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HOW THE “SUMMER OF THE SPINOFF” CAME TO BE: THE BRANDING OF CHARACTERS IN AMERICAN MASS MEDIA

*Benjamin A. Goldberger**

I. INTRODUCTION

“If in past summers Hollywood seemed to surrender its creative soul to the making of sequels, prequels, spinoffs, remakes and franchise films based on comic books, television series or video games, take a deep breath and prepare for the summer of 2002.”¹ With these words, the *New York Times*’ Rick Lyman dubbed this past summer “the summer of the spinoff.”² Although it is most apparent in the movie theater, mass media art of all types in the United States is becoming increasingly derivative.³ Our movies were once television shows, our television shows were once video games, our video games were once books, and our books were once movies. As various media feed on and cross-pollinate each other, the conventional distinctions among art forms are blurred. Thus, “in many cases . . . it may be more helpful to think of cross-media marketing of a *fiction*, rather

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1. Rick Lyman, *Summer of the Spinoff*, N.Y. TIMES, Apr. 17, 2002, at E1.

2. *Id.*

3. Of the top ten grossing movies of all time, as of September 22, 2002, four are based on novels (*Jurassic Park*, *Forrest Gump*, *Harry Potter and the Sorcerer’s Stone*, *The Lord of the Rings: The Fellowship of the Ring*), one is a prequel (*Star Wars Episode I: The Phantom Menace*), one is based on a comic book character (*Spiderman*) and the other four are original works (*Titanic*, *Star Wars*, *E.T.*, *The Lion King*). See *All-Time Domestic Blockbusters*, Box Office Guru, at <http://www.boxofficeguru.com/blockbusters.htm> (last updated Nov. 10, 2002). There is some question as to exactly how original *The Lion King* is. See *infra* note 170. Looking solely at films released in 2001, the top ten grossing films consist of three sequels (*Rush Hour 2*, *The Mummy Returns*, *Jurassic Park III*), two remakes (*Ocean’s Eleven*, *Planet of the Apes*), three adaptations of books (*Harry Potter and the Sorcerer’s Stone*, *The Lord of the Rings: The Fellowship of the Ring*, *Shrek*) and only two original works (*Monsters, Inc.*, *Pearl Harbor*). See *Top 50 Highest Grossing Releases of 2001*, Box Office Guru, at <http://www.boxofficeguru.com/top50gross01.htm> (last updated May 29, 2002).

than of the adaptation of a novel into film.”⁴

The breaking down of barriers between media has both positive and negative effects on art. On one hand, when a video game designer incorporates techniques from movies, she may very well make a more entertaining game. On the other hand, if a movie studio decides to forego a new, unproven idea for a formulaic sequel with a more certain return on investment, the best movies may never be made. Convergence of art encourages artists to break through some types of barriers while encouraging entertainment companies to construct new barriers of an entirely different kind.

The modern entertainment conglomerate is a business—and it acts like one. This means reusing proven commodities whenever possible in order to ensure the largest profits. It also means foregoing the riskier projects that could truly advance a particular field of art.

This Article examines this trend through the prism of the character. Characters are central to the most common types of recycling and reuse in the entertainment business.⁵ Although other aspects of a work can be reused to create new works, it is the character that is most portable and most profitable. Characters such as James Bond, Hercule Poirot, and even Bart Simpson transcend any one work in which they appear. The thing that makes them so valuable is that they can appear over and over again in a variety of media. With these brand name characters, the ability to use them in derivative works is even more valuable than the right to sell any one particular work.⁶

This Article begins in Part II by inquiring into what defines a character and how characters interact with the other elements that make up an artistic work. Part III examines and defines the different ways that an entertainment company can maximize the value of its characters. Part IV applies these methods to different media and considers the various economic opportunities different media offer for exploitation of characters. Part V contemplates different ways in which characters can lose their value. Part VI discusses the various legal tools available to prevent these losses and allow a company to capture its characters' value. Part VII considers the law's impact on creativity in the entertainment business and asks whether varying the amount of legal protection afforded to characters could lead to better quality art.

Legal academics and courts have long wrestled with the question of

4. John Izod, *Words Selling Pictures*, in *CINEMA AND FICTION* 95, 102–03 (John Orr & Colin Nicholson eds., 1992).

5. See *infra* Part III.

6. See Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 432 (1986).

how much protection to afford fictional characters.⁷ The answer involves a delicate balancing act between providing sufficient incentives to create by rewarding authors for original work while not unduly hampering the efforts of those who build on the work of their predecessors. After considering the available legal tools and the incentives of the marketplace, this Article concludes that intellectual property law is not an appropriate lever with which to shift the creative focus of entertainment companies. Consumers' demand for more of their favorite characters, coupled with the other market forces that determine which projects a company will choose to invest in and promote, are too strong to significantly alter through changes in the laws protecting characters.

II. WHAT IS A CHARACTER?

Before one can intelligently discuss legal protection for characters, one must be able to distinguish characters from the works in which they appear. The concept represented by the word "character" is notoriously difficult to define and distinguish from other aspects of a work.⁸ Simple definitions such as "personality as represented or realized in fiction or drama"⁹ or "[i]maginary people created by the writer"¹⁰ are of little value, as they point us to equally vague concepts of personality and personhood. Only by comparing and contrasting character to the other elements of a work of fiction can a true understanding of its metes and bounds be reached.

A. Literary Theory

Literary theorists identify several elements which together comprise a work of literature. They include character, plot, setting, point of view, theme, style, mood, and tone.¹¹ In order to investigate what constitutes

7. One of the earliest treatments of the subject was published in 1954. See Note, *The Protection Afforded Literary and Cartoon Characters Through Trademark, Unfair Competition, and Copyright*, 68 HARV. L. REV. 349 (1954).

8. See ANDREW HORTON, WRITING THE CHARACTER-CENTERED SCREENPLAY 25 (1994) ("For we all feel we KNOW what character is until we try to explain it."); Celia Brayfield, *Choosing a Central Character*, Purefiction.com, at <http://www.purefiction.com/pages/writing/black/celia1.htm> (last visited Dec. 22, 2001) ("It is difficult to define any character when you begin thinking of a book, because character and plot are indivisible.").

9. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 376 (1996).

10. Jennifer Jordan-Henley, *The Elements of Literature*, at <http://www.rsc.c.c.tn.us/owl/writingcenter/OWL/ElementsLit.html> (last modified Nov. 1999).

11. See, e.g., Josephine F. Ablamsky, *Emphasis on Elements of Fiction for Better Reading Comprehension*, at <http://www.yale.edu/ynhti/curriculum/units/1983/3/83.03.07.x.html> (last visited Feb. 22, 2003) (identifying plot, setting, characters, mood, tone, point of view, and theme);

characters as such, this Article first examines the other elements of a fictional work.

Contemporary literary theory draws a distinction between the plot of a novel and the story.¹² The story is “the sequence of imagined events” that the reader reconstructs from the narrative.¹³ The plot is the rendering of those events selected by the author. Thus, plot is story combined with the author’s perspective on the relationship between the various events.¹⁴

Setting is the time and place in which the story takes place.¹⁵ It is more than just a date and time, latitude and longitude. It can include “geography, architecture, era, season or culture” and the writer can use it to “provide backgrounds for the action, act as an antagonist, create atmospheres or moods, reveal character(s), [and] reinforce themes.”¹⁶

Point of view refers both to the way the plot, characters, and setting are considered, and to the identity of the person considering them.¹⁷ This person, the narrator, is often distinct from the story, in that he exists outside of the story and tells it from a third-person perspective. In other works, the narrator is—or perhaps more properly *was*—a character in the story as well as the person relating the story.¹⁸ This situation can lead to confusion between point of view as a literary element, i.e., the point of view of the narrator, and the narrator’s presentation of events as he perceived them at the time he witnessed them as a character. Even when the narrator is not a character, confusion can result from the narrator’s focus on one character or a small group of characters.¹⁹ Focusing on a subset of characters or

D.K. Peterson, *Literature Resources: Literary Elements*, Literature Resources syllaweb, at <http://www.english.wayne.edu/~peterson/Fiction/elements.html> (last modified Nov. 1, 1999) (identifying character, plot, point of view, setting, style/tone, theme, and symbolism); Marilyn H. Stauffer, *Outline on Literary Elements*, at <http://www.cas.usf.edu/lis/lis6585/class/litelem.html> (last modified Mar. 4, 1999) (identifying character, plot, setting, style, point of view, and tone); Bill Stifler, *Elements of Fiction*, at <http://www.cdc.net/~stifler/en111/elements.html> (last visited Jan. 24, 2003) (identifying plot, character, setting, point of view, and literary conventions, a term comprising style, tone, and theme).

12. See CHRIS BALDICK, *THE CONCISE OXFORD DICTIONARY OF LITERARY TERMS* 170 (1990); James Phelan, *Plot*, in 2 *ENCYCLOPEDIA OF THE NOVEL* 1008, 1008 (Paul Schellinger ed., 1998).

13. BALDICK, *supra* note 12, at 211; see also Phelan, *supra* note 12, at 1008.

14. *But cf.* Phelan, *supra* note 12, at 1009–10 (discussing some recent proposals for a conception of plot beyond “story-plus-X”).

15. See Peterson, *supra* note 11.

16. *Id.* (bullet points replaced with commas).

17. See Seymour Chatman, *Point of View*, in 2 *ENCYCLOPEDIA OF THE NOVEL* 1011, 1011 (Paul Schellinger ed., 1998).

18. *Id.* at 1012 (“Some narrators, speaking ‘now’ in discourse-time, were characters ‘back then’ in story-time.”).

19. See Peterson, *supra* note 11.

filtering the story through particular characters' perceptions can have as much of an impact on the reader as the choice of the narrator and his point of view. Nevertheless, the distinction between a narrator's point of view and filtration through a character's perspective is important because it "help[s] [one] remember that the narrator does not inhabit the world of the story but rather the world of the discourse."²⁰

Style is a broad term that refers to "any specific way of using language, which is characteristic of an author, school, period, or genre."²¹ One can examine different aspects of style, including "the writer's diction (choice of words), syntax (grammar or sentence structure), and [use of] figurative language."²² Style is the interface between the author and the reader, for it is only through the author's use of language that the reader experiences literature.²³

Theme is "the meaning, the significance of the fiction."²⁴ It is rarely directly expressed by the author; rather, "[t]he theme has to be abstracted by the reader from the fusion of plot, setting, characters and tone."²⁵ Indeed, some would say that the author has no more authority to declare the theme of a work than any reader does.²⁶ Thus, the theme is as much the message received by the reader as it is the message sent by the author.

Mood and tone are closely related, very vague terms used in literary criticism to refer to the "atmosphere" of the work or the author's attitude toward his audience or subject matter.²⁷

Thus, although character is separate from these other elements, it is also in many ways inextricably linked to each of them.²⁸ Characters are capable of action only as part of a plot in a setting, as related by a narrator

20. Chatman, *supra* note 17, at 1013.

21. BALDICK, *supra* note 12, at 214.

22. See Peterson, *supra* note 11.

23. *Id.*

24. Ablamsky, *supra* note 11; accord WILFRED L. GUERIN ET AL., A HANDBOOK OF CRITICAL APPROACHES TO LITERATURE 14 (3d ed. 1992) ("The often rich and varied underlying idea of the action is the theme.").

25. Ablamsky, *supra* note 11.

26. See Peterson, *supra* note 11 ("The author's claim is not definitive and neither is the reader's: there may be many potential themes in a work.").

27. See BALDICK, *supra* note 12, at 225–26 (defining tone as "a very vague critical term usually designating the mood or atmosphere of a work, although in some more restricted uses it refers to the author's attitude to the reader . . . or to the subject-matter."); Peterson, *supra* note 11 ("Tone can be defined as the value that style or gesture gives to words. Most often, a story's tone conveys the writer's or the character's attitude toward something.").

28. See Uri Margolin, *Character*, in 1 ENCYCLOPEDIA OF THE NOVEL 197, 199 (Paul Schellinger ed., 1998) ("Individuals in story worlds do not exist in isolation. They are intimately connected with and in part also defined and determined by their relations to other aspects of narrative—primarily action, theme, and the structure of narrative transmission.").

with a particular point of view.²⁹ The reader comes to experience these literary elements only through the author's style, mood and tone.³⁰

Characters—whether they be individuals or groups,³¹ people, humanoids, animals, or objects³²—are, in one sense, only that which the author has presented to the reader. An author's presentation of characters, often called characterization, can be one of two types: direct and indirect.³³

Direct characterization usually consists of the narrator telling the reader about the characters. In addition, direct characterization can also involve other external details, such as names or other overt commentary. Other methods of direct characterization include having the narrator or author passing direct judgment on or even analyzing a character, or having other characters in the story give the reader information about the one being characterized.

Indirect characterization involves the author letting the character reveal himself by what he says, does, or thinks within the story.³⁴

Margolin identifies three types of information sources an author can

29. *See id.*

30. *See id.* at 200 (“Fictional individuals are created and sustained exclusively by verbal means. All the information about them is contained, explicitly or implicitly, in the text that evokes them.”).

31. A character need not be a particular entity; it can also be a collective entity. For example, the Klingons of the various incarnations of *Star Trek*, the X-Men of the comic book series, television series, and feature films, and the Ring Wraiths of J.R.R. Tolkien's *Lord of the Rings* series are each distinctive groups that play important, often central roles. The groups may be composed of nameless, indistinguishable members or the groups' members may themselves be individual characters with their own names and other distinguishing features. The key point is that the groups themselves have distinct characteristics that make them unique artistic creations. *Id.* at 197.

32. Characters need not be human, as a quick perusal of most any science fiction work will demonstrate. However, they need not be humanoid either. Characters can also be animals, whether they are capable of human speech, like television's Mister Ed (*Mister Ed* (CBS television broadcast, 1961)) and Salem Saberhagen (*Sabrina, the Teenage Witch* (ABC television broadcast, 1996)), or not, like Lassie (multiple novels, short stories, radio broadcasts, television shows, and movies). Indeed, characters need not even be alive. So long as an entity in a fictional work “possess[es] one or more physical, interactional (behavioral, social), locutionary, or—especially—psychological (mental) properties or features” it qualifies, at least in a limited sense, as a character. *Id.* at 198. For example, Betty, the talking tattoo voiced by Jodie Foster in *The X-Files: Never Again* (FOX television broadcast, Feb. 2, 1997) and the One Ring in J.R.R. Tolkien's *The Lord of the Rings*, which “wants to be found,” are characters as much as the people with whom they interact.

33. *See* Ablamsky, *supra* note 11; Peterson, *supra* note 11.

34. Peterson, *supra* note 11; *accord* Margolin, *supra* note 28, at 200 (noting that when information about a character is provided by other characters or the character in question it “may be unreliable owing to ignorance, misconception, or deliberate deception”).

use for indirect characterization:

1. The character's physical, verbal, and mental actions and interactions—their substance, manner, and relation to the context in which they occur

2. Features of the character's physique and of his environment—appearance, gestures, manners, natural setting, and man-made milieu (the literary convention here is that proximity or contiguity implies similarity or parallelism between external and internal features, that the physical can act as a signifier whose signifieds are the invisible, internal mental features)

3. Formal textual patterns—the character's name, groupings of characters and the analogies and parallels engendered by them, parallel and embedded stories, repetition and gradation, and the use of epithets, formulas and schemas familiar from earlier works (intertextuality)³⁵

Each of these three sources of information about characters is closely tied to another literary element.³⁶ The first, actions and interactions, is subsumed in large part by plot. In this respect, characters are nothing more than the sum total of their actions.³⁷ The second, physique and environment, is related in part to setting.³⁸ The third, formal textual patterns, is linked to style, but also includes background knowledge that readers may have gained from earlier works.³⁹

Analysis of the level and variety of detail with which an author presents a character to the reader provides a useful method for classifying characters. The more details about a character that the author provides, the “rounder” the character is.⁴⁰ If an author provides very few details about a

35. Margolin, *supra* note 28, at 200; *see also* Peterson, *supra* note 11 (“[Indirect characterization] often involves the use of external details, such as dress, mannerisms, movements, speech and speech patterns, appearances, and so forth.”).

36. *See* Kurtz, *supra* note 6, at 431.

37. *Id.* (“It also is difficult to extricate a character cleanly from a plot which contains elements of its life history, and from the people, events and surroundings that have formed it. ‘[A] novel is a living thing, all one and continuous, like any other organism. . . . What is character but the determination of incident? What is incident but the illustration of character.’”) (quoting Henry James, *The Art of Fiction*, in *THE ART OF FICTION AND OTHER ESSAYS* 13 (1948)) (ellipses and brackets in original); *cf.* Jean-Paul Sartre, *Existentialism*, in *EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE* 280, 358 (Walter Kaufmann ed., New American 1975) (1965) (“Man is nothing else but what he purposes, he exists only in so far as he realizes himself, he is therefore nothing else but the sum of his actions, nothing else but what his life is.”).

38. *See* Kurtz, *supra* note 6, at 431.

39. *See id.*

40. Margolin, *supra* note 28, at 198.

character, then the character is termed flat.⁴¹ An author need not even provide a name for a flat character, instead limiting characterization to a brief physical description.⁴²

In addition to classification based on how a character is presented, one can classify characters “according to their relation to abstraction or general classes, yielding a scale of personification, type, and individual.”⁴³ This level-of-abstraction/specificity scale is logically independent from the level-of-detail scale, although there is often a strong negative correlation between abstraction and detail.⁴⁴

At one end of the abstraction scale are **personifications**: characters who embody “a conceptual entity, such as an idea, a faculty of mind, a vice or a virtue.”⁴⁵ These characters have but one dimension and all of their actions embody the concept the character represents. In the middle of the scale are **types**.⁴⁶ A type, sometimes called a stock character, is a character based on a stereotype such as a ruthless capitalist, femme fatale, or mad scientist.⁴⁷ Some types of characters have appeared so frequently or prominently in so many different works that psychologists and literary critics have suggested that these so-called archetypes “embod[y] some essential element of ‘universal’ human experience.”⁴⁸ At the end of the scale, opposite from personifications are **individual** characters.⁴⁹ These characters are divorced from abstraction to the point that they are unique

41. *Id.* (Some critics use the terms schematic and full instead of flat and round, respectively.).

42. *See id.* at 198–200.

43. *Id.* at 198.

44. *See id.* (“A recurrent type such as the struggling artist may be rich and nuanced in terms of number of features, while a striking, unique individual may be constructed by means of a few unusual or extreme features.”).

45. *Id.* For example, Gay describes the character of Robert the Bruce’s father in *Braveheart* (20th Century Fox/Paramount Pictures 1995) as follows: “Robert’s father is a man withering away. He is ugly, weak and cowardly. He is evil personified. He is death.” John Gay, *Why the Main Character of Braveheart Is Not William Wallace*, Leaderue.com, at <http://www.leaderu.com/humanities/braveheart.html> (last visited Nov. 12, 2002).

46. *See* Margolin, *supra* note 28, at 198.

47. *Id.* (“A ‘type’ is a character that instantiates a limited, fixed set of properties, a cliché or stereotype predefined in the cultural ‘encyclopedia,’ one supposed to have some general human validity and often associated with a social class, age, role, or nationality.”).

48. BALDICK, *supra* note 12, at 16. Interestingly, many archetypes were, once upon a time, original, highly defined characters in their own right. *See* Margolin, *supra* note 28, at 198 (“[W]hat begins as a unique, individual literary creation may over time become generalized into a recurrent literary type or even a cultural model (Don Quixote, Don Juan).”). For examples of archetypes that figure prominently into American myths, see Linda Seger, *Creating the Myth, in SIGNS OF LIFE IN THE USA 250, 256–57* (Sonia Maasik & Jack Solomon eds., 2000).

49. *See* Margolin, *supra* note 28, at 198.

creations.⁵⁰ Some individual characters change as time passes in their story; they are called dynamic. Those characters which remain essentially the same are called static.⁵¹

A final way to classify characters is their relationship, if any, to actual people. Characters can be based on actual people in three ways.⁵² First, an author can name a character after an actual person.⁵³ Second, an author can model a fictional character after a person with whom she interacts or observes in real life.⁵⁴ Finally, an author may write a historical novel in which historical figures are the characters.⁵⁵ Authors who derive their characters from modeling others or using their names are not limited to actual people; they can use other fictional characters as well. As with real people, the degree to which one character is modeled after another ranges from explicit copying to derivation from a particular "type" character to inspiration gleaned from a variety of characters.⁵⁶

50. *See id.*

51. *Id.*

52. *See id.*

53. *See, e.g.,* STEVEN JAY RUBIN, *THE JAMES BOND FILMS 1* (1983) (telling the story of how Ian Fleming named his British secret service agent after an ornithologist named James Bond, author of *Birds of the West Indies*, a book Fleming kept on his coffee table); *Mario: The Unauthorized Biography*, CNET Networks, at <http://www.videogames.com/features/universal/mario/3.html> (last visited Nov. 12, 2002) (describing how Mario, Nintendo's flagship character, became known as "Mario" rather than "Jumpman" because he looked like a real-life Mario, Nintendo of America's landlord).

54. *See* BEN BRADY & LANCE LEE, *THE UNDERSTRUCTURE OF WRITING FOR FILM & TELEVISION* 67-68 (1988). These real people can range from the unknown to the famous. *Compare* Jae-Ha Kim, *The Real Kramer: Comic Gets Celeb Status Without Work*, CHI. SUN-TIMES, May 12, 1998, at 27 (describing how *Seinfeld* character Cosmo Kramer was based on the real-life next door neighbor of producer Larry David) *with* ROY KINNARD, *THE COMICS COME ALIVE: A GUIDE TO COMIC-STRIP CHARACTERS IN LIVE-ACTION PRODUCTIONS* 21 (1991) (noting that in creating the character Vicki Vale, Batman creator Bill Kane was "inspired by the young Marilyn Monroe, whom he met in Hollywood").

55. *See* Margolin, *supra* note 28, at 198 ("But, the historical originals are inevitably fictionalized because they coexist and interact with purely fictional individuals, because unconditional claims are made about their mental life, and because some of their historically documented properties are changed, sometimes radically to fit artistic needs.").

56. *Compare* *Detective Comics, Inc. v. Bruns Publ'ns, Inc.*, 111 F.2d 432, 432 (D.C. Cir. 1940) (affirming finding that *Wonderman* comics infringed the copyright of *Superman* comics because of glaring similarities) *with* KINNARD, *supra* note 54, at xi (1991) (stating that all of the "[m]yriad superhero characters . . . [who] flourished in the '30s and '40s" were "derivatives of Superman and Batman in one way or another") *and* Robbie Robertson, *The Narrative Sources of Ridley Scott's Alien*, in *CINEMA AND FICTION* 171, 175-76 (John Orr & Colin Nicholson eds., 1992) (discussing inspirations for the monster in *Alien* (20th Century Fox 1979)).

B. Characters in Visual Media

Although any work of fiction has the literary elements discussed in Part II.A, there are some fundamental differences between the presentation of a character in a visual medium and presentation in a print medium.⁵⁷ When characters are presented in a visual medium such as television or theater, a writer must share control over her characters with the director and actor.⁵⁸ Although characters in visual media have their roots in the written word in the form of a play or screenplay, they are not fully realized without the contribution of the actor, as influenced by the director. Indeed, a well-known actor for whom audiences have certain expectations may overshadow any characterization that the writer and director provide.⁵⁹ This is more likely to occur in the medium of film than it is in theater.⁶⁰

Many academics who study cinema have a director-centric view of authorship.⁶¹ Known as auteur theory, this theory views the director, rather than the writer of the screenplay, as the “author.”⁶² In the world of television, cinematic auteur theory has been adapted so that the producer of the series is viewed as the primary author.⁶³ Auteur theory has come under increasing criticism as those who study visual media have begun to recognize the collaborative nature of film and the unique contributions of

57. See GEORGE BLUESTONE, *NOVELS INTO FILM* 34–35 (1957).

58. This loss of control results not only from the nature of the medium, but also from the economic realities underlying the business of selling tickets as opposed to selling copies of a book. See *id.* (“Where a novel can sell 20,000 volumes and make a substantial profit, the film must reach millions. This explains, perhaps, why writers accustomed to working in isolation are continually unnerved by the co-operative demands of film production.”).

59. Cf. DAVID HOWARD & EDWARD MABLEY, *THE TOOLS OF SCREENWRITING: A WRITER’S GUIDE TO THE CRAFT AND ELEMENTS OF A SCREENPLAY* 13 (1993) (“Some films have a clear-cut stamp of personality; often this is contributed by the director, but sometimes by the writer, by the cinematographer, or, more often than a lot of auteur theorists care to admit, by the star whose brand is all over the film, no matter who wrote or directed.”). By the time Sylvester Stallone played Kit Latura in the action film *Daylight* (Universal Pictures 1996) he had already appeared in three Rambo films and numerous other action films such as *Cobra* (Warner Bros. 1986), *Cliffhanger* (Carolco Pictures 1993) and *Demolition Man* (Warner Bros. 1993). Audiences knew exactly what to expect from Kit Latura as soon as they knew Stallone was playing him.

60. See Leo Brady, *Acting: Stage vs. Screen*, in *FILM THEORY AND CRITICISM: INTRODUCTORY READINGS* 387, 392–93 (Gerald Mast et al. eds., 4th ed. 1992), reprinted from LEO BRAUDY, *THE WORLD IN A FRAME* (1976).

61. See F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 *UCLA L. REV.* 225, 311–13 (2001).

62. *Id.*

63. See JOSTEIN GRIPSRUD, *THE DYNASTY YEARS: HOLLYWOOD TELEVISION AND CRITICAL MEDIA STUDIES* 28–29 (1995) (“The directors (and writers) may change, while the series—and its producer(s)—remain.”).

professionals other than the director to the final product.⁶⁴

The entire team of filmmakers is the *auteur*—the writer and director, but also the producer, the cinematographer, the production designer, and the actors. The director is obviously an important player on the team, but without a script, without actors, without camera, sound, sets, costumes—the whole production—the director is helpless.

In other words, the question of authorship becomes a moot point. The interdependencies of the family of filmmakers who produce, shoot, and edit a film are much too strong for any one contributor to be the sole author of the work.⁶⁵

One reason that the other professionals are so important to characterization in visual media is that the writer of a play or movie, more than the author of a novel, must rely more on indirect characterization.⁶⁶ Compare, for example, the description of the following character in a draft of the screenplay to the presentation of the character on screen:

EXT. SOFTBALL FIELD - DAY

THE RIGHT MAN FOR THE JOB

His name is LIEUTENANT JUNIOR GRADE DANIEL ALLISTAIR KAFFEE, and it's almost impossible not to like him. At the moment he's hitting fungoes to about a dozen LAWYERS who are spread out on the softball field on a corner of the base. The '27 Yankees they're not, but they could probably hold their own against a group

64. HOWARD & MABLEY, *supra* note 59, at 12–13.

65. *Id.* at 13; accord STEVEN POOLE, TRIGGER HAPPY: THE INNER LIFE OF VIDEOGAMES 86–87 (2000) (“Just as a film is a collaborative effort between many different specialists—director, cinematographer, actors, composer, set designer, costumier, dolly grip, best boy and so forth—so videogame ‘studios’ today employ concept designers, animators, 3D artists, tool developers, programmers, composers, writers, character designers and a host of other experts in relatively hermetic fields.”); see also Dougherty, *supra* note 61, at 312 (“Auteurism as an approach to film criticism may have been superseded by other critical approaches, but today studio production executives focus more on business matters and the director’s importance has correspondingly increased.”).

66. See BEN BRADY, PRINCIPLES OF ADAPTATION FOR FILM AND TELEVISION 36 (1994) (“The screenwriter cannot impart a character’s values in words as a novelist does. The values must make themselves felt through surface characteristics of behavior, conduct, and communication that in directly express or imply a condition that others can accept.”).

of, say, Airforce dentists.

KAFFEE's in his late 20's, 15 months out of Harvard Law School, and a brilliant legal mind waiting for a courageous spirit to drive it. He is, at this point in his life, passionate about nothing . . . except maybe softball.⁶⁷

In the screenplay, the writer, Sorkin, uses direct characterization to communicate some basic information about the character. In the movie, however, it is Tom Cruise as directed by Rob Reiner who must convey Kaffee's charisma and [initial] lack of passion.⁶⁸ Indeed, major stars are often able to shape the development of their characters by contributing to the creative process, particularly in a medium like television where characters are more likely to change over time.⁶⁹ Although it is possible to occasionally incorporate direct characterization on the screen through the use of voiceover⁷⁰ or an on-screen narrator, a director cannot use narration with nearly the same frequency or depth that an author can. Indeed, audiences and critics are both likely to object to overuse of narration in films or television shows as not in keeping with the nature and purpose of the medium.⁷¹

In addition to the limiting use of direct characterization, the absence of a narrator in visual media limits the artist's choice among points of view.⁷² In comparing the novel *The Great Gatsby* to the 1974 film version

67. AARON SORKIN, *A FEW GOOD MEN* 6 (draft screenplay), available at <http://www.scriptdude.com/frames/moviescripts/fewgoodmen.pdf> (last visited Jan. 20, 2002).

68. See *A FEW GOOD MEN* (Columbia Pictures 1992).

69. See GRIPSRUD, *supra* note 63, at 49.

70. Voiceover is narration heard by the audience while the speaker is not shown on screen. See *SLANGUAGE DICTIONARY*, Variety.com, at http://www.variety.com/index.asp?layout=slanguage_result&slang=voiceover&page=slanguage&display=voiceover&starting=1 (last visited Feb. 22, 2003).

71. See JOHN C. TIBBETTS & JAMES M. WELSH, *NOVELS INTO FILM: THE ENCYCLOPEDIA OF MOVIES ADAPTED FROM BOOKS* xvi-xvii (1998) (stating that “[f]ilm theorists who prefer images to words have been skeptical of voice-over narration as a device that is ‘literary’ rather than cinematic” and citing sources); Seymour Chatman, *What Novels Can Do That Films Can't (And Vice Versa)*, in *FILM THEORY AND CRITICISM: INTRODUCTORY READINGS* 403, 408 (Gerald Mast et al. eds., 4th ed. 1992), reprinted from Seymour Chatman, *What Novels Can Do That Films Can't (And Vice Versa)*, 8 *CRITICAL INQUIRY* (1980) (“Filmmakers and critics traditionally show disdain for verbal commentary because it explicates what, they feel, should be implicated visually.”).

72. See generally *supra* text accompanying notes 17-20 (Narration can offer a third person point of view, which helps to develop the story more easily.).

starring Robert Redford,⁷³ Tibbets and Welsh contend that the movie “cannot begin to approximate that narrative approach, let alone capture its nuances, when it turns into an objective visual narrative. The novelistic narrator mediates the meaning of the novel for the reader, and that continuing mediation cannot be captured by the film’s minimal voice-over narration in Nick Carroway’s voice.”⁷⁴ In other words, “the camera is always the narrator,” no matter how much voiceover a director uses.⁷⁵

Style has a fundamentally-new meaning when applied to a visual medium as opposed to a book.⁷⁶ Many stylistic elements of language that the author uses to express characters in a book simply have no counterpart in film.⁷⁷ Instead, they are replaced by aspects of cinematic style that have no counterpart on the printed page. Using techniques such as close-ups, wide-angle shots, freeze frame, and varying sharpness of focus, the director, cinematographer, and editor of a film are able to contribute their own personal styles to the final product.⁷⁸ Visual media such as films, television shows and video games are also able to make use of music to set mood, either with scores and songs composed specially for the project or through the use of popular music.⁷⁹

73. THE GREAT GATSBY (Paramount Pictures 1974). Other versions of the film were released for the theater in 1926 and 1949, and for television in 2001.

74. TIBBETS & WELSH, *supra* note 71, at xvii.

75. BLUESTONE, *supra* note 57, at 49–50 (“Even when the narrator appears in the film, the basic orientation does not change.”). *But see* JAMES GRIFFITH, ADAPTATIONS AS IMITATIONS 46–53 (1997) (criticizing Bluestone and others for too readily equating camera and point of view). Griffith’s arguments are unpersuasive to this author, however, as he equivocates point of view itself with filtering point of view through particular characters. *See supra* text accompanying note 20.

76. *See generally supra* text accompanying notes 57–60.

