. 303, 303 (1992) ("[C]opyright protection for characters as such is redundant, defies rational articulation, and encourages dubious litigation . . . .").

117. See supra Part III.A.

118. See supra notes 84-90 and accompanying text.

119. They are: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. See 17 U.S.C. § 102 (1994).


121. SUPP. REP. OF THE REGISTER OF COPYRIGHT ON THE GENERAL REVISION OF U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89th Cong., 1st Sess. 6 (1965) [hereinafter REGISTER'S REPORT].
between the 1909 Copyright Act and the 1976 Copyright Act that would have any impact on the protectability of characters. Therefore, the Register's report is very relevant to assessing whether copyright can protect creations like Sam Spade and the Ultimate Warrior. The Register maintained that the larger categories of literary and pictorial works would encompass all such characters and could provide them adequate protection without a special enumerated category for characters. Thus, the lack of an explicit mention of characters in the Copyright Act should not be mistaken for congressional intent to preclude characters from copyright protection.

2. Trademark Law Provides Inadequate Protection for Characters

A second argument against copyright protection for characters is that sufficient protection already exists under trademark law. Trademark law does offer some security to a character's creators; its biggest advantage over copyright is that it has the potential for permanent protection instead of protection for a fixed period of years. There are some limitations to trademark protection, however, which make it an unacceptable substitute for copyright.

First, trademark only protects a character's name and, sometimes, its physical appearance. Copyright protection extends further, encompassing not only appearance "but also the totality of the characters' attributes and traits" including physical abilities and personality. Unlike trademark, copyright provides protection against rivals who seek to duplicate a character's unique personality, which is often the most valuable and creative part of a character, and also

122. See 1 NIMMER & NIMMER, supra note 15, § 2.12 n.8, at 2-172.34 ("The status of the copyrightability of characters under the 1909 Act, whatever it may have been, remains unchanged under the current Act.").
123. See REGISTER'S REPORT, supra note 121, at 6.
124. See HOWELL, supra note 43, at 64.
126. Warner Bros., Inc. v. ABC, 720 F.2d 231, 241 (2d Cir. 1983); see also Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1169 (9th Cir. 1977) ("[I]t is the combination of many different elements which may command copyright protection because of [the work's] particular subjective quality.").
127. See 1 PAUL GOLDSTEIN, COPYRIGHT § 2.11.1 (2d ed. 1996).
the attribute most intertwined with the creator's persona.\textsuperscript{128} For example, trademark does not safeguard the traits that make a popular pro wrestler truly distinctive. Signature finishing moves, interviewing style, and crowd-pleasing gestures are part of what makes a wrestling character unique and popular.\textsuperscript{129} A wrestler who develops a unique character that draws in fans is not sufficiently protected by a trademark in the character's name and strictly physical likeness.

Second, trademark protection is tied to marketplace perceptions of a character without any acknowledgment of the personhood justification for property ownership. A certain level of popular recognition is necessary to earn trademark protection. A trademark will only be enforced while the general public sees it as indicative of a source and not just a description of the character.\textsuperscript{130} Thus, trademark can only protect well-known characters; a character that has had little public exposure would not be benefited by trademark law.\textsuperscript{131}

Moreover, rabid fans can take over a character and deprive the original author of control. For example, when the movie studio that created King Kong alleged that Nintendo had infringed on their creation with its Donkey Kong video game, a district court found that the King Kong character had become too popular to be protected by trademark.\textsuperscript{132} The court explained that there were so many competing King Kong versions in the world that the original proprietor had lost ownership.\textsuperscript{133} Thus, only a fraction of the character population is covered by trademark law. Trademark does not protect those characters that have not achieved popular

\textsuperscript{128} See BEYOND THE MAT (Lions Gate Films 2000) (explaining that it was Jake "the Snake" Roberts's personality and not his physical abilities that made him a popular professional wrestler).

