NOTES

DRAWING IDEA FROM EXPRESSION: CREATING A LEGAL SPACE FOR CULTURALLY APPROPRIATED LITERARY CHARACTERS

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At a charity event in Radio City Music Hall in the summer of 2006, authors J.K. Rowling, Stephen King, and John Irving hosted a night with "Harry, Carrie, and Garp."[1] During this gathering, the authors held a discussion with the audience on the art of literary writing. In the months preceding the event, media publications had circulated news of a rumor that Rowling would kill off her wildly popular protagonist, Harry Potter, in the final installment of the *Harry Potter* series.[2] Rowling refused to confirm or deny the truth of the rumor at the charity event. King and Irving, however, pled openly with her to keep Harry alive—a sentiment most likely shared by the rest of the audience and the *Harry Potter*-reading public in general.[3]

Concern for the life of Harry Potter gives invested readers the incentive to take control of his destiny, in some sense, by creating their own versions of the *Harry Potter* story. Inspired by the frank discussion with Rowling, an audience member at the charity event might have gone home and penned her own piece of *Harry Potter* fan fiction in which the character lived to fight another day.[4] She might have posted her work to an online fan fiction archive, one of many sites already serving as a repository for the thousands of other fan-written renditions of *Harry Potter*.[5] It would not be surprising if Stephen King, John Irving, or Salman Rushdie (also present in the

1. Otto Penzler, *2006: What a Wonderful Year!*, N.Y. SUN, Jan. 3, 2007, at 12.

2. *Cop That, Young Harry*, SUNDAY HERALD SUN (Austl.), Aug. 13, 2006, at E3; Caroline Iggulden, *JK & The Web of Rumours*, THE SUN (Eng.), Aug. 5, 2006; Crystal Little, *Hogwarts Minus Two—But Who?, Children Brace for the Possibility of Harry Potter's Death*, LEXINGTON HERALD-LEADER (Ky.), July 18, 2006, at D1.

3. *'See Save Harry Potter,' Authors Urge*, CBC NEWS, Aug. 2, 2006 ("'I don't want [Harry] to go over the Reichenbach Falls.'" (quoting Stephen King)). King was referring to Arthur Conan Doyle's attempt to kill off Sherlock Holmes. Succumbing to fan pressure, Doyle eventually resurrected the character. *But cf.* Damon Lindelof, Op-Ed., *The Boy Who Died*, N.Y. TIMES, July 8, 2007, at 13 (arguing that for the sake of "closure," Harry Potter should die).

4. Rowling so far has been supportive of fan fiction works, but she has expressed concern over derivative works that tend towards the pornographic. *See* Ariana Eunjung Cha, *Harry Potter and the Copyright Lawyer; Use of Popular Characters Puts 'Fan Fiction' Writers in Gray Area*, WASH. POST, June 18, 2003, at A1. In contrast, novelist Anne Rice has publicly denounced fan fiction and encouraged readers to write their own original stories with their own characters. *See* AnnRice.com, http://annerice.com/fa_writing_archive.htm (last visited Nov. 23, 2007).

5. *See, e.g.*, FanFiction.net, www.fanfiction.net/book/Harry_Potter/ (last visited Nov. 23, 2007); HarryPotterFanFiction.com, http://www.harrypotterfanfiction.com (last visited Nov. 23, 2007); The Sugar Quill, http://www.sugarquill.net (last visited Nov. 23, 2007).

audience that day) contemplated the possibility of putting their own distinctive spins on the *Harry Potter* story. In anticipation of the final book's release, the *New York Times* also entered the fray by publishing four different "endings" to *Harry Potter*, as envisioned by four different writers.[6]

The creative contribution of secondary writers reflects the power of narrative in today's postmodern world of cultural production. A single storyline has the potential to explode into a multitude of different readings—each founded upon the reader's unique perspective when encountering the text.[7] This power is also vested in literary characters, which exist within the narrative as the focal point for human identification. In the present cultural milieu, today's readers, as tomorrow's writers, are twisting and refashioning iconic literary characters to reflect their own insights and identities. Floating around various parts of the world are unauthorized renditions of a Harry Potter who is Indian,[8] Russian,[9] Chinese,[10] or still positively English but confused about his sexual orientation.[11] Imposing existing copyright laws onto a culture that is sharing, borrowing, and transforming artistic works at a rapid rate has become noticeably harder. This Note will address the ways

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6. Op-Ed., *Five Ways to End Harry Potter*, N.Y. TIMES, July 8, 2007, at 13.

7. *See* Roland Barthes, *The Death of the Author*, *in* IMAGE MUSIC & TEXT 142, 146 (Stephen Heath trans., 1977) ("We know now that a text is not a line of words releasing a single 'theological' meaning ... but a multi-dimensional space in which a variety of writings, none of them original, blend and clash.").

8. *See* Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue," Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 610-11 (2007) (describing the unauthorized commercial sale in India of *Harry Potter in Kolkata*).

9. *See* Dennis S. Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17, 18-19 (2006) (discussing the ambitious Russian take on *Harry Potter* by author Dmitri Yemets, with titles such as *Tanya Grotter and Her Magical Double-Bass* and *Tanya Grotter and the Disappearing Floor*).

10. The Chinese have been especially prolific with their renditions of *Harry Potter*. *See* Op-Ed., *Memo to the Dept. of Magical Copyright Enforcement*, N.Y. TIMES, Aug. 10, 2007, at A19 (presenting summaries and brief translations of eight different Chinese renditions of *Harry Potter*); Tim Wu, *Harry Potter and the International Order of Copyright*, SLATE, June 27, 2003, http://www.slate.com/id/2084960 (referring to the Chinese publication *Harry Potter and Leopard-Walk-Up-to-Dragon*, where Harry "encountered sweet and sour rain, became a hairy troll, and joined Gandalf to re-enact scenes from *The Hobbit*").

11. *See* Ika Willis, *Keeping Promises to Queer Children: Making Space (for Mary Sue) at Hogwarts, in* FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET 153, 160 (Karen Hellekson & Kristina Busse eds., 2006).

in which the law should account for the sense of cultural entitlement that is encouraging readers to appropriate, recode, and inject literary characters into the social dialogue.

The legal question of ownership hangs somewhat ominously over the practice of unauthorized recoding and rewriting. U.S. copyright law grants ownership of the original and creative elements of a work to the original author.[12] Copyright ownership entitles the author to a set of exclusive rights, including the right to create derivative works.[13] Derivative works incorporate the original creation and transform it into a different work that may or may not be independently copyrightable.[14] Sequels, parodies, synopses, and translations are all examples of the kinds of derivative works that can spawn from the original. To the extent that literary characters are independently copyrightable, repurposing them into a new story or situation also leads to the creation of a derivative work. Barring a fair use defense, the unauthorized derivative use of an original work or character, not already in the public domain, may constitute a copyright violation. From a formal standpoint, fan-written *Harry Potter* adventures, no matter how innocuous, may be illegal reproductions of J.K. Rowling's original and protected work.

Learned Hand first suggested that literary characters could be independently copyrightable with his opinion in *Nichols v. Universal Pictures Corp.*[15] Under his "distinct delineation" test, any character that was sufficiently delineated, and not composed primarily of common elements from within the public domain, could be protected under copyright laws.[16] In *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, the Ninth Circuit suggested that any character within a work that constituted the "story being told" could obtain copyright protection.[17] Protection under the "distinct delineation" test or the "story being told" test meant that the

12. Section 102(a) of the 1976 Copyright Act grants copyright protection to "original works of authorship." 17 U.S.C. § 102(a) (2000). To satisfy the requirement of originality, the work must be the independent creation of an author and must possess a minimal degree of creativity. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991).

13. 17 U.S.C. § 106(2).

14. 17 U.S.C. § 101 (2000 & Supp. 2004) (providing a statutory definition of "derivative work").

15. 45 F.2d 119 (2d Cir. 1930).

16. *Id.* at 121.