77. *See* GRIFFITH, *supra* note 75, at 43 (“Critics may still raise the issue of linguistic qualities that would be impractical to read into the soundtrack of a film. What about metaphors, image motifs, assonance, alliteration, cadence, and tone?”).

78. *See generally* JAMES MONACO, HOW TO READ A FILM 72 (1981) (“Recording technology now offers us the opportunity of capturing a representation of sounds, images, and events and transmitting them directly to the observer without the necessary interposition of the artist’s personality and talents.”).

79. Books cannot play music, and an author has no way to convey an original score or song to her reader. At best, she can cause a reader who has heard a particular song in the past to remember it and “hear” it mentally through textual triggers. *Compare* STEPHEN KING, THE STAND (Signet Paperback ed. 1980) (1978) (including lyrics from Blue Öyster Cult, (*Don’t Fear*) *The Reaper*, on AGENTS OF FORTUNE (Sony/Legacy 1976)) with *The Stand* (ABC television broadcast, 1994) (miniseries adaptation of the novel including (*Don’t Fear*) *The Reaper* on its soundtrack).

C. Transformation and Continuity of Characters as Media Change

The fundamental differences among various entertainment media are most noticeable when a character or an entire work is adapted from one medium to another.⁸⁰ As the discussion in Part II.B indicates, it may be impossible to adapt a character from page to screen with complete accuracy.⁸¹ The very concept of accuracy is somewhat slippery here, though, as each reader of a novel visualizes characters differently and each viewer of a film draws different conclusions about the inner thoughts of the characters on screen. Novels and films each rely on their audiences to use their imagination to provide a different subset of details about characters, as novels cannot show and films cannot tell. Thus, there will always be changes as characters and other elements of fictional narratives move from book to film or vice versa.⁸²

Even a change from one visual medium to another, such as from theater to television to film, necessitates alterations in characterization. Although the differences among visual media are less obvious and harder to define than the difference between literary works and visual works, most critics agree that there are important differences.⁸³

There is little agreement, however, as to exactly what those differences are as between theater and film.⁸⁴ One important idea that is widely

80. See generally MONACO, *supra* note 78, at 429 (explaining that different mediums focus on and develop different themes and presentations).

81. See BLUESTONE, *supra* note 57, at 23–24 (“Protesting De Mille’s butchering of *Four Frightened People* by E. Arnot Robinson, [Michael] Orme reflects, ‘you cannot transpose any one character from page to screen and hope to present him entirely as the novelist created him or as the novelist’s public knew him. . . . who can really recall having seen a screen performance which really and truly portrayed his favourite [sic] character as he knew it?’”) (ellipses in original) (quoting Michael Orme, *The Bookshelf and the Screen*, ILLUSTRATED LONDON NEWS, Mar. 10, 1934, at 368); *supra* notes 57–60 and accompanying text.

82. See BLUESTONE, *supra* note 57, at 63–64 (“At this [farthest] remove, what is peculiarly filmic and what is peculiarly novelistic cannot be converted without destroying an integral part of each.”).

83. See HOWARD & MABLEY, *supra* note 59, at 6 (“The problem of describing the ways in which film and theater diverge is a lot like trying to define the difference between a dog and a cat; both are mammals that walk on all fours, have tails, fur, ears that stick up, and snouts. Yet even the quickest glance can determine the difference between them.”); Susan Sontag, *Theater and Film*, in STYLES OF RADICAL WILL 99, 99 (1969) (“Does there exist an unbridgeable gap, even opposition, between [theater and film]. . . . Virtually all opinion holds that there is.”).

84. See Sontag, *supra* note 83, at 106 (noting the conflict between Allardyce Nicoll, who maintains that theater demands type characters while cinema is better adapted for individualized characters, and Erwin Panofsky, who argues for the opposite position). Compare HOWARD & MABLEY, *supra* note 59, at 7 (theorizing that film lacks the intimacy of theater) with André Bazin, *Theatre and Cinema*, in FILM THEORY AND CRITICISM: INTRODUCTORY READINGS 375, 377–79 (Gerald Mast et al. eds., 4th ed. 1992), reprinted from ANDRÉ BAZIN, WHAT IS CINEMA?

accepted is that the theater is spatially limited by the stage, whereas film can take its cameras anywhere.⁸⁵ Another is that theater, because it is performed over and over again, is never the same twice, while film is a finished product.⁸⁶ However, critical theory regarding differences in characterization between the two media is at best muddled.⁸⁷ Leo Braudy presents what is in this author's view the most compelling distinction:

We know much better what our attitude should be toward characters in fiction and drama. Unlike those forms, films emphasize acting and character, often at the expense of forms and language. Films add what is impossible in the group situation of the stage or the omniscient world of the novel: a sense of the mystery inside character, the strange core of connection with the face and body the audience comes to know so well, the sense of an individuality that can never be totally expressed in words or action. The stage cannot have this effect because the audience is constantly aware of the actor's impersonation. Character in film generally is more like character as we perceive it everyday than it is in any other representational art.⁸⁸

Although the differences between films and comic books or video games have not received as much critical attention as the differences between theater and film have, they are still present and still impact characters.⁸⁹ As a character moves from any one visual medium to another, the strengths and weaknesses of the two media create structural problems and

(1967) (arguing that film audiences have a greater tendency to identify with the characters than theater audiences do) and EDWARD MURRAY, *THE CINEMATIC IMAGINATION: WRITERS AND THE MOTION PICTURES* 9, 12 (1972) ("Identification of the viewer with the film character, then, can be much more intimate than the analogous situation in the theater."), *quoted in* THE COLUMBIA WORLD OF QUOTATIONS (Robert Andrews et al. eds., 1996), at <http://www.bartleby.com/66/50/40950.html> (last visited Jan. 20, 2003).

85. See HOWARD & MABLEY, *supra* note 59, at 7; Sontag, *supra* note 83, at 110–11.

86. See THOMAS L. ERSKINE & JAMES M. WELSH, *VIDEO VERSIONS: FILM ADAPTATIONS OF PLAYS ON VIDEO* viii (2000); Braudy, *supra* note 60, at 389; Sontag, *supra* note 83, at 110–11.

87. See *supra* note 84.

88. Braudy, *supra* note 60, at 388.

89. See, e.g., ROBERT C. HARVEY, *THE ART OF THE COMIC BOOK: AN AESTHETIC HISTORY* 173–91 (1996) (discussing in detail the differences between films and comic books, with illustrations); Jerry Robinson, *Introduction* to JOHN A. LENT, *COMIC BOOKS AND COMIC STRIPS IN THE UNITED STATES: AN INTERNATIONAL BIBLIOGRAPHY*, at xix, xix (1994) ("[Comic books are] at once a literary art in the tradition of the written word and a visual art with the ability to compress and expand time, develop character, and create a sense of immediacy through crosscutting and nonlinear plot development—techniques of the film, theater, and television. But unlike film, theater, and television, it is an intensely personal art more akin to the traditional children's illustrated book in that the reader literally holds the story in his hands."); POOLE, *supra* note 65, at 26–28, 78–102 (discussing the differences between video games and other media, especially film).

opportunities that result in changes to characters.⁹⁰ For example, a television series allows for greater character development over dozens of hour or half-hour episodes, while a film has only two to three hours in which to display its characters. When a video game or comic strip is adapted to create a television series or feature film, perhaps the biggest challenge facing the producers is casting voices and, in some cases, actors, for the previously animated, often silent characters.⁹¹

Despite these differences, characters are certainly recognizable as they move from one medium to another. They are recognizable through the presence of the information sources used for indirect characterization identified by Margolin.⁹² Foremost among these information sources is the character's name.⁹³ A name by itself is typically sufficient to identify a character with only minimal additional context.⁹⁴ An identical or similar physical appearance, especially for cartoon characters, may also be sufficient.⁹⁵ However, neither name nor physical appearance is strictly necessary. Theoretically, an audience could also identify a character from an older work in a newer work by a combination of common characterizations between the two works other than name and physical appearance.

Identification of a character is important when the author of a new work wants to capitalize on the character's appearance in an earlier work,

90. See generally MONACO, *supra* note 78, at 429.

91. See, e.g., Scott Adams, *Dilbert Newsletter #20*, Dilbert.com (June 1998), at <http://www.dilbert.com/comics/dilbert/dnrc/html/newsletter20.html>. ("The scariest part of the process [of adapting his comic strip *Dilbert* into a television series] was casting for the voices. We needed to find people who had not only the acting and comedic skills, but the voices that fit the characters. Any one of those filters will empty a room pretty quickly."). See also Andy Seiler & Mike Snider, *Lara Croft's Greatest Leap*, USA TODAY, June 15, 2001, Life at 1 (attempting to predict the success of the movie adaptation of the video game *Tomb Raider* and quoting Dean Takahashi, who writes about video games for *Red Herring* magazine, as stating that "[c]asting is half the battle").

92. See *supra* note 34 and accompanying text.

93. This falls into the formal textual patterns division. In visual media, of course, the textual patterns (other than the titles) are replaced by the speech patterns of actors and actresses or the voices of animated characters.

94. At least a scintilla of context is necessary, even for the most famous characters. If a character appears in a G-rated animated movie as a teenage girl working behind a fast-food counter and happens to be wearing a nametag bearing the moniker "James Bond," audiences will not recognize her as the British super-spy.

95. In the case of characters from a non-animated visual medium, physical appearance is often not sufficient to identify a character. Some other clue, such as the title of the work, is required to give context. If physical appearance were sufficient, an actress who played one well-known character would never be able to successfully portray another character. Typecasting, in which an actor is able to land only roles portraying a certain "type" of character, is somewhat common. However, it is rare for the public to so identify an actor with a character that they are unwilling to suspend disbelief to the point that the actor always evokes a particular character.

as discussed in the following section.⁹⁶ In this scenario, the artist will try to make it as easy as possible for the audience to identify the character. Thus, the artist will use the same name for the character and will often refer to the original work in the new work's title to provide an initial context for the audience.⁹⁷

Sometimes, though, an artist may want to "borrow" a character from another work while obscuring the original source of the character in order to avoid legal action by the character's creator. In these cases, the artist must strike a delicate balance of taking enough of the attributes of the character so as to satisfy his rationale for copying while not taking too much so as to violate the law.⁹⁸

III. THE ECONOMICS OF CHARACTER BUILDING

"Entertainment—not autos, not steel, not financial services—is fast becoming the driving wheel of the new world economy."⁹⁹ Direct expenditures on entertainment account for slightly more than five percent of the total expenditures of the average American household.¹⁰⁰ This is more than Americans spend on clothing and almost as much as they spend on health care.¹⁰¹ When one considers the additional products that are marketed through entertainment tie-ins or endorsements, the impact of entertainment on the economy as a whole becomes even greater.¹⁰²

96. See generally Peterson, *supra* note 11 (describing the methods that authors use to get the audience to visualize characters in certain ways).

97. See *supra* text accompanying note 35 (describing indirect characterization through reference to earlier works). Compare, e.g., ROCKY (Chartoff-Winkler Productions 1976) with ROCKY II (Chartoff-Winkler Productions 1979) and ROCKY III (Metro-Goldwyn-Mayer 1982) and ROCKY IV (Metro-Goldwyn-Mayer 1985) and ROCKY V (Chartoff-Winkler Productions 1990); STEPHEN KING, THE DARK TOWER I: THE GUNSLINGER (1982) with STEPHEN KING, THE DARK TOWER II: THE DRAWING OF THE THREE (1987) and STEPHEN KING, THE DARK TOWER III: THE WASTE LANDS (1991) and STEPHEN KING, THE DARK TOWER IV: WIZARD & GLASS (1997).

98. See, e.g., text accompanying *infra* note 629.

99. MICHAEL J. WOLF, THE ENTERTAINMENT ECONOMY: HOW MEGA-MEDIA FORCES ARE TRANSFORMING OUR LIVES 4 (1999) (italicized in original); see also Press Release, Jack Valenti, President & CEO of the Motion Picture Association of America, Study Shows Copyright Industries As Largest Contributor To The U.S. Economy (Dec. 12, 2000), at http://www.mpa.org/jack/2000/00_12_12.htm (reporting study concluding that "[i]n 1999, the creative industries . . . contributed more to the U.S. economy and employed more workers than any single manufacturing sector").

100. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CONSUMER EXPENDITURES IN 1999, at 4 tbl. B (May 2001), available at <http://www.bls.gov/cex/csxann99.pdf>.

101. See *id.*

102. See generally WOLF, *supra* note 99, at 55–56.

When an artistic work has achieved commercial success, there is a strong incentive to find the secret of that success and capitalize on it. Sometimes it is the unique combination of characters, plot and style that make a work popular.¹⁰³ Such a work is difficult, if not impossible, to reproduce. Quite often, however, it is the characters that the public most easily identifies with the original work.¹⁰⁴ When a character has this kind of commercial value, it is adaptable into a brand that engenders consumer loyalty.¹⁰⁵ Building a brand is key to long-term profitability.¹⁰⁶

Established brands also produce short-term profitability, as one need not spend as much money to promote a well-known entertainment product as to promote a new product.¹⁰⁷ With the amount of money that entertainment companies spend on advertising, this is no small matter.¹⁰⁸ Indeed, if a brand has wide public recognition, the release of a new entertainment product can generate free publicity as the news media covers the events surrounding the product's release as entertainment news.¹⁰⁹

No company illustrates the principle that brands make bucks in the

103. See generally Ablamsky, *supra* note 11 (noting that combining key elements of a work could add to better viewer understanding and success).

104. See generally WOLF, *supra* note 99, at 225 (explaining that audience demand for characters in pictures is a result of characters symbolizing certain popular culture concepts).

105. See *id.* at 225 ("The original form entertainment companies used to build a brand on a hit product was serialization. If audiences wanted to see more of Harrison Ford's "Jack Ryan," Sylvester Stallone's "Rocky," or the *Police Academy* squad, the studio would make a sequel. If audiences still wanted more, it would make the hit movie into a TV series. If they *still* wanted more, it could create a spin-off series.")

106. See *id.* at 223 ("In today's environment, *mind share*—how well the public knows your brand and cares about it—often precedes market share.")

107. See Andy Soltis, *Bookstores: Readers Gobble up 'Hannibal'*, N.Y. POST, June, 9, 1999, at 35 ("Like the sequel to the 'Star Wars' movies, 'Hannibal' didn't need heavy advertising or promotion. [The author] hasn't given an interview since 1984 and no advance copies of 'Hannibal' were circulated.")

108. See WOLF, *supra* note 99, at 25 ("[T]he need to get the consumer's attention has shifted the balance between production and promotion. On any company's profit-and-loss statement those costs are a behemoth sitting on top of the bottom line. In some cases, advertising, promotion, and marketing outweigh pure production costs by 100 percent."); OLEN J. EARNEST, *Star Wars: A Case Study of Motion Picture Marketing*, in 1 CURRENT RESEARCH IN FILM: AUDIENCES, ECONOMICS, AND LAW 1, 4 (Bruce A. Austin ed., 1985) ("[I]t is now [early 1980s] the rule-of-thumb that media expenditures to launch a motion picture average two-thirds the cost of the movie.")

109. George Lucas was the beneficiary of this type of publicity both when *The Phantom Menace*, prequel to the *Star Wars* series, was released and when trailers for it were first available in theaters. See Saul Rubin, *The Big Tease Is Here Now*, L.A. TIMES, Nov. 21, 1998, at F1 ("TV news and entertainment programs hyped the movie preview and broadcast it in full on Thursday, a day after it was announced with great fanfare and made available on the movie's official Web site."). Two Seattle *Star Wars* fans made news on January 1, 2002, when they became the first people to wait in line for the May 16 release of *Star Wars Episode II—Attack of the Clones*. They established a web site, www.waitingforstarwars.com, to document their project.

entertainment business better than the Disney Corporation. Disney is renowned for its ability to make money off its stable of characters.¹¹⁰ Smith and Parr describe how Disney has leveraged its intellectual property to position itself as a world leader in entertainment, as well as found alternative revenue streams to take advantage of the popularity of its characters:

At first the company profited from animated motion picture films, with classics like *Cinderella*, *Snow White*, *Pinocchio*, and *Lady and the Tramp*. The same characters have been the basis of comic books and children's toys since the 1930s. This success led to the recent establishment by the company of three new book divisions. . . .

The first theme park—Disneyland—located in Anaheim, California, set the standard for family vacations. Its huge success fostered the establishment of an East Coast version of the park in Orlando, Florida—Disney World—and a more recent opening of the Animal Kingdom theme park. . . .

The retail products of the company use the characters that are seen by hundreds of millions of people each year at theaters, at theme parks, and on television. In retailing, every conceivable product that can be trademarked has Disney characters, including wrist watches, T-shirts, hats, and stuffed dolls. This has led to the establishment of upscale retail outlets.

Disney is a one-of-a-kind enterprise entirely founded on intellectual property. Between September 1994 and 1998, revenues more than doubled from \$10.1 billion to \$23.0 billion. . . . The total book value of the business enterprise [as of Sept. 30, 1998] was \$32.2 billion.¹¹¹

Companies that want to follow in Disney's footsteps must use several methods in order to fully exploit a character's value. In this Article, I will distinguish between several types of character reuse in which an owner can engage: remakes, adaptations, sequels/prequels, spinoffs, cameos, and cross-overs. Use of characters in advertising campaigns and on consumer goods are discussed separately in Parts IV.C and IV.H.

110. See HORTON, *supra* note 8, at 59 ("If Mickey Mouse is not the most seen, most used, most loved image of the twentieth century in the world, he is very close to the top."); see also WOLF, *supra* note 99, at 224 ("I can't begin to count the number of times that people who run consumer businesses have confided to me that their goal is to create the broad-based success that Disney seems to bring to every project and every business it touches.").

111. GORDON V. SMITH & RUSSELL L. PARR, VALUATION OF INTELLECTUAL PROPERTY AND INTANGIBLE ASSETS 124 (3d ed. 2000).

A **remake** is an artistic work that reproduces an earlier work.¹¹² The characters, plot, and theme are mostly the same.¹¹³ Sometimes the setting is updated to modernize the work.¹¹⁴ Often, the new work has the same name as the original work. Most remakes are movies¹¹⁵ or theatrical productions,¹¹⁶ in which case they are called revivals.¹¹⁷

An **adaptation** is a remake in which the medium changes.¹¹⁸ For example, a novel or play is made into a film.¹¹⁹

A **sequel** is a new work that follows the main characters or action of the original work into the future.¹²⁰ A **prequel**, on the other hand, is a new work presenting the characters or story of the original work in earlier times, often expanding on historical occurrences referred to in the original work.¹²¹ Typically, the most important factor in the success of a sequel is a strong character or characters in the original work with which audiences

112. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 127 (2d ed. 1978).

113. Cf. Thomas Simonet, *Conglomerates and Content: Remakes, Sequels and Series in the New Hollywood*, in 3 CURRENT RESEARCH IN FILM: AUDIENCES, ECONOMICS, AND LAW 154, 156 (Bruce A. Austin ed., 1993).

114. See generally *id.* at 157.

115. Compare, e.g., OCEAN'S ELEVEN (Warner Bros. 1960) with OCEAN'S ELEVEN (Jerry Weintraub Prods. 2001); PSYCHO (Shamley Prods. 1960) with PSYCHO (Universal Pictures 1998).

116. See, e.g., *Friday in New York*, N.Y. DAILY NEWS, Jan. 11, 2002, at 56 (noting opening of "revival of playwright Jean Reynolds' 'Dance With Me,' a three-character story of love and sexual relationships in the 1950s"); Chris Jones, *Stage Backstage*, CHI. TRIB., Jan. 11, 2002, at 3 (noting revivals of Eugene O'Neill's *Long Day's Journey into Night* and Arthur Miller's *The Price*).

117. See Braudy, *supra* note 60, at 389 ("'Revival' is a stage word and 'remake' is a film word.").

118. FILM TERMS GLOSSARY, Reality Film, at <http://www.realityfilm.com/resources/terms/a.html> (last visited Jan. 30, 2003) [hereinafter Reality Film "A"].

119. Compare, e.g., WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK (1604) with HAMLET (Double A Films 2000); HAMLET (Warner Bros. 1990); HAMLET (Pilgrim Pictures 1948); STEPHEN KING, THE SHINING (Doubleday 1977) with THE SHINING (Warner Bros. 1980).

120. Cf. MOVIE TERMINOLOGY GLOSSARY, The Internet Movie Database, Ltd., at <http://www.imdb.com/Glossary/S> (last visited Nov. 12, 2002) ("A movie that presents the continuation of characters and/or events of a previously filmed movie."). But cf. Simonet, *supra* note 113, at 156-57 (distinguishing between a *sequel* which "take[s] up the action where it left off; the characters' history in the earlier film is mentioned, understood or otherwise significant in the later ones" and a *series* in which the later work has no "specific chronological relationship" to the earlier work). This Article does not make this distinction, instead treating sequels, prequels and series as one group because the relationship between the new work and the original work viewed in the context of the characters is the same.

121. Cf. MOVIE TERMINOLOGY GLOSSARY, The Internet Movie Database, Ltd., at <http://www.imdb.com/Glossary/P#prequel> (last visited Dec. 24, 2001) ("A movie that presents the characters and/or events chronologically before the setting of a previously filmed movie.").

identify.¹²² Characters are extremely important to the success of a sequel, because there need be only a minimal relationship between the plot and setting of the new work and that of the old work.¹²³ Works in almost any medium are amenable to the creation of a sequel.¹²⁴

A **spinoff** is a new work built around a single supporting character from an earlier work.¹²⁵ Used primarily in television, spinoffs take advantage of a character that producers already know has audience appeal.¹²⁶ In this way, the producers of the new show hope to capture a substantial portion of the old show's audience.

A **cameo** is a brief appearance, usually lasting for only one scene, of a character in a work in which the character does not ordinarily appear.¹²⁷ Although the term typically refers to the appearance of an actor rather than a character,¹²⁸ the purpose is parallel. Rather than increase a work's appeal by having a famous actor appear, the producer increases audience appeal by having a famous fictional person appear.¹²⁹ This type of character reuse

122. See MARTIN DALE, *THE MOVIE GAME* 27 (1997) ("Sequels are usually dependent on a lead character who can be followed through a series of adventures. This character thereby becomes a 'franchise' which can be exploited for future films, and also for television series, consumer products and theme parks.").

123. The minimal relationship required with regard to plot can be described as one of logical consistency. So long as the things that occur in a sequel could possibly occur (or, in the case of a prequel, could possibly have occurred) in a world in which the action of the original work took place, there is no limit on what an artist can do with his characters in the new work.

124. See, e.g., STEPHEN KING, *THE DARK TOWER I: THE GUNSLINGER* (1989); STEPHEN KING, *THE DARK TOWER II: THE DRAWING OF THE THREE* (1989); STEPHEN KING, *THE DARK TOWER III: THE WASTELANDS* (1992); STEPHEN KING, *THE DARK TOWER IV: WIZARD AND GLASS* (1997); *STAR WARS* (Lucasfilm Ltd. 1977); *THE EMPIRE STRIKES BACK* (Lucasfilm Ltd. 1980); *RETURN OF THE JEDI* (Lucasfilm Ltd. 1983); *STAR WARS: EPISODE I—THE PHANTOM MENACE* (Lucasfilm Ltd. 1999).

125. Cf. *THE AMERICAN HERITAGE ILLUSTRATED ENCYCLOPEDIA* 1601 (1st ed. 1987) ("Something derived from an earlier work, especially a television show starring a character who had a popular minor role in an earlier show.").

126. Compare, e.g., *Buffy the Vampire Slayer* (WB Television Network broadcast, 1997) (this TV series is an adaptation of the movie *Buffy the Vampire Slayer* (20th Century Fox 1992)) with *Angel* (WB Television Network broadcast, 1999) (starring David Boreanaz reprising his *Buffy* role of Angel/Angelus); *Cheers* (NBC television broadcast, 1982) with *Frasier* (NBC television broadcast, 1993) (starring Kelsey Grammar reprising his *Cheers* role of Dr. Frasier Crane).

127. MOVIE TERMINOLOGY GLOSSARY, The Internet Movie Database, Ltd., at <http://www.imdb.com/Glossary/C#cameo> (last visited Dec. 23, 2001) (defining cameo as "[a] bit part played by a famous actor who would ordinarily not take such a small part").

128. *Id.*

129. Sometimes, a celebrity plays himself as a character in the fictional world. See, e.g., *THERE'S SOMETHING ABOUT MARY* (20th Century Fox 1998) (including a cameo by Brett Favre, quarterback of the Green Bay Packers, as himself); *NOTHING BUT TROUBLE* (Warner Bros. 1991) (including cameos by Humpty Hump, Shock-G, Money-B, and other members of the rap group Digital Underground as themselves).

can be accomplished in almost any medium.¹³⁰

A **cross-over** is a special type of extended character cameo that lasts for an entire episode or installment of a series.¹³¹ This type of character reuse is found almost exclusively in television, but is theoretically applicable to a series of movies, comics, books, or video games.¹³² In addition to the extended presence of the characters in the world defined by the host show, thematic elements of the characters' original show are typically incorporated into the episode of the host show.

Thus, characters are reusable either in conjunction with other elements of a work or in isolation. Remakes and adaptations maintain most elements of a work.¹³³ Sequels and prequels rely more heavily on characters, but typically have similar themes and style.¹³⁴ Spinoffs, cameos, and cross-overs are the purest forms of character reuse, using none of the other elements of the original work.¹³⁵ Having established a vocabulary of character reuse, I now turn to media-specific applications of these techniques.

IV. MEDIA

The various methods of character reuse can be applied to works originating in any medium that an artist can use to express a work of fiction. The natural limitations of the medium, as well as constraints arising from the structure and economics of the marketplace, impact the viability and effectiveness of these methods.¹³⁶ The following sections examine

130. See, e.g., STEPHEN KING, *THE TOMMYKNOCKERS* (1987) (including a brief cameo by one of the characters from another Stephen King novel, *It* (1986)); *SHREK* (DreamWorks SKG 2001) (featuring character cameos by Cinderella, Snow White, and the three little pigs among others); *Dorn and Sirtis on Trek X Script*, *TrekToday*, at http://www.trektoday.com/news/110601_01.shtml (last visited Dec. 23, 2001) (reporting that one of the Star Trek X actors confirmed "that the movie will feature one character cameo from another series"); Frank Provo, *GameSpot: PlayStation Reviews: X-Men: Mutant Academy 2 Review*, Oct. 10, 2001, at <http://gamespot.com/gamespot/stories/reviews/0,10867,2817265,00.html> (describing character cameo of Spider-Man in X-Men game as a "wonderful touch").

131. Cf. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 277 (10th ed. 1999).

132. See, e.g., *The Simpsons: The Springfield Files* (FOX television broadcast, Jan. 12, 1997) (featuring the characters Scully and Mulder from *The X-Files*); *Boston Public: Chapter Thirteen* (FOX television broadcast, Feb. 12, 2001) (featuring the characters Ellenor Frutt and Jimmy Berlutti from *The Practice*).

133. See Reality Film "A", *supra* note 118.

134. See *supra* notes 120–121 and accompanying text.

135. See generally Melissa Ricci, *Shows Hit the Spin Cycle*, REVIEW, March 19, 1999 (discussing TV network's interest in spin-offs based on the popularity of character actors).

136. Characters can appear in almost any artistic medium. For example, painters and sculptors can create works of art depicting characters from famous stories or myths. See, e.g., *The Capture of the Golden Fleece* (painted by Jean-François Detroy), available at <http://www.nationalgallery.org.uk/cgi-bin/WebObjects.dll/CollectionPublisher.woa/wa/>

character reuse in the context of various entertainment media.

A. Literature

Despite pundits' warnings that American culture is increasingly being defined by new technology—particularly television—Americans continue to buy large numbers of books.¹³⁷ Ipsos-NPD reports that Americans bought over one billion books in 1998.¹³⁸ Over half of book sales were popular fiction.¹³⁹ Thus, novels are able to capture a significant portion of the book market, now estimated at around \$25 billion annually.¹⁴⁰

Over 70,000 individual titles are published each year.¹⁴¹ However, only a few become bestsellers.¹⁴² Thus, locating, promoting, and reaping the profits of bestsellers are becoming more important to publishing houses

work?workNumber=NG6512 (last visited Jan. 31, 2002); *Samson and Two Philistines* (sculpted by Michelangelo Buonarotti), available at <http://www.frick.org/html/smichel.htm> (last visited Jan. 31, 2002). I limit the discussion, however, to those media that provide, directly or indirectly, the characters which are viewed by the largest audiences and account for the largest revenues in the entertainment industry today. It is these characters that are most susceptible to reuse, most at risk of damage, and most likely to provoke litigation.

Likewise, I concentrate on the major means of production and distribution within the treatment of each medium. Of course, individuals may self-publish novels, shoot and edit their own films or produce other works of art and distribute them without the assistance of the major players in the artists' chosen medium. By using the internet as a distribution means, an independent artist has the potential to reach a worldwide audience. However, the *actual* audience for these works is so small compared to that for works created, marketed and distributed through traditional means that focusing on the core of each medium seems most appropriate.

137. See, e.g., Roger Bull, *In a World of Our Own: How Technology Is Turning Us into a Nation of Isolationists*, FLA. TIMES-UNION, Aug. 31, 2000, at C1.

138. THE NPD GROUP, INC., THE 1999 CONSUMER RESEARCH STUDY ON BOOK PURCHASING 8 (2000), available at <http://www.ipsos-npd.com/pdf/0600presentation.pdf> (last visited Feb. 19, 2003). Schiffrin puts the number even higher, at 2.5 billion books. ANDRE SCHIFFRIN, THE BUSINESS OF BOOKS 7 (2000).

139. THE NPD GROUP, INC., *supra* note 138, at 15.

140. See Press Release, Ass'n of Am. Publ'rs, Book Sales Total \$25 Billion in 2001 (Mar. 1, 2001), at <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=34> (last visited Mar. 12, 2003) (stating that year 2000 sales were just over \$25 billion); SCHIFFRIN, *supra* note 138, at 2. *But see* Press Release, Book Industry Study Group, Inc., Domestic Consumer Expenditures on All Books Expected to Reach \$36.4 Billion by 2006 (May 3, 2002), at <http://www.bisg.org/pr020503.htm> (last visited Feb. 21, 2003) (estimating annual revenues in excess of \$31 billion).

141. See SCHIFFRIN, *supra* note 138, at 7. "[A]lthough the United States' title output . . . looks impressive at first glance, it is actually lower per capita than many other countries.'" *Id.* Nevertheless, some top executives of the largest publishing houses have expressed concerns about the growth of the number of titles and have made efforts to cut back. See *Publishing 2002: Where the Buck Stops*, PUBLISHERS WKLY., Jan. 7, 2002, <http://publishersweekly.reviewsnews.com/index.asp?layout=article&articleid=CA189863>.

142. See SCHIFFRIN, *supra* note 138, at 11.

as they are bought by large conglomerates.¹⁴³ Attempting to balance the publishing of popular books with the publishing of “worthwhile” books, the traditional concern of publishing houses, has been subrogated to ensuring a return on investment, the traditional concern of corporations.¹⁴⁴ Today, the general rule is that publishers should not use the profits from popular titles to subsidize unprofitable titles.¹⁴⁵ A title that cannot be independently profitable, which typically means selling 20,000 or more copies, will not be published by one of the major publishing houses.¹⁴⁶

“To meet these new expectations, publishers drastically change the nature of what they publish. In a recent article, the *New York Times* focused on the degree to which large film companies are now putting out books through their publishing subsidiaries, so as to cash in on movie tie-ins.”¹⁴⁷ Books, which have always been a rich source of material for movies,¹⁴⁸ are now also the destination medium for adaptations. After the box office success of *The Mummy*¹⁴⁹ and *The Mummy Returns*,¹⁵⁰ Random House announced a series of children’s books collectively referred to as *The Mummy Chronicles*.¹⁵¹ These books follow the exploits of Alex O’Connell, the son of the hero and heroine of the two movies, and himself a central figure in *The Mummy Returns*.¹⁵² On the other hand, a character need not even have had a major part in a movie to appear in books. For example, writers have taken a character like Momaw Nadow, who appeared for less than five seconds in the film *Star Wars*, and included him in multiple novels based on the series of films.¹⁵³

Publishers are unlikely to borrow merely characters and plots from their film industry counterparts. They will undoubtedly borrow business

143. *Id.* at 118–19.