\textsuperscript{129} See Flaherty, supra note 5, at 30 (describing what made The Rock the most popular personality in the WWF); Don Kaplan, Everything Adoring Fans Love to Hate, N.Y. POST, Nov. 25, 1999, at 3 (describing what made "Stone Cold" Steve Austin "the most successful character in the history of wrestling").

\textsuperscript{130} See Howell, supra note 43, at 59. But see Frederick Warne & Co. v. Book Sales, Inc., 481 F. Supp. 1191, 1196 (S.D.N.Y. 1979) ("The fact that a copyrightable character or design has fallen into the public domain should not preclude protection under the trademark laws . . . .").

\textsuperscript{131} See Feldman, supra note 12, at 705-07.


\textsuperscript{133} See id.
recognition or that have become so popular that the public no longer associates them with one creator.

Trademark does offer some valuable protections to character creators. For example, an Arizona court found that James Hellwig could have trademark rights to the distinctive name, face paint, and likeness of the Ultimate Warrior character. But trademark protections end at the point where the personhood justification for property rights indicates that there should be the strongest security for characters. For the most part, trademark cannot protect the personality or emotional attributes of a character. Moreover, trademark's application is limited to well-known characters who have already achieved public recognition. But, for many characters, it may take years to reach a level of public notoriety worthy of a trademark. Thus, trademark law does not do enough to obviate the need for copyright protection for characters.

3. The Right of Publicity Cannot Sufficiently Safeguard Human Characters

Another potential substitute for copyright protection is the right of publicity. This right allows an individual to control the commercial value of her name and image by using the legal system to stop unauthorized exploitation by others. Although in recent years courts have broadened the scope of this right, it is still loosely defined.

The courts are more likely to find sufficient delineation (and thus grounds for copyright) in a cartoon character than in a human character. The right of publicity helps make up for the difference between copyright protections for non-human characters like Mickey Mouse and copyright protections for human characters like the Ultimate Warrior. In fact, two authors suggest that human performance


135. See Groucho Marx Prods., Inc. v. Day & Night Co., 523 F. Supp. 485, 487 (S.D.N.Y. 1981); see also RESTATMENT (SECOND) OF TORTS § 652C (1976) (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”).

136. See JOYCE ET AL., supra note 15, at 918.

137. See supra notes 15-19 and accompanying text; Niro, supra note 12, at 374; see also Walt Disney Prods. vs. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978) (stating that a comic book character is more likely to contain “unique elements of expression” than a literary character).
characters should receive less copyright protection than strictly pictorial characters because human performance characters have the right of publicity.\textsuperscript{138} Since human actors are protected by the right of publicity, they argue, the actors' appearance and personality should not be part of the delineation test when evaluating the copyrightability of a human performance character.\textsuperscript{139}

Still, the right of publicity is not enough of a property substitute for copyright protection of human characters. First, copyright law is preferable to the right of publicity because it offers a uniform, nationwide standard. Only half of the states recognize the right of publicity,\textsuperscript{140} and the scope of the right varies from state to state.\textsuperscript{141}

Second, the right of publicity was originally only conceptualized to protect a well-known person from unauthorized commercial exploitation of her name and appearance. Building on the tort of right to privacy, there is an idea in the right of publicity that we should permit famous people to be "let alone."\textsuperscript{142} This autonomy interest is designed to protect real people, not their character creations.

In perhaps the broadest judicial interpretation of the right of publicity, the Ninth Circuit found that an unauthorized advertisement featuring a robot imitating Wheel of Fortune letter spinner Vanna White infringed on Ms. White's right to control her own likeness in White v. Samsung Electronics of America.\textsuperscript{143} But even the White court did not hold that the right to publicity includes the thoughts and personality behind a human character. White was protesting an unauthorized representation of her own person as a robot; there was no fictional character at issue. White is

\textsuperscript{138} See Bayard F. Berman & Joel E. Boxer, Copyright Infringement of Audio Visual Works and Characters, 52 S. CAL. L. REV. 315, 330-31 (1979); see also Niro, \textit{supra} note 12, at 389-90 ("Because of an actor's right of publicity, the more 'human' the character depicted in a movie or television work appears, the more personality the character must possess to acquire copyright protection.").