17. 216 F.2d 945, 950 (9th Cir. 1954).

character could not be the subject of another derivative work without a license from the author. Current cases dealing with the infringement of copyrighted characters continue to determine protectability by drawing upon the *Nichols* and *Warner Bros.* standards.[18]

This Note argues that copyright law should create a legal space for derivative works that appropriate culturally iconic literary characters. Characters that have become valuable subjects of cultural dialogue should not be bound by the traditional benchmarks espoused in *Nichols* and *Warner Bros.*, especially when doing so would stifle the creative contribution of secondary authors. Despite inroads in the fair use argument with respect to literary works and characters, fair use protection may still be too difficult to obtain or too limited in the type of repurposing that it affords. A better solution may be to revisit the existing copyright doctrine on literary characters and to question, in particular, the protectibility of these characters in the first place. Certain characters, though they may constitute original expressions, may each, nevertheless, have such ubiquitous cultural presences that it is more appropriate to consider them as collectively owned ideas.[19] If the concept of collective ownership is a more compelling model than the idea of the singular author, then barriers to secondary appropriation should be adjusted to reflect this new cultural reality.

Part I of this Note examines the existing debate on the appropriation of literary characters in derivative works—a debate often couched in terms of a battle between authors' rights and readers' rights. Part II outlines the current standards for copyright protection over literary characters, with a particular emphasis on the traditional *Nichols* standard for separating unprotectible ideas from protectible expression. Part III considers the ways in which secondary authors can avail themselves of the fair use defense. Part IV proposes a new immunity against infringement claims for culturally appropriated characters that are an integral part of the cultural dialogue. This concept, which recognizes iconic characters

18. *See infra* Part II.

19. *See* Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 434 ("A character may live in the public imagination, beyond the reach of any individual work.").

as culturally owned ideas, also draws from expression-protective concepts in trademark law. Finally, Part V responds to anticipated criticisms of the cultural appropriation defense, particularly addressing the ways that it harms the author's interest in controlling her creation, and, from the opposite end, the ways it fails to promote readers' interests in an adequate manner.

I. AUTHORS' RIGHTS VERSUS READERS' RIGHTS

Under traditional notions of romantic authorship, the author's ascendancy in relationship to her work remains unquestioned.[20] The author serves as the key to the meaning in her creation. Postmodern constructions of literary theory, however, pit the author against her readers, with both parties vying for control over the meaning of the work.[21] The debate over the unauthorized recoding of characters is grounded in this larger debate between authors' rights and readers' rights. There are philosophical and cultural underpinnings to each side's claim for legal rights over the text.

A. The Author Argument

Three key principles support the argument for authors' rights and, by extension, the author's ability to maintain exclusive ownership and control over her literary characters. First, in the United States, an economic rationale for copyright protection seeks to maintain commercial incentives for authorial creation by allowing authors to benefit from a limited monopoly over their works. Second, as a result of the legacy of British intellectual property jurisprudence, authors are conditioned to believe that their works should exist as a property right. Finally, authors are also drawing from the influences of literary culture and European copyright law to claim a moral right over their characters. All of these principles focus on different elements of the author's role as a creator and seek to

20. *See* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 1-2 (1993); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 455-56.

21. *See generally* Barthes, *supra* note 7.

protect the rights of the author by drawing upon economics, property rights, or moral rights-based rationales.

The Framers of the Constitution established a utilitarian foundation for copyright law in the United States.[22] The U.S. Constitution protects the author's economic rights over the work in order to "promote the [p]rogress of [s]cience and useful [a]rts."[23] This assurance of an exclusive right of economic return, even if only for a limited duration, ensures that authors will have an incentive to create original works that benefit the public. Moreover, the author's exclusive right to exploit various commercial markets also encourages her to disseminate her creations amongst society at large. Under utilitarian modes of thought, commercial reward, not internal inspiration, serves as the author's primary motivation to create.[24] The work becomes an economic interest for the duration that copyright protection is granted; this serves, in some respects, as payment for the work's eventual entry into the public domain.

Although the utilitarian justification serves as the foundational principle for copyright law in the United States, the theory is not the most compelling justification for the promotion of authors' rights. As many an author may argue, the right to control a work and to reap economic benefit from it comes second to the goal of protecting authorial expression within the cultural marketplace.[25] Under utilitarian principles, there is little emphasis on the idea of protecting the author for the sake of the author or the authorial creation itself. It is perhaps for this reason that advocates of authors' rights look to additional philosophical and legal underpin-

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22. *See* Neil Netanel, *Copyright Alienability Restrictions and Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 365 (1993); Marci A. Hamilton, The Historical and Philosophical Underpinnings of the Copyright Clause 13 (Benjamin N. Cardozo School of Law, Occasional Papers in Intellectual Property Working Paper No. 5, 1999) ("The Framers were willing to condone the suppression of copying, even if it was the copying of expression, for limited times so that the market would progress and the community benefit.").

23. U.S. CONST. art. I, § 8, cl. 8.

24. *See* Warner Bros., Inc. v. Columbia Broad. Sys., Inc., 216 F.2d 945, 950 (9th Cir. 1954) ("Authors work for the love of their art no more than other professional people work in other lines for the love of it. There is the financial motive as well.").

25. *See* Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1063-64 (2003).

nings to explain why authors should retain ownership and control over their literary works.[26]

At the heart of the property rights justification for copyright protection is the longstanding idea of the romantic author toiling away to create a work of beauty and genius.[27] Copyright law intertwines this vision of the romantic author with the hallowed labor theory principles articulated in John Locke's seminal work, *Two Treatises of Government*.[28] Locke stated that by taking a substance from its general state of nature and subduing or transforming it, the laborer engaged in a legally recognizable act of appropriation, and thereby established a property right in the subject.[29] Hence, for the visionary romantic author who labors to appropriate unique expressions from the general ether of ideas, his just reward should be the recognition of his rights as the work's property owner.[30]

The connection between the concepts of author-as-genius and author-as-owner did not exist as a foregone conclusion through the centuries.[31] It was not until the English Parliament passed the Statute of Anne in 1710 that the law formally recognized the literary work as a form of authorial property.[32] During the years preceding the statute, prominent legal minds such as William Blackstone and Lord Mansfield began to suggest that the author's

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26. *See* Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990) (advocating the restoration of natural law as a basis for U.S. copyright jurisprudence).

27. *See* JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51-58 (1996); James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 630-31 (1988) [hereinafter Boyle, *Search for an Author*] ("The romantic conception of authorship should seem familiar. Today it dominates popular conceptions of the 'great writer.'").

28. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-89 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

29. *See id.*

30. *But see* Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1254-57 (1997) (arguing that even in the context of the Romantic authorship theory, the court should not automatically grant derivative rights to the copyright owner above the secondary user). If romantic authorship is indeed a celebration of originality, some derivative work is, in fact, more original than the work it has copied. *Id.* at 1255.

31. *See* Boyle, *Search for an Author*, *supra* note 27, at 631.

32. *See* ROSE, *supra* note 20, at 4 ("In the Statute of Anne, the author was established as a legally empowered figure in the marketplace well before professional authorship was realized in practice.").

relationship to the literary work should parallel the relation between a property owner and his real estate.[33] The real estate trope proved useful because it accommodated the increased commerciality of literary works in the eighteenth century marketplace.[34]

The idea of the character as an authorial property interest stems from this larger concept of the author's property right in the literary work as a whole. If the work exists as a piece of real estate, then the character, by analogy, exists as a valuable feature of the terrain and as a property asset in its own right.[35] Lockean labor theory also applies in this instance: whatever "idea" of a character the author has taken and transformed into his own unique expression would count as an appropriated property interest. The transition from the "un-owned" to the "owned" occurs when an author takes a stock-character concept and molds it into something original, detailed, and unique. From the author's perspective, anything that counts as expression also counts as property, and the law should award rights to the author as such.

Finally, the most personal connection between the author and the character is articulated in the concept of moral rights. Although not officially recognized in U.S. copyright law, outside of the slim exception for artistic visual creations,[36] moral rights theory elevates authorship into an almost spiritual concept. Advocates of moral rights see authorial creation as an act of divinely inspired creativity.[37] Here lies the vision of the singularly inspired author giving birth to his character creation.[38] The literary character exists as the child of the author—living and breathing through the pages of the text. Moral rights proponents view human dignity as the

33. Mark Rose, *Copyright and its Metaphors*, 50 UCLA L. REV. 1, 6-8 (2002).

34. ROSE, *supra* note 20, at 4.

35. Richard Wincor, *Copyright and the Spin-off Hero: B.O. Value of Incidental Characters*, VARIETY, Jan. 9, 1963, at 8 ("Artists who create characters that stir the imagination ought to be in a class with people who own homes and common stocks: all of these are private property.").