144. *Id. passim*. “It is now increasingly the case that the owner’s *only* interest is in making money and as much of it as possible.” *Id.* at 5.

145. *See id. passim*.

146. *See id.* at 105–06. Although there are over 50,000 independent publishers in the United States, the top twenty firms control 93% of the market. With another 2% of sales going to the various university presses, a fiction writer who cannot land a major publishing house must go to one of 50,000 publishers who share a mere 5% of the market. *See id.* at 142.

147. *Id.* at 119.

148. *See infra* notes 184–187 and accompanying text.

149. (Alphaville Pictures 1999).

150. (Alphaville Pictures 2001).

151. *See The Mummy Returns*, Random House, Inc., at <http://www.randomhouse.com/kids/mummyreturns/index.html> (last visited Jan. 11, 2002).

152. *See The Mummy Returns*, Random House, Inc., at <http://www.randomhouse.com/kids/catalog/display.pperl?isbn=0553487531> (last visited Feb. 22, 2003).

153. *See A Tribute to Forgotten Heroes*, UnderGroundOnline, at <http://www.ugo.com/channels/filmtv/features/forgottenheroes/page3.asp> (last visited Jan. 11, 2002).

strategy as well. This means turning to tried and true formulas for success rather than relying on untested original works.¹⁵⁴ Thus, the importance of control over characters within the publishing industry is increasing as publishers are likely to turn to sequels and spinoffs to ensure profitability.¹⁵⁵

The power of sequels in the literary world is exemplified by the runaway success of the series of Harry Potter novels.¹⁵⁶ Potter, a creation of British author J. K. Rowling, has become an international phenomenon. Scholastic, the publisher of the Potter books, reports that over 55 million copies of the four books are in print in the United States.¹⁵⁷ The first weekend sales of the fourth book in the series, which Scholastic estimated at nearly three million copies, were “the fastest in recent memory” according to industry veterans.¹⁵⁸

Successful literary spinoffs and sequels need not be based on books.¹⁵⁹ The “official” novels based on the television series and movies of *Star Trek* “are extraordinarily popular—every title since July 1986 has gone into the *New York Times* bestseller list; their worldwide sales top 30 million copies.”¹⁶⁰

Of course, with 70,000 titles published each year, sequels and spinoffs will remain only a small part of the body of literature produced in this country.¹⁶¹ Consequently, books are more often the source of a character that can be reused elsewhere, rather than a medium for further exploiting characters created in earlier works.

154. Cf. Leslie Kaufman, *Novel's Sequel: Bridges Are Burned*, N.Y. TIMES, Apr. 4, 2002, at E1 (describing release of sequel after initial reluctance by publishing houses).

155. Cf. *infra* text accompanying notes 194–195 (discussing the importance of sequels because they offer more financial success).

156. J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* (1998); J.K. ROWLING, *HARRY POTTER AND THE CHAMBER OF SECRETS* (2000); J.K. ROWLING, *HARRY POTTER AND THE PRISONER OF AZKABAN* (2001); J.K. ROWLING, *HARRY POTTER AND THE GOBLET OF FIRE* (2002).

157. Press Release, Scholastic Inc., *Scholastic's Harry Potter Books Buoyed by Movie Phenomenon* (Nov. 19, 2001), at http://www.scholastic.com/aboutscholastic/news/press00/press_11.20.01.htm. Despite Potter's success, another one of Scholastic's more established characters, Clifford the Big Red Dog, graces the company's 2000/2001 annual report, gripping a globe in his big red paws. SCHOLASTIC INC., 2000/2001 ANNUAL REPORT (2001).

158. John Mutter & Jim Milliot, *Harry Potter and the Weekend of Fiery Sales*, PUBLISHERS WEEKLY.COM, at http://www.publishersweekly.com/articles/20000717_88081.asp (last visited Jan. 10, 2002). The release of the book was celebrated at bookstores around the country as young Harry Potter fans and their parents gathered to participate in a variety of activities sponsored by the retailers. See *id.*

159. See MICHÈLE BARRETT & DUNCAN BARRETT, *STAR TREK: THE HUMAN FRONTIER* 43 (2001).

160. *Id.*

161. SCHIFFRIN, *supra* note 138, at 7.

B. Plays and Musicals—The Legitimate Theater

During the 1999–2000 season, Broadway theaters sold over eleven million tickets.¹⁶² However, the thirty-nine theaters on the Great White Way are just a tiny fraction of the venues for theater across the United States.¹⁶³ Community theater companies, which number in the hundreds,¹⁶⁴ and performing arts groups associated with colleges and universities provide another avenue for producers to exhibit plays and musicals.

Although we normally think of plays and musicals as providing fodder for movie adaptations, the process sometimes runs in reverse. “Consider, for example, *The Little Shop of Horrors*, which began as a cheap and cheesy Roger Corman B-movie shot in two days in 1960. This ‘black’ comedy was then transformed into a campy stage musical on Broadway and in London’s West End”¹⁶⁵ Indeed, Broadway is relying less and less on original shows.¹⁶⁶ “New works are increasingly emanating from regional theaters, from movies, and from abroad, in particular from London and Canada.”¹⁶⁷

These adaptations have been remarkably successful. In the summer of 2001, “THE show to see in New York” was Mel Brooks’ *The Producers*, based on his 1968 movie of the same name.¹⁶⁸ The show it replaced at the top of the Broadway must-see list was “the long-running smash *The Lion King*,”¹⁶⁹ which was also based on a movie.¹⁷⁰ The rationale behind

162. *Who Goes to Broadway—The Demographics of the Audience 1999–2000* Live Broadway.com, at <http://www.livebroadway.com/audience-1999.html> (last visited Jan. 13, 2002). Sales dropped in the wake of the September 11th attacks. See Charles Isherwood, *Broadway Trails Economy into Slump*, MSNBC, Nov. 29, 2001 at <http://stacks.msnbc.com/news/664834.asp?cp1=1>.

163. See *Welcome*, Am. Ass’n of Cmty. Theater, at <http://www.aact.org/index.html> (last visited Jan. 31, 2002) (putting the number of theatre venues across the United States at over 7,000).

164. See dmoz Open Directory Project, at http://dmoz.org/Arts/Performing_Arts/Theatre/Community_Theatre/United_States/ (last visited Feb. 22, 2003).

165. ERSKINE & WELSH, *supra* note 86, at xv.

166. See Joni Maya Cherbo, *Creative Synergy: Commercial and Not-for-Profit Live Theater in America*, 28 J. ARTS MGMT. L. & SOC’Y 129, 134 (1998) (“Since the 1980s, Broadway has declined even further as the generator of new productions.”).

167. *Id.*

168. Michael Janusonis, *Deja Vu All over Broadway*, PROVIDENCE SUNDAY J., Jan. 17, 2001, at D1 (emphasis in original).

169. *Id.*

170. THE LION KING (Walt Disney Pictures 1994). Was the movie, in turn, based on an earlier cartoon series? Disney says that any similarities to *Kimba, the White Lion* (NBC television broadcast, 1966) and the associated comic books are coincidental. See Cecil Adams, *Did Disney’s The Lion King Rip Off an Old Japanese TV Series?*, at <http://www.straightdope.com/columns/991224.html> (last visited Mar. 4, 2002). See generally Tezuka’s “Jungle King” and Dis-

adaptations is a familiar one that is echoed in nearly every entertainment medium: minimization of risk.

With ever-escalating costs to mount Broadway shows, especially musicals, producers and their backers are increasingly reluctant to put money into untested vehicles. They want a more certain return on their hefty investments. With something that has been a success before or is based on something that was a success, the risk is minimized. They feel more secure. Their money doesn't seem as though it's going to fly out the window.¹⁷¹

C. Movies

People watch movies through one of three submedia: theaters, pre-recorded cassettes and DVDs, and on television. Many movies begin as feature films in theaters, are then released on video, and, finally, make it to television in its various forms—pay-per-view, premium cable, basic cable, and broadcast.¹⁷² Others are released directly to video or are made specifically for television.¹⁷³

1. Theatrical Releases

In 2002, Americans spent \$9.2 billion on theater admissions for feature films—a new record.¹⁷⁴ On the production end, this revenue stream is captured primarily by the eight largest film studios, collectively known as the Majors. The studios are Disney, MGM, Paramount, Sony, 20th Century Fox, DreamWorks, Universal, and Warner Brothers.¹⁷⁵ One source estimates the Majors' market share at 80%.¹⁷⁶ There are significant barriers to entry which discourage newcomers to the field and protect the Majors' market share.¹⁷⁷ The Majors release a little over 150 films each year.¹⁷⁸

ney's "Lion King," at http://www.cs.indiana.edu/~tanaka/Tezuka_Disney/index.html (last visited Jan. 24, 2003).

171. See Janusonis, *supra* note 168, at D1.

172. See *United States v. Columbia Pictures Indus., Inc.*, 507 F. Supp. 412, 414–25 (S.D.N.Y. 1980).

173. See John Koch, *More Big-Name Feature Films Get Small-Screen Premieres*, BOSTON GLOBE, Oct. 17, 2001, at C3.

174. See Carl DiOrio, *Ticket Sales, Grosses Broke Records in '02*, REUTERS, Dec. 31, 2002, available at <http://www.philly.com/mld/philly/entertainment/movies/4845225.htm> (last visited Mar. 5, 2003).

175. See SLANGUAGE DICTIONARY, Variety.com, at http://www.variety.com/index.asp?layout=slanguage_result&slang=major&starting=1 (last visited Dec. 24, 2001).

176. See DALE, *supra* note 122, at 10.

177. See *id.* at 22–23.

Independent producers release another 100 films.¹⁷⁹

Domestic box office revenues are but a small portion of the return on investment studios realize from their films. Video sales and rentals typically account for 20% of production revenues while sales to television networks account for another 20% of revenues.¹⁸⁰ Foreign sales vary widely depending on the film.¹⁸¹

At its core, the movie business is like any other business. It is based on the principles of risk and return.¹⁸² Studios are always seeking ways to reduce their risk and increase their return.¹⁸³ From the very beginning, they "had discovered that the adaptation to cinema of written fiction was a reliable method (re-making successful theatrical productions and using popular music were others) of improving the chances of an individual film doing well."¹⁸⁴ Adaptations of literature initially comprised over one-third of all the films released.¹⁸⁵ This number dipped during the Second World War; however, as the domestic movie industry became extremely successful in the 1950s, adaptations regained and even surpassed their earlier prominence within the industry.¹⁸⁶ Today, "[o]ver half of Hollywood films are based on original scripts . . . [while t]he rest are adaptations of books and stage plays, remakes and sequels, which provide the security of prior success and notoriety."¹⁸⁷

This security is by no means a guarantee—adaptations can lose money like any other film.¹⁸⁸ For example, Universal Pictures and the De Laurentis family sought to produce a profitable adaptation by pairing successful director David Lynch with a script based on the popular science fiction novel *Dune*.¹⁸⁹ The book version of *Dune* was "acclaimed as one of the great genre achievements of the last twenty years, winner of the Hugo and Nebula Awards, and never out of print since first published."¹⁹⁰ Nevertheless, the film version of *Dune* was "one of the major failures in the

178. *See id.* at 22.

179. *See id.* at 93 (noting that about 70 of the films released by the Majors were originally produced by an independent studio and later picked up by a Major).

180. *See id.* at 36.

181. *See id.* at 74–77.

182. *See DALE, supra* note 122, at 20–22.

183. *See id.* at 22.

184. Izod, *supra* note 4, at 95.

185. *See id.* at 100; BLUESTONE, *supra* note 57, at 3.

186. *See Izod, supra* note 4, at 100–01.

187. DALE, *supra* note 122, at 29.

188. Elisabeth Liddell & Michael Liddell, *Dune: A Tale of Two Texts*, in *CINEMA AND FICTION* 122, 122 (John Ott & Colin Nicholson eds., 1992).

189. *Compare* FRANK HERBERT, *DUNE* (1965) *with* DUNE (Universal Pictures 1984).

190. *See Liddell & Liddell, supra* note 188, at 122.

history of the film industry—‘a disaster of the very first order’, as we are succinctly informed in *Halliwel's Film Guide 7*.¹⁹¹

Although adaptations of novels or plays may be preferable from the standpoint of a production company trying to turn a profit, adaptation may be difficult for screenwriters.¹⁹² The differences between the media are such that it may require more skill—or at least a different kind of skill—to adapt a work than to create one from scratch.¹⁹³

Like adaptations, sequels are of tremendous importance in the movie industry because they offer more predictable revenues.¹⁹⁴ Although the average sequel brings in only 60% of the gross of the original film on which it is based,¹⁹⁵ sequels are a far surer bet for a studio than a brand new film.

The most important factor in the success of a sequel is a strong character or characters in the original movie with which audiences already identify.¹⁹⁶ However, the ability to portray the character in a new movie may, at times, be so closely tied to the actor who played the character in the original movie that the actor is able to capture a large portion of the character's value. For example, “Arnold Schwarzenegger will be paid \$30 million to reprise his cyborg role in [*Terminator 3: The Rise of the Machines*].”¹⁹⁷

Other producers have successfully substituted actors and actresses in a particular role with success. *Hannibal*,¹⁹⁸ the long awaited sequel to *Silence of the Lambs*,¹⁹⁹ featured Anthony Hopkins reprising his role as Dr. Hannibal Lecter, but substituted Julianne Moore for Jodie Foster as Agent Clarice Starling.²⁰⁰ Nevertheless, *Hannibal* posted an impressive domestic

191. *Id.*

192. See also HOWARD & MABLEY, *supra* note 59, at 9.

193. See *id.* (“Very few stories created for another medium, or stories that have actually been lived through, lend themselves easily and immediately to the needs of a screenplay.”).

194. See DALE, *supra* note 122, at 27; Simonet, *supra* note 113, at 155 (quoting a *Wall Street Journal* headline, “Playing it safe, Hollywood banks heavily on sequels to recent hits”).

195. Simonet, *supra* note 113, at 156. Some sequels, however, far surpass their progenitors in terms of gross profit. See Lyman, *supra* note 1, at E10 (“The original ‘Austin Powers: International Man of Mystery’ made only \$54 million in 1997, while ‘Austin Powers: The Spy Who Shagged Me’ brought in \$205 million two years later. Similarly, ‘Rush Hour’ made \$141 million in 1998, while ‘Rush Hour 2’ made \$226 million last summer.”).

196. See DALE *supra* note 122, at 27.

197. *WB Nabs Terminator 3 Rights*, *Movies.com* (Dec. 11, 2001), at <http://movies.go.com/news/2001/12/t3wb121101.html>; see also *Gibson to Appear in New ‘Mad Max’ Film*, *CNN*, Dec. 10, 2002, at <http://www.cnn.com/2002/SHOWBIZ/Movies/12/10/film.madmax.reut> (last visited Dec. 10, 2002) (stating that Gibson will be paid a salary approaching \$25 million for the fourth *Mad Max* film).

198. (Universal Pictures/Metro-Goldwyn-Mayer 2001).

199. (Orion Pictures Corp. 1991).

200. Frankie Faison also reprised his role as Barney Matthews. Faison also played the role

gross of over \$165 million—almost \$35 million more than *Silence of the Lambs*.²⁰¹ The producers of the various James Bond movies have had overwhelming success with several different actors portraying Bond.²⁰² On a somewhat smaller scale, commercial success has also recently followed Batman through three actors and four films.²⁰³ Likewise, several different actors have successfully portrayed Superman.²⁰⁴

2. Video/DVD

“From the studio perspective, the cost to make and market a direct-to-video title is probably only a third that for a theatrical title, and they can bring them out faster as well”²⁰⁵ Sequels seem to be particularly successful candidates for direct-to-video releases.²⁰⁶ Indeed, Disney’s success with the direct-to-video release of *The Return of Jafar*,²⁰⁷ a sequel to the

of Lt. Fisk in *Manhunter* (DSG 1986), based on the novel *Red Dragon*, the first of the stories involving Dr. Lecter. No actor played the same role in both of the earlier movies, although Dan Butler, like Faison, played different characters in the same “world.” *Manhunter* grossed only \$8.62 million. See *Business Data for Manhunter*, Internet Movie Database, Inc., (1986), at <http://us.imdb.com/Business?0091474> (last visited Jan. 17, 2002). In 2002, a new film adaptation of *Red Dragon*, bearing the same title was released. RED DRAGON (Universal Pictures 2002). In this movie, Faison was once again cast as Barney Matthews and the part of Mr. Fisk was played by Christopher Curry. The main roles were played by Hopkins (Dr. Lecter), Edward Norton (Will Graham), and Ralph Fiennes (Francis Dolarhyde), and *Red Dragon* experienced significantly more success at the box office than *Manhunter* did, grossing over \$90 million domestically. See *Business Data for Red Dragon (2002)*, Internet Movie Database, Inc., at <http://us.imdb.com/Business?0289765> (last visited Jan. 4, 2003).

201. Compare *Business Data for Hannibal*, Internet Movie Database, Inc., (2001), at <http://us.imdb.com/Business?0212985> (last visited Jan. 17, 2002) with *Business Data for Silence of the Lambs*, Internet Movie Database, Inc., at <http://us.imdb.com/Business?0102926> (last visited Jan. 17, 2002).

202. See Michael Reed, alt.fan.james-bond FAQ, at <http://www.ianfleming.org/mkkbb/afjbfaq/2.shtml> (last updated Oct. 13, 2000).

203. Akiva Goldsman, *Introduction to BATMAN: THE MOVIES 6, 7* (1997) (“Michael Keaton brought to Bruce Wayne an understanding of the hero’s duality. Val Kilmer opened a window into Bruce Wayne’s haunted darkness. And George Clooney reveals to us an emotionally adult Bruce Wayne, a man as involved with the turmoils of the present as he is with the demons of the past. And so Batman continues to grow, to become an amalgamation of visions. The true Batman isn’t created by any individual interpretation but through the refraction of all of them.”).

204. See KINNARD, *supra* note 54, at 191–93.

205. Dennis Michael, *Straight-to-Video: It’s Not an Insult Anymore*, CNN, Oct. 16, 1998, at <http://www.cnn.com/SHOWBIZ/Movies/9810/16/direct.to.video/index.html> (quoting Jeffrey Eves, president of the Video Software Dealers Association).

206. See *id.* (“Video is now the most profitable industry, and more studios are opting for the direct-to-video release, particularly when that release is a sequel to a proven hit.”).

207. (Walt Disney Pictures 1993). The video was successful despite the notable absence of Robin Williams who voiced the Genie in the original. Williams was replaced by Dan Castellaneta, best known for voicing several characters on *The Simpsons*, including Homer. Castellaneta’s voice appeared as the Genie in four more direct-to-video releases in 1998 and one in

animated theatrical hit *Aladdin*,²⁰⁸ spurred the company to include direct-to-video releases as a regular part of its product offering.²⁰⁹

The success of direct-to-video sequels to works originally released theatrically may be attributed to the producers' ability to spend less money promoting the sequel.²¹⁰ Once the characters and core story are developed in the original work, an established audience is eager to follow the characters into a continuation of the saga, requiring less encouragement through advertising.²¹¹ Since sequels typically earn less than original movies even when released in theaters,²¹² the easiest way to increase their profitability is to reduce their production or advertising cost.

3. Made-for-TV Movies

Although movies originally designed for theatrical release often end up on the small screen, there remains a smaller market for "made-fors"—movies produced for original release on television.²¹³ Excluded from this category are theatricals optimized for television production with an alternate version, sometimes with different footage or soundtrack.²¹⁴

The market for made-fors is on the decline because they are simply not profitable enough. "In the fall of 1997, the average made-for cost \$3.1 million to produce but got only \$2.7 million in license fees from a network. . . . Hollywood's majors had all stopped producing made-fors completely, except for Disney which planned 16 over the next year, because of the low profits."²¹⁵ Like other films, made-fors can be sequels of theatrical

2001. See Dan Castellaneta, Internet Movie Database, Inc., at <http://us.imdb.com/Name?Castellaneta,+Dan> (last visited Jan. 21, 2003).

208. (Walt Disney Pictures 1992).

209. KERRY SEGRAVE, *MOVIES AT HOME* 154 (1999) ("While the studio expected *Jafar* to sell perhaps two million copies, in fact, it sold close to 11 million units (earning the producer \$100 million) causing Disney to announce it would release three or four DTV features a year, including sequels to *The Lion King* (1994) and *Beauty and the Beast* (1991).").

210. See generally Michael Wiese, *Finance Your Film: Direct to Video Movies*, Movie-Making.net, at <http://www.mwp.com/pages/financecenterdirecttovid.html> (last visited Mar. 2, 2003) (describing the minimal costs of producing and promoting made-for-video films).

211. See *id.*

212. See *supra* text accompanying note 195.

213. See *Definitions*, Kennedy's TV SF Guide, at <http://www2.mountains.net.au/nval/scifi/definiti.htm> (last modified July 11, 2002).

214. The replacement footage and soundtrack are used to satisfy the additional requirements television puts on movies. See SEGRAVE, *supra* note 209, at 129–32. These requirements include a different aspect ratio for the screen, commercial breaks and content-based restrictions related to profanity, violence, and sexual content. See *id.* at 130.

215. *Id.* at 140.

releases,²¹⁶ adaptations of literature,²¹⁷ based on a television series²¹⁸ or real events,²¹⁹ or original works.²²⁰

D. Television Series

Americans watch a lot of television; the average American watches eighteen hours per week.²²¹ This amount of concentrated attention means there is a tremendous potential to make money. "In its simplest terms, the business of television in this country is the buying and selling of eyeballs."²²² Of course, the business is not really that simple. Revenues come from three primary sources: sale of advertising, cable subscription fees, and premium cable fees.²²³ Despite increased revenues from cable fees, advertising is "the foundation of the American television network system and, consequently, of the Hollywood production process."²²⁴ In 2000, advertising revenues for network television were \$41 billion, whereas cable advertising brought in an additional \$13.8 billion.²²⁵ However, television advertising revenues are on a decline, and this figure is expected to drop in 2002.²²⁶

Television series are produced by the Majors, and now, after twenty

216. See, e.g., *The Final Days* (ABC television broadcast, Oct. 29, 1989) (a sequel to *All the President's Men* (Warner Bros. 1976)).

217. See, e.g., *The Langoliers* (ABC television broadcast, May 14, 1995) (based on the first novella in Stephen King's *Four Past Midnight* (1990)).

218. See, e.g., *The Pretender: Island of the Haunted* (TNT television broadcast, Dec. 10, 2001) (based on *The Pretender* (NBC television broadcast, 1996)).

219. See, e.g., *Casualties of Love: The Long Island Lolita Story* (CBS television broadcast, Jan. 3, 1993) (based on the Amy Fisher story).

220. See e.g., *Stranger Inside* (HBO television broadcast, June 23, 2001).

221. See Jeannie Keever, *Finding Free Time*, HOUS. CHRON., Jan. 21, 2001, Lifestyle at 1 (citing JOHN P. ROBINSON ET AL., *TIME FOR LIFE* (2d ed. 1999)). But see Eric Harr, *Resolved: To Keep My Resolutions*, RECORD (N.J.), Jan. 1, 2002, at F01 (27 hours per week; no study cited); Sharon Robb, *Workaholics Doing Poor Job of Getting Sleep*, SUN-SENTINEL (Ft. Lauderdale), Apr. 1, 2001, at 15 (20 hours per week; no study cited).

222. WILLIAM F. BAKER & GEORGE DESSART, *DOWN THE TUBE* 65 (1998).

223. See GENE F. JANKOWSKI & DAVID C. FUCHS, *TELEVISION TODAY AND TOMORROW* 63-64 (1995). Television series are not amenable to pay-per-view funding which sells one-time access to a movie or special event. See *id.* at 65.

224. *Id.* at 67.

225. See A. Larrison Campbell, *Cable Commercials Get Slick*, HARTFORD COURANT, Aug. 27, 2001, at B1; Kathy Bergen, *The Pendulum Swings for Media*, CHI. TRIB., Oct. 28, 2001, Business at 1 (estimating 2000 broadcast and cable total at \$55.7 billion). But see Vanessa O'Connell, *Digital Video Recorders Stir up a New Battle*, WALL ST. J., Dec. 17, 2001, at B4 (estimating 2001 network advertising revenues at \$16.1 billion). These figures represent total advertising revenues. They are not limited to television series; rather, they include revenues associated with programming ranging from news to sporting events to game shows to music videos.

226. See Bergen, *supra* note 225.

years of exile due to antitrust violations, by the networks themselves.²²⁷ A very limited number of new television series are produced each year. Baker and Dessar describe the process as follows:

Alan Wagner, a former head of programming at CBS, estimates that he and his associates were presented with about six thousand ideas a year, many of them over breakfast, coffee, lunch or dinner with the other networks. The ideas come from a variety of sources, most of them within a few miles of Sunset Boulevard. Some are generated by network executives, some by the major studios, others by stars and their agents, still others by independent producers, writers, and packagers. Partly because of Hollywood insularity and arrogance, and partly because the networks fear lawsuits from rejected nonprofessionals, the more than twenty thousand unsolicited manuscripts submitted by the public are routinely returned unread. According to Wagner, about two thousand program ideas are seriously considered in a given year. Of these, sample scripts are commissioned for as many as two hundred. From those, "a limited number of fully produced programs—seldom more than twenty—are ordered."²²⁸

Among the fully produced shows, an even smaller number are introduced as part of the fall lineup. Others are held in reserve to be substituted mid-season in place of inevitable failures, and still others are rejected.²²⁹

There are three types of television series: the episode series, "which features the same characters weekly;" the anthology or unit series, which "does not have the same characters appearing in each show, [t]he only common thread might be an unusual premise, or the umbrella title of the series itself;" and the mini-series or multi-part series, which "focuses on the larger saga of major characters and dramatically significant events."²³⁰ Umbrella shows, including the recent spate of reality shows, sometimes feature recurring characters, but the link between characters and success is more tenuous.²³¹ With regard to characters, which are the most important

227. See BAKER & DESSART, *supra* note 222, at 98–99. Cable networks are increasingly producing their own original programs. See *id.* at 101. HBO, with its Emmy-winning series *Sex and the City* and *The Sopranos*, has seen the most success in this area. Nevertheless, due to the networks' large share of advertising revenue and the cost of producing original programming, "American network television will remain the fundamental source of new entertainment programming for the foreseeable future." *Id.* at 121.

228. *Id.* at 119.

229. See *id.*

230. RICHARD A. BLUM, TELEVISION WRITING 10 (rev. ed. 1984).

231. Cf. Thurston Hatcher, 'Survivor' No Longer the Office Cooler Ruler, CNN, Jan. 10,

factor in the episode series, and their reusability, a mini-series is very much like a long made-for-TV movie that is broadcast in several parts.²³²

1. Episode Series

Strong characters are vital to the success of an episode series. They are the core element that appears week after week on the series. Therefore, the characters are typically what producers rely on to draw audiences, and through the audience, advertisers. This is particularly true with comedy series.²³³ Some television dramas, like *Twin Peaks*²³⁴ and *Babylon 5*,²³⁵ are designed around a complex plot that is advanced through each episode, and, therefore, are less dependent on characters than the average series. Viewers tune in week after week to see what happens next.²³⁶

Other dramas, like *ER*²³⁷ and *MacGyver*,²³⁸ are more character focused—following one or more main characters as they face new situations and perhaps follow their growth and development as individuals. Dramas that are more action/adventure-oriented typically have static characters that must confront a new villain or challenge each week.²³⁹

From the perspective of the audience, when an actor or actress

2002, at <http://www.cnn.com/2002/SHOWBIZ/TV/01/10/reality.survivor/index.html> (last visited Jan. 23, 2002) (stating that despite diminished success of most reality shows the genre still has good prospects).

232. See generally *supra* Part IV.C.3 for a discussion of made-fors and *supra* Part II.B for a discussion of characters in movies generally. The two media are so similar that the Hollywood Foreign Press Association combines mini-series and made-fors into a single category for their Golden Globe awards. See generally *Golden Globe Awards 2002 Winners*, Hollywood Foreign Press Association, at <http://hfpa.org/html/GoldenGlobeAwards-2002.html> (last visited Jan. 21, 2002).

233. Compare DENNIS A. BJORKLUND, TOASTING *CHEERS*: AN EPISODE GUIDE TO THE 1982–1993 COMEDY SERIES, WITH CAST BIOGRAPHIES & CHARACTER PROFILES 15 (1997) (“Part of the staying power of ‘Cheers’ was the stability of its characters.”) with GRIPSRUD, *supra* note 63, at 219 (“While it is important for writers to keep in mind what the audience already know about a character, so as to avoid all too obvious breaches in a believable, if not realistic, depiction of him or her, a character may, as noted above, still be stretched to the implausible if the plot requires it.”). The different conclusions Bjorklund and Gripsrud reach about the primacy of plot and character in the success of episodic series can best be explained by their focus on a comedy, *Cheers*, and a drama, *Dynasty*, respectively.

234. (ABC television broadcast, 1990).

235. (PTEN television broadcast, 1994).

236. See generally Gary Johnson, *The Serials: An Introduction*, IMAGES JOURNAL, at <http://www.imagesjournal.com/issue04/infocus/introduction.htm> (last visited Feb. 27, 2003) (describing human view habits in regard to serials).

237. (NBC television broadcast, 1994).

238. (ABC television broadcast, 1985).

239. See, e.g., *The A-Team* (NBC television broadcast, 1983); *Xena: Warrior Princess* (WB television broadcast, 1995).

portrays a character week after week, no other person can “be” that character.²⁴⁰ Consequently, as a series becomes more successful, the cast is able to demand more and more money.²⁴¹ As actors become more expensive by demanding larger and larger salaries, economics may cause the cancellation of even the most popular shows, as advertising revenues are unable to keep up with stars’ salaries as a part of the production costs.²⁴²

Successful television series are often adapted for the big screen, especially after the series has ended.²⁴³ In the late 1990s, the producers of *The X-Files* launched a major motion picture that picked up the story at the end of the show’s fifth season.²⁴⁴ The show then continued for four more seasons and, following its final episode in May 2002, fans may see a second movie released.²⁴⁵ Other series, such as *The Brady Bunch* and *Charlie’s Angels*, have inspired feature films long after the series themselves are no

240. See *infra* notes 415–416 and accompanying text. On rare occasions, producers have been able to replace a departing actress or actor in order to retain the character rather than writing the character out of the series. See e.g., *Roseanne* (ABC television broadcast, 1988) (substituting actress Sarah Chalke for Lecey Goranson in the role of Roseanne’s oldest daughter, Becky, when Goranson left the series for college between the 1992 and 1993 seasons); *Bewitched* (ABC television broadcast, 1964) (substituting actor Dick Sargent for Dick York in the role of Darrin Stephens when York left the series due to a chronic back ailment between the 1968 and 1969 seasons). In some cases, there is a third alternative. The producers can introduce a new character of the same type, allowing the show to maintain the balance with the other characters that made it a success in the past while injecting something new into the series to keep it fresh. Cf. ROB OWEN, *GEN X TV: THE BRADY BUNCH TO MELROSE PLACE 77* (1997) (discussing replacement characters on *Beverly Hills 90210* (FOX television broadcast, 1990)).

241. See, e.g., GRIPSRUD, *supra* note 63, at 49 (“The stars of a successful show are seen by the industry as major factors behind its popularity, and this empowers the stars in the production process—and in the negotiation of their salaries.”); Gary Levin, *The Big ‘Friends’ Financial Scene: Take 2*, USA TODAY, Jan. 17, 2002, at D1 (“In May 2000, the [*Friends*] cast signed an 11th-hour, two-year deal, hiking their pay sixfold from \$125,000 to \$750,000 an episode and offering each a greater share of syndication profits.”); *id.* at D1 (noting that Kelsey Grammar, star of *Frasier*, will reportedly make \$1.6 million per episode).

242. Cf. JANKOWSKI & FUCHS, *supra* note 223, at 78 (describing economics behind CBS’s cancellation of *The Red Skelton Show* (CBS television broadcast, 1951)).