\textsuperscript{139} See Berman & Boxer, \textit{supra} note 138, at 330-31.

\textsuperscript{140} See \textit{JOYCE ET AL.}, \textit{supra} note 15, at 918.

\textsuperscript{141} See id. (explaining that the descendibility of the right of publicity varies from 100 years after the celebrity's death in Indiana to 40 years after death in Florida).

\textsuperscript{142} Cf. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing "the right most valued by civilized men" as "the right to be let alone.").

\textsuperscript{143} 971 F.2d 1395 (9th Cir. 1992).
a real person and does not adopt a different persona for her game show. All of the cases the White court used to justify its decision involved unauthorized use of a real celebrity's identity, not the identity of a fictional character. Copyright extends further than the right of publicity to cover fictional characters and their personalities, not just the personas of celebrities. Moreover, although recent right of publicity cases like the White case have expanded the scope of the right, there is no guarantee that this will continue; the right of publicity may have reached its high water mark.

Note that even when combined with trademark protection, the right of publicity cannot adequately safeguard human performance characters from appropriation by others. Take the case of a stage performer who creates a one-person show. The performer has a unique look and dress, but is also known for her particular brand of on-stage behavior. Trademark can only protect the character's name and physical appearance. Moreover, if the performer just started her show, she would not be protected since trademark only applies to highly recognizable characters associated with a single artist. Since the right of publicity has not been shown to extend to the actor's fictional creations, the actor's name, face, and voice could be protected from unauthorized use,

144. See, e.g., Carson v. Here's Johnny Portable Toilets, 698 F.2d 831, 835-37 (6th Cir. 1983) (right of publicity was implicated when portable toilet manufacturer used the phrase "Here's Johnny" without Johnny Carson's permission); Motschenbacher v. R.J. Reynolds Tobacco, Co., 498 F.2d 821 (9th Cir. 1974) (right of publicity issue was juryable when company used photograph of plaintiff's race car in a television commercial and made it appear that the plaintiff was driving).

145. See White, 971 F.2d at 1402-03 (9th Cir. 1992) (Alarcon, J., concurring in part, dissenting in part) (criticizing the majority for expanding California's right of publicity beyond cases involving proof of the appropriation of a name or likeness); see also id. at 1404 ("[T]he majority confuses Vanna White, the person, with the role she has assumed as the current hostess on the 'Wheel of Fortune' television game show.").

146. One example I can think of is "Dame Edna," a female impersonator with a sold out Broadway run. Dame Edna is known for treating her audience as provincials and bemoaning their lack of sophistication throughout the show. See David Usborne, Dame Edna Conquers Broadway at Last, INDEPENDENT (London), Feb. 9, 2000, at 17.

147. See Lugosi v. Universal Pictures, 25 Cal. 3d 813, 818 (1979) (en banc) (stating that a famous movie actor has a "right of value" in his name and face).

148. See Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (finding that Bette Midler stated a tort cause of action against an advertiser that used a "sound alike" in a commercial to imitate her voice).
but it is not clear whether the right of publicity could stop others from taking over her stage persona.\(^{149}\)

Third, even if the right to publicity could be expanded to provide additional protection to human characters and supplement copyright law, such an expansion may not be the best thing for the artistic marketplace. Publicity rights threaten to cut a much larger swath through the public domain than copyright because they are not subject to traditional infringement defenses like fair use\(^{150}\) or the First Amendment.\(^{151}\) As Judge Kozinski argued in his White dissent, "reducing too much to private property can be bad medicine."\(^{152}\) He explains that it is impossible to parody a movie, play, or television show without evoking the identities of the real actors.\(^{153}\) Without a fair use defense, however, celebrities could stifle would-be parodists. As a result, Kozinski thinks that it is a mistake to extend the right of publicity defense to representations that evoke a celebrity's persona without using her actual name or likeness.\(^{164}\)

Kozinski's concerns are exaggerated to a degree. A movie studio might welcome some parodies of its work because they would fuel increased interest in the original. Still, allowing the right of publicity to take over the terrain of copyright law seems to be too broad of a solution for the problem of character protection. Copyright offers built-in safeguards to preserve a healthy public domain, like the fair use defense, that the right of publicity lacks.