36. Visual Artists Rights Act, 17 U.S.C. § 106A (2000).

37. Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1962-70 (2006). Moral rights can also point to a secular explanation for intrinsic creativity: social psychology circles look to concepts such as the intrinsic motivational principle to explain internal affinities toward creation and imagination. *Id.*

38. *Id.*

external embodiment of the intrinsic self.[39] Thus, to respect an author's dignity, one must also respect the integrity and the significance of his external creations, which simultaneously serve as a reflection of the self and the divine.

Moral rights supporters seek recognition of two particular legal rights with respect to the author: the right of attribution and the right of integrity.[40] The right of attribution protects the author's right to be considered the creator of the work.[41] The right of integrity articulates the right of the author to have her works maintained in accordance with her artistic vision.[42] The work should be free from distortion and should not be subject to anything that might misrepresent the author's creative expression. The right of integrity therefore stands in opposition to cultural desires to modify and recode original works. Unauthorized derivative modifications would constitute disrespect toward the author and, moreover, would count as an invasion of the author's personal—and highly spiritual—relationship with her work. In contrast to the utilitarian theory embodied in the Constitution, moral rights law privileges the author's rights above the needs of the public good.[43]

Some argue that the copyright debates in our present society are a result of the failure to recognize the author as the primary creator of her work.[44] From this perspective, fewer efforts to circumvent the author's relationship with her creation would be needed if society appreciated the full ramifications of the author's dominance over her work. The author remains a force to be reckoned with, regardless of whether the justification for her cultural and legal supremacy is based on economic, property, or moral rights.

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39. *Id.* at 1973.

40. Moral rights also include the additional rights of disclosure, resale royalty, withdrawal, and protection from excessive criticism. The Berne Convention for the Protection of Literary and Artistic Works of 1886, art.6 *bis*, Sept. 9, 1886, 828 U.N.T.S. 221, 235, incorporated only the right of attribution and the right of integrity. PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS 147 (2004).

41. Netanel, *supra* note 5, at 386.

42. *Id.* at 387.

43. *See* GERSTENBLITH, *supra* note 40, at 147-48.

44. *See* Ginsburg, *supra* note 25, at 1063.

B. The Reader Argument

On the other side of the debate are arguments advocating the privileging of readers' rights—rights which, by extension, include the freedom to rework and recode literary characters. The elevation of readers' rights corresponds to a more skeptical view of authorial "genius." It is becoming harder to ignore the fact that all creations come from the same "cultural reservoir" of ideas.[45] This awareness of the collective spirit behind creativity makes justifying the concept of authorial originality in copyright law more difficult. Additionally, the rise of postmodern thought in recent decades, with its focus on the highly relative and isolative nature of language, weakens the idea that the author has the ability to dictate the meaning of his own text.[46] Finally, with the emergence of increasing disparities between dominant and non-dominant cultures, proponents of "semiotic democracy" are pushing for the freedom to reject dominant cultural icons by rewriting them from a minority's perspective.[47] These three developments signal the impending displacement of the metaphorical and legal arguments that have supported authors' rights in copyright law jurisprudence through the centuries.

Literary work is invariably based on what has come before it.[48] Copyright, however, relies on the concept of originality to mark the division between protection and non-protection.[49] Originality in this context has two different meanings: it refers, firstly, to the requirement that the work be the independent creation of a particular author and, secondly, to the requirement that the work possess a

45. *See* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 652 (1997) ("Storytellers have long drawn on a vast reservoir of cultural knowledge.").

46. *See* ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 50 (1998) (discussing different ways of reading in postmodern culture).

47. *See* Chander & Sunder, *supra* note 8, at 601 ("Specifically, we argue that semiotic democracy requires the ability to resignify the artifacts of popular culture to contest their authoritative meaning.").

48. For an interesting presentation of this idea of cultural non-originality, see generally Jonathan Lethem, *The Ecstasy of Influence*, HARPER'S, Feb. 2007, at 59-71. *See also* NELSON GOODMAN, WAYS OF WORLDMAKING 6 (1978) ("Worldmaking as we know it always starts from worlds already on hand; the making is a remaking.").

49. *See* 17 U.S.C. § 102 (2000) (extending copyright only to original works of authorship).

minimum degree of creativity.[50] In a culture saturated with recycled ideas, this element of creative originality in copyright law draws the most criticism.[51] Judge Alex Kozinski, in his dissent in the famous right of publicity case, *White v. Samsung Electronics, Inc.*, described cultural non-originality as such: "Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before."[52]

Society has become increasingly aware that mainstream culture is saturated with themes and variations of themes, to the point where originality can no longer operate as a workable justification for copyright law. In light of this cultural reservoir from which ideas are drawn,[53] it seems inaccurate to continue holding that human creativity must always be synonymous with originality. In a culture in which no idea seems truly unique and innovative anymore, acts of reworking and recoding may constitute the only real avenues for creativity.[54] Recoded literary works operate as a form of dialogue and commentary; the sharing of these recoded concepts and ideas through social dialogue advances the public good in a way that is, arguably, no less inferior than the dissemination of an "original" idea.

The second argument for readers' rights draws upon the precepts of postmodern thought. Despite its decreasing popularity as a theory within elite academic circles,[55] postmodernism still explains

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50. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991).

51. Northrop Frye once pointedly remarked that all literature is "elaborately disguised by a law of copyright pretending that every work of art is an invention distinctive enough to be patented." ROSE, *supra* note 20, at 2.

52. 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc).

53. Tushnet, *supra* note 45, at 652.

54. *Id.* at 658 ("In a postmodern era in which almost all possible themes seem to have been already produced, reworking may be the only creative act still available.").

55. *See generally* Alan D. Sokal, *Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity*, 46 SOC. TEXT 217 (1996) (presenting a supposedly postmodern theory of quantum physics); Alan D. Sokal, *A Physicist Experiments with Cultural Studies*, *in* QUICK STUDIES: THE BEST OF LINGUA FRANCA (Alexander Star ed., 2002) (revealing that the SOCIAL TEXT submission was a hoax designed to highlight the absurdity of postmodernism); *see also* Characterizing a Fogbank: What Is Postmodernism, and Why Do I Take Such a Dim View of It?, Posting of Keith DeRose to Certain Doubts, http://fleetwood.baylor.edu/certain_doubts/?p=453 (Oct. 23, 2005).

much of the collective mindset of present-day popular culture.[56] Postmodern constructions of the nature of reading and language push for the more liberal use and re-use of authorial creations. Postmodernist thinkers do away with what they consider to be an unworkable assumption: that the author's input of one meaning into the text corresponds to the output of the exact same meaning in the mind of the reader.[57] This theory acknowledges that each reader is capable of eliciting a different interpretation of the text and that each individual derivation of meaning is equally as valid as the meaning suggested by the author.[58] As such, the author no longer serves as the key to his own text.[59] Moreover, if all readers approach a text from a unique, individual perspective, then there must be a means to combat the disconnect between the author and the reader and to quell the sense of isolation between one reader and the next. Social dialogue, in the form of parody, criticism, review, and secondary narrative, operates to close the gaps associated with relativistic reading.[60]

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56. *See* COOMBE, *supra* note 46, at 82-87.

57. *See* Barthes, *supra* note 7, at 147 ("In the multiplicity of writing, everything is to be *disentangled*, nothing *deciphered*; the structure can be followed, 'run' (like the thread of a stocking) at every point and at every level, but there is nothing beneath ...."). Barthes seems to be suggesting that the multiplicity of readings leads not to a text replete with meanings, but to a text that is ultimately meaningless.

58. *Id.* at 148; *see also* HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE 51-52 (1992). Jenkins writes that

> [r]ecent work in cultural studies directs attention to the meanings texts accumulate through their use. The reader's activity is no longer seen simply as the task of recovering the author's meanings but also as reworking borrowed materials to fit them into the context of lived experience. As Michel de Certeau (1984) writes, 'Every reading modifies its object .... The reader takes neither the position of the author nor an author's position. He invents in the text something different from what they intended. He detaches them from their (lost or accessory) origin. He combines their fragments and creates something unknown'.... The text becomes something more than what it was before, not something less.