243. Compare, e.g., *Star Trek* (NBC television broadcast, 1966) (cancelled in 1969) with *STAR TREK: THE MOTION PICTURE* (Paramount Pictures 1979). Adaptations of the original *Star Trek* series abound. There have been five sequel television series and nine feature films with a tenth on the way. See *Episodes and Movies*, LCARSCOM.NET, at <http://www.lcarscom.net/episodes.htm> (last visited Feb. 14, 2002). There are also over twenty-five video games and countless novels based on the various series. See *Gaming*, Gaming.startrek.com, at <http://gaming.startrek.com/games> (last visited Feb. 2, 2003); *The Star Trek Books & Recording Index*, at <http://www.dramaturgy.net/star-trek-books/>.

244. *THE X-FILES* (20th Century Fox 1998).

245. See Press Release, FOX, ‘The X-Files’ Reaches Climactic Series Finale This May on FOX (Jan. 16, 2002), at <http://www.thexfiles.com/finale.htm> (last visited Feb. 2, 2002); Greg Dean Schmitz, *The X-Files 2*, at <http://www.movies.yahoo.com/shop?d=hp&id=1808406645lcf=prev> (last visited Feb. 2, 2002) (speculating that the gap between series finale and movie sequel could be as long as two years).

longer in production.²⁴⁶ Movies have also served as the source of characters for television series such as *The Real Ghostbusters*²⁴⁷ and *The Young Indiana Jones Chronicles*,²⁴⁸ admittedly with limited success.²⁴⁹

Another way to continue using characters as a series winds down is to create a spinoff series centered around a supporting character from the original series.²⁵⁰ Some spinoffs, such as *Frasier*, have been remarkably successful.²⁵¹ Others, however, are short-lived.²⁵² Success is by no means guaranteed—even for one of television’s most prolific producers, Aaron Spelling. Owen describes the failure of *Models Inc.*,²⁵³ a spinoff of *Melrose Place*,²⁵⁴ quoting a FOX executive as attributing the failure, in part, to insufficient time for the audience to identify with and invest in the series’ characters.²⁵⁵

2. Comedy Sketch Shows

One type of anthology show which deserves special note is the comedy sketch show. The success of comedy sketches, featured on television shows such as *Saturday Night Live*²⁵⁶ and *MAD TV*,²⁵⁷ heavily depend on the characters in the sketch.²⁵⁸ Funny characters are used repeatedly in

246. Compare *The Brady Bunch* (ABC television broadcast, 1969) (last episode aired in 1974) with THE BRADY BUNCH MOVIE (Paramount Pictures 1995) and A VERY BRADY SEQUEL (Paramount Pictures 1996); *Charlie’s Angels* (ABC television broadcast, 1976) (last episode aired in 1981) with CHARLIE’S ANGELS (Columbia Pictures 2000).

247. (ABC television broadcast, 1986). See generally GHOSTBUSTERS (Columbia Pictures 1984).

248. (ABC television broadcast, 1992). See generally RAIDERS OF THE LOST ARK (Paramount Pictures 1981).

249. The one bright spot in the movie to television adaptation is *Buffy the Vampire Slayer* (WB Television Network broadcast, 1997), which has had success well beyond that of its movie source, *Buffy the Vampire Slayer* (20th Century Fox 1992).

250. See generally Melissa Ricci, *Shows Hit the Spin Cycle*, REVIEW, Mar. 19, 1999 (describing process behind selecting characters for spinoff series based on popularity of character and actor) available at http://www.review.udel.edu/archive/1999_Issues/03.19.99/index.php3?section=3&article=7 (last visited Feb. 14, 2002); *supra* notes 125–126 and accompanying text (describing spinoffs and giving examples).

251. *Id.*

252. *Id.*

253. (FOX television broadcast, 1994).

254. (FOX television broadcast, 1992).

255. OWEN, *supra* note 240, at 108–10.

256. (NBC television broadcast, 1975).

257. (FOX television broadcast, 1995).

258. Cf. Tom O’Neil, *Emmy Commemorative: Skit Shooting*, VARIETY, Aug. 31, 2001, at 42, available at <http://www.variety.com/index.asp?layout=story&articleid=VR1117852124&categoryid=1057&cs=1> (quoting Carol Burnett, hostess of the multi-Emmy winning variety show *The Carol Burnett Show*, as saying “We didn’t write jokes. The humor came out of those

sketch after sketch, week after week. “Unfunny” characters disappear.

First airing in 1975, *Saturday Night Live (SNL)* has been extraordinarily successful in exporting its characters to other media.²⁵⁹ Wayne and Garth were first presented to America on February 18, 1989, in an *SNL* skit called “Wayne’s World.”²⁶⁰ Within three years, they graduated to the big screen in the feature film, *Wayne’s World*,²⁶¹ followed a year-and-a-half later by a sequel, *Wayne’s World 2*.²⁶² Other *SNL* characters who have appeared in movies include Jake and Elwood Blues,²⁶³ the Coneheads,²⁶⁴ Pat Riley,²⁶⁵ Stuart Smalley,²⁶⁶ Doug and Steve Butabi,²⁶⁷ Mary Katherine Gallagher,²⁶⁸ and Leon Phelps.²⁶⁹ Although none of the other films was the box office hit that *Wayne’s World* was, Paramount claims that the *SNL* films they produced were, by and large, profitable.²⁷⁰

The format of comedy sketch shows, which features many short, unrelated sketches presented in a single show, is ideal for experimentation with characters.²⁷¹ Adding a new sketch with a new character requires little cost, but the payoff from a successful sketch can be astronomical. *The Simpsons*, one of the most profitable brands in entertainment today, began as a short segment on *The Tracey Ullman Show*.²⁷²

characters’ pain, frustration, fear and lack of self-esteem.”)

259. MICHAEL CADER, *SATURDAY NIGHT LIVE: THE FIRST TWENTY YEARS* 7 (1994).

260. *See id.* at 226–29.

261. (Paramount Pictures 1992).

262. (Paramount Pictures 1993).

263. *THE BLUES BROTHERS* (Universal Pictures 1980); *BLUES BROTHERS 2000* (Universal Pictures 1998) (featuring Elwood only).

264. *CONEHEADS* (Paramount Pictures 1993).

265. *IT’S PAT* (Touchstone Pictures 1994).

266. *STUART SAVES HIS FAMILY* (Paramount Pictures 1995).

267. *A NIGHT AT THE ROXBURY* (SNL Studios 1998).

268. *SUPERSTAR* (SNL Studios 1999).

269. *THE LADIES MAN* (SNL Studios 2000).

270. *See* Claudia Eller, *Studios See Green in Less-Than-Worthy ‘SNL’ Film Spinoffs*, L.A. TIMES, Oct. 1, 1999, at C1.

271. Comedy sketches also appear on awards shows. Ben Stiller converted his sketch *Derek Zoolander*, *Male Model*, which he performed at the 1996 VH1 Fashion Awards, into the feature film *ZOOLANDER* (Paramount Pictures 2001). Stiller received a writers credit for the screenplay, story and character. *See Full Cast and Crew for Zoolander*, Internet Movie Database, Inc., (2001), at <http://us.imdb.com/Credits?0196229> (last visited Apr. 1, 2002).

272. (FOX television broadcast, Apr. 19, 1987). In total, there were forty-eight shorts on *The Tracey Ullman Show* before *The Simpsons* series was launched. *See* RAY RICHMOND, *THE SIMPSONS: A COMPLETE GUIDE TO OUR FAVORITE FAMILY* 14–15 (1997) (listing shorts, air dates and brief summaries of the plots).

E. Video Games

The video game industry, which features the youngest mass-market entertainment medium, is experiencing dramatic growth.²⁷³ “Research from US analysts Datamonitor suggests that sales of games consoles and software in Europe and the US will generate over \$17 billion worth of business a year by 2003.”²⁷⁴ Video games are played on personal computers, specialized game consoles for the home, portable game consoles, and special machines created for arcades. Often, companies will make versions of a game available on multiple platforms.²⁷⁵ Although there are a wide variety of companies that design games, the market for home game consoles has shrunk to three serious contenders: Sony (Playstation), Microsoft (X-Box), and Nintendo (Gamecube).²⁷⁶

Video games are unique among the media examined in this Article in that the audience—the player—is often a part of the creative team that defines the characters and plot.²⁷⁷ Without input from the player or players, the main characters do nothing. In terms of game play, the marketing of the games, and the hardware on which they run, many video games revolve around main characters.²⁷⁸ They are a video game company’s most valuable assets.²⁷⁹ As with other media, popular characters can appear in a series of games, providing a sustainable stream of revenue.²⁸⁰ Many games

273. See J.C. HERZ, JOYSTICK NATION 14 (1997) (noting original foray into video game technology in the early 1960s and first commercialization in 1971); Leonard Herman et al., *The History of Video Games*, Gamespot.com, at <http://gamespot.com/gamespot/features/video/nov/> (last visited Feb. 15, 2002) (placing initial forays into video game technology in the late 1950s but concurring with 1971 date for commercialization).

274. POOLE, *supra* note 65, at 24 (emphasis in original); see also Jim Hu, 2001: Record Year for Video Game Sales, ZDNET, Feb. 7, 2002, at <http://zdnet.com.com/2100-1104-831793.html> (“[R]etail sales in the U.S. video game industry last year shot up nearly 43 percent to \$9.4 billion from \$6.6 billion in 2000, according to market researcher NPD.”).

275. See, e.g., *The History of Virtua Fighter*, Sega.com, at http://www.sega.com/games/ps2/post_ps2article.jhtml?article=art_historyofvf (last visited Feb. 16, 2002) (describing how various versions of the popular fighting game series were released to arcades, personal computers, and consoles such as the Sony Playstation and Sega Genesis).

276. See Daniel Sieberg & Richard Stenger, *Analysis: Clash of the Video Game Consoles*, CNN, Nov. 29, 2001, at <http://www.cnn.com/2001/TECH/ptech/11/28/console.clash/index.html> (noting withdrawal of Sega from the hardware market).

277. See POOLE, *supra* note 65, at 26–27.

278. See *id.* at 159–63 (“A really successful character is not just a money-maker for software developers, either: as we’ve seen, it enables hardware companies to sell consoles.”).

279. See HERZ, *supra* note 273, at 133–34 (quoting Peter Main, Nintendo’s vice-president of marketing as stating “It doesn’t show on our balance sheet as our most important assets . . . and yet, at the end of the day, these characters are unquestionably our most important assets.”).

280. See, e.g., CNET Networks, *supra* note 53 (describing over twenty games in which Nintendo’s Mario has appeared); *The History of Metal Gear*, CNET Networks, at http://gamespot.com/gamespot/features/video/mg_history/p10_01.html (last visited Feb. 28,

also have non-playable characters (NPCs) which interact with the playable characters.²⁸¹ NPCs are entirely the creation of the game's producers and the player has no direct control over them.²⁸²

Of course, different types of games rely in varying degrees on characters. Herz divides the kingdom of video games into eight phyla: action, adventure, fighting, puzzle, role-playing, simulation, sports and strategy.²⁸³ Some categories are more character-dependent than others. Puzzle, simulation, and strategy games may have no identifiable characters;²⁸⁴ adventure and role-playing games use characters to tell a story like any other work of fiction;²⁸⁵ sports, action and fighting games are often centered around characters with little to no plot.²⁸⁶ Modern sports games are interesting in that the main characters are typically based on real-life professional athletes. They wear the same uniforms, have similar abilities relative to other players, and even look quite a bit like the actual athletes.²⁸⁷

Movie adaptations of video games are relatively few in number because, with the recent exception of *Lara Croft: Tomb Raider*,²⁸⁸ they have largely been both critical and box office disappointments.²⁸⁹ On the other

2002) (listing five games featuring the character Solid Snake).

281. See POOLE, *supra* note 65, at 114–15.

282. NPCs certainly respond to the actions of the player controlled character, and in that sense, the player does influence NPCs. The difference is that an NPC's responses are defined entirely by the game's creators whereas the main character's attitude, strategy, intelligence and values are defined by the player. See generally POOLE, *supra* note 65, at 115–17 (discussing the influence of artificial intelligence advances in the algorithms that control NPCs).

283. *Id.* at 24–31.

284. See, e.g., TETRIS (Alexey Pazhitnov 1985) (popular puzzle game featuring shapes); MICROSOFT FLIGHT SIMULATOR 2000 (Microsoft 2000) (flight simulator); SUBMARINE TITANS (Strategy First 2001) (futuristic strategy game focusing on submarine warfare).

285. See, e.g., METAL GEAR SOLID (Konami 1999) (part of a series of adventure games focusing on the exploits of a commando named Solid Snake); FINAL FANTASY X (Square 2001) (tenth game in a series of role playing games featuring a variety of characters).

286. See, e.g., MADDEN NFL 2002 (Electronic Arts 2002) (featuring characters based on real current and past players, coaches and announcers); MARIO BROTHERS (Nintendo 1983) (first of a series of popular action games featuring Mario and his brother Luigi); TEKKEN 2 (Namco 1995) (fighting game allowing players to choose among twenty-three characters for their bouts).

287. See, e.g., POOLE, *supra* note 65, at 52 (“In EA’s [Electronic Art’s] World Cup 98, not only are real players licensed, their faces digitally mapped on to computer figures, but the actual French stadia are lovingly rebuilt on the screen.”).

288. (Paramount Pictures 2001).

289. Compare *Business Data for Lara Croft: Tomb Raider*, Internet Movie Database, Inc., (2001), at <http://us.imdb.com/Business?0146316> (last visited Feb. 21, 2002) (reporting domestic gross in excess of \$130 million and a budget of \$80 million) with POOLE, *supra* note 65, at 85 (“Films based on videogames are even worse, as anyone will testify who has giggled throughout the truly spectacular artistic abyss that is *Street Fighter: the Movie*.”). Although *Teenage Mutant Ninja Turtles* (New Line Cinema 1990) grossed \$135 million on a \$13.5 million budget, the Turtles are originally comic book characters that merely made a stopover in a video game before

hand, video game adaptations of movies have been quite numerous, despite their limited success.²⁹⁰ Further, tie-ins are expanding to other media, particularly novels.²⁹¹ Novelist Tom Clancy, in particular, has experienced success in porting his books to various video game platforms.²⁹²

F. Comics

The medium of comics is composed of three submedia: comic strips, comic books, and graphic novels.²⁹³ Strips appear daily in newspapers, whereas comic books and graphic novels are sold individually. Graphic novels are longer than comic books, and typically appear on higher quality paper. The three submedia are unified by the presentation of the characters and story through a sequence of still pictures with speech located in dialogue "bubbles."

"Once considered a rather lowbrow and immature form of entertainment, albeit a popular one with newspaper readers and therefore a circulation builder, the comic strip during its 100-year history has gradually and grudgingly been recognized by the art and literary establishment as a unique and indigenous American art form."²⁹⁴ It is also deserving of recognition as a source medium for valuable characters.²⁹⁵ The tremendous

ascending to the silver screen. See *Business Data for Teenage Mutant Ninja Turtles*, Internet Movie Database, Inc., (1990), at <http://us.imdb.com/Business?0100758> (last visited Feb. 21, 2002). The latest video game turned movie, *Resident Evil* (New Legacy 2002), had a respectable, although not spectacular, opening weekend gross of around \$18 million. See Martin A. Grove, *Box Office Analysis: March 17*, HOLLYWOOD.COM, Mar. 17, 2002, at <http://www.hollywood.com/news/detail/article/1106474> ("Putting the film's cost in the very modest area of \$30 million, [the president of the film's financier] said it should be profitable for all concerned."). A sequel is planned for 2003. See *Resident Evil: Nemesis* (2003), Internet Movie Database, Inc., at <http://us.imdb.com/Title?0318627> (last visited Jan. 1, 2003).

290. See MARSHA KINDER, PLAYING WITH POWER IN MOVIES, TELEVISION, AND VIDEO GAMES 95 (1991) (listing fourteen games for the Nintendo Entertainment System based on movies); Glen Jackson, *The Gameslice Interview: The World Is Not Enough*, Gameslice.com, at <http://www.gameslice.com/features/twine/index.shtml> (last visited Feb. 21, 2002) ("Usually news of a game based on a movie causes eyes to roll. . . . As a rule, movie licenses don't work in the gaming industry. But Goldeneye is one of the best examples of an exception to that rule.").

291. See POOLE, *supra* note 65, at 23–24.

292. See Press Release, Monday_03.04.02-UBI Soft Unleashes the Next Generation of Tom Clancy's Rainbow Six (Mar. 4, 2002), at <http://www.raven-shield.com/press.php> (announcing Action Game of the Year for 1999 awards from both *PC Gamer* and *Computer Gaming World*).

293. Robinson, *supra* note 89, at xi.

294. *Id.* at xix.

295. See *id.* at xxi ("Cartoons have set the style for clothes, coiffure, food, manners, and mores. They have become Broadway shows, motion pictures, radio and TV series, popular songs, books, and toys."); KINNARD, *supra* note 54, at xii ("Since the introduction of the newspaper comic strip and the comic book, purveyors of entertainment in other media have been eager to adapt comic-strip characters, sensing the obvious profits to be earned from a pre-sold audience

success comic strip characters have enjoyed in other media largely overshadows the market for the books and strips themselves.²⁹⁶ Consider the evolution of Superman from a comic strip in 1938 to books, movies, television shows, and now a theme park ride:

Created by writer Jerry Siegel and artist Joe Shuster, Superman—the greatest of all comic strip heroes—premiered in ACTION COMICS #1 in June of 1938. The strip was such a wildfire success that Superman was quickly awarded his own book. Eventually, an entire line of spin-off books appeared, featuring virtually every friend and acquaintance of Superman's, and even his own adolescence was scrutinized in SUPERBOY comics.

Although a series of excellent Technicolor cartoons, animated by the Max Fleischer studios, appeared in the early 1940s, it was not until 1948 that SUPERMAN was finally adapted to the screen in live-action form, in a serial produced by Columbia Pictures.²⁹⁷

Expansion into alternate media is not the only way to make money with comic book characters. Although the market for comic books themselves is dwarfed by other media examined in this Article, sales of books, collectibles, and original artwork are increasing. "The increasing number of fans and collectors has . . . inflated original artwork prices to astonishingly-high levels in Europe and the United States, and supported more than 4,000 comic book stores and dozens of very well-attended comic fests in the United States."²⁹⁸

Although some comic strip characters are totally imaginary, "[s]trips today tend to [sic] more autobiographical than inventive," relying on characters based on the lives of the writers.²⁹⁹ There are few other sources for today's comic strip characters beyond the lives and imaginations of their

already familiar with the material. . . . Comic strip adaptations have spanned all the media, including theater and radio, but movies and television have produced the most strip adaptations.").

296. Compare, for example, the tremendous success of the Teenage Mutant Ninja Turtles as characters in television shows, movies and merchandising with their humble beginnings as comic book characters. See KINDER, *supra* note 290, at 125.

297. KINNARD, *supra* note 54, at 191.

298. JOHN A. LENT, COMIC BOOKS AND COMIC STRIPS IN THE UNITED STATES xi (1994).

299. Mort Walker, *Foreword* to JOHN A. LENT, COMIC BOOKS AND COMIC STRIPS IN THE UNITED STATES, at vii, viii (1994) ("'Hagar' and his wife were caricatures of Dik and Joan Browne. Bill Keane's characters are not only caricatures, they all have their real names. So does 'Cathy.' My characters were *all* taken from real people. Lynn Johnston and her husband, Rod, star in their own strip. I guess it helps to give the characters life, and it seems to be what the readers prefer because they keep voting for them in readership polls.").

creators.³⁰⁰ Perhaps due to the relatively small size of the comic book market as compared to other markets, entertainment companies have not seen a large profit opportunity in exporting television or movie characters to the comics. Thus, despite the fact that comic books have been the genesis of characters that have become powerful brands in the entertainment world, few outside brands have been imported into the comic books.

G. Advertising

Characters appear in advertising campaigns for other products in one of two ways. First, a character from another work may appear in the campaign and lend his or her “endorsement” to the product.³⁰¹ Second, a character can be specially designed for the advertising campaign.³⁰²

An example of the former is the large number of product endorsements made by James Bond, as played by Pierce Brosnan, prior to the 1997 release of *Tomorrow Never Dies*.³⁰³ “Prior to the film’s release, television screens and magazines were filled with images of . . . James Bond advertising BMW roadsters and motorcycles, Heineken beer, Smirnoff vodka, Omega watches, Ericsson cellular phones, Brioni suits and Visa credit cards.”³⁰⁴ Thus, rather than merely have the endorsement of an actor like Pierce Brosnan, companies are able to benefit from the endorsement of Bond himself.³⁰⁵ “Ivo Soave, of Omega watches, said that the Omega Seamaster experienced an increase in sales of more than 100% over a short period of time” as a result of the Bond-based marketing campaign.³⁰⁶ Following in Bond’s footsteps, Austin Powers, a British secret agent of another sort, has appeared in the “Got Milk” advertising campaign as well as

300. There are, of course, some exceptions. For instance, *The Simpsons* television series has inspired several comic books. See William La Rue, *Collecting Simpsons Part 2: The History*, at <http://members.aol.com/bartfan/history.htm> (last visited Feb. 14, 2002).

301. This has the added benefit of promoting the original work. See *infra* text accompanying note 351.

302. The two approaches can, of course, be combined, as Toys ‘R’ Us did in a series of television spots featuring their long-time spokes-character Geoffrey the Giraffe and E.T., the Extra-Terrestrial. See Courtney Kane, *Will the Magic of E.T. Work Again?*, N.Y. TIMES, Mar. 22, 2002, at C2.

303. (United Artists 1997).

304. Mike Bassett, *Teachable Moments: And Now a Word from Our Sponsor*, at <http://www.media-awareness.ca/eng/med/class/teamedia/bond2.htm> (last visited Jan. 8, 2002).

305. See *Bond: Nobody Sells It Better*, BBC NEWS, Dec. 4, 1997, at <http://news.bbc.co.uk/1/hi/uk/36885.stm> [hereinafter *Bond: Nobody Sells It Better*]. But see Guy Trebay, *Buy Like Bond: Make it a Finlandia and 7Up, Shaken, Not Stirred*, N.Y. TIMES, Oct. 27, 2002, Section 4, at 14 (noting that with the release of *Die Another Day* in November 2002, Bond’s vodka of choice has switched from Smirnoff to Finlandia)

306. *Bond: Nobody Sells It Better*, *supra* note 305.

advertisements for Heineken beer.³⁰⁷

Using a character to pitch a product as part of an advertising campaign is often accompanied by placement of the product in the artistic work itself, where the character can use it in a more “realistic” setting. Advertisers either pay large sums of money to insert their products in movies and video games, or promise to promote the primary work in exchange for product placement.³⁰⁸ Product placement also takes place without an accompanying advertising campaign.

Specially-designed characters for advertising have been used to sell products and services ranging from breakfast cereal³⁰⁹ to automobiles³¹⁰ to programming languages.³¹¹ Some characters are animated, like the Pillsbury Doughboy.³¹² Others are played by well-known actors and actresses, such as the stars of the 1-800-COLLECT commercials, Eva Savealot and Inspecta Collect, played by Alyssa Milano and Mr. T respectively.³¹³

307. See Review, *Austin Powers: The Spy Who Shagged Me*, at <http://entertainment.planetwisdom.com/movies/austinpowers2.htm>.

308. See Bruce Horowitz, *Hollywood May Add ‘Safe’ to Its Sex Scenes*, L.A. TIMES, July 6, 1993, at D2 (“[P]roducts . . . appear in the films only because companies were willing to pay top dollar for the exposure, or supply them free.”); *Bond: Nobody Sells It Better*, *supra* note 308 (“Alongside Pierce Brosnan as Bond and Teri Hatcher as femme fatale Paris Carver, a host of products have starring roles in the film, at a total cost of £20m to the manufacturers.”); Cesar G. Soriano & Andy Seiler, *‘Powers’ Turns on, Sells out Mod Products*, USA TODAY, June 24, 1999, at 4D (quoting Heineken executive Dan Tearnio describing the arrangement between Heineken and the producers of the Austin Powers sequel, *The Spy Who Shagged Me*, “This worked the way most of these things work nowadays, in that there is no money exchanged. We get our product featured in the film, and we get the right to use Austin Powers’ likeness in commercials. In return, we agree to do a sizable promotion for the film.”); POOLE, *supra* note 65, at 22 (noting that, just like the billboards seen in real sports arenas, sponsors can pay for advertising space in the virtual arenas found in video games).

309. See, e.g., *Trix*, General Mills, at <http://www.generalmills.com/corporate/brandscape/trix/index.htm> (last visited Jan. 12, 2003) (featuring the Trix rabbit; “Silly rabbit, Trix are for Kids”); *Lucky Charms*, General Mills, at <http://www.generalmills.com/corporate/brandscape/luckycharms/index.htm> (last visited Jan. 12, 2003) (featuring Lucky the Leprechaun).

310. See Michael McCarthy, *Popular Demand Revives Joe Isuzu*, USA TODAY, Aug. 7, 2001 (reporting on the revival of Joe Isuzu, the lying car salesman, in a new series of advertisements after a ten-year hiatus).

311. See The Duke Gallery, java.sun.com, at http://java.sun.com/features/1999/05/duke_gallery.html (last updated June 12, 2002) (telling the story of the origins of Duke, the mascot of the Java programming language).

312. See *General Mills History of Innovation: The Pillsbury Doughboy*, at http://www.generalmills.com/corporate/about/history/hist_doughboy.pdf (last visited Mar. 5, 2003) (explaining the origins of Poppin’ Fresh and the Pillsbury Doughboy as an idea begun in 1965).

313. See 1-800-COLLECT FAQs, at http://www.1800collect.com/docs2/sub_info.html (last visited Jan. 7, 2002). Mr. T’s Inspecta Collect trades not only on Mr. T’s popularity as an actor generally but also on his break-out role portraying Clubber Lang in *Rocky III*. In one television commercial, Inspecta Collect appears wearing boxing gloves and robe and states that he “pities

Celebrity is not required; Dell's television advertisements featuring a previously unknown acting student at NYU as Steven—"the Dell Guy"—have been extremely successful.³¹⁴ The design of new characters for marketing campaigns is not a recent phenomenon. Since as early as the late 1800s, companies have introduced us to new characters who identify and hawk their wares.³¹⁵ "Some have been short-lived, others have lasted for ninety years or more."³¹⁶

Still others take on a life of their own and leap out of the advertising medium into other media such as video games, television series, and various branded consumer products. In the late 1980s, Dominos pizza launched an advertising campaign featuring "The Noid," who appeared in "many claymation TV commercials. He would always try to destroy people's pizza, much like the evil Tricks [sic] rabbit."³¹⁷ In addition to TV commercials, the Noid inspired a video game for the Nintendo Entertainment System.³¹⁸ Although Dominos ultimately abandoned the campaign, the Noid still has fans—464 of whom have signed a web-based petition to "bring back the Noid."³¹⁹ Other spokes-characters who lived beyond their

the fool" who doesn't know that 1-800-COLLECT saves money. Cf. ROCKY III (Metro-Goldwyn-Mayer 1982) ("No, I don't hate Balboa. I pity the fool."); see also Kurtz, *supra* note 6, at 470 (discussing a similar case in which an actor from a television series appeared in a Burger King commercial, allegedly "as" his character).

314. Jason Carroll, *Dude, Meet the Dell Guy*, CNN.COM, Jan. 31, 2002, at <http://www.cnn.com/2002/SHOWBIZ/TV/01/31/dell.guy/index.html>.

315. See McCrea Adams, *Advertising Characters: The Pantheon of Consumerism*, in SIGNS OF LIFE IN THE USA, 359, 381 (Sonia Maasik & Jack Solomon eds., 1997) (referencing the Quaker Oat Quaker and Psyche, the White Rock Soda girl).

316. *Id.* at 384.

317. See Unofficial Noid Homepage, at <http://www.angelfire.com/80s/noid/index.html> (last visited Jan. 8, 2002).

318. YO! NOID (CapCom 1990); see *The Yo!Noid Video Game*, at <http://www.angelfire.com/80s/noid/yonoid.html> (last visited Jan. 8, 2002). *Yo! Noid*, along with an unreleased game entitled *California Raisins*, based on the advertising characters of the same name have the dubious honor of being named to a list of "The Ten Worst Ideas to Make Nintendo Games About." See *Based on Crap: The Ten Worst Ideas to Make Nintendo Games About*, at <http://www.seanbaby.com/nes/basedoncrap.htm> (last visited Jan. 8, 2002). *Cool Spot*, a game based on the animated red spot from 7-Up cans and bottles, received an honorable mention. See *id.*

319. See *Bring Back the Noid! Petition*, at <http://www.petitiononline.com/bbtrn42/petition.html> (last visited Jan. 8, 2002) ("We the pizza eaters of the world are upset about the loss of a long-loved icon, the Noid. We feel that Domino's pizza should bring the Noid back into its commercials. This petition is for all those who want to, once again, see the loveable Noid and his antics on the television."). Domino's recently discontinued another advertising campaign featuring a character called "Bad Andy" because the "Bad Andy campaign focused on our in-store operations." See *Domino Pizza's New Ad Campaign Provides a Peek Behind the Scenes*, at <http://www.dominos.com/C1256B420054FF48/vwContentByKey/W257GMQX890DOMBEN>. Now, Domino's is attempting to return "the very essence of our brand: delivery." *Get the Door, It's Domino's*, at www.dominos.com/C1256B420054FF48/vwContentByKey/

advertising campaigns include the California Raisins, who, while unable to break into the video game market, were the subject of an animated television series,³²⁰ and the Taco-Bell chihuahua who is featured on “stuffed toys, T-shirts and other products.”³²¹

Use of characters—either already established or specially-created—is important to advertising because it gives the target audience someone to identify with and remember.³²² P. David McGovern, an ad director at IBM responsible for the company’s highly successful campaign featuring Charlie Chaplin’s Tramp character, describes this quality as “stopping power.”³²³ Although memorable characters are not the only way to achieve stopping power in an advertisement, it is a proven method that advertisers will continue to use.³²⁴

H. Merchandising

Once a character has achieved a certain level of popularity, the right to use the character’s image on various consumer products can be tremendously valuable. “Merchandising can be more profitable than filmmaking. The haul from of all the ‘Star Wars’-related items has hit \$4.5 billion.”³²⁵

W257KQFJ272DOMBEN (Mar. 6, 2001). The author has been unable to locate any petitions seeking the return of Andy.

320. *The California Raisins Show* (CBS television broadcast, 1989).

321. See Brooks Boliek, *Court Refuses FCC Hiring Case: Civil Rights Groups Sought Reinstatement of EEO Regulations*, HOLLYWOOD REP., Jan. 23, 2002, LEXIS, News Library, B globe File.

322. See Kristina Brenneman, *Vinton Finds Niche Reviving Tired Advertising Characters*, PORTLAND BUS. J., Jan. 12, 2001, available at <http://portland.bizjournals.com/portland/stories/2001/01/15/story5.html> (last visited Feb. 16, 2002) (quoting David Altschul, president of Vinton Studios’ advertising division, as stating “The real brand building is all about storytelling. It’s about engaging customers in an emotional relationship. That’s very different from a spokesperson.”).

323. Jane Caputi, *IBM’s Charlie Chaplin: A Case Study*, in SIGNS OF LIFE IN THE USA, 117, 118 (Sonia Maasik & Jack Solomon eds., 1994) (“Chiefly, we wanted something that people would remember. Using the Chaplin character was one way to create ads with stopping power.”). Time Magazine credited the campaign with “creat[ing] a new image for IBM.” *Id.* (quoting *Softening a Starchy Image*, TIME, July 11, 1983, at 54 (“The firm has always been seen as efficient and reliable, but it has also been regarded as somewhat cold and aloof. The Tramp, with his ever present red nose, has given IBM a human face.”)).

324. See Malla Pollack, *Your Image Is My Image: When Advertising Dedicates Trademarks to the Public Domain—With an Example from the Trademark Counterfeiting Act of 1984*, 14 CARDOZO L. REV. 1392, 1397–1411 (1993). “An ad campaign can offer a specific identifying factor to the consumer as its added value. Often this specific pull is identification with a human celebrity. Many of the more lasting identifications are made with synthetic celebrities—characters created for the advertisements.” *Id.* at 1408–09.

325. Rick Bentley, *Merchandising Showdown*, FRESNO BEE, Nov. 29, 2001, available at <http://www.fresnobee.com/lifestyle/movies/-print/story/1241621p-1310129c.html>.