Thus, the objections to protecting characters through copyright are unconvincing. The Copyright Act's failure to explicitly mention characters does not mean that Congress intended to exclude them. Trademark does not provide

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\(^{149}\) See, e.g., Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 845 (S.D.N.Y. 1975) (indicating that the right of publicity applies to "name or likeness" but not more "abstract" qualities of an actor's performance).


\(^{152}\) White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (dissenting from the order rejecting the suggestion for rehearing en banc).

\(^{153}\) See id. at 1518.

\(^{154}\) See id. at 1514.
sufficient protection for the personality aspects of a character, often the most important part of a human performance character. Expanding the right of publicity to fully protect human characters would risk removing too much material for artistic creation from the public domain. Copyright seems to be the best solution for protecting character creation. But if copyright is the answer, there needs to be clearer guidelines for character copyrightability than are currently provided. Part III of this article offers a more specific framework for determining when a human performance character is fully delineated.

IV. A PROPOSED DOCTRINE FOR EVALUATING HUMAN PERFORMANCE CHARACTERS

A. **Different Mediums, Different Characters**

Artists and performers create characters on canvas, the printed page, and through audiovisual images. The medium in which an artist chooses to depict her character has consequences for the courts’ view of where the character falls in the continuum between unprotected idea and copyrightable expression. A cartoon character presents the author’s expression for objective evaluation in a way that a literary character cannot. Even the most fully sketched literary character is less concrete than a cartoon character. A literary character is created and defined by its author, but then comes to life in the mind of the reader where it may be reshaped. A character such as Huck Finn, for example, can mean different things to different people.

In contrast, a visual character is given full shape by its creator; there is little room for imagination on the part of the audience. A cartoon may mean different things to different viewers, but it looks the same to all of them. The advantage for pictorial characters extends past physical characteristics to emotional attributes. Bugs Bunny’s wisecracking style is

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155. See Niro, supra note 12, at 370.
156. See Nevins, supra note 116, at 304; Niro, supra note 12, at 362.
157. See, e.g., *Culture Shock* (PBS television broadcast, Feb. 2, 2000) (describing the controversy among Hannibal, Missouri’s white and African-American residents over how to portray Huck Finn in their annual celebration of Mark Twain).
158. See Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978) (explaining that "a comic book character, which has physical as well as
stamped in the viewer's mind by the signature way he chews on a carrot with the side of his mouth and says "What's up, Doc?" It is not really true that pictorial characters are more likely to fall on the copyrightable side of the idea/expression dichotomy. A literary character may be more delineated, more richly textured than a cartoon. But the literary character lacks the simple objective visual indices that we can be confident everyone will see. Creators can use these visual indices to justify a decision that a character is "original." As a result, the courts are more likely to grant protection to visually depicted characters than to literary characters. This is only fair; courts should only grant copyright protection when they can make a convincing argument that a character has been sufficiently delineated, and it is easier to make a convincing argument based on what everyone sees than on what only some people can visualize through reading.

Like pictorial characters, human performance characters allow the audience to see their facial expressions and physical attributes. They can also acquire objectively observable behavioral traits like pictorial characters. For example, successful professional wrestlers are known more for their personalities than for their athletic prowess. In training academies, would-be wrestlers are taught to pick a "gimmick" or "ring persona" that will resonate with the audience. Those who become superstars attribute their success to finding a character that appeals to fans. Visual props cue the audience to the character's storyline. Onlookers can see these visual props and physical actions of the wrestlers and use them to understand their characters. A cartoon character's personality becomes apparent to its audience in the same way. Just as the courts are more willing to grant protection to pictorial characters than literary characters because they can make more compelling delineation arguments for them, the courts should be more willing to grant protection to human performance characters because the same visual cues exist.