Id.

59. Seminal thinkers in the field of postmodernism, such as Barthes and Foucault, denigrate the author's primacy and focus on the reader's ability to derive her own meaning from the text. *See* Barthes, *supra* note 7 and accompanying text; Michel Foucault, *What is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141, 159-60 (Josué Harari ed., 1979) ("The author is the principle of thrift in the proliferation of meaning.").

60. *See* COOMBE, *supra* note 46, at 51.

Characters, as literary entities composed of words on a page, are also susceptible to a multiplicity of meanings. The meaning that the author intends to convey through the depiction of one particular character is not necessarily the same meaning that the reader will derive from the text. Thus, a character may represent one person to one reader and another person to another reader. Therefore, although the author has in a sense given birth to her own character, she alone will not be able to capture the entire significance of that which she has created. This is ultimately an operation that must be shared between the author and her various readers.[61] Readers, through their rewritings and recodings, help to draw out the character's many dimensions and to enrich the character's overall contribution to the cultural marketplace.

From a postmodern perspective, conceiving the literary character as an entity independent from the author is possible.[62] Characters, because of their relativistic significance, are loosened from the original author's grip.[63] Leslie Kurtz explains that the inability of a single person to capture all strands of meaning in a particular character cements a character's independence: "It is only in this abstract form that a character can be said to have an independent existence. An independent character, therefore, is difficult to define or grasp clearly, since no two minds will conceive of it in precisely the same way."[64] If it is impossible for one person to claim responsibility for all of the interpretations, permutations, and significances of a literary character, then the idea that one person can own a character exclusively—as the law currently contemplates—is also brought into question. Postmodernism allows for a more accurate

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61. *See id.* at 32 (describing characters as both individually owned and socially shared).

62. *See* JENKINS, *supra* note 58, at 50-52 (describing, with reference to the popular children's story, *The Velveteen Rabbit*, the process of a character becoming "real").

63. Playwright Luigi Pirandello described this notion of independence in his seminal play, *Six Characters in Search of an Author*:

> When a character is born, he immediately assumes so much independence, even from his own author, that he can be imagined by everybody in a number of other situations in which the author never thought of putting him, and sometimes he even acquires a meaning the author never dreamed of giving him!

LUIGI PIRANDELLO, SIX CHARACTERS IN SEARCH OF AN AUTHOR AND OTHER PLAYS 56 (Mark Musa trans., 1995).

64. Kurtz, *supra* note 19, at 431.

accounting of cultural significance through its recognition of the idea of collective ownership.[65]

Not all those who support the recoding of literary characters will recognize and agree with the tenets of postmodern thought. This final category includes those who recode because they seek to undermine mainstream culture by rejecting dominant cultural icons and rewriting these icons from a minority perspective.[66] The objective of such individuals is to achieve a "semiotic democracy" where "demeaning representations" in popular culture can be contested.[67] The word "demeaning" has been equated with the word "dominant."[68] Hence, majority representations of characters may be overturned with respect to race, gender, sexuality, and any other social factor that is a dominant cultural norm. This phenomenon explains the variety of rewritings which have depicted the male characters in Star Trek as gay lovers, Harry Potter as an Indian boy, and Batman as either an evil protagonist or as a gay super-hero.[69] By rewriting characters in this manner, readers are giving birth to non-dominant readings which help to raise awareness of minority issues.[70]

Cultural momentum is growing to a point where entertaining the idea of divorcing the author from the literary character is feasible. Writers and readers want their own opportunity to participate in today's "Rip. Mix. Burn."[71] culture. The freedom to recode literary characters is beneficial to society because this type of expression

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65. *See* Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 302 (1992).

66. *See* COOMBE, *supra* note 46, at 61 ("Socialinguistics and anthropological scholarship would suggest, instead, that meanings are always created in social contexts, among social agents, in social practices of communication, reproduction, transformation, and struggle: in short, that cultural distinction is socially produced.").

67. Chander & Sunder, *supra* note 8, at 624.

68. *Id.* at 625.

69. *Id.* at 611, 624.

70. Academics writing on the nature of fan fiction have identified common motivations for the authoring of such recoded pieces. Apart from the self-indulgent "what if" scenarios that fans like to engage in, fan writers also write to fill in gaps that they see in the text or to make room for a latent minority reading that is subsumed in the original work by a dominant reading. *See* Willis, *supra* note 11, at 155-56.

71. This is an old Apple slogan used to promote the downloading, mixing, and burning capabilities of its computer system. *See* Lawrence Lessig, *Innovating Copyright*, 20 CARDOZO ARTS & ENT. L.J. 611, 617 (2002).

counts as a unique and valuable form of cultural dialogue. With the freedom to rewrite comes the freedom to either embrace or reject existing ideas in mainstream culture.[72] With the current doubts regarding the traditional copyright tenet of "originality" and the development of a postmodern approach to reading text, the time is ripe for this shift in culture to be recognized more formally from a legal perspective. Advocates of readers' rights stress that the activity of reading itself is a highly creative process.[73] As such, the current author-centered copyright laws should evolve to recognize the "central importance of readers ... in the copyright scheme."[74]

II. WHERE COPYRIGHT PROTECTION OF LITERARY CHARACTERS CURRENTLY STANDS

Literary characters, in particular, have proven to be troublesome for the courts because of their abstract and non-visual composition.[75] Characters of this type exist as a conglomeration of words and phrases—words that are physically descriptive, internally reflective, or plot-driving in nature. In 1930, the Second Circuit was the first court to tackle the question of copyright protection for literary characters in *Nichols v. Universal Pictures Corp.*[76] *Nichols* gave birth to one of the threshold tests for character protection, known as the "distinct delineation" test.[77] In 1954, the Ninth Circuit developed its own standard, known as the "story being told" test, in *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*[78] Both of

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72. *See* COOMBE, *supra* note 46, at 84-85. As Coombe puts it,

> If what is quintessentially human is the capacity to make meaning, challenge meaning, and transform meaning, then we strip ourselves of our humanity through overzealous application and continuous expansion of intellectual property protections. Dialogue involves reciprocity in communication: the ability to respond to a sign with signs. What meaning does dialogue have when we are bombarded with messages to which we cannot respond, signs and images whose significations cannot be challenged, and connotations which we cannot contest?

Id. (citations omitted).

73. *See* Jessica Litman, *Creative Reading*, 70 LAW & CONTEMP. PROBS. 175, 179 (2007).

74. *Id.*

75. Kurtz, *supra* note 19, at 451 (explaining the "particularly elusive" nature of the idea/expression distinction for literary characters in comparison to visual characters).

76. 45 F.2d 119 (2d Cir. 1930).

77. *Id.* at 122.

78. 216 F.2d 945, 950 (9th Cir. 1954).

these tests, despite the often confusing analyses they entail, continue to serve as the means by which courts determine the copyrightability of a given character.

In *Nichols*, the plaintiff, author of a play entitled *Abie's Irish Rose*, sued a production company for creating *The Cohens and The Kellys*, a movie that allegedly infringed upon the plot and the characters depicted in the plaintiff's work. Both the play and the movie involved the story of a young Jewish woman, a man of Irish-Catholic descent, and two very irate fathers who disapproved of the couple's budding romance.[79] When deliberating on the similarities between the characters in both works, Judge Hand intimated that certain well-delineated characters might be able to receive copyright protection, independent of the literary work itself.[80] *Nichols*, however, was not a case that warranted this kind of distinction. Judge Hand found for the defendant on the infringement claim, stating that the copied elements—the characters, in particular—were nothing more than unprotectible ideas already existing in the public domain.[81]

Courts adhering to the *Nichols* test have adopted a more structured two-fold process: first, the court questions whether the character is sufficiently delineated or developed to constitute a unique form of authorial expression;[82] second, if the first requirement of distinct delineation is satisfied, the question then becomes whether the infringing work is substantially similar to the original—that is, whether the copied character significantly resembles the original protected character to the extent that a finding of infringement is warranted.[83] This Note is primarily concerned with the first prong of the *Nichols* test, which determines, as a starting point, the actual protectibility of the literary character given its composition on the idea/expression scale.[84] Since *Nichols*, courts have struggled

79. *Nichols*, 45 F.2d at 120.