The all-encompassing nature of merchandising is the subject of a joke in *Spaceballs*,³²⁶ the Mel Brooks parody of *Star Wars*, as well as a long-running gag on *The Simpsons*.³²⁷ When the writers of *The Simpsons* poke fun at merchandising, it is particularly amusing given the enormous profits its creators reaped from merchandising shortly after the show became popular.³²⁸ After oversaturation destroyed the market for *Simpsons* goods in the mid-1990s, FOX launched a new, more sustainable merchandising effort in 1998 that continues to be profitable.³²⁹

Merchandising depends more on popular characters than any other element of a work. Stuffed animals and action figures necessarily feature characters.³³⁰ T-shirts, water bottles, hats, posters, and similar items also typically feature characters.³³¹ With few exceptions, pictures of characters are the best way to evoke a fictional work in a consumer product.³³² Use of the title, while effective, limits the visual appeal of the consumer product by relying on text rather than an image. Thus, characters from visual media such as films and television series are most amenable to merchandising.³³³

326. (Metro-Goldwyn-Mayer 1987) (featuring products such as Spaceballs . . . the Flame-thrower and the character Yogurt reminding us that merchandising is “where the real money from the movie is made.”).

327. See RICHMOND, *supra* note 272, at 208–09 (listing Krusty the Clown merchandising including three different kinds of cereal, the Lady Krusty Mustache Removal System, and Krusty Handguns).

328. See OWEN, *supra* note 240, at 64 (“Not since *The Flintstones* has a prime time cartoon captured so much attention and led to so much mass marketing.”). See also William LaRue, *Collecting Simpsons! Part 2: The History*, at <http://members.aol.com/bartfan/history.htm> (last visited Feb. 14, 2002) (noting products including stuffed figures, back packs, lunch boxes, action figures and a board game) [hereinafter *Simpsons!*]. LaRue describes the early frenzy over *Simpsons* T-Shirts:

Buyers snapped up shirts featuring “The Simpsons” so fast that some merchants hawked them right out of the packing boxes. One report estimated that the shirts were selling for a while at the mind-boggling rate of 1 million a week. “There was a public demand, practically an outcry, for *Simpsons* products,” wrote Steve Dale and Shane Tritsch in their unofficial 1990 book, “*Simpson Mania*” (Publications International Ltd.).

Id.

329. See LaRue, *supra* note 328.

330. See *id.*

331. See *id.*

332. In some cases, a setting such as one of the spaceships or space stations from *Star Trek* is equally effective. See *Star Trek Icon T-Shirt*, T-Shirt King.com, at <http://www.t-shirtking.com/catalog/StarTrek/ea628899e4ccad839ba14223a112389d> (last visited Jan. 28, 2002).

333. See Peter K. Yu, Note, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 CARDOZO L. REV. 355, 356–57 (1998) (“[C]haracter merchandising has not only become a well-known feature of modern marketing but has also grown into a multi-billion dollar business.”) (internal quotation marks omitted). *Id.* Like their non-interactive cousins, movies and television, video games are ripe with merchandising opportunities, “generat[ing]

“The most suitable films for promotional or merchandising activities are sequels.”³³⁴ As familiarity with characters increases with the number of works in which they appear, consumer demand for merchandise featuring the characters also increases.

Merchandising products are limited only by imagination.³³⁵ Clothing and consumer goods are just the beginning. The Flintstones have brought us not one, but two cereals.³³⁶ Rather than adapting a television series into a novel, inventive producers of various television shows have produced books about their series ranging from episode guides³³⁷ to trivia books³³⁸ to encyclopedic reference materials.³³⁹

The wide range of opportunities for merchandising makes it difficult, if not impossible, to accurately estimate the overall economic value of characters across entertainment companies. Although any one company may be able to account for its merchandising profits, no such figures representing the entertainment industry, as a whole, are available.

I. Conclusion

The increasingly complex interaction among the various entertainment media makes it difficult to categorize the relationships between works. Some works are at the same time sequels and remakes, adaptations and spinoffs.³⁴⁰ For example, Titan Books, Ltd., under license from DC Comics, published a collection of the official comic book adaptations of the

a large spin-off industry of playing cards, posters, strategy guides, clothes and plastic figurines.” POOLE, *supra* note 65, at 21.

334. Rachel Miller, *Licensing: The Box Office Retains Its Draw*, *MARKETING*, Jan. 20, 2000, at 27 (quoting David Moore, chairman of marketing communications consultancy Twenty20 CbH) (“The Bond movies and Star Wars with its recent prequel, as well as Austin Powers are about as close as you can get to guarantees in marketing.”).

335. *Cf.* KINDER, *supra* note 290, at 121–22 (describing the “Turtlemania” resulting from expansions of the Teenage Mutant Ninja Turtles from their comic book/video game/movie/tv series origins to “a rock group that performs live in concerts,” “martial arts classes” and “over one thousand Turtle products”); OWEN, *supra* note 240, at 7–8 (discussing various products and services based on television shows); *Newbury Street: Restaurants*, at <http://www.newbury-st.com/asp/merdtl.asp?id=120> (last visited Apr. 1, 2002) (Boston’s Newbury Street features a bar called Daisy Buchanan’s, named after the character from F. Scott Fitzgerald’s *The Great Gatsby* (1925)).

336. *See* *POST Pebbles*, Kraftfoods.com, at <http://www.kraftfoods.com/postcereals/pebs.html> (last visited Jan. 12, 2002) (advertising both Fruity Pebbles and Cocoa Pebbles).

337. *See, e.g.*, RICHMOND, *supra* note 272.

338. *See, e.g.*, GERALD J. WAGGETT, *THE OFFICIAL GENERAL HOSPITAL TRIVIA BOOK* (1997).

339. *See, e.g.*, RICK STERNBACH & MICHAEL OKUDA, *STAR TREK: THE NEXT GENERATION TECHNICAL MANUAL* (1975).

340. *See* Goldsman, *supra* note 203.

four recent *Batman* movies.³⁴¹ In his introduction to the book, Goldsman describes the contents as “*interpretations* of movies which are, of course, essentially *interpretations* of comics.”³⁴² But the relationships of the comics to other works are even more complicated than Goldsman describes. The contemporary *Batman* movies themselves influenced and were influenced by the various TV series, earlier movies, and video games.³⁴³ Simultaneously, descendents of the old and progenitors of the as-yet-uncreated, modern interpretations of *Batman* are links in the ever-growing chain that defines the character.³⁴⁴ Consider also the twists and turns in this analysis of an episode of the animated television series, *Garfield and Friends*, entitled *The Lasagna Zone*:³⁴⁵

In this clever parody of “The Twilight Zone,” we are entreated (in direct address) by a cartoon Rod Serling to “consider, if you will, the case of one Garfield the cat, “who, after dropping lasagna on his owner John’s new satellite dish, “finds himself in the wrong end of that cathode ray tube.” Garfield’s entry into the TV screen parodies the celebrated dream sequence from *Sherlock Junior*, where Buster enters the fictional world of the movie he’s projecting. “In ‘The Lasagna Zone,’ this bizarre premise generates TV parodies within a film parody within a TV parody—a multilayered structure like lasagna and like the TV supertext (which “*Garfield and Friends*” reproduces with its unpredictable segmentation).”³⁴⁶

Increased interaction among various media redefines not only character, but also other elements of art, including style, setting, and theme. Our movies become more like video games and our video games more like movies.³⁴⁷ Old lines between media that once may have been bright have now become blurred. Indeed, for those works that cross the traditional

341. *Id.*

342. *Id.* at 8.

343. The Internet Movie Database lists nine additional theatrical releases; three made-for-television movies; two direct-to-video releases; nine television series; and nine video games. See IMDb Title Search, at <http://www.imdb.com/Tsearch?batman> (last visited Jan. 19, 2002). The artists responsible for a new *Batman* work sometimes intentionally avoid the influence of earlier works which do not present a compatible vision of the superhero. See KINNARD, *supra* note 54, at 20–21 (“The 1989 feature starring Michael Keaton as *Batman* was . . . a welcome return to a serious approach, and wisely ignored the previous TV series.”). However, even in choosing to ignore an earlier work, the artist is influenced by it—in deciding what *Batman* is not, one determines part of what *Batman* will be.

344. See, e.g., KINNARD, *supra* note 54, at 19–20.

345. *Garfield and Friends: The Lasagna Zone* (CBS television broadcast, Oct. 7, 1989).

346. KINDER, *supra* note 290, at 75–76.

347. See POOLE, *supra* note 65, at 86–97.

boundaries of media, distinguishing between the work as a TV show, film, or lunch box does not make much sense.

[I]n many cases of co-ordinated exploitation, it may be more helpful to think of cross-media marketing of a *fiction*, rather than of the adaptation of a novel into film. For now the executives of media corporations will consider not only the exploitation of film, stage play and novel, but will also think of entering an array of coordinated markets with pre-recorded video-cassettes, cable television, the tv series, sound-track albums and audio cassette tapes, video and computer games, and a whole range of marketable tie-ins from vests through shoelaces to ice-cream and horrible toys.³⁴⁸

Thus, the person responsible for designing the vehicles used in *Jurassic Park 2: The Lost World* was not an employee of the production company, Universal, but rather an employee of its partner, the toy company Hasbro, who “designed the vehicles . . . for their playability long before any film was shot for the movie.”³⁴⁹

This sort of coordinated multimedia exploitation is typically centered on a film.³⁵⁰ This is probably a result of the immense effort and money necessary for the successful marketing of a film. First, when images of a film’s characters appear on T-shirts³⁵¹ or songs about them are played on the radio,³⁵² the public’s awareness of the film is raised.³⁵³ Soundtracks have become even more important with the rising popularity of MTV, where music videos are essentially free trailers that can run in excess of five minutes several times each day. This contributes to the box-office success of the film. These types of advertising are self-sufficient in that they often pay for themselves while promoting the movie. Second, the

348. Izod, *supra* note 4, at 102–03.

349. WOLF, *supra* note 99, at 229.

350. Cf. KINDER, *supra* note 290, at 122–23. In introducing the concept of a “supersystem,” “a network of intertextuality constructed around a figure or group of figures from pop culture,” Kinder gives seven examples of fictional characters that serve as the basis for supersystems. Only one, the Simpson family, has not been the subject of a theatrically released motion picture.

351. See, e.g., *Movie T-Shirts*, T-ShirtKing.com, at http://www.t-shirtking.com/products_t-shirts/Movie_T-Shirts.html (last visited Feb. 6, 2003) (offering for sale t-shirts from various movies).

352. See, e.g., Bobby Brown, *On Our Own*, on GHOSTBUSTERS II SOUNDTRACK (MCA Records 1989) (featuring lyrics about the characters and plot of *Ghostbusters II*); JON BON JOVI, BLAZE OF GLORY (Polygram Records 1994) (containing songs “inspired by the film *Young Guns II*”); Prince, *Batdance*, on BATMAN: MUSIC FROM THE MOTION PICTURE (Warner Bros. Records 1989) (featuring dialogue from the movie *Batman*).

353. See KINDER, *supra* note 290, at 132–33 (describing the coordinated multi-media blitz surrounding the release of *Teenage Mutant Ninja Turtles* (New Line Cinema 1990)).

traditional methods of advertising for the film³⁵⁴ are costs that the producer/distributor must bear regardless of whether cross-marketing occurs. However, when a consumer sees an advertisement for *Toy Story*, the movie, he or she may instead be moved to purchase a Buzz Lightyear action figure.³⁵⁵ Since the high movie promotion costs are sunk costs in terms of realizing profit from other media, there is a strong incentive to diversify product offerings to make the most of the consumer awareness generated by the movie's marketing push.

The *New York Times* business section recently featured an article about how Warner Brothers has embraced cross-media exploitation as a business strategy.³⁵⁶ Attempting to emulate and even surpass the success Disney has had in squeezing maximum value from its characters, Warner Brothers' top management plans "to produce even bigger and more frequent franchise films, wringing more profits and extending a concept's shelf life through television spinoffs, product tie-ins, movie soundtracks, promotional Web sites and other multimedia means."³⁵⁷ In executing their plan, they will be able to draw on the extensive reach of Warner Brothers' parent company, AOL Time Warner, into other media.³⁵⁸ "The direction . . . Warner Brothers . . . is now veering toward could foretell the entertainment industry's future: a consolidation wave among smaller film and television studios, which even now are having difficulty competing against media conglomerates like AOL Time Warner and Vivendi Universal."³⁵⁹

The success of coordinated exploitation both encourages and is encouraged by consolidation of entertainment businesses across media boundaries.³⁶⁰ Firms with valuable characters seek to merge with companies that can provide distribution channels in alternate media.³⁶¹ Newly-consolidated companies are presented with novel opportunities to exploit

354. Traditional advertising methods include billboards, television commercials, theatrical trailers, taxicab and bus advertising, and travel costs for the stars as they promote the movie on various television and radio shows.

355. Or, perhaps, repeatedly ask his parents to purchase one.

356. Laura M. Holson & Ricky Lyman, *In Warner Brothers' Strategy, A Movie Is Now a Product Line*, N.Y. TIMES, Feb. 11, 2002, at C1.

357. *Id.* Compare *id.* (quoting Barry Meyer, CEO of Warner Brothers, as stating "Disney has been such an icon. We think we can do even more.") with *supra* notes 110–111 and accompanying text (describing Disney's success).

358. See Holson & Lyman, *supra* note 356 ("Certainly, no other company commands the reach into movies, television, publishing and the Internet that AOL Time Warner does.").

359. *Id.*

360. *But cf.* Simonet, *supra* note 113, at 161–62 (rejecting "[t]he hypothesis that conglomerate ownership has stifled originality in film scripts by increasing the number of remakes, sequels and series").

361. See Holson & Lyman, *supra* note 356 ("They've got a lot of tools. It gives them a much more predictable business.").

their combined stable of characters.³⁶²

Character reuse is further encouraged by entertainment businesses viewing themselves more as businesses and less as entertainers and artists. The diminished risk level associated with works based on characters who have already proven their popularity makes such works popular with Wall Street as well as Main Street.³⁶³ Thus, in almost all of the media examined above, there appears to be a trend towards increased reliance on reuse of characters and plots from earlier works.³⁶⁴

This trend is important to entertainment producers and consumers alike. Below, I first examine increased reliance on character reuse from the perspective of entertainment producers. As companies shepherd the growth of their characters into brands, they must be wary of damage to their characters' value.³⁶⁵ Thus, the following sections examine potential loss of character value and the legal tools for preventing or recouping that loss. I then turn to the perspective of the consumer and ask whether this trend is desirable and how changes in intellectual property law could or should impact character reuse.

IV. CHARACTERS AT RISK: HOW CHARACTERS LOSE ECONOMIC VALUE

Characters lose economic value in two ways. The first is opportunity cost, i.e., the lost opportunity to make money.³⁶⁶ If a third party uses the character in a project without compensating the owner, the owner has lost the opportunity to exploit the character's economic value in a similar project.³⁶⁷ The second is damage to the ultimate value of a character.³⁶⁸ This occurs when damage to the character's reputation limits future use of the character or increased costs associated with the character's use prevent realization of a profit.

362. Consolidation eliminates the transaction costs associated with negotiations over works featuring two "worlds" of characters. The canonical work in this area, *The Jetsons Meet the Flintstones* (syndicated television broadcast, Nov. 9, 1987), featured two groups of characters under the control of Hanna-Barbera Productions. As control over various groups is consolidated, audiences can expect similar works in the future.

363. See Holson & Lyman, *supra* note 356 ("So there is a clear value in cranking out a steady run of strong, low risk franchises in which the studios retains financial control.").

364. There are some exceptions. The sheer number of literary titles published each year prevents character reuse from occupying a substantial portion of the market. Comic strips continue to be primarily original creations. Despite these outliers, the overall trend of risk reduction through character reuse is unmistakable.

365. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 14.01[A], 14.02 (2002) [hereinafter NIMMER].

366. See *id.* § 14.02[A][1].

367. See *id.*

368. See *id.*

A. Opportunity Cost

Simply put, for every dollar another person makes through the use of a character, there is one less dollar available for the character's owner. Some owners are unable to fully exploit the economic value of a character themselves.³⁶⁹ However, through licensing arrangements, joint ventures, and other business combinations, they are, in theory, still able to realize some profit on any conceivable use of a character by partnering with those who have other capabilities.³⁷⁰ Consider, for example, the broad range of companies involved in capitalizing on the ever-increasing popularity of Harry Potter associated with the release of his first movie:

Mattel . . . has the master license for all Potter toys and promotional products. Toys hitting store shelves include the plush Roarin' Snorin' Norbert the Dragon, and Harry's Levitating Challenge, a skill game in which players "levitate" pretend stones through obstacles using compressed air. . . .

Number two toymaker Hasbro . . . is offering Potter-themed card games and electronic toys, while game-software company Electronic Arts has the rights to computer games and video-games. Flying Colors, a unit of toymaker Jakks Pacific will produce a line of craft and activity kits. . . .

And if that weren't enough, your kids may even want to wear Potter's image on their clothing. Most accessories will be made by privately held apparel companies.

Fossil . . . will have a Potter watch, and Department 56 . . . will offer a line of six lockable secret boxes. Collectibles maker Enesco . . . will release a line of mugs.³⁷¹

Although third-party use inevitably leads to lost revenues for the character's owner, calculating the extent of the lost opportunity can be difficult. Third party profits are rarely, if ever, an accurate measure of the owner's lost profit opportunities, because different companies have varying capabilities with regard to exploiting a character's economic value.³⁷² A third party could have higher or lower production costs; either party might

369. See, e.g., Press Release, New Line Cinema, Jim Rosenthal Named President of New Line Television (Mar. 13, 2001), at http://www.newline.com/press/2001/press_rosenthal.html (able to profit on character use through other joint ventures and businesses).

370. For example, New Line Cinema enlisted Toy Biz (toys), Electronic Arts (video games), and Applause, Inc. (gifts), to cash in on the characters from the movie version of *The Lord of the Rings* trilogy. See *id.*

371. Arik Hesseldahl, *Cashing in on Harry Potter's Magic*, FORBES.COM, Nov. 21, 2001, at <http://www.forbes.com/2001/11/21/1121sf.html>.

372. 4 NIMMER, *supra* note 365, § 14.02[A][1].

be able to make use of already-constructed facilities for creating merchandise featuring the character unavailable to the other party; the owner may have lost sales of other products linked to the sale of products featuring the character; and the owner may have been forced to cut prices on her own products in order to compete with the third party's products.³⁷³

Opportunity cost is particularly high if the third party's use is incompatible with the owner's use of the character.³⁷⁴ Compare the case of an unauthorized T-shirt featuring Spiderman, which merely takes away some of the market share of authorized T-shirts for which the owner receives royalties, to the case of an unauthorized sequel in which Spiderman is killed. In the latter case, not only does the owner not make money on the sequel, but she also may lose profits from any future sequels if audiences are unwilling to accept a resurrected Spiderman or two alternate worlds—one in which Spiderman lives and one in which he dies.

The estimated damage that an incompatible character story line has on the market for future works is speculative at best.³⁷⁵ Although there is a strong theoretical argument that the potential for serious damage exists, there is anecdotal evidence that audiences do not mind inconsistencies across works so long as one is deemed official or canonical.³⁷⁶ Benton describes how publishers of Superman comics were able to distinguish between the real, canonical Superman stories, and the unreal stories outside the canon:

The Superman legend must be respected and all the pieces of the ongoing mythos should fit together. Fanciful stories, such as Superman's marriage to Lana Lang or his death by kryptonite, which could not fit into the developing Superman canon were printed as "Imaginary Stories." The other stories in the comic books were "real" and became a part of the well-ordered and internally consistent mythology for each DC superhero of the Silver Age.³⁷⁷

373. *See id.*

374. *See id.*

375. *See* Rebecca Tushnet, *Using Law and Identity to Script Cultural Production: Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *LOY. L.A. ENT. L.J.* 651, 670–74 (1997).

376. *See id.* at 672–73.

377. MIKE BENTON, *THE ILLUSTRATED HISTORY OF SUPERHERO COMICS* 36 (1991); *see also* Tushnet, *supra* note 375, at 669–74 (discussing the impact of fanfic on the market for authorized derivative works when the fanfic includes "copyright disclaimers" that inform a reader that a work is unauthorized); Mike Beidler et al., *Introduction: The Canon Question*, at http://www.geocities.com/mike_beidler/starwarsliteraturecompendium/intro.html (last visited Jan. 20, 2003) (including an excellent discussion of the concept of a canon as applied to the various *Star Wars* movies, books, and comics).

Superman's fans seem to have accepted the dichotomy between the real and imaginary stories without any negative impact on future use of the character. Whether fans of other characters will react similarly is an empirical question that will undoubtedly admit only of case-specific answers. It is difficult to generalize from one case to any other particular intersection between canonical work, alternate work, and audience. High quality alternate works that tell a convincing story consistent with the existing canon are probably more likely to damage the market for other sequels to the original work than an unbelievable or poorly produced alternate work. Particular types of audiences, such as science fiction fans, may be more willing or less willing to accept inconsistencies than the average audience.

Sometimes a third party appropriates characters, not to make money, but merely as a mode of artistic expression or to resurrect characters from a discontinued series of works. The Internet is awash with this so-called fan fiction, or "fanfic" for short.³⁷⁸ Fanfic authors unapologetically "borrow" the characters of popular works such as *The X-Files*, the *Harry Potter* series, and *Star Trek* and weave new stories around them.³⁷⁹ Even though the decentralized nature of fanfic makes it impossible to accurately determine the quantity of material produced, a conservative estimate is that, as of September 2000, there were over one-half million stories in various fora around the Internet.³⁸⁰

Although the fanfic author does not charge the public for access to her newly-created works, the owner of the characters can still be said to have lost an opportunity to make additional money. At the very least, by not receiving payments for character licenses, the owner loses an income stream.³⁸¹ Additionally, despite being free, fanfic may harm the market for the owner's works in much the same way as for-profit works by a third party do. Some fanfics are unsuitable for the mass market due to their poor

378. See Erica Friedman, *Writing in the Cracks: The Impetus for Fanfic*, at <http://www.fanficrevolution.org/revolution/cracksn.htm> (last visited Jan. 25, 2003) ("Fanfic is usually defined as fiction about characters from a TV, movie, comic, or cartoon series, written by fans."). See generally David Plotz, *Luke Skywalker is Gay?*, SLATE, Apr. 14, 2000, at <http://slate.msn.com/default.aspx?id=80225>.

379. See, e.g., Tushnet, *supra* note 375, at 657 & n.25; Michela Ecks, *Fan Fiction, Novels, Copyright, and Ethics*, WHOOSH!, Nov. 2001, at <http://www.whoosh.org/issue62/ecks2.html>.

380. See Mary Ellen, *The Fan Fiction Universe: Some Statistical Comparisons*, at <http://www.alternateuniverses.com/fanficuniv.html> (last visited Feb. 6, 2003) (presented at Carnegie Mellon University Sept. 30, 2000).

381. This is, of course, assuming that there is some property right that the owner has against fanfic authors such that they would need a license to use the characters. This issue is discussed in depth *infra* Part V.A.2. Cf. 4 NIMMER, *supra* note 365, § 13.05[A][4] (noting that this type of potential market loss assumes that the property owner had a right to stop the third-party use).

quality or explicit sexual content.³⁸² Others are virtually indistinguishable from a story produced by a mainstream entertainment company.³⁸³ In the case of fanfic based on a novel, the fanfic is no different from a commercially produced sequel or spinoff.³⁸⁴ A fanfic based on a television series is very different from a competing series, but the story is comparable to a new episode.³⁸⁵ Since fanfic is free, it is a matter of some debate as to whether it really harms the market for the original works.³⁸⁶ Indeed, fanfic may actually benefit the market for the original work by maintaining audience interest during the long waits between the release of the various books or films in a series. The question of whether consumers read free fanfic *instead* of the original artist's work or whether they read fanfic *in addition* to the original artist's work is an empirical one that admits of no easy or universal answer.

B. Damage to Ultimate Value

Characters, just like real celebrities, have images that need protection. A character who loses favor in the eyes of the audience becomes less valuable as he or she provides less of a draw to future works. Although exact loss is sometimes difficult to quantify or trace to a particular event, the high costs of building an entertainment brand and the enormous potential for profits that the brand offers indicate that damage to a character's image may have tremendous economic impact on the owner.³⁸⁷

Consequently, owners of valuable characters go to extraordinary lengths to make sure that the public identifies with and even loves their characters.³⁸⁸ In promoting the movie *Harry Potter and the Sorcerer's Stone*, Warner Brothers encouraged Potter's young fans to send him electronic birthday cards for his birthday.³⁸⁹ Perhaps even more important than building additional fan loyalty is protecting existing loyalty. Events and

382. See Ecks, *supra* note 379.

383. See *id.*

384. See *id.*

385. See *id.* Of course, truly dedicated and technically proficient fans could create their own series. Cf. *Starship Exeter*, at <http://homepage.mac.com/starshipexeter/> (last visited Jan. 4, 2003) (online video based on the style of the original *Star Trek* television series by fans after approximately seven years of labor).

386. See Tushnet, *supra* note 375, at 669–74 (concluding that, if fanfic has any effect on the market for the original work, it is a positive one).

387. See Ecks, *supra* note 379.

388. See, e.g., *Make a Wish, Harry Potter!*, CNN.COM, July 30, 2001, at <http://www.cnn.com/2001/SHOWBIZ/News/07/30/showbuzz/index.html> (Harry's birthday is July 31st).

389. *Id.*

associations that have the potential for tarnishing the reputation and image of a valuable character must be taken seriously.³⁹⁰

Although characters are often damaged by third parties, a careless owner can damage her character's value and reputation through the character's officially sanctioned actions or attributes.³⁹¹ The allure of additional revenues through product endorsement can tarnish a character's image. This has been the result of promotion of alcohol and tobacco products by characters that appeal to children.³⁹² Companies must balance the prospective income from endorsements with the risk they create. Unfortunately, the risk associated with most product endorsements is not as readily identifiable as with the case of alcohol and tobacco. Endorsement of certain products may make a character appear too elitist or indifferent to traditional family values. Failure to limit the sheer number of endorsements may make a character appear too commercialized, sacrificing the long-term value of the character for short-term income. Overuse may also lead to less effective advertising as "[t]he more ads a celebrity does, the less likely a consumer might be to recall the product being pitched in any one ad."³⁹³

Potential damage is not limited to product endorsements—any action a character takes, whether it be as part of a marketing campaign or as part of the plot of a book, can negatively impact the character's image.³⁹⁴ Sometimes, however, a damaged reputation in the eyes of a few is acceptable if changing the character would alter its defining characteristics. For example, Harry Potter's association with the "dark arts" has raised the ire of some religious groups and his books have even been burned at public gatherings.³⁹⁵ Yet, without magic, Harry Potter would not be Harry Potter. Likewise, many children love Barney the Dinosaur and his "I love you; you love me" theme song, yet the dinosaur and his song are despised by some

390. See, e.g., HERZ, *supra* note 273, at 134 ("Nintendo's in-house characters are its crown jewels. And the company is fastidious, to the point of paranoia, about safe-guarding their reputations.").

391. See Adams, *supra* note 315, at 386–88.

392. See *id.* (describing complaints about Budweiser mascot Spuds MacKenzie, "a forty-seven-pound English bull terrier who sometimes appeared with 'a trio of spandexed honeys' called the Spudettes"); HERZ, *supra* note 273, at 134 (noting that Nintendo does not permit its video game characters to endorse alcohol or tobacco products).

393. Stuart Elliott, *Critics Claim Multiple Deals Risk Saturation*, USA TODAY, Apr. 30, 1991, at 1B.

394. See Julie Ann Stephens, *Spells Up in Smoke*, SANTA FE NEW MEXICAN, Dec. 31, 2001, at A1 (quoting Christ Community Church founder and pastor, Jack Brock as stating "[t]hese books teach children how they can get into witchcraft and become a witch, wizard or warlock"), at <http://www.cnn.com/2001/US/12/31/potter.book.burning.ap/index.html> (last visited Jan. 14, 2002).

395. *Id.*

members of the adult population.³⁹⁶ Finally, Mattel's Barbie doll has long been the target of criticism that her unrealistic figure contributes to negative body images of young girls.³⁹⁷

Damage caused by third parties can also come from unlikely sources. Such was the case in the fall of 2001 when *Sesame Street's* beloved character Bert appeared side-by-side with Osama bin Laden on posters carried at an anti-American protest in Bangladesh.³⁹⁸ Apparently, the person making the poster downloaded images of bin Laden from the Internet, including one from a humor website, Evil Bert, which featured "proof" of Bert's connection to various evil causes.³⁹⁹ Sesame Workshop issued a statement that they were "outraged that [their] characters would be used in this unfortunate and distasteful manner. This is not at all humorous."⁴⁰⁰ Although the Evil Bert website has since been taken down voluntarily by its host,⁴⁰¹ several "mirror" sites are still accessible.⁴⁰² Evil Bert presents an extreme case of damage to a character's reputation. Although the site's ultimate goal was humor, its method was associating negative images with Bert.

Other third-party use may damage the character's reputation through

396. See *Woman in Barney Costume Attacked at Store Opening*, SEATTLE TIMES, Apr. 11, 1994, at A5 (reporting about attacks on people dressed in Barney costumes in Galveston, Texas, and Worcester, Massachusetts); Lauri Githens, *All Right, Sir, We're Serious About Seinfeld*, BUFFALO NEWS, Sept. 26, 1993, at E1 ("And after only two years, that purple dinosaur is so prevalent that a 'We Hate Barney' fan club now exists for parents who need to confess their secret loathing of the PBS show and its inane theme song.").

397. See, e.g., Meredith Berkman, *Ban Barbie Bashing!*, N.Y. POST, Jan. 12, 1999, at 70; *Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120, 1139 (C.D. Cal. 1998) (noting that for some people, Barbie has "come to represent" "shallow, plastic values"). Similar complaints have been raised about Eidos's video game character, Lara Croft. See, e.g., Cal Jones, *Lara Croft, Female Enemy Number One?*, in *FROM BARBIE TO MORTAL KOMBAT* 338, 338-39 (Justine Cassell & Henry Jenkins eds., 1998) ("[I]f you genetically engineered a Lara-shaped woman, she would die within around fifteen seconds, since there's no way her tiny abdomen could house all her vital organs.").

398. See Declan McCullagh, *Osama Has a New Friend*, WIRED NEWS, Oct. 10, 2001, at <http://www.wired.com/news/print/0,1294,47450,00.html>; Michael Y. Park, *Bin Laden's Felt-Skinned Henchman?*, FOX NEWS, Oct. 14, 2001, at <http://www.foxnews.com/story/0,2933,36218,00.html>.

399. See Park, *supra* note 399 ("Of course, the other explanation might be that Bert has finally ditched Ernie, canceled his account at Mr. Hooper's shop and taken his Kalashnikov to the other side of the war.").

400. *Id.*

401. See *Good Bye Bert*, Fractalcow.com, at <http://www.fractalcow.com/bert/bert.htm> (last visited Jan. 17, 2003) ("I am doing this because I feel this has gotten too close to reality and I choose to be responsible enough to stop it right here . . . "[I] fear that it may destroy the character's credibility with children.").

402. See, e.g., *Bert is Evil!*, Fortunecity.com, at <http://fortunecity.com/bennyhills/murphy/259/bert.htm> (last visited Jan. 27, 2003). A "mirror" is a recreation of a web site on an alternate server, usually created to distribute requests for the information across the network or to provide a substitute source in case the primary site is inaccessible.

creating unauthorized works of fiction in which the character engages in behavior that is either immoral or in conflict with the owner's view of who the character is.⁴⁰³ The unauthorized nature of the work—provided that the audience is aware that it is unauthorized—may minimize or even eliminate any damage to the character's reputation if consumers draw a distinction between canonical works and those unauthorized works that do not really represent the character.⁴⁰⁴ Nevertheless, some audiences, particularly young children, may not be able to draw distinctions among various incarnations of a character. Even those who do draw a distinction may yet be unable to shake the negative associations from the unauthorized use when confronted with future authorized uses.