*conceptual qualities, is more likely to contain some unique elements of expression [than a literary character].") (emphasis added).

159. See 1 NIMMER & NIMMER, supra note 15, § 2.12, at 2-175; Kaplan, supra note 27, at 827.

160. See Leland, Our Man Goes to the Mat, supra note 86, at 54.

161. See Flaherty, supra note 5, at 30; Leland, STONE COLD CRAZY!, supra note 86, at 77.
B. The Predictability Test: A Better Way to Determine Character Copyrights

The courts should be willing to protect not only the image of a human performance character, but the character's conceptual qualities as well. But the character's conceptual qualities should only be protected if they are sufficiently distinct. Characters only become non-fungible properties when their audience can differentiate them from other characters. It is important for a person to feel that she is unique and cannot be replaced by an identical human substitute. Similarly, a character only becomes valuable to a performer when the character has been infused with enough personality to make it unique. I propose that a character becomes concrete enough to deserve copyright protection when it can be placed in a new plot or situation and it will act in a way that is predictable, but also true to its unique style. Predictability is what makes for good literature: "[C]haracters are dear to us because they are predictable, because they entitle us to the superiority of gods who can lovingly foresee [sic] and thus more readily forgive what is fixed." True characters have a few clearly defined qualities that dominate all others. Their personalities are relatively stable. Their occupations follow from their personality.

This test also makes sense based on human experience. In essence, the predictability test asks whether the character has started to resemble a person. "[W]hat counts in recognizing something as a person is a consistent character structure. Persons are what they are in virtue of their past and future . . . ." Every person must have general desires or

163. Cf. 1 GOLDSTEIN, supra note 127, § 2.7.2, at 2:97 (stating that characters are protectible when "they react in ways that are at once distinctive and unsurprising").
165. See id.
166. See id.
167. See PETER B. MURRAY, SHAKESPEARE'S IMAGINED PERSONS 1-2 (1996) (explaining that Shakespeare constructed his characters as real people designed to generate human emotions in the audience).
168. Radin, supra note 72, at 964.
goals that motivate them. "Distinctive and structured patterns of desire and project" are a part of every person. Characters become predictable once we understand the desires that motivate them.

In its analysis of character predictability, the court should look to three distinct areas: physicality, story of origin, and behavior. Only when each of these areas suggests something distinctive enough to make the character predictable to the trier of fact should there be a finding of character copyrightability. By asking these questions, a court gets closer to what makes a character truly distinctive, and what makes the character more human.

This emphasis on predictability is a marked improvement over the delineation test first set out in the Nichols case. It sets forth an objective standard for determining the copyrightability of characters that tracks the personhood justification for property rights. The courts should abandon the rival "story being told" test. Admittedly, it can be useful to look to the importance of a character to a work when assessing copyrightability. Characters that are not important in a work are usually sketched so thinly as to fail the delineation test. But requiring a character to be the work's central emphasis in order to be copyrightable is too high of a standard. A work may be rich in plot, setting, and have highly developed characters. Rich character creations should not be penalized for being part of an interesting story line. Using the three factors of predictability to judge if a character is sufficiently delineated is a better way to determine if a character deserves copyright protection.

1. **Physicality**

Physicality refers to the part of the human performance character that can be observed objectively by the viewer.


170. *Id.*

171. *See, e.g.,* Olson v. NBC, 855 F.2d 1446, 1452-53 (9th Cir. 1988) (finding that screenplay characters depicted by only three-line summaries were so basic as to fail the "story being told" test).

172. *See supra* notes 43-44 and accompanying text.

173. Wrestling plots have become more complex as the WWF has hired writers from other television programs to develop interesting stories for its characters. *See* John Leland, *Why America Is Hooked on Wrestling*, NEWSWEEK, Feb. 7, 2000, at 46.
Physicality would involve the character's costume and any props usually used by the character. Physicality could also include the physical build and facial characteristics of the performer. Wrestlers use aspects of their physicality to cue the audience into their character's personality. For example, The Undertaker emerges from a cloud of smoke. Kane, "a mute scarred misfit," hides behind a scary red mask. Hard drinking antihero "Stone Cold" Steve Austin wears a T-shirt with a fist popping through the state of Texas and a camouflage baseball hat with a skull on it.