80. *Id.* at 121 ("Nor need we hold that the same may not be true as to the characters, quite independently of the 'plot' proper, though, as far as we know, such a case has never arisen.").

81. *Id.* at 122.

82. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12 (Matthew Bender ed., 2007); Kurtz, *supra* note 19, at 453.

83. Kurtz, *supra* note 19, at 453.

84. *But see* Jasmina Zecevic, *Distinctly Delineated Fictional Characters that Constitute the Story Being Told: Who Are They and Do They Deserve Independent Copyright Protection?*, 8 VAND. J. ENT. & TECH. L. 365, 385-86 (2006) (arguing that the first prong of the *Nichols* test

to sift out the protected expression from the unprotected general idea in their analyses of literary characters.[85] When devising this abstractions test, Learned Hand himself admitted that any line of demarcation could be vague and slightly arbitrary.[86]

With regard to the first prong of the test, *Nichols* makes a distinction on the continuum of character composition between general stock characters and developed characters.[87] Stock characters are the character archetypes traditionally associated with a particular genre or context in literary fiction. In *Nichols*, Judge Hand determined that the characters in the plaintiff's play were unprotectible because the characters themselves, the "low comedy Jew and Irishman," were nothing more than longstanding "prototypes" which had existed prior to the creation of the plaintiff's work.[88] Prototype characters of this nature are often dismissed as *scenes a faire*, elements of the work that are so inextricably connected to a certain genre that their appearance in the work cannot be considered to be unique or original.[89]

Developed characters, by contrast, fall into the protected realm of unique expression. The more substantially crafted and detailed a character is, the more likely it is to pass the first prong of the *Nichols* test, which requires distinct delineation.[90] Judges have employed the distinct delineation test; but, with respect to literary characters, they have done little to explain the mechanics behind their decisions. The literary characters in Edgar Rice Borroughs's *Tarzan* were put to the test when movie producers created an X-rated film entitled *Tarz & Jane & Boy & Cheeta*.[91] In the copyright infringement suit that followed, the court determined that Bur-

should be collapsed into the second prong for substantial similarity because characters should not need to establish independent copyright protection from the work).

85. *See, e.g.*, Filmvideo Releasing Corp. v. Hastings, 509 F. Supp. 60 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 91 (2d Cir. 1981). For a discussion of the court's unclear application of Learned Hand's abstractions test, see Kurtz, *supra* note 19, at 458-59.

86. *Nichols*, 45 F.2d at 122 ("[W]hile we are as aware as any one [sic] that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases.").

87. *Id.* at 121.

88. *Id.* at 122.

89. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980).

90. *Nichols*, 45 F.2d at 121.

91. *See* Edgar Rice Burroughs, Inc. v. Manns Theatres, No. 76-3612, 1976 U.S. Dist. LEXIS 11754 (C.D. Cal. Dec. 20, 1976).

roughs's characters were in fact distinctly delineated.[92] The court, however, did not venture into any discussion on how developed a character needed to be before it could pass this first prong of the *Nichols* test. In another case involving Tarzan, the court similarly found that Tarzan was a distinctly delineated character but failed to provide a clear explanation for its finding.[93] If anything, the determination of sufficient delineation seemed to hinge simply upon the court's ability to muster up adjectives to describe the character: "Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotion. He is athletic, innocent, youthful, gentle and strong. He is Tarzan."[94] The mechanics of the distinct delineation test therefore remain shrouded in mystery; judicial determinations in this area are more a product of subjective opinion than careful analysis.[95] This vagueness introduces a level of subjectivity that is likely to exceed what Judge Hand anticipated when he initially coined the test.[96]

The Ninth Circuit derived a second threshold test in *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, involving the character of Sam Spade, the protagonist from Dashiell Hammet's

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92. *Id.* at **9-10 (holding that infringement had taken place).

93. Burroughs v. Metro-Goldwyn-Mayer, Inc., 519 F. Supp. 388, 391 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982).

94. *Id.* Leslie Kurtz argues that, in this passage, the court has done nothing more than describe a character concept, which could easily fit another jungle-type character, such as Mowgli in Kipling's *Jungle Book*. Kurtz, *supra* note 19, at 458.

95. Courts in the Second Circuit, in particular, have found characters to be copyrightable under the *Nichols* test without elaborating on the contested characters' level of delineation. *See, e.g.*, Silverman v. Cent. Broad. Sys., Inc., 870 F.2d 40, 50 (2d Cir. 1989) (finding, with little discussion, the characters of the *Amos 'n' Andy* radio series to be sufficiently delineated to warrant copyright protection); Filmvideo Releasing Corp. v. Hastings, 426 F. Supp. 690 (S.D.N.Y. 1976), *aff'd,* 668 F.2d 91 (2d Cir. 1981) (concluding that the character Hopalong Cassidy was protected under copyright simply because he was "well developed"); *see also* Francis M. Nevins, *Copyright + Character = Catastrophe*, 39 J. COPYRIGHT SOC'Y U.S.A. 303, 312 (1992).

96. Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930). The distinct delineation standard, however, is clearer when it involves a character with a graphical element. *See* Detective Comics, Inc. v. Bruns Publ'ns, Inc., 111 F.2d 432 (2d Cir. 1940); Gregory S. Schienke, *The Spawn of Learned Hand–A Reexamination of Copyright Protection and Fictional Characters: How Distinctly Delineated Must the Story Be Told?*, 9 MARQ. INTELL. PROP. L. REV. 63, 69-70 (2005).

classic *The Maltese Falcon*.[97] In that case, Warner Brothers complained about the continued use of the Sam Spade character in a radio show after Hammet had sold Warner Brothers the rights to *The Maltese Falcon*.[98] In *Warner Bros.*, the Ninth Circuit stated, in what was arguably dicta, that copyright protection could include characters who were significant enough to constitute the "story being told."[99] A character who was simply a "chessman" or a "vehicle[]" in the larger story would not, however, be eligible for separate copyright protection.[100] Sam Spade, in the eyes of the court, was merely a vehicle for the story; even if Hammet had transferred all of his rights to the plaintiff, he would not have been able to transfer exclusive rights to an unprotected character.[101] The *Sam Spade* standard heightened the standards for literary character protection and made this benchmark effectively unreachable for most characters.[102] For a character to constitute the "story being told," the story would have to resemble a detailed character study that was essentially "devoid of plot."[103]

Although both the *Nichols* test and the *Sam Spade* test have their own respective degrees of murkiness, supporting a standard as unclear and unstable as the one presented in *Sam Spade* is especially difficult.[104] The "story being told" test complicates the idea/expression analysis even further by adding additional elements into the picture. A highly developed character still might not attain copyright protection if he is not sufficiently a part of the work as to constitute the full story. As such, protectibility is not only an issue of idea versus expression, but is also an issue of the character's presence in relation and proportion to the rest of the work. This

97. 216 F.2d 945 (9th Cir. 1954) (*Sam Spade*).
98. *Id.* at 948.
99. *Id.* at 950.
100. *Id.*
101. *Id.*
102. 1 NIMMER & NIMMER, *supra* note 82, § 2.12.
103. *Id.*
104. Interestingly, some commentators surmise that the Ninth Circuit developed the "story being told" standard because of frustrations with the vagueness of the distinct delineation test. *See, e.g.*, Mark Bartholomew, *Protecting the Performers: Setting a New Standard for Character Copyrightability*, 41 SANTA CLARA L. REV. 341, 347 (2001).

standard is untenable because it produces disparate results with respect to the protection and nonprotection of literary characters.[105]