Moreover, third parties who damage characters need not be strangers to the owner. When a character's owners allow individuals to dress as the character as part of a marketing campaign, they risk the negative publicity which might result from the costumed actor committing a crime while in costume.⁴⁰⁵ This was of particular concern to Lyrick Studios, Inc., producers of the *Barney & Friends*⁴⁰⁶ television series.⁴⁰⁷ To prevent damage to its character's image, the company engaged in an extensive campaign to prevent people from dressing in unauthorized Barney costumes.⁴⁰⁸

Just as with anonymous actors in costume, when a particular actor is strongly associated with a character, the public may impute the misdeeds of the actor to the character.⁴⁰⁹ Lewd sexual behavior of an actor or actress

403. See Tushnet, *supra* note 375, at 675–76.

404. Cf. *supra* text accompanying notes 375–377 (discussing the concept of canon as it relates to incompatible story lines).

405. See HERZ, *supra* note 273, at 134 (“Having some rent-a-Mario molest grade-school boys in the back aisle of Nobody Beats the Wiz would not do wonders for the Italian Plumber Equity Account.”).

406. See *Scholastic to Be U.S. Publisher of Barney Books*, THE WRITE NEWS, Feb. 9, 2001, at http://www.writenews.com/2001/020901_scholastic_barney.htm.

407. See Pamela Manson, *A Super D-Duper Job*, TX. LAW., Feb. 11, 2002 (“‘We’re afraid that someone presenting himself as Barney could get a child to do something inappropriate,’ says [Lyrick’s general counsel], noting that youngsters have developed a trust in the big purple dinosaur and could be susceptible to suggestions from imposters.”), available at <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZWBSVGGXC>.

408. See *id.*

409. To some extent, this type of damage can be discouraged by including morals clauses in actors’ contracts. The clauses serve three functions. The first is bringing to the actor’s attention the need to maintain his image in order to preserve the character’s image. The second is providing the production company with a legal method of terminating the association between the character and the actor. Firing an actor may mitigate damage to the character, although in many situations it will be the equivalent of locking the barn door after the horse is stolen. The third function is providing the producers with a remedy against the actor to recover damages to the character resulting from the breach of contract. However, this author has been unable to locate any published cases where such a remedy has been sought.

may taint a character, particularly if one of the character's attributes is purity. For various sociological reasons, the risk may be greater for female characters.⁴¹⁰ For example, "Ivory Soap executives . . . were horrified when the media discovered that the woman whose portrait graced their boxes of '99 44/100% pure' detergent was Marilyn Chambers, an adult film star."⁴¹¹ Teen actress Jessica Biel attempted to capitalize on this vulnerability by posing semi-nude in *Gear* magazine as part of an unsuccessful effort to break her contract with the producers of *7th Heaven*. "[A]ngered over the lack of spice to her straight-laced character," Biel presumably thought that if she became enough of a liability the producers would feel that it would no longer be worthwhile to keep her on the show, thus freeing her time for other projects.⁴¹²

Television characters appearing on broadcast television and basic cable are particularly vulnerable to this kind of damage because of their show's dependence on advertising dollars for its existence.⁴¹³ Advertisers concerned about the moral sensibilities of those who buy their products, as well as those advertisers who pursue their own moral agenda through their business decisions, may pull advertising support from programs featuring tainted characters.

A second type of damage to ultimate value is possible, indeed even probable, when an actor becomes entwined with a character—increased cost of use. If a character is so tied to an actor that no one else can portray him, the actor will be able to command a higher price, thus making the character more expensive to use.⁴¹⁴ Furthermore, if the actor becomes unavailable, for example due to death⁴¹⁵ or incarceration,⁴¹⁶ the character may

410. Adams, *supra* note 315, at 387.

411. *Id.* ("Ironically, advertising, which thrives on the sexual tease, must evade the actuality of intercourse.").

412. See *Celeb Courthouse: Aaron Spelling v. Bob Guccione Jr., et al.*, E! Online (Jan. 22, 2003), at <http://www.eonline.com/News/Court/0002.spelling.html> (describing lawsuit filed by *7th Heaven* producer Spelling against *Gear* publisher Guccione following publication of the photo spread).

413. See *supra* text accompanying notes 224–226.

414. Compare *supra* text accompanying note 197 (noting \$30 million salary for Arnold Schwarzenegger to reprise his role as the Terminator in the third movie in the series) with *supra* text accompanying notes 202–204 (discussing the success of films starring multiple actors portraying James Bond, Batman, and Superman).

415. See, e.g., Matt Zoller Seitz, *Try to Imagine The Sopranos Without Livia*, STAR-LEDGER (N.J.), June 21, 2000, at 39 (discussing future of HBO's *The Sopranos* after the death of Nancy Marchand and noting cancellation of *Chico and the Man* and *Cover Up* after the deaths of their lead actors). New technology ameliorates this risk somewhat by allowing producers to use existing footage to finish an almost completed project or allow a more graceful exit for a character. See also Heather Jacobs, *Bringing an Actress Back to Life for the Sopranos*, SHOOT, Mar. 30, 2001, at 7 (discussing the use of digital editing to posthumously add Nancy Marchand to an epi-

be unusable altogether.

It is important to note that although lost opportunities always involve third-party use of characters, damage to ultimate value can result from either third-party use or the owner's use. Thus, the prudent owner will not only attempt to curb third-party use but will also carefully examine her own use to ensure that she is maximizing the character's value.

V. AVAILABLE LEGAL TOOLS

A character's owner has a range of legal tools available to combat unauthorized third-party use.⁴¹⁷ Together, they provide an interlocking mesh of protection for characters. However, none of these tools was designed with protection of characters in mind. Consequently, there are gaps in the coverage they provide—chinks in the armor.⁴¹⁸ Most legal remedies are more suitable for preventing and recovering lost opportunities. Few are oriented toward preventing damage to the ultimate value of a character.⁴¹⁹ Still, by using the control over third-party use of characters that the law provides, an owner can minimize damage to ultimate value by limiting third-party access to its characters at the outset.

A prudent artist or entertainment company will design its business relationships to ensure the broadest protection that the law can afford. That protection not provided for by statute or common law can sometimes be obtained through contracts, particularly contracts with the actors and actresses who portray the characters at issue and the team of artists who bring them to life. Thus, this section focuses on the legal tools available against strangers—third parties who threaten to capture or destroy the value of another's characters.

sode of *The Sopranos*, and noting similar efforts to finish the films *The Crow* and *Gladiator* after the deaths of Brandon Lee and Oliver Reed, respectively). Nevertheless, the death of an actor portraying a core character can still derail a movie or television series.

416. See, e.g., *Will Ally Lose Her New Man?*, ABC NEWS, Nov. 28, 2000, at <http://www.abcnews.go.com/sections/entertainment/DailyNews/downeyjr001128.html> (discussing how Robert Downey, Jr.'s drug arrest could require the elimination of his character, Larry Paul, from the show *Ally McBeal*).

417. See 17 U.S.C. § 106 (2000); 35 U.S.C. § 271 (2000).

418. See generally 17 U.S.C. § 107 (2000) (providing copyright protection without specific reference to "characters").

419. See *id.* § 102 (defining specific subject matter of copyright protection without reference to "characters").

A. Copyright Law

1. General Scope and Remedies

Copyright is a protection afforded by federal law to the authors of original works that grants authors⁴²⁰ several exclusive rights, including the rights to reproduce or perform the work and the right to create derivative works⁴²¹ for the life of the copyright.⁴²² Copyright law offers an aggrieved copyright owner powerful remedies against an infringer, including recovery of actual or statutory damages, injunctive relief, impounding and destruction of infringing copies, and the potential for the recovery of attorney's fees.⁴²³ Willful infringement of copyright is also a criminal offense,⁴²⁴ providing the owner with increased leverage in negotiating settlements with infringers.

An author need not do anything in order to receive copyright protection; it attaches to a work as soon as the work is "fixed in any tangible

420. Determining exactly who the author is in visual media such as movies is somewhat difficult. *See generally* Dougherty, *supra* note 61. *See also supra* notes 61–64 and accompanying text. However, copyright law allows companies that oversee collaborative projects to consolidate any claims to copyright through contractual arrangements. *See* 17 U.S.C. §§ 201, 204 (2000).

421. *See* U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS 1 (2000), available at <http://www.copyright.gov/circs/cirl.html>; 17 U.S.C. §§ 102, 106 (2000). In the final analysis, the right to make derivative works is really a proper subset of the reproduction and performance rights. Professor Nimmer argues persuasively that whenever the right to make derivative works is "infringed, then there is necessarily also an infringement of either the reproduction or performance rights." 2 NIMMER, *supra* note 365, § 8.09[A] ("Unless sufficient of the pre-existing work is contained in the later work so as to constitute the latter an infringement of the former, the latter by definition is not a derivative work. Therefore, if the latter work does not incorporate sufficient of the pre-existing work as to constitute an infringement of either the reproduction right or of the performance right, then it likewise will not infringe the right to make derivative works because no derivative work will have resulted."). Nevertheless, it is conceptually helpful to think of copyright as covering derivative works in order to fully appreciate the broad scope of the reproduction right.

422. With some minor exceptions, copyrights last for 70 years after the death of the author, or in the case of anonymous and institutional authors, for the shorter of 95 years from publication or 120 years from creation. *See* U.S. COPYRIGHT OFFICE, *supra* note 421; 17 U.S.C. §§ 302–05 (2002). In the case of a character who appears in a series of works, it seems most appropriate "that once the copyright in the first work that contained the character enters the public domain, then it is not copyright infringement for others to copy the character in works that are otherwise original with the copier, even though later works in the original series remain protected by copyright." 1 NIMMER, *supra* note 365, § 2.12; accord Christine Nickles, *The Conflicts Between Intellectual Property Protections when a Character Enters the Public Domain*, 7 U.C.L.A. ENT. L. REV. 133, 155 (1999) ("Thus, a copyright on a character that is derivative of a public domain character does not remove the character from the public domain.").

423. *See generally* 17 U.S.C. §§ 501–505 (2000).

424. *See* 17 U.S.C. § 506 (2000); 18 U.S.C. § 2319 (2000).

medium.”⁴²⁵ Compliance with formalities such as marking and registration may be required before an author may pursue some of the remedies listed above.⁴²⁶ In order to demonstrate infringement, a copyright owner must show that an unauthorized party actually copied his work to create a “substantially similar” copy.⁴²⁷ Since “[i]t is generally not possible to establish copying as a factual matter by direct evidence,” it is sufficient to demonstrate access to the earlier work and substantial similarity between the two works.⁴²⁸ Copying that crosses the boundaries of media is no less an act of infringement.⁴²⁹

Thus, insofar as characters are “copyrightable,” this area of law seems to present a powerful tool for owners who want to maintain exclusive dominion over their characters, particularly in the context of expansion to alternate media. There are, however, important limitations on the scope of copyright that provide defenses for accused infringers.⁴³⁰ Foremost among these is the idea/expression dichotomy. This deceptively simple concept, that “[c]opyright may be claimed only in the ‘expression’ of a work of authorship, and not in its ‘idea,’” serves as the basis for myriad disputes in both courtrooms and law schools.⁴³¹ As illustrated below, it is also the key issue in determining the extent to which a character is protected by copyright.⁴³²

425. 17 U.S.C. § 102(a); *see also* 17 U.S.C. § 101 (2000) (Fixation of a work occurs when “its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”).

426. *See* U.S. COPYRIGHT OFFICE, *supra* note 421.

427. *See* 2 NIMMER, *supra* note 365, §§ 8.01[A], 8.01[G]. Thus, the Copyright Act does not protect against independent creation. The plaintiff must also demonstrate ownership of a valid copyright and “compliance with applicable statutory formalities,” but these issues are less often in dispute than substantial similarity and copying. *See* 4 NIMMER, *supra* note 365, § 13.01[A].

428. *See* 4 NIMMER, *supra* note 365, § 13.01[B].

429. *See* 2 NIMMER, *supra* note 365, § 8.01[B]. (“[A] motion picture copied from a play, or a novel, a sketch copied from a photograph, or a plaque, or a doll copied from a cartoon may be an infringing copy.”) (citations omitted).

430. *See* discussion of fair use *infra* Part VI.A.3.

431. 1 NIMMER, *supra* note 365, § 2.03[D]; *accord* 17 U.S.C. § 102(b) (2000) (“In no case does copyright protection for an original work of authorship extend to any idea, . . . concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); *see also, e.g.,* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (“Nobody has ever been able to fix that boundary, and nobody ever can.”); 4 NIMMER, *supra* note 365, § 13.03[B][2][a] (“Merely stating the rule, however, does not make any easier the task of drawing the line between where idea ends and expression begins.”); Laurie Sterns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 526 (1992) (“[T]he ‘idea/expression dichotomy’ has proved difficult to apply because there is often no bright line demarcating an idea from its expression, and each distinction must necessarily be made according to highly individual criteria.”).

432. *See* discussion accompanying *infra* note 447.

2. Application to Fictional Characters

“Characters” are not one of the enumerated examples the Copyright Act provides to illustrate what constitutes a “work of authorship.”⁴³³ However, the list is non-exclusive, which means characters are theoretically copyrightable. Professor Nimmer writes: “Although there has been some conflict in the cases, it is clearly the prevailing view that characters *per se* are entitled to copyright protection.”⁴³⁴ This prevailing view must be taken with a grain of salt. The reality is that only those aspects of a character that are sufficiently detailed so as to be expression rather than ideas are protected by copyright.⁴³⁵ Consequently, it is often difficult to assert copyright protection for purely literary characters as compared to characters that have a visual component.

Nimmer cites twenty cases to illustrate the “prevailing view.”⁴³⁶ However, eleven of these cases deal with comic book or cartoon characters,⁴³⁷ three with puppets or puppet-like characters,⁴³⁸ and one with a video game character.⁴³⁹ As Nimmer readily admits, cases “where both the original work and the copied work consist of cartoons or other graphic representations” are more likely to result in findings of copyright infringement.⁴⁴⁰ When there is a visual component to a character, courts are simply more

433. 17 U.S.C. § 102(a) (2000).

434. 1 NIMMER, *supra* note 365, § 2.12.

435. *See id.*

436. *See id.*

437. Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (discussing cartoon characters including Mickey Mouse, Goofy, the Big Bad Wolf, and Toby Tortoise); DC Comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24 (2d Cir. 1982) (Batman); Detective Comics, Inc. v. Bruns Publ'ns, Inc., 111 F.2d 432 (2d Cir. 1940) (Superman); King Features Syndicate v. Fleischer, 299 F. 533 (2d Cir. 1924) (discussing Barney Google and Spark Plug cartoon book); Fleischer Studios, Inc. v. Alpha A. Freundlich, Inc., 73 F.2d 276 (2d Cir. 1934) (Betty Boop); Detective Comics, Inc. v. Fox Publ'ns, Inc., 46 F. Supp. 872 (S.D.N.Y. 1942); United Feature Syndicate, Inc. v. Sunrise Mold Co., 569 F. Supp. 1475 (S.D. Fla. 1983) (Peanuts characters); Hill v. Whalen & Martell, Inc., 220 F. 359 (S.D.N.Y. 1914) (Mutt and Jeff); Siegel v. Nat'l Periodical Publ'ns, Inc., 508 F.2d 909 (2d Cir. 1974) (Superman); Warner Bros., Inc. v. Am. Broad. Co., 530 F. Supp. 1187 (S.D.N.Y. 1982), *aff'd* 720 F.2d 231 (2d Cir. 1983) (Superman); Empire City Amusement Co. v. Wilton, 134 F. 132 (C. C. D. Mass. 1903) (Alphonse and Gaston).

438. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) (H.R. Pufnstuf show and associated characters); Universal City Studios, Inc. v. Kamar Indus., Inc., 217 U.S.P.Q. 1162 (S.D. Tex. 1982) (E.T., The Extra-Terrestrial); Universal City Studios, Inc. v. J.A.R. Sales, Inc., 216 U.S.P.Q. 679 (C.D. Cal. 1982) (E.T., The Extra-Terrestrial).

439. Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607 (7th Cir. 1982) (PAC-MAN video game).

440. 1 NIMMER, *supra* note 365, § 2.12; *accord* Kurtz, *supra* note 6, at 444 (“Courts have been far more willing to protect characters that have a visual component than to protect literary characters, which exist as more abstract mental images.”).

likely to find that the character is an expression rather than an idea.⁴⁴¹ Four of the other opinions cited do not stand for the proposition that a character is copyrightable at all.⁴⁴² This leaves but one cited case, *Filmvideo Releasing Corp. v. Hastings*,⁴⁴³ which holds that a purely literary character is protected by copyright.⁴⁴⁴

The court in *Filmvideo* decided that the characters of the Hopalong Cassidy books "were sufficiently delineated, developed and well known to the public to be copyrightable" and, therefore, infringement was present "irrespective and independent of the similarity of the story line."⁴⁴⁵ Thus, the court held that copyright protects characters even if the third party does not appropriate any of the other literary elements, such as plot.⁴⁴⁶ This is important because several types of lucrative character reuse, including sequels and merchandising, can be accomplished relying on characters alone.

The key issue underlying *Filmvideo's* holding was whether the characters were on the expression side of the idea/expression divide.⁴⁴⁷ The

441. See Michael Todd Helfand, Note, *When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623, 633 & n.55 (1992) ("In contrast to the plight of literary characters, pictorial characters had a far easier time receiving protection against unauthorized use because of their physical embodiment.").

442. *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 620 n.10, 631 (2d Cir. 1982) ("We express no opinion on whether the character of Tarzan is covered by copyright, but hold that MGM, in any event, had the right to use the character in its 1981 film."), *aff'g* 519 F. Supp. 388, 391 (S.D.N.Y. 1981) (finding that the Tarzan character was copyrightable); *Pattern v. Superior Talking Pictures, Inc.*, 8 F. Supp. 196 (S.D.N.Y. 1934) (relying on unfair competition law rather than copyright law); *Downey v. General Foods Corp.*, 323 N.Y.S.2d 578 (N.Y. App. Div. 1971), *rev'd on other grounds*, 286 N.E.2d 257 (N.Y. 1972) (dealing with claim for misappropriation of marketing idea for JELLO rather than copyright claim); *Gilroy v. ABC*, 395 N.Y.S.2d 658 (N.Y. App. Div. 1977) (deciding motion to dismiss contract and common law copyright claims but not dealing with federal copyright claims).

443. 509 F. Supp. 60 (S.D.N.Y. 1981) (finding characters in Hopalong Cassidy books copyrightable), *aff'd*, 668 F.2d 91 (2d Cir. 1981).

444. This is, of course, not the only case holding that a literary character is copyrightable. See, e.g., *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1367 (N.D. Ga. 2001) ("The characters of *Gone With the Wind* are copyrightable, apart from the story they inhabit, and cannot be used in a new work without the permission of the copyright owner."), *rev'd on other grounds*, 268 F.3d 1257 (11th Cir. 2001).

445. *Filmvideo*, 509 F. Supp. at 65-66.

446. See generally discussion *supra* Part II.A.

447. See *Filmvideo*, 509 F. Supp. 60. But see Helfand, *supra* note 441, at 648-52 & n.142 (arguing that the *Filmvideo* court's consideration of the fact that the characters were "well known to the public" is an example of the convergence of intellectual property doctrines as trademark law concepts are blended into copyright law). It is unclear to what extent this factor actually influenced the court's decision in *Filmvideo*. In theory, popularity should not be an issue in deciding whether a work or elements of that work are properly the subject of copyright. However, Helfand makes a compelling case that, at least in the context of protection for characters, trademark law analysis has infected copyright law decisions.

court reached its decision by applying a test for character copyrightability originally articulated by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*⁴⁴⁸ Commonly referred to as the abstraction test, Hand's proposed standard is for courts to examine the degree to which the author developed the character at issue. In oft-quoted language, he wrote:

But we do not doubt that two plays may correspond in plot closely enough for infringement Nor need we hold that the same may not be true as to the characters, quite independently of the "plot" proper, though, so far as we know, such a case has never arisen. 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. These would be no more than Shakespeare's "ideas" in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.⁴⁴⁹

Hand's focus on level of development has parallels in literary criticism.⁴⁵⁰ However, Hand's test is unclear as to whether an author must present her character with a sufficiently high level of detail or a sufficiently low level of abstraction.⁴⁵¹ Although at first blush, level of abstraction seems more closely linked to the idea/expression dichotomy, level of detail is more important to the policies underlying this aspect of copyright. It is the details of characterization that are really the expressive elements of a character. As Margolin reminds us, "[a] recurrent type such as the struggling artist may be rich and nuanced in terms of number of features."⁴⁵² In this case, the unique features of the character are protected as expression, while the idea of a struggling artist is not. Linking protection to level of abstraction would be analogous to determining that a particular still life portrait featuring flowers is not copyrightable regardless of the amount of

448. 45 F.2d 119 (2d Cir. 1930).

449. *Id.* at 121; see also *Gund, Inc. v. Smile Int'l, Inc.*, 691 F. Supp. 642, 644 (E.D.N.Y. 1988) (citing most of this passage and stating "[w]hat must be meant by the provision denying protection to 'ideas' is that the law will not grant an author a monopoly over the unparticularized expression of an idea at such a level of abstraction or generality as unduly to inhibit independent creation by others.").

450. See *supra* notes 41–51 and accompanying text.

451. See *supra* text accompanying note 44.

452. Margolin, *supra* note 28, at 198.

detail in the picture because it is just one of a recurring type of painting.⁴⁵³

With characters, as with paintings, the key question thus becomes not whether the work is copyrightable, but whether any expressive elements of the work, which are entitled to protection, were copied to make a substantially similar work.⁴⁵⁴ Non-expressive, unprotected elements of a character do not figure into the substantial similarity analysis. For example, in analyzing infringement of a character based on a real person, those traits such as name,⁴⁵⁵ physical appearance, and documented activities that are grounded in historical fact are not subject to copyright protection.⁴⁵⁶

The Ninth Circuit articulated a stricter test for the copyrightability of characters in *Warner Bros. Pictures v. CBS*.⁴⁵⁷ Under this test, copyright would be limited to cases where “the character really constitutes the story being told.”⁴⁵⁸ Rather than limiting its examination to the characters themselves, the Ninth Circuit would examine the role the characters played as compared to the plot.⁴⁵⁹ Judge Hand’s articulation is widely preferred to the Ninth Circuit’s “story being told test.”⁴⁶⁰ Following this trend, the

453. Compare Jan van Huysum, *Vase of Flowers* (1722), available at <http://www.getty.edu/art/collections/objects/o817.html> (last visited Mar. 7, 2002) with Gustave Courbet, *Bouquet of Flowers in a Vase* (1862), available at <http://www.getty.edu/art/collections/objects/o883.html> (last visited Mar. 7, 2002) and Ambrosius Bosschaert the Elder, *Flower Still Life* (1614), available at <http://www.getty.edu/art/collections/objects/o842.html> (last visited Mar. 7, 2002).

454. See *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1367 (N.D. Ga. 2001) (“*The Wind Done Gone* uses fifteen fictional characters from *Gone With the Wind*, incorporating their physical attributes, mannerisms, and the distinct features that Ms. Mitchell used to describe them, as well as their complex relationships with each other.”), *rev’d on other grounds*, 268 F.3d 1257, 1266–67 (11th Cir. 2001) (quoting this passage from the district court opinion with approval); 1 NIMMER, *supra* note 365, § 2.12 (“The issue of whether a character from a work of fiction is protectible apart from the story in which such character appears, is in a sense more properly framed as relating to the degree of substantial similarity required to constitute infringement rather than in terms of copyrightability *per se*.”); Kurtz, *supra* note 6, at 440–41, 463.

455. It is doubtful that even a fictional character’s name, standing alone, could ever be protected by copyright. See Kurtz, *supra* note 6, at 460 & nn.176–79; U.S. COPYRIGHT OFFICE, *supra* note 421, at 3. However, use of a copyrighted character’s name combined with even minimal contextual clues may contribute to a finding of substantial similarity. See *supra* text accompanying notes 94–96.

456. See also *Chase-Riboud v. DreamWorks, Inc.*, 987 F. Supp. 1222 (C.D. Cal. 1997) (analyzing copyright infringement claim relating to historical character appearing in *Amistad* (DreamWorks SKG 1997)).

457. 216 F.2d 945 (9th Cir. 1954).

458. *Id.* at 950.

459. Presumably, the characters’ prominence as compared to other literary elements such as setting and style would also be a fair subject of inquiry. See, e.g., *Warner Bros.*, 216 F.2d at 950.

460. See 1 NIMMER, *supra* note 365, § 2.12 (opining that “the Court of Appeals for the Ninth Circuit drew a much too restrictive line in *Warner Bros. Pictures, Inc.*” and citing cases indicating same); Kurtz, *supra* note 6, at 455 (“Outside the Ninth Circuit, [*Warner Bros. Pictures, Inc.*] has encountered rejection and engendered confusion.”); Dean D. Niro, *Protecting Charac-*

Ninth Circuit itself has retreated somewhat from *Warner Bros.* by limiting its applicability to purely literary characters.⁴⁶¹

Under the level-of-development test articulated in *Nichols*, it is clear that the most commercially valuable characters—those around which a company can build a brand—will be protected by copyright to some extent.⁴⁶² Although one author's character cannot create a monopoly that occupies an entire genre, copyright law certainly protects others from using the character brand to sell derivative works. In order to capitalize on the brand, one must present the character in such a way that the audience recognizes the character.⁴⁶³ Sequels, merchandising, and cameos all derive their economic benefits from the fact that the consumers desire products featuring their favorite characters. Thus, it will almost invariably be the case that when an accused infringer is trying to piggyback on the prior success of someone else's character, the infringing work will feature a substantially similar character. Otherwise, there is little incentive to infringe.

Capitalizing on a character's brand is distinct from capitalizing on the changes in consumer attitudes that a particularly successful set of characters may effect. In the months following the phenomenally successful debut of George Lucas's *Star Wars*, the courts were called on to make this distinction. Seeking to capitalize on the success of the movie, Ideal Toy altered some of its existing designs to create space-themed action figures.⁴⁶⁴

ters Through Copyright Law: Paving a New Road upon Which Literary, Graphic, and Motion Picture Characters Can All Travel, 41 DEPAUL L. REV. 359, 380–81 (1992) (advocating a unified test for all types of characters based on level of recognizability and distinctiveness after concluding that “[t]he story being told test is archaic and rarely applied”). *But see* Francis M. Nevins, Jr., *Copyright + Character = Catastrophe*, 39 J. COPYRIGHT SOC'Y 303 (1992) (criticizing the Hand test and arguing “that copyright protection for characters as such is redundant, defies rational articulation, and encourages dubious litigation over whether the characterization of one author's creation is too much like the characterization of another's”).

461. *See* *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978). Indeed, the Ninth Circuit seemed to recognize that the real issue is whether the character is unprotected idea or protected expression. *See id.* (“Put another way, while many literary characters may embody little more than an unprotected idea, a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression.”) (citation omitted); *Olson v. NBC.*, 855 F.2d 1446, 1451–53 & n.7 (9th Cir. 1988) (leaving question of appropriate standard for literary characters open, but performing analysis under *Nichols* test in addition to *Warner Bros.* test).

462. *See Nichols*, 45 F.2d at 121.

463. *See generally supra* discussion accompanying notes 92–97. Of course, there are some characters on their way to becoming archetypes that may be recognizable by reference to unprotected ideas rather than protected expression. *Cf.* Kurtz, *supra* note 6, at 473. Many characters that are most definitely not James Bond still evoke his memory because Bond is so closely linked to the idea of a super-spy in the American consciousness. However, without the details that make James Bond James Bond, any imitator is unlikely to garner the original's box office grosses or endorsement deals.

464. *See Ideal Toy Corp. v. Kenner Prods. Div. of General Mills Fun Group, Inc.*, 443 F.

Marketed under the name “Star Team,” these action figures included three characters: Knight of Darkness, Zem-21, and Zeroid.⁴⁶⁵ When the producer of *Star Wars* and its toy licensee objected that these three characters were infringements of the copyrights in Darth Vader, C-3PO, and R2-D2 respectively, Ideal filed suit seeking a declaratory judgment that its action figures did not infringe.⁴⁶⁶ On a request for preliminary injunction by the declaratory judgment defendants, the court ruled that any similarities between the characters were insubstantial and that Ideal was merely trying to capitalize on the unprotected theme embodied in the movie characters and the movie itself.⁴⁶⁷

Ideal Toy is an example of a case where the court correctly limited the protection afforded by copyright to the distinctive expressive elements of the characters at issue.⁴⁶⁸ The fact that *Star Wars* created benefits for other companies by exciting consumer interest in space-based adventure⁴⁶⁹ does not entitle its creators to reap the profits of others following in their footsteps.⁴⁷⁰ Indeed, the very purpose of copyright is to encourage publication of works so that others can build upon them.⁴⁷¹ Here, Ideal did not trade on the *Star Wars* brand, but rather on the transitory excitement that the brand generated. This distinction is even clearer in hindsight, as few remember the Star Team characters today, while the *Star Wars* brand remains a significant power in the entertainment industry.

The limits on copyright protection provided by the idea/expression dichotomy encourage a rich variety of work within a particular area.

Supp. 291, 294 (S.D.N.Y. 1977) (“At the end of May [the month in which *Star Wars* hit theaters], however, Ideal determined that it was necessary to capitalize on the space toy fad as quickly as possible.”).

465. See *id.* at 295–97. See generally *Zeroids*, at <http://www.wildtoys.com/zeroids/index.asp> (last visited Mar. 14, 2002) (including images of the accused toys).

466. See *Ideal Toy Corp.*, 443 F. Supp. at 293, 297.

467. See *id.* at 303–04.

468. See *id.* at 303 (discussing differences between physical attributes of characters).

469. See *id.* at 294. Ideal claimed that its decision to enter the space toy market was fueled not only by the success of *Star Wars* but also by “the continued popularity of the television show ‘Star Trek’, the publicity surrounding the American space shuttle, the expected release of other space movies, and the fact that other toy companies were bringing out space toys.” *Id.*

470. Like intellectual property law, real property law also recognizes that the land-owner who develops his property may create positive externalities captured by his neighbors. For example, when Disney creates a new theme park, it will probably increase the value of land in the area as its neighbors build hotels, restaurants and other businesses to take advantage of the increased traffic. Disney has no right to the increased value of its neighbors’ land. Likewise, when Disney develops its characters in such a way that there is increased consumer interest in, for example, mermaids, companies who sell mermaid figurines for fish tanks may see increased profits to which Disney has no right.

471. See Pierre N. Leval, Comment, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107–10 (1990).

Consider, for example, the range of vampire films produced in the twentieth century—there are over 300 from which to choose.⁴⁷² If copyright protected the general idea of a vampire, “a dead person who returns from the grave to suck the life (blood) from living persons,”⁴⁷³ development in the genre would be stifled. On the other hand, if the expressive details that define a particular vampire character⁴⁷⁴ were unprotected, authors would lack the incentive to develop reusable characters and create derivative works featuring them.⁴⁷⁵

3. Fair Use Limitations on Copyright

Even if an owner can establish access and substantial similarity, the accused infringer can escape liability by presenting an affirmative defense. Nimmer identifies ten such defenses, but only one of them, fair use, is particularly important to the protection of fictional characters.⁴⁷⁶ Created by judges as an equitable⁴⁷⁷ doctrine that “permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle

472. See JOHN L. FLYNN, *CINEMATIC VAMPIRES 1* (1992) (cataloguing films).

473. *Id.* at 2 (identifying this as “[t]he single element which seems to unite the most diverse traditions” surrounding vampire lore from around the world).

474. See, e.g., ANNE RICE, *INTERVIEW WITH THE VAMPIRE* (1976) (introducing the vampire Lestat, a central character in several of Rice’s later novels); *Number of the Day*, pbskids.org, at <http://pbskids.org/sesame/number/index.html> (last visited Mar. 15, 2002) (featuring Count von Count).

475. See Gerald S. Jagorda, *The Mouse that Roars: Character Protection Strategies of Disney and Others*, 21 T. JEFFERSON L. REV. 235, 235 (1999) (“What incentive would there be for an author such as Erle Stanley Gardner to create a character with the popularity of Perry Mason, if another person, with a only modicum of writing ability, were allowed to incorporate the same character into his own work, financially benefiting from Gardner’s fertile imagination?”).