Physical characteristics are extremely important to delineating a character. Popular characters have a set of signature physical actions that track their personalities. Charlie Brown continually whiffs and lands on his back when he tries to kick a football. One of the most important decisions in a production of King Lear is how to physically represent the tragic king. Superman has physical powers like x-ray vision, and can leap over tall buildings. Wrestling characters have signature "finishing" moves as well as crowd-pleasing gestures they repeat out of the ring. Wrestling fans recognize Goldberg by his particularly menacing mannerisms.

The physicality requirement has the advantage of being the easiest component of character predictability to apply. Already courts often begin their analysis of character copyrightability by looking at physical characteristics. Unlike personalities or behavioral patterns, physical

175. Id. at 57.
176. See Leland, STONE COLD CRAZY!, supra note 86.
179. See Flaherty, supra note 5, (describing The Rock's finishing move, the People's Elbow); see also Kaplan, supra note 129, at 3 (describing Steve Austin's popular finishing move, the "Stone Cold Stunner").
180. See Rosellini, supra note 174, at 52.
181. Cf. Niro, supra note 12, at 382 (arguing that visual comparisons are the easiest part of a copyright infringement case).
182. See, e.g., Titan Sports, Inc. v. TBS, 981 F. Supp. 65, 68 (D. Conn. 1997) (emphasizing the costumes, hair color, and style of the wrestling character Diesel).
characteristics can be compared. Differences are obvious. For human performance characters, however, a distinctive physical presence should not be enough. A performer’s natural looks do not amount to creative expression. A distinctive story of origin and behavioral pattern should also be required before a character can be granted copyright protection.

2. Story of Origin

Story of origin refers to all of the historical baggage attached to a fully delineated character. A successful character usually has a compelling story of origin. Historical origins are important because they act as a roadmap for the audience giving them clues to predict how the character will behave in the future. The fate of literary heroes is usually shaped by their parentage. Hamlet is doomed by his father’s history as well as his own. Part of what makes the “E.T.” character unique is that he comes from outer space. Similarly, the story of Superman’s birth shapes his actions on Earth. The vicious supernatural villain Freddie Krueger acts and looks the way he does because of his fatal encounter with a vigilante group.

Story of origin can also tie into more current issues. A character’s tasks and her capacity to meet those tasks can be fixed by where that character came from and who she associates with now. For example, professional wrestling characters are involved in alliances with other wrestlers to whom they pledge their support. A wrestler might be a hero or a villain depending on which power bloc he is associated with. The alliances are often forged out of some natural

184. See Rorty, supra note 164, at 303.
187. See HOWELL, supra note 43, at 112.
189. Cf. Rosellini, supra note 174, at 52 (discussing the “feuds, rivalries, grudges, and byzantine subplots” in the WWF’s program “Raw is War”).
affinity based on social status or place of birth. For example, the Mean Street Posse is a group of preppie wrestlers who supposedly grew up in wealthy suburban Connecticut.\footnote{190} By focusing on a character’s origins, the court gets a better sense of how that character will behave in the future. A character without real origins lacks the detail necessary to survive the delineation test.