Rarely does the "story being told" test stand on its own as the means by which to determine a given character's protection. When courts within the Ninth Circuit make use of this test, the standard is often applied in conjunction with the *Nichols* test—the outcome of which tends to weigh more heavily on the determination of protectibility. In many cases, in order to warrant copyright protection, a contested character can be *either* "especially distinctive" or the "story being told."[106] In the recent case *Bach v. Forever Living Products*,[107] plaintiff-author Richard Bach complained that the defendant had infringed upon his exclusive rights to the character of Jonathan Livingston Seagull—an anthropomorphized seagull figure who was the subject of a popular novella written by Bach in 1973. Although the court acknowledged that both the *Nichols* and the *Sam Spade* standards were relevant in determining whether Jonathan Livingston Seagull was a protected character, the ensuing analysis focused predominantly on the character's well-delineated qualities under the *Nichols* lens:

> Like other highly delineated literary and film characters, the Jonathan Livingston Seagull character is protected under copyright. Jonathan Livingston Seagull is a well-defined character—an ordinary seagull named Jonathan Livingston Seagull who is determined to fly higher and faster, who transcends his beginnings, and who teaches others to do the same. He is not a stock character and the fact that his character has not been delineated over time is inconsequential.[108]

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105. At least one court has been brave enough to employ this standard, though not with regards to a literary character. *See* Universal City Studios, Inc. v. Kamar Indus., Inc., 217 U.S.P.Q. 1162, 1165 (S.D. Tex. 1982) (applying the "story being told" test to unauthorized derivative use of the character of E.T.). Notably, the Ninth Circuit found a way to avoid its own test in the case of *Walt Disney Productions v. Air Pirates*. The court held that the characters in issue, because of their graphical quality, were by nature distinctive and, hence, there would be no need to rely on the "story being told" test. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757-58 (9th Cir. 1978).

106. Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003); *see also* Anderson v. Stallone, 11 U.S.P.Q.2d 1161, 1165-67 (C.D. Cal. 1989) (concluding that Rocky characters are both highly delineated and the "story being told" in the movies Rocky I, II, and III).

107. 473 F. Supp. 2d 1127 (W.D. Wash. 2007).

108. *Id.* at 1135-36.

The opinion also noted, though only briefly, that Jonathan Livingston Seagull was protectible under the "story being told" standard because he was the title character in a book that was "entirely about *his* development from an ordinary seagull to an extraordinary one."[109]

As its continued adoption by the various courts demonstrates, the *Nichols* test offers the more workable framework for determining literary character protection.[110] By focusing on the distinction between idea and expression with regard to literary characters, *Nichols* brings the analysis closer in line with other works of authorship vying for protection under the federal copyright statute. Admittedly, the framework requires further development. Even though the division between stock idea and unique expression will always be, by necessity, somewhat subjective and amorphous,[111] the courts should continue to attempt to articulate more objective standards for distinct delineation.[112]

As this Note will argue, however, the binary distinction in *Nichols* between stock variety and distinctly delineated characters is incomplete in yet another way: it fails to account for characters that have managed to transcend the traditional idea/expression continuum. Characters in this unrecognized class are highly delineated forms of original expression, but their cultural resonance and prevalence within the cultural dialogue should allow them to exist as free idea-concepts and not as caged and protected forms of authorial expression. Hence, although *Nichols* provides a relatively workable starting point for character protection, the framework must be enlarged in order to account for the increased significance of literary characters within the postmodern cultural marketplace.

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109. *Id.* at 1136.

110. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 n.6 (1977). The court stated,

> We have surveyed the literature and have found that no better formulation has been devised. Moreover, most of these criticisms are directed at the fact that the courts tend to pay only lipservice to the idea-expression distinction without it being fairly descriptive of the results of modern cases. This is a criticism more of the application of the distinction than of the distinction itself, and can be alleviated by the courts being more deliberate in their consideration of this issue.

Id.

111. Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).

112. *Krofft*, 562 F.2d at 1162 & 1163 n.6.

III. FAIR USE CONSIDERATIONS

Before undertaking a revision of the *Nichols* paradigm, it is important to note that the secondary author who appropriates a protected character is not completely defenseless in the face of a potential infringement suit. The doctrine of fair use occupies much of the defensive terrain with respect to the creation and distribution of unauthorized derivative works. The purpose of this doctrine is to allow courts to circumvent a finding of copyright infringement when such a finding would undermine the purpose of copyright law. When looking at the merits of this defense, courts are encouraged to consider, though not exclusively, (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the whole of the copyrighted work; and (4) the effect of the use upon the value or potential market for the copyrighted work.[113]

The Supreme Court recognized the transformative use of derivative works in *Campbell v. Acuff-Rose Music, Inc.*[114] The Court held that the defendant's parodic rap version of the Roy Orbison song *Oh, Pretty Woman* constituted fair use. The defendant's song, *Big Fat Hairy Woman*, was a parody in that it served as "a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies."[115] The parody was a transformative work because it succeeded in adding something new to the original, "altering the first with new expression, meaning, [and] message."[116] *Campbell* signified the expansion of the artistic possibilities under the fair use doctrine: unauthorized derivative works, to the extent that they were sufficiently transformative, could be protected because their creative contribution furthered the goals of copyright. The court even suggested that transformative use could diminish the impact of a negative fair-use consideration, such as commercial use.[117]

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113. 17 U.S.C. § 107 (2000).
114. 510 U.S. 569 (1994).
115. *Id.* at 583.
116. *Id.* at 579.
117. *Id.*

Following in the steps of the Supreme Court, the Eleventh Circuit ruled in favor of the secondary author in *SunTrust Bank v. Houghton Mifflin Co.*,[118] a case dealing with an unlicensed derivative to Margaret Mitchell's *Gone With the Wind*. The defendant, Alice Randall, had authored *The Wind Done Gone*, a novel that retold Mitchell's classic from the perspective of a black slave girl. *The Wind Done Gone* was a novel of reversals; it "explode[d]" Mitchell's "romantic, idealized portrait of the antebellum South during and after the Civil War";[119] flipped race roles by portraying powerful white characters as "stupid or feckless";[120] and undermined the depiction of the classic love story by introducing the specter of homosexuality.[121] The court drew extensively from the *Campbell* opinion in determining that Randall's work should be protected under fair use. *The Wind Done Gone* was highly parodic because it was clear that Randall had "employed ... conscripted elements from [*Gone With the Wind*] to make war against it."[122] The work expressed a transformative quality because it "provide[d] social benefit, by shedding light on an earlier work, and, in the process, creat[ed] a new one."[123]

Those championing the cause of fan fiction and other unauthorized secondary works often look to *Campbell* and *SunTrust* for pointers on the legal battle ahead. Fan-created derivative works, created without the express permission of the author, occupy a somewhat questionable place within the current copyright scheme.[124] Despite the proliferation of cease and desist letters issued to fan fiction websites,[125] the dispute over fan fiction has not risen to the level of litigation. Nonetheless, academics pondering the legitimacy of fan fiction generally conclude that this type of work should fall under the fair use umbrella.[126]

With respect to fan fiction, the most important fair use considerations under 17 U.S.C. § 107 are the first factor, the derivative

118. 268 F.3d 1257, 1276-77 (11th Cir. 2001).
119. *Id.* at 1270.
120. *Id.*
121. *Id.*
122. *Id.* at 1271.
123. *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).
124. Cha, *supra* note 4.
125. *Id.*
126. Chander & Sunder, *supra* note 8, at 611; Tushnet, *supra* note 45, at 661-80.

work's nature and purpose, and the fourth factor, the effect of the use on the potential market.[127] Two issues that determine the nature and purpose of the derivative work are the non-commercial element of fan fiction and the potential for transformative use. Fan fiction authors do not write to make a profit; they write to share their readings and interpretations of a given character with their fellow fan community.[128] Additionally, the transformative element of fan fiction, as carved out in *Campbell* and *SunTrust*, is evidenced by the way fan fiction not only serves as a communicative tool for linking fans together, but also allows fans to comment upon, criticize, and refashion the original work.[129] Fan fiction, moreover, has no perceivable effect on the potential market of the original author.[130] With fans making it a point to divorce their works from the original through the use of disclaimers,[131] fan fiction is extremely unlikely to have any substitutive effect on the market for the original. If anything, fan fiction increases market demand for the original by serving as another means to nurture the interests of the fan community.[132] With its non-commercial, non-substitutive, and potentially transformative qualities, fan fiction presents itself as a strong candidate for fair use protection.