476. The defenses include “license or assignment from the copyright owner, joint ownership of the work, jurisdictional defects, limitations[,] laches, [and] *res judicata*.” 4 NIMMER, *supra* note 365, § 13.04. Nimmer addresses the defenses of fair use, abandonment of copyright, estoppel, and unclean hands/misuse of copyright in sections 13.05 to 13.09. The “defense” of innocent intent is not really a defense to liability, but it may limit some of the remedies available to the plaintiff. See *id.* § 13.08, at 13-279. By focusing on fair use, I do not mean to imply that the other defenses may not be dispositive in a particular litigation. However, there is little unique about, for example, *res judicata* as applied to character misappropriation as compared to other types of misappropriation.

477. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447–48 (1984) (referring to the doctrine as an “equitable rule of reason”). But see Leval, *supra* note 471, at 1127 & n.98 (arguing that it is misleading to view fair use as a creature of equity). Leval’s criticism is well taken insofar as he argues that morality and motives have no place in a fair use determination. However, courts do and should consider traditional equitable principles in determining whether a particular use is “fair.” The statutory factors are not an exclusive list and should not be treated as such. See 17 U.S.C. § 107 (2000) (“the factors to be considered shall include . . .”) (emphasis added); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1152 (1990).

the very creativity which that law is designed to foster,”⁴⁷⁸ the fair use doctrine was ratified in 1976 by Congress.⁴⁷⁹ Fair use thus acts as a safety valve, preventing copyright law from exerting so much pressure on development of new works that innovation is stifled.

The fair use determination “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”⁴⁸⁰ Indeed, “Section 107 does not attempt to define ‘fair use’”—rather, it provides a list of non-exclusive factors to consider in considering a fair use defense.⁴⁸¹ The four statutory factors are:

- (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 a copyrighted work.⁴⁸²

Although any fair use determination is necessarily case-specific, some of the types of character reuse described in Part II are more amenable to a fair use defense than others are. Insofar as all are commercial uses⁴⁸³ of fictional works, the first two factors weigh against a finding of fair use. Commercial use, particularly in the merchandising context, although not dispositive of the fair use inquiry, counsels strongly against a finding of no fair use under the first factor.⁴⁸⁴ The fact that the copyrighted work is a work of fiction, and therefore within the core of copyright’s purposes, also

478. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)) (brackets omitted) (internal quotation marks and citation omitted); accord *Leval*, *supra* note 471, at 1107 (“Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.”).

479. Copyright Act of 1976 § 101, 17 U.S.C. § 107 (2000); accord *Campbell*, 510 U.S. at 577; *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001); 4 NIMMER, *supra* note 365, § 13.05 (citing House Report for proposition that the Copyright Act was intended to preserve the judicially developed doctrine of fair use and “not to change, narrow, or enlarge it in any way”).

480. *Campbell*, 510 U.S. at 577.

481. 4 NIMMER, *supra* note 365, § 13.05[A]; accord *Yu*, *supra* note 333, at 398 n.270 (“Though the Copyright Act does not explicitly define fair use, it lists four criteria that are to be applied to determine whether a particular use is ‘fair.’”).

482. 17 U.S.C. § 107 (2000). See generally *Campbell*, 510 U.S. at 576–94. See also 4 NIMMER, *supra* note 365, § 13.05.

483. Fanfic and other derivative works distributed on a not-for-profit basis are an exception. See *supra* notes 378–381 and accompanying text.

484. See *Campbell*, 510 U.S. at 584–85.

weighs against a finding of fair use under the second factor.⁴⁸⁵

The third factor examines both the quantity and quality of the appropriated material.⁴⁸⁶ In the context of character misappropriation, this analysis is heavily colored by whether the court views the copyrighted work as the character or the larger work in which the character appears. If the former, all types of character reuse are likely to involve a relatively large taking. If the latter, the court must engage in a "story being told" type inquiry⁴⁸⁷ to determine the importance of the character as compared to the other elements of the copyrighted work. Under this sort of inquiry, remakes and adaptations are less likely to result in a fair use finding than the other types of character reuse; cameos and cross-overs are most likely to be considered fair use; sequels and spinoffs fall somewhere in the middle. This second type of inquiry is the better test, as it recognizes that copyright subsists in works and not individual elements of works such as characters.

The fourth factor, which many view as the most important,⁴⁸⁸ is more likely to be satisfied by cameos and cross-overs, which have little impact on the market for the original. In analyzing market harm, courts must look only at opportunity losses without taking into account damage to ultimate value resulting from "disparaging or otherwise unfavorable reference[s]" to the protected character in the accused work.⁴⁸⁹ Paralleling the exclusion of

485. See *Stewart v. Abend*, 495 U.S. 207, 237–38 (1990) ("In general, fair use is more likely to be found in factual works than in fictional works.").

486. See *Campbell*, 510 U.S. at 587.

487. See *supra* notes 457–459 and accompanying text.

488. See 4 NIMMER, *supra* note 365, § 13.05[A][4]. In 1990, the Supreme Court cited Professor Nimmer for the proposition that "[t]he fourth factor is 'the most important, and indeed, central fair use factor.'" *Stewart*, 495 U.S. at 238; accord *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) ("This last factor is undoubtedly the single most important element of fair use."). In examining fair use again in 1994, however, the Court did not reaffirm this language in *Campbell* and may have shifted to an approach that weights the four factors more evenly. See generally *Campbell*, 510 U.S. at 590 & n.21 ("[T]he importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors."). Nimmer notes that after *Campbell*, the Second Circuit "maintains that this fourth factor no longer enjoys primacy and that all four factors must be weighed in the aggregate." 4 NIMMER, *supra* note 365, § 13.05[A][4] (citing *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. 1998)). However, Nimmer argues that despite this clear statement of equality among the factors, the Second Circuit's opinion reveals "that the fourth factor continues to weigh most heavily in the fair use calculus." *Id.* Even if the courts do not assign market impact paramount importance among the fair use factors, it retains its prominence when viewed from the perspective of the copyright owner. Given the cost of litigation, copyright owners will rarely pursue claims against infringers who do not have a significant impact on the owner's bottom line. See generally Part V.C *infra*. But see *Warner Bros. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740 (S.D.N.Y. 1988) (ordering plaintiff Warner Brothers to pay the litigation costs and attorneys' fees of defendant that were incurred after defendant conceded that it infringed Warner Brothers' copyright in the character Gizmo from the movie *Gremlins* by selling six plastic Gizmo dolls for \$15).

489. 4 NIMMER, *supra* note 365, § 13.05[A][4]; accord *Campbell*, 510 U.S. at 592 ("The

unprotected ideas from the substantial similarity determination, “a court need not take into account the adverse impact on the potential market for plaintiff’s work by reason of defendant having copied from plaintiff non-copyrightable factual material.”⁴⁹⁰ Although, strictly speaking, adaptations do not compete against the original work because the medium has changed, the market analysis extends to harm prospective derivative works as well.⁴⁹¹ Thus, as contemplated by the fourth factor, remakes, adaptations, spinoffs, sequels and prequels are all likely to cause significant market harm to the copyrighted work. However, this likelihood does not translate to a legal presumption of harm—the party claiming fair use has the burden of producing evidence relating to market harm.⁴⁹² Typically, this takes the form of expert testimony about the relevant markets, which is often accompanied by or based on data gathered specifically for the case through surveys of consumers.

One type of character reuse that is important to a discussion of fair use—the parody—was not discussed in Part II, as it is rarely if ever used by a character’s owner.⁴⁹³ When the fair use doctrine is applied to a parody, the analytical framework shifts somewhat. Parodies, even commercially sold parodies, are accorded special status under the first fair use factor because they are transformative in nature; they are works of criticism.⁴⁹⁴ Criticism has traditionally been one of the core activities protected by fair use.⁴⁹⁵ By ridiculing the original work and portraying its characters in a negative light, a parody can harm the ultimate value of the original. However, this is not the type of harm that is cognizable under the fourth fair use factor.⁴⁹⁶ In other words, there is no protected “derivative market for critical works.”⁴⁹⁷ The quality/quantity test of the third fair use factor is also tilted more toward the accused infringer in the parody context. Since

role of the courts is to distinguish between ‘biting criticism that merely suppresses demand and copyright infringement, which usurps it.’”) (brackets removed) (citing *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

490. 4 NIMMER, *supra* note 365, § 13.05[A][4].

491. *See Campbell*, 510 U.S. at 590.

492. *See generally id.* at 590–91, 593–94.

493. *See, e.g., id.* at 591–92.

494. *See id.* at 579 (“We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.”). *See generally* Leval, *supra* note 471, at 1111 (introducing concept of transformative use as cited by the Supreme Court).

495. *See, e.g.,* 17 U.S.C. § 107 (2000) (listing criticism first in the list of purposes fair use doctrine is designed to protect).

496. *See* sources cited *supra* note 489.

497. *Campbell*, 510 U.S. at 592. However, many parodies are both criticisms of the original work as well as competitors in the sense that they can also qualify as market substitutes. Only the latter type of market harm is relevant to a fair use determination.

“quotation of the original’s most distinctive or memorable features” is necessary to “conjure up” the original for parodic purposes, a parodist is entitled to take more of the heart of the original than an ordinary infringer.⁴⁹⁸ However, there are still limits on how much can be taken—at a certain point, the parodist has taken more than is “reasonable in relation the purpose of the copying.”⁴⁹⁹ Finally, the second factor—nature of the work—is of almost no importance in the parody context.⁵⁰⁰

Since courts are more likely to find fair use in the case of a parody than in other commercial uses, it is important to note the limited scope of parody for fair use purposes. In *Campbell v. Acuff-Rose Music, Inc.*,⁵⁰¹ the Supreme Court stated that “[f]or the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, *comments on that author’s works.*”⁵⁰² Although the Court relied primarily on its interpretation of dictionary definitions of “parody” in light of the purposes of copyright law, it reached a definition of “parody” that is consistent with modern literary theory. In her book, *A Theory of Parody*, Hutcheon argues:

It will be clear by now that what I am calling parody here is not just that ridiculing imitation mentioned in the standard dictionary definitions. The challenge to this limitation of its original meaning, as suggested (as we shall see) by the etymology and

498. *Id.* at 588.

499. *Id.* at 586, 589 (“[A]s to the lyrics, we think the Court of Appeals correctly suggested that ‘no more was taken than necessary.’”). The extent of copying impacts the first and fourth factors as well. Copying beyond what is needed for criticism lessens the transformative nature of the work. Too much copying may also lead a court to view a parody as a true market substitute for the original work rather than merely a piece of criticism that potentially decreases demand for the original. See 4 NIMMER, *supra* note 365, § 13.05[C][2]. The more transformative a parody is, however, the more any attempted analysis of market substitution becomes difficult and speculative. See *id.* § 13.05[A][4], at 13-186 to 13-187 & n.246. Ironically, since the burden of proof is on the party invoking the fair use defense, the better the accused infringer fares on the first factor, the harder his task becomes on the fourth factor.

500. See *Campbell*, 510 U.S. at 586 (noting the fact that creative works which fall within the core of copyright protection “is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works”). However, just because the second statutory factor is not useful for distinguishing one parody from another does not mean that courts should discount the factor altogether. It should weigh equally against nearly all parodies, lending strength to the copyright holder’s claim of no fair use.

501. 510 U.S. 569 (1994).

502. *Id.* at 580 (emphasis added); accord *SunTrust Bank*, 268 F.3d at 1268–69 (“For purposes of our fair-use analysis, we will treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work.”).

history of the term, is one of the lessons of modern art that must be heeded in any attempt to work out a theory of parody that is adequate to it. . . .

Parody, therefore, is a form of imitation, but imitation characterized by ironic inversion, not always at the expense of the parodied text. . . . Parody is, in another formulation, repetition with critical distance, which marks difference rather than similarity.⁵⁰³

Likewise, the Court and Hutcheon both draw a distinction between satire and parody. Satire uses an earlier work to comment on something external, such as society at large, while parody comments on the original work itself.⁵⁰⁴ “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”⁵⁰⁵ Anyone trying to advance a social cause through art may be able to better accomplish his or her goal by using another person’s property.⁵⁰⁶ For example, a group of protesters may want to hang a banner on a hotel where a convention is being held. Despite the fact that our country generally values political speech, the law recognizes no privilege of banner hanging for the protesters. Likewise, the protesters may be able to convey a more effective message through a short film featuring a popular fictional character than a film without a cultural icon as its centerpiece.⁵⁰⁷ However, fair use recognizes no such privilege. Only when the film comments on the character itself—when the original work is a target rather than a weapon⁵⁰⁸—is appropriation of the original author’s copyright truly necessary. Fair use doctrine recognizes that artists

503. LINDA HUTCHEON, *A THEORY OF PARODY* 5–6 (1985). In the past, the majority of literary theorists sought a more limited definition of parody that incorporated “humor or derision.” *Id.* at 51.

504. *See id.* at 52–59; *Campbell*, 510 U.S. at 580–81.

505. *Campbell*, 510 U.S. at 580–81; *accord id.* at 597 (Kennedy J., concurring) (“It is not enough that the parody use the original in a humorous fashion, however creative that humor may be. The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well”).

506. *Cf.* Richard A. Posner, *When Is Parody Fair Use?*, 21 *J. LEGAL STUD.* 67, 73–74 (1992).

507. *Cf.* HUTCHEON, *supra* note 503, at 58 (“It is not Shakespeare who is being mocked in the many topical, satiric, parodies of his best-known speeches that appeared in *Punch* and other magazines. Satirists choose to use parodies of the most familiar of texts as the vehicle for their satire in order to add to the initial impact and to reinforce the ironic contrast.”).

508. *Cf. id.* at 52 (citing J.A. Yunck, *The Two Faces of Parody*, 8 *IOWA ENGLISH YEARBOOK*, 29, 29–37 (1963)) (making the target/weapon distinction). This distinction was also made several years later in Posner, *supra* note 506, at 71.

should not be able to prevent criticism of their work through parody. However, it must also recognize that expansion of parody to cover all works that ridicule an earlier work elevates a formalistic and outdated definition of the word above the very purposes of copyright law, which fair use is supposed to protect.⁵⁰⁹

“The fact that parody by definition must borrow elements from an existing work, however, does not mean that every parody is shielded from a claim of copyright infringement as a fair use.”⁵¹⁰ Thus, in considering whether Alice Randall’s appropriation of characters⁵¹¹ and other elements from *Gone with the Wind* in her novel—*The Wind Done Gone*—was a fair use of Margaret Mitchell’s copyrighted materials, the Eleventh Circuit applied the statutory fair use factors as explicated by the Supreme Court in *Campbell*.⁵¹² In analyzing the first factor, the Court of Appeals explicitly referred to the changes in characterization that illustrated the transformative nature of Randall’s work.⁵¹³ As the Supreme Court suggested, the second factor was “given little weight.”⁵¹⁴ With regard to the third factor, the Eleventh Circuit gave the accused infringer substantial latitude by finding that although more was taken from *Gone with the Wind* than was strictly necessary for criticism purposes, the amount was still reasonable in light of its parodic purpose.⁵¹⁵ The fourth fair use factor was also decided in favor of the accused novelist, but this conclusion was colored heavily by specific evidence in the record and the procedural posture of the case—an appeal of a preliminary injunction granted to the copyright holder.⁵¹⁶

509. See *Campbell*, 510 U.S. at 597–98 (Kennedy, J., concurring) (“If we keep the definition of parody within these limits, we have gone most of the way towards satisfying the four-factor fair use test in § 107.”).

510. *SunTrust Bank*, 268 F.3d at 1268; accord *Campbell*, 510 U.S. at 581.

511. See *supra* note 454.

512. See Note, *Gone with the Wind Done Gone: “Re-Writing” and Fair Use*, 115 HARV. L. REV. 1193, 1197–98 (2002).

513. See *SunTrust Bank*, 268 F.3d at 1270–71 & nn.25–26 (“Randall’s work flips *GWTW*’s traditional race roles, portrays powerful whites as stupid or feckless”); *id.* at 1271 (“In *TWDG*, nearly every black character is given some redeeming quality—whether depth, wit, cunning, beauty, strength, or courage—that their *GWTW* analogues lacked.”).

514. *Id.* at 1271.

515. See *id.* at 1271–74.

516. See *id.* at 1274–76 & nn.31–32. At this stage of the proceedings, the burden was on the copyright holder to demonstrate the likelihood of success on the merits whereas typically the burden to demonstrate lack of market harm is on the accused infringer who is mounting a fair use defense.

4. Summary

The protection afforded by copyright law is a powerful weapon for preventing opportunity loss, but not strong enough at preventing damage to ultimate value. Any protection for a character's ultimate value provided by copyright results from the copyright holder having control over unauthorized use of the character. Still, there are significant gaps in copyright law. First, the fair use doctrine allows parodists and other critics to damage a character's reputation.⁵¹⁷ The *SunTrust* case is a vivid illustration of a copyright holder unable to stop publication of a derivative work it saw as potentially devastating to its characters.⁵¹⁸ Second, the idea/expression dichotomy limits the scope of the copyright such that others may be able to use characters of a similar type—even those that may be considered knock-offs—without any recourse for the copyright holder.⁵¹⁹

Since copyright protection is automatic upon the creation of a copyrightable work,⁵²⁰ it will always be available to a character's creator until the term expires. Although the limited term is theoretically a drawback to relying on copyright protection, few characters have the staying power such that they will need protection nearly a century after creation.⁵²¹ The net present value of prospective income that far into the future is so small as to be of little concern to most copyright owners.⁵²²

B. Unfair Competition and Trademark Law

1. General Scope and Remedies

The second area of law a plaintiff can use to prevent misappropriation of characters is unfair competition law. Unfair competition is a broad area of law encompassing a wide range of business torts.⁵²³ The term's precise meaning is constantly subject to debate⁵²⁴ and the law varies from

517. See *Campbell*, 510 U.S. at 590–92.

518. See *SunTrust Bank*, 268 F.3d at 1259.

519. See *Campbell*, 510 U.S. at 592.

520. 17 U.S.C. § 101 (2000).

521. See generally *supra* note 422.

522. See *Eldred v. Ashcroft*, 123 S. Ct. 769, 804–08 (2003) (Breyer, J. dissenting).

523. See generally RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995).

524. See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:8 (2002) (“Can the tort of unfair competition be defined? The simple and honest answer to this question is no—not in the abstract.”); DORIS E. LONG, UNFAIR COMPETITION AND THE LANHAM ACT § 1.2.1, at 2–3 (1993) (“‘Unfair competition’ is a phrase in American jurisprudence whose precise meaning and definition have been the subject of countless disputes,

jurisdiction to jurisdiction. Nevertheless, the variations within this area of the law are small enough to permit a general discussion.⁵²⁵ The two primary causes of action that a character's creator can use to prevent third-party use of the character are false designation of origin and trademark infringement.⁵²⁶ The two are closely linked both in terms of purpose and elements of proof.

Black's Law Dictionary defines unfair competition as "[d]ishonest or fraudulent rivalry in trade and commerce; esp., the practice of endeavoring to substitute one's own goods or products in the market for those of another by means of imitating or counterfeiting the name, brand, size, shape, or other distinctive characteristic of the article or its packaging."⁵²⁷ This practice is usually referred to as "passing off."⁵²⁸ Passing off has historically been at the core of unfair competition law and remains so today.⁵²⁹ The first successful unfair competition claims in American courts arose out of a competitor's passing off its products as those of the plaintiff.⁵³⁰

[P]assing off theory became so firmly entrenched in U.S. common law that courts refused to grant relief for deceptive commercial acts unless those acts actually involved palming off. . . . Eventually, courts began to recognize that other forms of anti-competitive acts were equally worthy of protection under the common law even if the previously critical element of passing off did not exist. The pull of the passing off requirement, however, remained strong.⁵³¹

There are two types of passing off, expressed and implied.⁵³² Express passing off involves expressly misrepresenting the origin of a product or use of a competitor's trademark.⁵³³ Implied passing off involves use of "a picture or sample of its competitor's product, impliedly misrepresenting that its product is the competitor's product."⁵³⁴ Actions for express passing

scholarly writings, and court decisions.").

525. See Geoffrey C. Hazard, Jr., *Foreword* to RESTATEMENT (THIRD) OF UNFAIR COMPETITION, at xi (1995) ("For the most part the federal legislation does not preempt state law, and both federal and state unfair competition statutes generally rely without significant elaboration on concepts derived from the common law.").

526. "That is, trademark law is a species of the generic law of unfair competition." 1 MCCARTHY, *supra* note 524, § 2:7.

527. BLACK'S LAW DICTIONARY 1529 (7th ed. 1999).

528. See LONG, *supra* note 524, § 1.2.2, at 3-4.

529. *Id.*

530. *Id.* at 3.

531. *Id.* at 4; accord 4 MCCARTHY, *supra* note 524, § 25:1.

532. LONG, *supra* note 524, § 5.2, at 215-16; 4 MCCARTHY, *supra* note 524, § 25:5.

533. LONG, *supra* note 524, § 5.2, at 215-16; 4 MCCARTHY, *supra* note 524, § 25:5.

534. 4 MCCARTHY, *supra* note 524, § 25:7; accord LONG, *supra* note 524, § 5.2, at 215-16.

off are particularly useful in protecting characters.

“In general, trademarks are words, names, symbols, devices, designs, or other distinctive items which serve to identify the source of goods or services and distinguish them from those sold by others.”⁵³⁵ Not everything that distinguishes the source of a product can qualify as a valid trademark.⁵³⁶ Excluded from trademarks are titles of single books, function features of the product, and generic designations, like “paint” or “toilet paper.”⁵³⁷ Descriptive marks are generally not subject to protection, but if a descriptive mark becomes distinctive over time and is therefore capable of identifying the source of goods, it can be protected.⁵³⁸ “A trademark, properly speaking, identifies goods or products. A service mark identifies a service.”⁵³⁹

Trademark rights arise out of continued use of the mark in commerce—that is, there must be actual sales of products designated by the mark.⁵⁴⁰ “Microeconomic theory teaches that trademarks perform at least two important market functions: (1) they encourage the production of quality products; and (2) they reduce the customer’s costs of shopping and making purchasing decisions.”⁵⁴¹ Promotion of these two functions is at the core of trademark law.

Thus, in order to demonstrate trademark infringement, a plaintiff must show not only that it owns a valid mark that designates the source of its products, but also that the defendant’s use of the mark is likely to cause consumer confusion as to the source, sponsorship, approval, or origin of the

535. Sheldon H. Klein, *Introduction to Trademarks*, in UNDERSTANDING BASIC TRADEMARK LAW 2000 9, 13 (PLI Intellectual Property Course, Handbooks Series No. G-613, 2000). When the source is identified by a combination of features, the features are collectively referred to as trade dress. The distinction between trade dress infringement and trademark infringement that once existed in American law has “gradual[ly] disappear[ed]” and there is little difference between infringement actions for one as compared to the other. See 1 MCCARTHY, *supra* note 524, § 8:1.

536. See generally 2 MCCARTHY, *supra* note 524, §§ 11:1–11:91 (describing different types of marks).

537. See JAMES E. HAWES, TRADEMARK REGISTRATION PRACTICE §§ 1:4, 1:6, at 1-5 to 1-7 (2d ed. 1997). The rationale behind excluding titles of books is that the title “describes the book. When the work enters the public domain others should be able to reprint the book and designate the reprint by its original title.” *Id.* § 1:4, at 1-6. However, the title of a series of works can serve as a trademark. See 2 MCCARTHY, *supra* note 524, § 10:6.

538. HAWES, *supra* note 537, § 7:9, at 7-27 to 7-29; accord 15 U.S.C. § 1052(e)(1) (2000) (forbidding registration of “merely descriptive” marks). See generally HAWES, *supra* note 537, § 7:4, at 7-9 to 7-10 (giving examples of descriptive and non-descriptive marks).

539. *Id.* § 1:4, at 1-7.

540. See *id.* § 1:7, at 1-13. It is possible to register a mark with the USPTO based on a bona fide intention to use the mark in the future. See *id.* § 2:27, at 2-45; Klein, *supra* note 535, at 5.

541. 1 MCCARTHY, *supra* note 524, § 2:3.

products.⁵⁴² Likelihood of confusion is the central issue in most litigated cases; it is also “among the most difficult legal issues to prove.”⁵⁴³ Evidence demonstrating a likelihood of confusion can come from many sources,⁵⁴⁴ but in most cases, customer surveys are the primary method used to prove or disprove likelihood of confusion.⁵⁴⁵ Surveys are expensive to design and conduct, and require the use of an expert witness to present the data and conclusions to the trier of fact.⁵⁴⁶

A plaintiff’s burden of proof with regard to ownership and validity of a mark can be significantly reduced by registering the mark.⁵⁴⁷ In the United States, trademark registration systems exist at both the federal and state levels.⁵⁴⁸ Federal registrations, governed by the Lanham Act,⁵⁴⁹ last for ten years and may be renewed for additional ten-year terms.⁵⁵⁰ Federal registration offers several benefits, including: access to the federal courts and statutory remedies;⁵⁵¹ constructive notice of ownership; “a presumption

542. See LONG, *supra* note 524, §5.2.1, at 216; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 20 (1995).

543. ARTHUR H. SEIDEL ET AL., WHAT THE GENERAL PRACTITIONER SHOULD KNOW ABOUT TRADEMARKS AND COPYRIGHTS § 9.03, at 105 (6th ed. 1992); accord Richard L. Kirkpatrick, *Likelihood of Confusion in Trademark Law*, in UNDERSTANDING BASIC TRADEMARK LAW 2000 § 1.3, at 1-7 to 1-13 (PLI Intellectual Property Course, Handbooks Series No. G-613, 2000), reprinted from RICHARD L. KIRKPATRICK, LIKELIHOOD OF CONFUSION IN TRADEMARK LAW (PLI No. G1-1024, Release No. 4, Nov. 1999) (difficulty of issue); 3 MCCARTHY, *supra* note 524, § 23:1 (“Likelihood of confusion is the basic test of both common-law trademark infringement and federal statutory trademark infringement.”).

544. See 3 MCCARTHY, *supra* note 524, § 23:2.1 (listing survey evidence, evidence of actual confusion and “argument based on a clear inference arising from a comparison of the conflicting marks and the context of their use”).

545. See SEIDEL ET AL., *supra* note 543, § 9.04, at 108 (“Survey techniques . . . though expensive, offer the only solution to the present morass into which trademark litigation has descended.”).

546. See *id.* § 9.04, at 108–10; 5 MCCARTHY, *supra* note 524, § 32:158; see G. Kip Edwards, *Lanham Act Surveys After Daubert: Lessons Learned So Far*, in STRATEGIES FOR LITIGATING COPYRIGHT, TRADEMARK & UNFAIR COMPETITION CASES 2001 421, 423–48 (PLI Intellectual Property Course, Handbooks Series No. G-677, 2001). The trademark literature is overflowing with books and articles about surveys, as they have taken center stage in most litigation.

547. It is important to note that registration is neither necessary nor sufficient to create the underlying right to exclude others from using the mark. See, e.g., 3 MCCARTHY, *supra* note 524, § 19:3. Eligibility for state common law protection and federal registration are not entirely co-extensive, but, in most cases, a person who is eligible for one will be eligible for the other. See *id.* § 19:8 at 19-20 to 19-22.

548. See SEIDEL ET AL., *supra* note 543, §§ 1.01, 2.01, at 2, 15–19.

549. Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051–1127 (2000)).

550. See 15 U.S.C. §§ 1058–59 (2000).

551. This benefit has become less important with the rise of claims for infringement of common law marks brought under § 43(a) of the Lanham Act. See text accompanying *infra* notes

of validity of the registration, its ownership, and the exclusive right to use the registered mark in commerce in connection with those items specified in the registration;" permission to use the ® symbol on products; and ability to apply for the incontestable right to use the mark for certain products after five years of continuous use.⁵⁵²

Common law remedies for unfair competition include injunctive relief and recovery of damages or the defendant's profits.⁵⁵³ However, plaintiffs are rarely limited to state law remedies, as section 43(a) of the Lanham Act provides a federal cause of action for passing off that occurs in interstate commerce.⁵⁵⁴ "Relief under section 43(a) may include an injunction, destruction order, recovery of the defendant's profits, and any damages sustained."⁵⁵⁵ These are the same remedies available in cases of infringement of a federally registered mark.⁵⁵⁶ Damages awards are designed to be compensatory, not punitive, although in "exceptional cases" the court may award reasonable attorneys' fees.⁵⁵⁷ The use of section 43(a) to pursue what were once state law passing off claims has not affected the underlying law; it merely "shift[ed] the locale of much traditional unfair competition litigation from state courts to federal courts."⁵⁵⁸

Just as trademark rights are acquired through use in commerce, they may also be lost through lack of use by the owner or use by others.⁵⁵⁹

Trademark rights can also be lost when others begin to use confusingly similar marks in commerce, as well as when the mark has become so well-established that it no longer designates just the trademark owner's goods, but also all goods of that general nature or style. To protect trademark rights, then, it is necessary for the trademark owner to continue to use the mark and to

554-556.

552. HAWES, *supra* note 537, §§ 1:3, 1:10, at 1-3, 1-17. See 15 U.S.C. §§ 1065, 1072, 1111, 1114 (2000).

553. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 35-37 (1995).

554. See BUSINESS TORTS & UNFAIR COMPETITION 45-46 (A. Michael Ferrill ed., 1996) [hereinafter BUSINESS TORTS] ("[T]his requirement has been liberally interpreted, and the reach of the statute 'is coincident with the constitutional boundary embodied in the commerce clause.'" (quoting *Jellibeans, Inc. v. Skating Club, Inc.*, 716 F.2d 833, 838 (11th Cir. 1983)).

555. *Id.* at 67.

556. See LONG, *supra* note 524, § 7.11, at 284-85; 15 U.S.C. §§ 1114, 1116, 1117, 1118 (2000). "Most state trademark statutes emulate the Lanham Act and provide for injunctive and monetary relief for infringement of state trademarks." LONG, *supra* note 524, § 9.4, at 334-35.

557. See BUSINESS TORTS, *supra* note 554, at 67.

558. 1 MCCARTHY, *supra* note 524, § 1:17.

559. See Klein, *supra* note 535, at 18-19 (stating that a mark is abandoned upon "discontinuance of use with intent not to resume"; "[n]on-use for three consecutive years is prima facie evidence of abandonment"; noting that failure to prosecute infringers can result in weakening rather than abandonment of the mark).

police the marketplace.⁵⁶⁰

An additional level of protection is available under the Lanham Act and several state statutes that protect famous marks from dilution.⁵⁶¹ Dilution is “a weakening or reduction in the ability of a mark to clearly and unmistakably distinguish one source.”⁵⁶² A third party can cause dilution in one of two ways. The first, blurring, is use of the mark in commerce without likelihood of confusion, but merely with a likelihood that the mark will become less distinctive.⁵⁶³ The second, tarnishment, is use of the “mark in an unwholesome or degrading context,” such that the mark “will suffer negative associations.”⁵⁶⁴ Anti-dilution remedies⁵⁶⁵ are available only for “famous” marks. A mark is famous if it “retains its source significance when encountered outside the context of the goods or services with which the mark is used by the trademark owner.”⁵⁶⁶ The federal statute provides safe harbors from dilution suits for comparative advertising, non-commercial use and news reporting and commentary.⁵⁶⁷ Even absent the statutory safe harbor, some suggest that the First Amendment requires a comparable limit on the scope of any anti-dilution statute so that non-commercial commentary, criticism and parody are insulated from liability.⁵⁶⁸ The federal anti-dilution statute, in contrast to several state

560. HAWES, *supra* note 537, § 1:8, at 1-13 to 1-14.

561. *See* 15 U.S.C. § 1125(c) (2000); 4 MCCARTHY, *supra* note 524, § 24:77–24:82 (discussing state anti-dilution laws).

562. 4 MCCARTHY, *supra* note 524, § 24:67.

563. *See id.* § 24:68; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25(1)(a) (1995). Thus, anti-dilution statutes allow a trademark owner to stop use of a mark on even non-competitive goods for which there is little to no chance of confusion as to source.

564. 4 MCCARTHY, *supra* note 524, §§ 24:104, 24:221, 24:222; *accord* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25(1)(b) & cmt. g (1995).