3. Behavior

Behavior refers to the actions and reactions of the character that are not strictly physical. Part of predicting what a character will do is judging her emotional compass. A sufficiently delineated character could be arrogant, kind, ill-tempered, generous, evil, etc. If the trier of fact cannot gain some idea of the character’s behavior, then she has no basis for predicting its future actions and should conclude that it is insufficiently delineated. “The qualities of characters are the predictable and reliable manifestations of their dispositions; and it is by these dispositions that they are identified.”\footnote{191}

Some courts already look to see if a creator sufficiently delineates a character’s behavior. One court found that costumed characters from a children’s Saturday morning television show satisfied the delineation test because they had “developed personalities and particular ways of interacting with one another and their environment.”\footnote{192} Part of what makes Tarzan a copyrightable character is that “[h]e is athletic, innocent, youthful, gentle and strong.”\footnote{193} But the courts need to make behavior a part of the equation every time they assess the copyrightability of human performance characters. Wrestling’s real drama occurs not in the ring, but backstage and during interviews “in weekly installments of lust, greed and betrayal.”\footnote{194} The predictability analysis forces a court to determine if a character’s behavior has created enough of a predictable pattern for the character to emerge as a distinct figure worthy of protection. Characters are not transformed by the events in their lives. Instead, they react

\footnote{190. See Leland, supra note 173, at 52.}
\footnote{191. Rorty, supra note 164, at 304.}
\footnote{192. Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1169 (9th Cir. 1977).}
\footnote{194. Tom Maurstad, This is Art?, DALLAS MORNING NEWS, May 23, 1999, at 1C.}
to these events in a way that is in keeping with their character.\footnote{195} If a character does change, it should be because it is in that character's nature to do so under specific circumstances.\footnote{196}

C. Advantages of Using the Predictability Test

By requiring a court to find that a character's conduct will be predictable after an analysis of physicality, story of origin, and behavior, the proposed framework takes some of the uncertainty out of the delineation test. Instead of inventing its own reasons why a character might be sufficiently delineated, a court can justify its answer by looking to whether or not the character's behavior will be predictable, and whether the character is fully developed through physical props, actions, and a compelling story of origin.

The test also refocuses the court on the reason for insuring the copyrightability of character: the link between the character property right and the personhood of the artist or performer. Until a character becomes richly textured enough to become predictable, it is interchangeable with other characters. A completely unpredictable character is

\footnote{195} See Rorty, supra note 164, at 304.
\footnote{196} See id. The predictability test should not penalize characters for being complex. I have used examples from professional wrestling because the need for a new character copyright scheme is most apparent in the increasingly commercial world of human performance characters. But the test applies equally well to more traditional and highly complicated characters from literature. For example, while the characters from Shakespeare's tragedies change over the course of the play, Shakespeare did not describe fundamental shifts in personality. See Arthur Sewell, Character and Society in Shakespeare 66 (1951). Rather, these characters are predisposed to a certain ideological makeup and are pushed and pulled by external events. It is the combination of the internal and the external that leads to their downfall. See id. The physicality prong of the predictability test might favor more simplistic characters. But see Christopher Gillie, Character in English Literature 156 (1965) (explaining that every great novelist uses part of the work to describe or imply the physical properties of a character). The story of origin and behavioral prongs are just as applicable to complex characters, however. In fact, the more complex and detailed a character's story of origin, the more the audience can get an appreciation for that character and be able to predict its future acts. Cf. Marjorie Garber, Coming of Age in Shakespeare 30-51 (1997) (discussing separation and individuation from one's upbringing as a recurring theme in Shakespeare). The predictability test does not require that the trier of fact be able to foretell every action of a character. Instead, it asks whether the trier knows the character well enough to have an impression of how she would react to a new external stimulus.
fungible and, under Radin's scheme, does not warrant strong property protections. But when a character's audience knows that the character will respond to events in a certain way, then the character comes alive. It is at this point when it has been infused with enough personality from its creator that it becomes "personal property" worthy of protection. The predictability test looks at some of the same components necessary for a human being to be a person. Like a person, a fully delineated character is motivated by goals and desires that give its life meaning.

The test also has the advantage of pushing the courts away from what sometimes could be an overfixation on whether a character borrows from a stock figure or familiar archetype. Nichols suggests that copyright law should not protect old, archetypal characters. As mentioned above, a stock character is usually somewhat ill-defined, a quick sketch of a general type. In this sense, a court that compares a character to a stock figure is simply saying that the character was so thinly sketched that it is insufficiently delineated. There is nothing wrong with this sort of analysis.