Commercially oriented derivative works may have a weaker leg to stand on with respect to fair use. Although fan fiction may seem harmless because it occupies an obscure corner of the Internet, authors and copyright owners see the sale of *Harry Potter in Kolkata* in India for thirty rupees (less than one U.S. dollar) or the sale of *Harry Potter and the Leopard-Walk-Up-to-Dragon* in

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127. Tushnet, *supra* note 45, at 664-76.

128. Deborah Kaplan, *Construction of Fan Fiction Character Through Narrative*, *in* FAN FICTION, *supra* note 11, at 134, 137.

129. Tushnet, *supra* note 45, at 665.

130. *Id.* at 670 & n.92.

131. *See, e.g.*, Morag, The Sugar Quill, *Divine Smells*, http://www.sugarquill.net/read.php?storyid= 2486&chapno=1 (last visited Nov. 25, 2007).

> Disclaimer: None of these characters, settings, etc. belong to me—they belong to Ms. [J.] K. Rowling, Bloomsbury, Scholastic, and Warner Bros. (et cetera)—I'm only playing with them for my own amusement, and am making no profit whatsoever from this other than a few hours of fun. No copyright infringement is intended.

Id.

132. *See* Tushnet, *supra* note 45, at 669 ("Fan fiction keeps its consumers excited about the official shows, receptive to other merchandise, and loyal to their beloved characters.").

China for an equally low price as a more sinister threat. A Stephen King portrayal of Harry Potter would be just as—if not more—controversial, unless Rowling herself licensed the use of her characters in another author's work. Although commercially distributed secondary works draw more scrutiny under the fair use lens, both *Campbell* and *SunTrust* demonstrate that commercial use does not automatically dismiss the possibility of fair use protection; the work's transformative quality contributes much to the fair use discussion and may even overcome the negative considerations associated with commercial use.

One issue raised by *Campbell* and *SunTrust*, however, is the question of what constitutes a transformative use. The fair use avenue opened up by both of these cases remains somewhat narrow, because each case dealt with a work of critical parody. Not all works of fan fiction are also works of parody. It would be nonsensical to conclude, however, that a non-parodic work—perhaps a more meditative piece involving character development—cannot be sufficiently transformative. Regardless of their parodic or non-parodic content, all fan fiction pieces are transformative because they marry elements of the original character with the unique insight of the reader.[133] Furthermore, although a commercial title such as *Harry Potter in Kolkata* may not be a critical parody of the original *Harry Potter*, the portrayal of an Indian Harry Potter is still transformative because it immerses a familiar iconic character into a foreign setting and culture. This kind of work notably exceeds the abilities and expectations of the original author, who is hindered by her unfamiliarity with the unique geographical and cultural scene.[134] In light of the potential for many kinds of culturally valuable recodings and repurposings of original works, the courts should be encouraged to expand their understanding of transformative use to include elements other than parody.

Fair use, arguably the most important doctrine that fan writers and other secondary creators can rely upon, gives secondary authors one avenue through which to legitimize their derivative works. One

133. *Id.* at 668 ("The specific content of fan fiction raises the issue of what, besides parody, can constitute transformative use.").

134. Karjala, *supra* note 9, at 37-38 ("[P]articularly for non-English-language stories, even [Rowling] is not capable of putting Harry into settings, languages, and cultures that may resonate better with children in other countries.").

problem with fair use, however, is that it helps to perpetuate a disparity in the treatment of original authors and second generation authors. Although there is a relatively low bar for copyright protection for original works (original authorship plus a minimum level of creativity),[135] a much higher bar is set for unlicensed secondary authors seeking to legitimize their derivative contributions through fair use. Despite some promising precedent, persuading copyright owners or the courts that all four fair use factors should lean in favor of the secondary author is still not an easy task. Fair use helps to perpetuate an author-centric copyright scheme in which second-generation creators remain second-class citizens and their works also retain a secondary status.[136] And, although courts engaged in resolving copyright disputes avoid matters of artistic judgment,[137] they should not confuse this prohibition with the task of recognizing a creative and socially beneficial artistic contribution, regardless of whether this contribution is primary or secondary in nature.

IV. RECOGNIZING CULTURALLY APPROPRIATED CHARACTERS

In addition to affording fair use protection, copyright law should expand to create a legal space for culturally appropriated characters. Characters falling within this space should be defendable against claims of infringement because they exist more appropriately as culturally owned ideas than as singularly owned expressions. From a practical standpoint, authors who create derivative works that include appropriated characters should have a two-fold defense against infringement: first, they should appeal to the traditional fair use principles that govern permissible unauthorized uses of copyrighted works;[138] second, they should argue that the

135. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

136. *See* Litman, *supra* note 73, at 177. Litman states that she is

> less optimistic than Professor Tushnet that fair use is capacious enough to be able to do a good job, even for the authors of fan fiction, fan art, and fan video. In its current form, it cannot possibly answer the legitimate claims of readers, listeners, and viewers of other sorts.

Id.

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

138. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001). *But see* Walt Disney Prods. v. Air

court may, as a legal matter, view these characters as unprotected ideas. Although the body of literature on fair use protection for literary characters in derivative works is growing,[139] few scholars have contemplated the merits of arguing against the copyright protection of these characters in the first place.[140] This Note aims to demonstrate why the latter solution is a good way in which to address the growing movement towards readers' rights, which in turn allows a greater freedom to recode literary works.

To define the metes and bounds of this legal space, determining what a culturally appropriated character actually is becomes important. Although there are no key identifying markers that will easily allow the court to cabin a certain set of characters, an informed comparison with the character-types in the existing *Nichols* paradigm may help to shed some light on the issue.[141] It may be helpful to know how a culturally appropriated "idea" character is different from a stock "idea" character; moreover, it would be equally helpful to know how best to draw the line between an author-owned expression and a culturally owned idea.

Culturally appropriated characters exist as idea concepts in the public domain. The same can be said of the stock characters, which Judge Hand dismissed as the unprotected elements of *scenes a faire*.[142] Although both types of characters exist on the same side of the idea/expression line, the noticeable difference in their degree of composition and cultural value situates them on alternative planes in the idea realm. Stock characters, in their undeveloped and generalized state, exist as the unremarkable elements of the literary terrain; at best, they serve as the short-cut signifiers to a particular literary theme or genre. For example, a barmaid, a saloon owner, and a town sheriff are the figures decorating the scene in a typical country western. Culturally appropriated characters, on the other hand, are more detailed in their composition and meet the *Nichols*

Pirates, 581 F.2d 751 (9th Cir. 1978) (rejecting the parody arguments and holding that the secondary work did not constitute fair use).

139. *See, e.g.*, Chander & Sunder, *supra* note 8; Karjala, *supra* note 9; Tushnet, *supra* note 45; Note, *Gone With the Wind Done Gone: "Re-writing" and Fair Use*, 115 HARV. L. REV. 1193 (2002); Mollie E. Nolan, Note, *Search for Original Expression: Fiction and the Fair Use Defense*, 30 S. ILL. U. L.J. 533-71 (2006).

140. *See* Karjala, *supra* note 9, at 25.

141. *See supra* Part II.

142. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-22 (2d Cir. 1930).

standard for distinct delineation. Moreover, the signifying function of these characters is self-referential: they are vessels for cultural meaning and significance in and of themselves.[143]

The distinctly delineated character and the culturally appropriated character may be harder to distinguish. These two types of characters share the same details and intricacies of composition: they are both sufficiently delineated in accordance with the *Nichols* paradigm to warrant protection. The difference lies in the connection between the character and the larger society. A high degree of recognition and a significant presence within the medium of social dialogue may indicate that the character has in fact become a culturally owned commodity. A character of this kind is one that has captured the public's imagination; one that is the subject of extensive dialogue and commentary; and one that may already be featured in a number of derivative works, both authorized and unauthorized in nature.[144] Because of this multiplicity of uses, the character's original textual composition no longer completely defines his identity. This is an instance in which the character has in fact become independent from the author in the postmodern sense.[145] If ownership must be established, it is more appropriately assigned to society as a whole.[146]

In calling such characters culturally appropriated, the presupposition is that society should benefit from all of the "surplus value"

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143. Leslie A. Kurtz, *The Methuselah Factor: When Characters Outlive Their Copyrights*, 11 U. MIAMI ENT. & SPORTS L. REV. 437, 441 (1994) ("[Characters] can encapsulate an idea, evoke an emotion, or conjure up an image. When a fictional character has entered the public domain, there are strong policy reasons for keeping it there, thus allowing others to make use of it.").