565. Under the federal statute, the only available remedy is injunctive relief “unless the person against whom the injunction is sought willfully intended to trade on the owner’s reputation or to cause dilution of the famous mark. If such willful intent is proven, the owner of the famous mark shall also be entitled to” damages, a destruction order and, in some cases attorneys’ fees. 15 U.S.C § 1125(c)(2) (2000).

566. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25 cmt. e (1995); *see also* 15 U.S.C. § 1125(c)(1) (2000) (listing eight factors to consider); 4 MCCARTHY, *supra* note 524, §§ 24:91–24:92; Sandra Edelman, *Dilution Update*, in LITIGATING COPYRIGHT, TRADEMARK & UNFAIR COMPETITION CASES 1998 513, 518–21 (PLI Intellectual Property Course, Handbooks Series No. G-537, 1998) (citing cases). *Compare* 4 MCCARTHY, *supra* note 524, § 24:92.1 (listing marks held to be famous) *with id.* § 24:92.2 (listing marks held not to be famous). *But see id.* § 24:91.2, at 24-158 (noting that the Second Circuit separates the distinctiveness and fame inquiries).

567. 15 U.S.C. § 1125(c)(4) (2000); *see also* *Mattel, Inc. v. MCA Records*, 28 F. Supp. 2d 1120, 1154–56 (C.D. Cal. 1998) (entering summary judgment on dilution claim because defendant’s parody of Barbie character was a noncommercial use of the mark).

568. *See* Natalie A. Dopson, Note, *The Federal Trademark Dilution Act and Its Effect on Parody: No Laughing Matter*, 5 J. INTELL. PROP. L. 539, 562–67 (1998); RESTATEMENT (THIRD)

anti-dilution statutes, requires the owner of the famous mark to demonstrate actual injury to the economic value of the mark.⁵⁶⁹ This requirement provides a practical protection to those accused of diluting a famous mark in that evidence of actual injury may be difficult to obtain.⁵⁷⁰

2. Application to Fictional Characters

Since most entertainment products move in interstate commerce, characters whose names or likenesses indicate a source of a product—be it a movie, book, or stuffed doll—are protectable and registerable as trademarks under the Lanham Act.⁵⁷¹ A character's name and physical appearance⁵⁷² are more likely to indicate the source of a product than other aspects of characterization.⁵⁷³ However, not all characters' names are protected. Protection has been denied in cases where "plaintiffs' works had virtually no circulation, were not associated in anybody's mind with the plaintiffs as the source, and the defendants' use of the names was therefore unlikely to cause public confusion."⁵⁷⁴ Thus, unlike copyright law, which gives equal protection to all works, trademark law, with its focus on harm to the consumer, grants greater protection to more popular works whose misuse is more likely to cause confusion.⁵⁷⁵

Plaintiffs who have litigated unfair competition claims based on unauthorized use of fictional characters have met with varying degrees of success.⁵⁷⁶ Unfair competition law is particularly useful in protecting a merchandising business, as the character serves as the source identifier for the T-shirt, coffee mug, or hat on which it appears.⁵⁷⁷ "Movies, plays, books

OF UNFAIR COMPETITION § 25(2) cmt. i (1995). Presumably, a court must engage in a similar analysis to the application of fair use doctrine to parodies of copyrighted works. *See id.* § 25 rep. note, at 283. Parody is only a defense to traditional trademark infringement insofar as the parodic nature of the use may eliminate any likelihood of confusion as to source or approval. *See* 5 MCCARTHY, *supra* note 524, § 31:153 (suggesting that consumer knowledge that the use is parodic and therefore presumably unauthorized may eliminate any confusion as to source or approval).

569. *See* *Moseley v. V Secret Catalogue, Inc.*, No. 01-1015, slip op. at 13–16 (U.S. Mar. 4, 2003).

570. *See id.* at 15.

571. *See* 15 U.S.C. § 1114 (2000).

572. Physical appearance is more likely to constitute a valid trademark in the case of comic book or animated characters. *See* Kurtz, *supra* note 6, at 482–84.

573. LONG, *supra* note 524, § 6.5.1; 2 MCCARTHY, *supra* note 524, § 10:42; Kurtz, *supra* note 6, at 492 ("If neither the name or appearance of a character is used, a claim of unfair competition or trademark infringement will ordinarily fail.").

574. Kurtz, *supra* note 6, at 481.

575. *See generally* LONG, *supra* note 524, § 1.1.

576. *See* 2 MCCARTHY, *supra* note 524, § 10:42 (listing characters and citing cases).

577. *See* 2 MCCARTHY, *supra* note 524, §§ 10:18, 10:20, 10:43. Kurtz argues that:

and songs are . . . also sold in the commercial marketplace like other more utilitarian products," bringing them within the ambit of unfair competition law as well.⁵⁷⁸ Since many characters are associated with a particular author or company, they can serve as source/approval identifiers when they appear in a new movie, book, or other works of fiction.⁵⁷⁹ It is important to note that a plaintiff can prevail even if the likelihood of confusion as to the source or approval occurs only after the sale, as would be the case when the defendant includes a character in a book but does not advertise the character itself.⁵⁸⁰

In addition to creating a likelihood of confusion that the new work of fiction is endorsed or sponsored by the original author, one who uses another's characters may be liable for simply claiming authorship of the new work. The theory of liability is that the author of the new work has falsely represented herself as the source of the original author's characters.⁵⁸¹ Thus, there has been an increasing trend to combine claims for false

Those who create fictional characters do not possess an inalienable right to capture the market for lunchboxes, mugs, T-shirts and toys. The assumption that public recognition is equivalent to a likelihood of confusion is unwarranted. Even if the defendant's merchandise is associated with the plaintiff's character or the work in which it appeared, there may be no confusion as to its source. It cannot be assumed that consumers believe any use of a well-known character means its creators sponsored or approved of it.

Kurtz, *supra* note 6, at 502–03. Kurtz's argument, however, is severely undercut by an empirical study of consumer attitudes about merchandising:

In 1983, well-known consumer survey expert Robert Sorenson designed a survey probing public attitudes regarding licensed wearing apparel bearing a picture of a cartoon character. The statement in the survey that elicited the highest degree of consumer agreement was this: "No product can bear the name of an entertainer, cartoon character, or some other famous person unless permission is given for its use of the owner of the name or character." Of the 250 persons interviewed, 91.2 percent agreed with that statement and almost 80 percent indicated the strongest possible level of agreement.

2 MCCARTHY, *supra* note 524, § 10:43.

Thus, in general, consumers are likely to be confused about the source or sponsorship of merchandising featuring characters. Although Kurtz argues forcefully that "[g]ranting one company a monopoly on the right to merchandise, or license the merchandising, of items bearing indicia of a character is costly" and probably results in a over-investment in characters "capable of supporting a merchandising effort," the fact remains that under the current state of the law, character merchandising is protected. Kurtz, *supra* note 6, at 505–06.

578. *Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir. 1989).

579. *See Kurtz, supra* note 6, at 477 ("For example, if Smith creates and publishes a book of Donald Duck cartoons, using the name and likeness of the well-known Disney character, buyers are likely to be confused into believing that Disney created the book."); *id.* at 489 ("When a well-known fictional character appears in identifiable form in another work of fiction, the law of trademarks and unfair competition will usually provide protection.")

580. *Cf.* 3 MCCARTHY, *supra* note 524, § 23:70 (describing liability for post-sale confusion).

581. This is comparable to a "reverse passing off" claim. *See generally* LONG, *supra* note 524, § 5.3.

attribution of source “with claims for copyright infringement where the work at issue has been duplicated or derived from the plaintiff’s copyrighted work without the plaintiff’s permission.”⁵⁸²

An accused infringer may attempt to defeat a finding of likelihood of confusion by including a disclaimer on her product indicating that there is no connection with the character’s creator.⁵⁸³ However, not all disclaimers are effective. In *Toho Co. v. William Morrow & Co.*,⁵⁸⁴ the plaintiff obtained a preliminary injunction barring defendant’s publication of a book based on plaintiff’s Godzilla character, despite a disclaimer on both the front and back covers of the book.⁵⁸⁵ Analyzing cases from the Second Circuit, the court in *Toho* stated that “the infringer has an affirmative duty to come forward with ‘evidence sufficient to demonstrate that any proposed material would significantly reduce the likelihood of consumer confusion.’”⁵⁸⁶ The court further noted that “the Second Circuit has also recognized a growing body of academic literature that suggests that disclaimers are generally ineffective.”⁵⁸⁷

As characters span the various media, particularly when different entities are licensed to use the character in different media, the character’s owner must be careful to maintain control over its licensing program.⁵⁸⁸ If the trademark ceases to identify a single source of goods, or at least a single source of quality controls, it may become unenforceable.⁵⁸⁹ Thus, the trademark owner “has the duty to control quality” when it licenses use of the mark, whether the licensing be for consumer goods or for a movie

582. *Id.* § 6.3 (“Where the work in question is subject to copyright protection, the success of the plaintiff’s claim for copyright infringement is generally dispositive of the false attribution claims under the Lanham Act.”).

583. *Cf. Arica Inst., Inc. v. Palmer*, 770 F. Supp. 188, 196 (S.D.N.Y. 1991) (“Disclaimers are a favored method of alleviating consumer confusion as to source or sponsorship.”), *aff’d*, 970 F.2d 1067 (2d Cir. 1992).

584. 33 F. Supp. 2d. 1206 (C.D. Cal. 1998).

585. *Id.* at 1212–13, 1218. The court did suggest that if the more detailed disclaimer on the back of the book appeared on the front cover as well, it might be more effective. However, this would not address other problems identified by the court, particularly consumers who look only at the spine of the book or who purchase the book over the Internet. *Id.* at 1213.

586. *Id.* at 1212 (quoting *HBO, Inc. v. Showtime/The Movie Channel Inc.*, 832 F.2d 1311, 1316 (2d Cir. 1987)).

587. *Id.*

588. *See generally supra* notes 370–371 and accompanying text (discussing licensing of characters).

589. *See Kurtz, supra* note 6, at 487–88 (discussing *Universal City Studios, Inc. v. Nintendo Co.*, 578 F. Supp. 911 (S.D.N.Y. 1983), in which trademark protection was denied for the King Kong character because the public could not identify a single source when various rights to the character were controlled by different companies).

version of a book.⁵⁹⁰

Federal and state anti-dilution statutes present a particularly powerful tool for preventing damage to the ultimate value of characters. Suits that seek to enjoin uses of trademarks in pornographic or anti-social contexts have been particularly successful.⁵⁹¹ Characters can constitute famous marks for dilution purposes. Indeed, in the most well-known case to address this question, *Danjaq LLC v. Sony Corp.*,⁵⁹² the status of James Bond as a famous mark was uncontested. “Although the case ultimately settled, it represents the revolutionary recognition of federal dilution as a separate and distinct cause of action for the protection of film and TV characters.”⁵⁹³

Ironically, however, the more damaging aspect of dilution—tarnishment—is frequently insulated from anti-dilution laws by a parody defense. Although “[s]ome commentators have argued that the [federal] Act effectively prevents using a trademark as a subject of parody,”⁵⁹⁴ courts have entertained the fair use defense and applied it, albeit inconsistently, to defeat anti-dilution suits.⁵⁹⁵ Thus, in *Mattel, Inc. v. MCA Records, Inc.*,⁵⁹⁶ the makers of the Barbie doll lost their dilution claim against the record company responsible for the song *Barbie Girl*⁵⁹⁷ on summary judgment when the court accepted the defendant’s parody defense. This holding is particularly noteworthy as anti-dilution laws are designed to protect against the very sort of alteration of a mark’s image present in *Mattel*.⁵⁹⁸ Indeed, another court was significantly more hospitable to the BARBIE mark, finding “dilut[ion] by tarnishment by the use of BARBIE’s PLAYHOUSE on defendant’s web site offering a female model who engaged in a sexually

590. See 2 MCCARTHY, *supra* note 524, §§ 18:42, 18:48 (describing effects of uncontrolled or “naked” licensing).

591. See 4 MCCARTHY, *supra* note 524, § 24:104.

592. 49 U.S.P.Q.2d 1341, 1346 & n.4 (C.D. Cal.), *aff’d mem.*, 165 F.3d 915 (9th Cir. 1998).

593. Kristen Knudsen, *The Protection of James Bond and Other Fictional Characters Under the Federal Trademark Dilution Act*, 2 VAND. J. ENT. L. & PRAC. 13, 19 (2000).

594. Dopson, *supra* note 568, at 540.

595. See Keren Levy, Note, *Trademark Parody: A Conflict Between Constitutional and Intellectual Property Interests*, 69 GEO. WASH. L. REV. 425, 442–47 (2001) (discussing cases).

596. 28 F. Supp. 2d 1120 (C.D. Cal. 1998).

597. Aqua, *Barbie Girl*, on AQUARIUM (MCA Records 1997).

598. *Compare Mattel*, 28 F. Supp. 2d at 1155 (“Plaintiff contends that its famous mark is associated with *wholesomeness* and that defendants’ song tarnishes that mark through its ‘sexual and denigrating lyrics.’”) (emphasis added) with 4 MCCARTHY, *supra* note 524, § 24:95 (“In the author’s view, because a tarnishing use lessens the ability and capacity of a famous mark to identify a certain standing or reputation of type, quality or *wholesomeness* of goods or services, dilution by tarnishment fulfills the statutory requirement . . .”) (emphasis added). The court’s statement in *Mattel* that the “plaintiff has not shown that its mark is associated exclusively with wholesomeness” places too high a burden on the trademark holder by demanding exclusivity of association. *Mattel*, 28 F. Supp. 2d at 1155.

explicit video conference.”⁵⁹⁹

3. Summary

Unlike copyright, which will always last for a set term, a properly protected trademark can last forever.⁶⁰⁰ However, maintaining trademark protection requires effort in terms of both monitoring the marketplace and pursuing remedies against infringers.⁶⁰¹ For particularly valuable characters, especially those for whom merchandising can achieve substantial revenues, maintaining trademark protection is usually worth its costs. Still, if a third party can eliminate consumer confusion, perhaps through a clever and prominent disclaimer, the protection afforded by trademark law is eviscerated.⁶⁰²

Although anti-dilution statutes initially appear to provide excellent protection for the long term value of characters by prohibiting the tarnishment of famous marks, courts tend to allow non-pornographic uses of characters that portray the character in a negative light as permissible parody rather than prohibited dilution.⁶⁰³ Consequently, as with copyright law, unfair competition law is better at preventing opportunity loss than damage to the ultimate value of characters.

C. Costs of Enforcement

Enforcing rights under trademark and copyright can be expensive. While filing for a federal trademark or copyright registration is relatively inexpensive,⁶⁰⁴ litigation is extremely costly. After paying for attorneys’ fees, expert witnesses, market surveys, depositions, and the other costs of litigation, expenses often top more than a million dollars per party in complex intellectual property cases.⁶⁰⁵ Copyright law allows owners to be more selective in deciding whether to sue infringers than trademark law

599. 4 MCCARTHY, *supra* note 524, § 24:95. As noted earlier, tarnishment claims are typically more successful against pornographers than others.

600. “There is no policy reason why a character picture that is out of copyright cannot achieve protection under trademark law. The two types of protection are separate and independent and do not lean on each other for support.” 2 MCCARTHY, *supra* note 524, § 10-42.

601. *See* MCCARTHY, *supra* note 524, § 24:104.

602. *See* Knudsen, *supra* note 593, at 21–22.

603. *See* Levy, *supra* note 595, at 442–47; *see also* *Mattel*, 28 F. Supp. 2d at 1155.

604. *See* Patents, Trademarks, and Copyrights, 37 C.F.R. § 2.6 (2002) (trademark registration application fees); § 201.3(c) (copyright registration application fees).

605. *See* JEROME S. LEVY & ROBERT C. PRATHER, SR., TEXAS PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION § 3.1 (2002) (“Complex intellectual property, patent, trademark and copyright litigation is extremely expens[ive] (averaging in excess of a million dollars per party) and protracted.”).

does.⁶⁰⁶ A party who does not police infringements of its trademarks risks weakening them or losing them outright.⁶⁰⁷

If a copyright or trademark owner is too heavy-handed in enforcing its rights, particularly in cases where the defendant claims fair use, it also risks damage to its reputation as a company. Consider, for example, the outcry against the trustees of *Gone with the Wind* when they attempted to halt publication of *The Wind Done Gone*.⁶⁰⁸ This type of backlash can be most damaging when the character's guardian targets a member of a group of fans who communicate with each other by the Internet. By banding together, fans upset with a company's enforcement tactics can organize boycotts and encourage negative media coverage.⁶⁰⁹ Thus, in many cases it may be good business sense to allow the risk of damage to a character's reputation in order to preserve the reputation of the company.

VI. PERSPECTIVES ON CREATIVITY

Other than occasional suggestions from academics,⁶¹⁰ there have been few efforts to adopt significant changes to the law that are focused on protections for characters. The fact that the entertainment industry has not pushed for strengthening of laws protecting fictional characters could be viewed as an indication that it views the current state of the law as adequate for its needs.⁶¹¹ The industry has not been shy about pressuring Congress to enact legislation providing stronger protection for intellectual property owners when it feels threatened.⁶¹² For example, Hollywood studios are currently lobbying for legislation mandating electronic copy protection

606. See *id.* § 3:2 (The legal profession is "converting itself from a 'sellers market' to a 'buyers' market.'").

607. See *supra* notes 559–560 and accompanying text.

608. See, e.g., Open Letter from Ben H. Bagdikian et al., (Apr. 10, 2001), available at http://www.houghtonmifflinbooks.com/features/randall_url/letter.shtml (urging the courts to allow publication of *The Wind Done Gone* and including signatures of Pulitzer Prize winners Harper Lee, James Alan McPherson, Larry McMurty, and Arthur M. Schlesinger, Jr.).

609. See Elizabeth Weise, 'Potter' Is Still the Muggles' Domain, USA TODAY, Apr. 24, 2001, at D3 (describing in detail a battle between *Harry Potter* fans and Warner Brothers and noting other clashes between fans of *Star Wars* and *Buffy the Vampire Slayer* and their producers/distributors).

610. See, e.g., Kurtz, *supra* note 6; David B. Feldman, Comment, *Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 CAL. L. REV. 687 (1990).

611. Cf. Feldman, *supra* note 610.

612. See Declan McCullagh & Robert Zarate, *Content Spat Split on Party Lines*, WIRED NEWS (Mar. 1, 2002) at <http://www.wired.com/news/politics/0,1283,50754,00.html>; Gwendolyn Mariano, *Senators Talk Tough on Digital Piracy*, CNET (Mar. 1, 2002) at <http://news.com.com/2100-1023-847229.html>.

controls in all digital devices so as to better police copying.⁶¹³ In the recent past, the entertainment industry has also successfully lobbied Congress for an extension to the term of copyright,⁶¹⁴ legislation protecting famous trademarks from dilution,⁶¹⁵ and laws providing enhanced protection for copyrighted works on the Internet.⁶¹⁶ By strengthening intellectual property protection in general, protection for fictional characters has been enhanced.⁶¹⁷ Indeed, protection of characters may have been at the front of Disney's mind when it pursued an extension of the copyright term in 1998, approximately five years before copyrights on characters such as Mickey Mouse, Pluto, and Donald Duck would begin to expire.⁶¹⁸

Perhaps the large entertainment companies, which are both creators of works and users who build upon the works of others, are reticent to increase the scope of protection for fictional characters per se for fear that increased legal protection may be used against them as much or more than they use it against others. Attempting to determine how all of a company's various divisions would be impacted by increased copyright or trademark protection would involve a tremendously complicated and perhaps impossible calculus. Consequently, any prospective changes to the law are very risky to endorse.

The difficulty of determining a large conglomerate's ideal state of intellectual property law was illustrated by events leading up to the

613. Mariano, *supra* note 612.

614. See *Disney Lobbying for Copyright Extension No Mickey Mouse Effort*, CHI. TRIB., Oct. 17, 1998, at 22. The constitutionality of the Sonny Bono Copyright Extension Act was recently upheld by the Supreme Court. See *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003). Commenting that "[t]he wisdom of Congress' action, however, is not within our province to second guess," the Court decided that Congress and the President have broad authority to determine the appropriate rewards for authors. *Id.* at 790.

615. See Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT L. REV. 789, 838-39 (1997) (noting that "Nils Victor Montan, Vice President and Senior Intellectual Property Counsel at Warner Bros., [was] among those who testified in support of the Act before" Congress); Knudsen, *supra* note 593, at 23 (describing Montan's testimony).

616. See Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication*, 52 STAN. L. REV. 1201, 1218 (2000) ("Passage of the DMCA was a high priority for the entertainment industry, and by all accounts the industry's power in developing the legislation was as strong as with other copyright-related matters taken up by Congress.").

617. See John F. Kennedy, *Remarks in Pueblo, Colorado* (Aug. 17, 1962), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: 1962 626 (1962) ("A rising tide lifts all the boats.").

618. See *Disney Lobbying for Copyright Extension No Mickey Mouse Effort* *supra* note 614, at 22; Knudsen, *supra* note 593, at 21-22 (describing extent of Disney's campaign contributions and the company's purchase of Winnie the Pooh character which was contingent on enactment of an extension).

resignation of CNN News Group's vice-president and chief counsel, Eve Burton.⁶¹⁹ "According to published reports in the *New York Times* and elsewhere, Burton's abrupt departure from CNN was prompted by her signing CNN's name on an amicus brief filed" on behalf of Houghton Mifflin in the *SunTrust* case.⁶²⁰ CNN News Group is part of Time Warner, which through Warner Books owns the copyright to *Scarlett*, the authorized sequel to *Gone with the Wind* and through Turner Entertainment owns the rights to the movie version of *Gone with the Wind*.⁶²¹ CNN's name was ultimately removed from the amicus brief and Burton resigned shortly thereafter.⁶²²

Just as the ideal level of protection is difficult to calculate from the perspective of a particular company, it is next to impossible to determine from a societal perspective.⁶²³ Attempts by Congress and the courts to strike the right balance in terms of copyright protection are hampered by the simple fact that "we don't know how much incentive is enough, and how much is too much."⁶²⁴ Although copyright protection is a social good insofar as it encourages the creation and dissemination of new works, if protection is too strong it will stifle creativity by preventing new artists from building on older works.⁶²⁵ The ability to borrow from and build upon earlier works is vital to the creation of new art.⁶²⁶

619. Janet L. Conley, *CNN Counsel's Resignation Highlights Position's Potential Conflict Risks*, FULTON COUNTY DAILY REP., Aug. 1, 2001, available at <http://www.law.com/jsp/printfriendly.sp?c=LawArticle&t=PrinterFriendlyArticle&cid=1051973976305> (last visited Feb. 14, 2003).

620. *Id.*

621. See *id.*; see also ALEXANDRA RIPLEY, *SCARLETT: THE SEQUEL TO MARGARET MITCHELL'S GONE WITH THE WIND* (Warner Books 1991); *GONE WITH THE WIND* (Selznick International Pictures 1939).

622. See Conley, *supra* note 619.

623. The ideal level of protection may vary from one medium to another. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 351 (1970).

624. Chris Sprigman, Legal Commentary, *The Mouse That Ate the Public Domain: Disney, the Copyright Term Extension Act, and Eldred v. Ashcroft*, FINDLAW'S WRIT (Mar. 5, 2002) at http://writ.news.findlaw.com/commentary/20020305_sprigman.html; see also George Leopold, *U.S. Patent Debate To Pit IP Rights vs. Competition*, EE TIMES, Feb. 11, 2002, at <http://www.eetimes.com/story/OEG20020208S0079> (describing similar conflict in area of patent law and efforts to determine societal impact of patent protection).

625. See, e.g., Jagorda, *supra* note 475, at 249–51 (suggesting we may have reached the point where copyright is overprotective).

626. See, e.g., *Emerson v. Davies*, 8 F. Cas. 615, 619 (D. Mass. 1845) (No. 436) ("In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before."); see also Sprigman, *supra* note 624 ("If we know little about the utility of longer copyright terms, there is abundant evidence regarding the vital importance to the progress of our culture of a robust stock

Strong protection for characters need not always stifle creativity. In some cases, concern for other's intellectual property rights may encourage artists to break new ground, as they attempt to ensure that their creations are sufficiently different from what came before so as to avoid litigation.⁶²⁷ For example, Lara Croft, perhaps the most popular female video game character of all time, may have been created as a man were it not for her creators' concerns about infringing another company's intellectual property rights.⁶²⁸ Steven Poole retells the following story about the development of the original *Tomb Raider* game as described by Jeremy Smith of Core Design:

The original script and graphics that were done, it just was Indiana Jones, and I said "Christ, you can't do that—we'll be sued from here to Timbuktu!" And they said, "Yeah, I suppose you're right. We'll work on it." And then literally two weeks later we had another project meeting and there was this *babe* there. I said, "It's a woman—what are you doing?", and they said "No, it's gonna really work." Well, at that point, it really didn't make any difference. It was only when they really started to develop Lara—she was animated and her hair was moving—it was like, "Wow, you could actually quite relate to this!"⁶²⁹

Anecdotes like this, however, are the exception rather than the rule. Increased protection on the whole appears to lead to consolidation of control over art in existing copyright and trademark holders while placing heavier burdens on new artists. Indeed, the very nature of the inquiry in fair use and unfair competition cases, with their emphasis on market substitutes and likelihood of confusion, is tilted towards those wealthy litigants who can afford the high costs of expert witnesses and carefully-crafted surveys. The substantive law has also seen an increase in protection for characters as large entertainment companies, who may be unwilling to take the risk of pushing for system-wide strengthening of protection for characters, may have effected an equivalent shift in the law through the sum total of their individual litigating efforts.⁶³⁰

of public domain works. Most artists, if pressed, will admit that the true mother of invention in the arts is not necessity, but theft. And this is true even for our greatest artists.").

627. See POOLE, *supra* note 65, at 163.

628. *See id.*

629. *Id.*

630. See Helfand, *supra* note 441, at 641–61 ("During the past twenty years, courts, often at the urging of character owners, have dissolved the analytical boundaries between statutory copyright, statutory and common law trademark, unfair competition, and dilution, thereby retooling traditional tests of infringement to produce particularly strong, and at times too strong, protection for fictional characters. The process can be seen as a convergence of these legal doctrines,

Kurtz has argued that if trademark law allows companies to capture the entire market for merchandising based on their characters, we risk unnaturally “[s]kewing investment” towards characters capable of sustaining a merchandising effort.⁶³¹ Likewise, as protection for characters in general increases, investment should theoretically gravitate towards characters that are reusable.⁶³² Insofar as control over markets through intellectual property law affects what kind of art our society produces, there is a strong argument that the law should encourage great characters rather than reusable characters. Focusing on creating high-quality characters rather than emphasizing plot or other literary elements may make for the best and most enduring pieces of art. In the context of feature films, Professor Horton writes:

The basic premise of this book is simple: there is a large gap between the typical plot-driven films, especially those produced by Hollywood, and those movies that actually win Academy Awards and other prizes around the world. The pictures we remember and which the Academy most often turns to when it takes a closer look at the end of each year tend to be narratives about strongly etched characters. And because these stories concern people *we care deeply about*, they have *emotional and moral resonance*: we replay them again and again in the cinemas of our mind.⁶³³

As illustrated in Part IV above, character reuse is a growing trend in nearly all media. As companies try to reduce risk through recycling proven characters in new projects, the variety of new works shrinks. Thus, given the current emphasis or overemphasis on character reuse, there seems little reason to increase protection for characters. Indeed, some academics have suggested that protection for characters should be decreased.⁶³⁴ However, these proposals are problematic as well. First, since protection for fictional characters is not an area of law unto itself, limiting property rights in characters can only be achieved by weakening copyright and unfair competition

whereby the strengths of each doctrine are accentuated and their weaknesses diminished.”).

631. Kurtz, *supra* note 6, at 505–06.

632. This assumes, of course, that the potential reusability of characters admits of determination prior to investment. This assumption seems warranted given the widespread use of surveys, focus groups and other methods of determining consumer interest currently used in the entertainment industry.

633. HORTON, *supra* note 8, at 12.

634. Compare Nickles, *supra* note 422, at 166 (arguing that trademark law should not prevent use of a copyrighted character after expiration of copyright term provided a disclaimer is used) with Nevins, *supra* note 460, at 327 (arguing that trademark law provides adequate protection for characters and copyright protection should be limited).

law generally.⁶³⁵ The unforeseen and unforeseeable consequences of a significant change of this nature for not only the entertainment industry but for all American businesses are legion. Second, decreasing intellectual property protection is likely to be unpopular. The moral and ethical undertones associated with copyright law's reward for artists and unfair competition law's protection of consumers and honest businesspeople are hard targets for those who desire weaker protections.⁶³⁶

Carving out areas of decreased protection for fictional characters may be theoretically possible, but it seems both philosophically inconsistent and difficult to implement given the way character is intertwined with other elements of fiction.⁶³⁷ Furthermore, the majority of the public may want to avoid damage to the reputations of popular characters almost as much as their owners do.⁶³⁸

These problems and risks seem difficult, if not impossible, to justify given the uncertainty that they could achieve any significant changes in the type and variety of art that entertainment companies produce. Character reuse has not flourished as a phenomenon because of lawyers; it has flourished because of bankers. The key factor driving character reuse is the profit motive of the companies that control the means of producing and distributing mass market entertainment.⁶³⁹ To be more specific, it is not extra profits as such that drive character reuse; rather, it is extra profits achieved through lower-risk investments.

Even absent the right to exclude others from the market for sequels, prequels, spinoffs, and merchandising,⁶⁴⁰ companies are still likely to use

635. There are those who argue forcefully that society would be well-served by this sort of system-wide reduction in intellectual property rights, particularly copyright. See, e.g., SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 5 (2001) (arguing for "'thin' copyright protection: just strong enough to encourage and reward aspiring artists . . . yet porous enough to allow full and rich democratic speech and the free flow of information").

636. See 1 MCCARTHY, *supra* note 524, § 1:18 (describing moral undertones of unfair competition law); Kurtz, *supra* note 6, at 437 (stating that "unspoken ethical considerations often underlie a court's desire to grant protection" for characters).

637. See generally *supra* Part II.A.

638. See Alex Kozinski, *Mickey and Me*, 11 U. MIAMI ENT. & SPORTS L. REV. 465, 469 (1994) ("For example, if we open up the field and allow these characters to be portrayed by someone other than the company that created them, they will become different characters. They'll change personalities. Batman and Superman, for example, have changed: they're not the same Batman and Superman I was reading about in 1964. I'm kind of sorry, because I liked the old Batman; the new, snazzier one is not to my taste. But if you have a lot of people creating their own versions of characters, this is what can happen. You end up diminishing the value of the product, not just to the creator, but to the general public as well.").

639. See generally *supra* Part III.

640. This scenario is highly unlikely. First, even among those who favor decreasing copyright protection for characters, the total elimination of exclusive rights in derivative works is an

these methods to exploit their characters. The original creator of a character may still maintain a competitive advantage in the absence of intellectual property rights. By taking advantage of existing business relationships, particularly with actors and actresses associated with characters, original creators may be better able to build on their earlier works. Consumers may also prefer “genuine” works to those of alternate producers.

The increased competition resulting from weakened intellectual property protection would likely decrease the cost of derivative works to the average consumer. However, it would be unlikely to alter the types of work available. We may end up with four alternate sequels to a popular film rather than one. In order to really change the amount of character reuse in the marketplace, the marketplace itself must change. Intellectual property law is simply not a strong enough lever to displace the demands placed on entertainment companies by their customers and financial backers.

VII. CONCLUSION

Few would argue that encouraging risk-free art is good social policy. However, the market forces which favor low-risk sequels and discourage highly-risky, yet creative new works are extraordinarily powerful. This is particularly the case in media such as television and feature films where the number of new works that receive wide distribution is quite limited. Unfortunately, so long as recycling past material is the easiest way for entertainment companies to ensure profitability, the law can do little to shift their focus.

extreme position. Second, it is highly questionable whether Congress could effectively eliminate the right to exclude others from derivative works without reducing the reproduction and performance rights or drastically retooling copyright infringement analysis. *See supra* note 421. Nevertheless, thinking about what entertainment companies would do in this scenario is helpful in thinking about what less drastic reductions in protection would accomplish.