But a stock figure is not necessarily always thinly sketched. And just because a character is not completely original when compared to the stock figure, this does not mean that the character should be excluded from copyright protection. Some would argue that all literary characters grow out of the stock figures of their particular genre. Although professional wrestling features some idiosyncratic personalities, most of the characters are built on familiar stereotypes. Wrestling employs familiar dramatic themes from history, religion, and folklore.

If the Ultimate Warrior represents a stock character, then Nichols suggests that he is not copyrightable. The act of taking a stock figure and placing her in a new medium,

197. See Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).
199. See Bidisha Banjeree, Raw is War!, J. Am. Contemp. Culture, Jan. 2000, at 18, 19 (“Cults of personality based around the perpetuation and glorification of stereotypes prevail [in professional wrestling]. Although some idiosyncratic persona... achieve popularity, as well as respect, more common are populist figures like Stone Cold Steve Austin, the beer-swilling, deer-killing avatar of tough working-class masculinity.”); Rosellini, supra note 174, at 52 (arguing that professional wrestling owes its success to its “ability to tap those troves of human archetypes”).
200. See Maurstad, supra note 194, at 1C.
however, can be original and transformative in itself. Use of familiar themes should not prevent human performance characters from receiving copyright protection. Artists cannot assert exclusionary control over themes from the public domain; as Locke argued, all persons have a right to use "The Earth . . . [and] all the Fruits it naturally produces." But the selection and combination of these themes into a unique, predictable character can, and should, be protected.

Finally, the three-factor predictability analysis would be easier for judges and jurors to apply than a rigid prescription against stock characters. Surely experts in the arts and literature are better equipped to determine which characters are following the path of tried and true literary tropes and which are breaking new ground. But, as Judge Hand argued in Nichols, a court should not be drawn into a battle of the experts on this subject. "The more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal," he explained. It appears that Hand was asking the trier of fact to rely on her innate sense of what is original and what is not. Hand himself relies on his own experience with "the low comedy Jew and Irishman." But relying on a person's innate sense of what is a stock character would invite different verdicts based on different levels of experience among judges and jurors. Instead, the trier of fact should look to whether the character's physicality, story of origin, and behavior are developed enough to make the character predictable.

V. CONCLUSION

The rights to human performance characters can be extremely valuable. The craze over professional wrestling shows just how important they can be. Yet the current law of copyright is very unsettled and vague, thus making it difficult to know when a character has been sufficiently developed so as to be copyrightable. Copyright law should protect characters. Intellectual property rights are justified because they personally affirm the rights of the creative artist in

201. See Rorty, supra note 164, at 305-06.
202. LOCKE, supra note 95, pt. II, § 26, at 304.
society, and human performance characters are closer to the person of the artist than any other type of intellectual property. Copyright protection is needed because trademark and the right of publicity are insufficient to fully safeguard these types of characters.

A clearer route for determining when a character has been sufficiently delineated to deserve protection focuses on whether that character's actions will be predictable in the future. When the trier of fact can predict how a character will respond to a new situation, the character is ripe for copyright protection. To determine this, the trier of fact should look at the character's physicality, its story line, and its physical and emotional behavior. Only when the trier can thoroughly describe the character according to each of these variables does the character become predictable enough to be sufficiently delineated for copyright protection. This new framework for character copyrightability gives needed substance to the ad hoc determinations of character development currently used by the courts. Moreover, it focuses on the personal characteristics that are important in a legal regime that is justified by awarding rights for the self-actualization of character creators. The framework also steers the courts away from per se rules against copyrightability when a character resembles a stock figure or familiar archetype. Judges will always have a difficult time pinning down the exact line between a protectable character and an unfinished idea. Still, artists and the public will benefit from copyright guidelines that not only make that line easier to see, but also move the law into closer alignment with the philosophical justifications for intellectual property.

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204. See Warner Bros., Inc. v. ABC, 720 F.2d 231, 240 (2d Cir. 1983) (stating that the "idea-expression distinction has proved especially elusive" for cases involving characters).