144. *Id.* at 440-41 (describing multiple secondary uses of iconic characters throughout the ages). Kurtz's focus is on characters already in the public domain. This Note argues for the free use of iconic characters, regardless of whether they are eligible for public domain status, which requires that a work remain protected for the life of the author plus seventy years. 17 U.S.C. § 302 (2000).

145. *See supra* notes 62-64 and accompanying text.

146. From a Lockean perspective, all of these endeavors by the larger society to place the character within the cultural dialogue should, in fact, count as an act of appropriation. As such, cultural appropriation leads to the legal recognition of a cultural property right. *See* LOCKE, *supra* note 28 and accompanying text. This idea of a collective property right is not a completely unheard of concept. For example, Diane Nelson, senior vice president of Warner Bros. Family Entertainment, once described fans as "core shareholders" in the property of the work and the "life blood" of the franchise. HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 190 (2006).

that it has contributed to the character's identity.[147] In addition to their source identification function, trademarks can also serve as a vehicle for social commentary.[148] For example, when a Rolex watch is described as the "Cadillac" of watches, the purpose of the word "Cadillac" is not to remind listeners of the car company, but rather to connote a social understanding of glamour, grandeur, and prestige. In addressing the debate over who should claim the "surplus value" associated with a trademark, some scholars suggest that despite the courts' tendencies to favor trademark owners, ownership should fall to the larger public, which has built additional meaning into the mark by employing it in the cultural dialogue.[149] By analogy, it is possible to argue that characters who also have developed an expressive dimension—who serve as the vehicles and the vessels for recoding—should similarly belong to the public.[150] Their surplus value is socially, and not individually, cultivated, and thus, they exist more appropriately as general commodities in a marketplace of ideas.

Another key idea to draw upon is the concept of expressive genericity.[151] In trademark law, genericity exists as a barrier to trademark protection if the trademarked term is broad enough to

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147. Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); *see also* Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 975 (1993). Kozinski argues that

> [t]he originator must understand that the mark or symbol or image is no longer entirely its own, and that in some sense it also belongs to all those other minds who have received and integrated it. This does not imply a total loss of control, however, only that the public's right to make use of the word or image must be considered in the balance as we decide what rights the owner is entitled to assert.

Id.

148. Dreyfuss uses the example of an apparel maker selling a t-shirt with the word "Barbie" printed on it; the apparel maker in this instance is taking advantage of the expressive connotations associated with the word "Barbie," but is not attempting to use the word as a commercial signifier. Dreyfuss, *supra* note 147, at 402.

149. *Id.* at 407 (explaining how the surplus value in the "Barbie" instance should not go to either Mattel or the t-shirt producer, but rather to the public who have "found uses for 'Barbie' in excess of signaling"); *see also* Karjala, *supra* note 9, at 26 (stating that copyright law traditionally assigns the excess value associated with "character merchandising" to the person who created the character or that person's assignees).

150. *See* Kurtz, *supra* note 19, at 472-74 (discussing the trademark protection of literary characters, to the extent that they serve as a form of source identification and command public acceptance in the marketplace).

151. *See* Dreyfuss, *supra* note 147.

describe the type of the good being offered.[152] This measure ensures that trademark owners do not monopolize terms in such a way as to inhibit the consumer's ability to identify the good in general.[153] Expressive genericity is a variation upon the commercial genericity usually contemplated by trademark law. Here, what becomes generic and unprotectible is the culturally communicative function of the trademark when it is not being used as a commercial signifier.[154] The doctrine of expressive genericity raises judicial awareness of the role of trademarked terms in the cultural vocabulary; by extension, it also serves as a warning to the court that the overprotection of trademarks will create a chilling effect on free expression.[155]

Characters, to the extent that they are employed by others for a similarly expressive function, should also be valued as vehicles for communication. Characters are culturally valuable tools because they are able to encapsulate a multiplicity of meanings—they can simultaneously embrace and contest dominant messages in society.[156] Hence, in the same way that denying trademarks their expressive capability serves as a lockdown on free expression, minimizing the free derivative use of literary characters will also eliminate an important means by which individuals can contribute

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152. Zatarain's, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786, 790 (5th Cir. 1983) ("A *generic* term is 'the name of a particular genus or class of which an individual article or service is but a member.'" (internal citation omitted)).

153. *Id.*; *see* Lanham Act § 14(3), 15 U.S.C. § 1064(3) (2000) (permitting the cancellation of registered marks that become generic).

154. Dreyfuss, *supra* note 147, at 418. Dreyfuss explains that

> [c]ourts entertaining hybrid use cases would first decide whether there is an expressive component to the challenged use and then consider how central the trademark is to the usage. If the mark is found to be rhetorically unique within its context, it would be considered expressively—but not necessarily competitively—generic, and the trademark owner would not be permitted to suppress its utilization in that context.

Id.

155. For this reason, in the realm of trademark law, scholars and judges have argued that in certain circumstances, the expressive utility of a trademarked term should trump the commercial use concerns of the trademark owner. *See* Kozinski, *supra* note 147, at 975-77; *see also* Kurtz, *supra* note 143, at 441 (arguing that owners of trademarked characters should not be able to use trademark law to curtail the expressive use of a character once that character has entered the public domain).

156. *See* COOMBE, *supra* note 46, at 50.

to the social discourse in a useful and meaningful way.[157] Judge Kozinski once again does his part to warn against the curtailing of the expressive function of fictional characters:

> When we limit the use of characters like Mickey Mouse and Snoopy, one of the things we do is wind up taking something that has become part of our culture and saying, in effect, these characters cannot be used as a means of communication. That really ends up diminishing our ability to speak with one another by choking off some of the vibrancy of our language.[158]

Judicial interference with modes and methods of discourse is not something to be taken lightly.

V. ANTICIPATING CRITICISMS TO THE DEFENSE OF CULTURAL APPROPRIATION

This final section addresses potential criticisms and objections that may arise in response to judicial attempts to widen the legal avenue for unlicensed derivative works. Although some criticisms may be pertinent to the cultural appropriation defense itself, other arguments find fault more generally with the idea of granting the public free and unlicensed access to the original author's original creations. Critics exist on both sides of the debate: those who believe that a defense of this kind would be harmful and detrimental to the interests of the author, and those who believe that the proposed modification does not adequately reflect the growing movement towards readers' rights.

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157. Karjala, *supra* note 9, at 26 ("Popular fictional characters become a part of the vocabulary of modern life and can serve as building blocks for development and expansion of our cultural heritage. Optimally effective speech often requires at least the evocation of cultural associations." (citation omitted)).

158. Alex Kozinski, *Mickey & Me*, 11 U. MIAMI ENT. & SPORTS L. REV. 465, 470 (1994). Interestingly, although Kozinski seems to support the idea of using characters as a means of expression, he is less supportive of character modifications as a result of cultural appropriation:

> [I]f we open up the field and allow ... characters to be portrayed by someone other than the company that created them, they will become different characters.... 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 ....

Id. at 469.

One of the biggest concerns arising from the increased proliferation of unlicensed derivative works is the threat of economic harm to the original author. Two ways in which the economic interests of the original author can be harmed exist: first, the derivative work may act as a substitute for the original work;[159] second, if the market is saturated by multiple depictions of the same character, the original author will lose the ability to demand a higher price by controlling the scarcity of her good.[160] Both of these arguments extend from the utilitarian justification for copyright law, which ties the economic protection of the author to her incentive to create works for the public good.[161]

One way to respond to this two-fold economic argument is to note that a sophisticated market can handle multiple renditions of the same character.[162] This is especially true when the character at issue is one that has developed a following of its own;[163] the cultural appropriation defense only applies to characters of this nature. Members of a postmodern society can simultaneously juggle a continued following of the original canon and entertain secondary variations of this canon. In the fast-paced and culturally savvy markets of the Far East, this is already apparent. For example, in Japan, the market for *doujinshi*—the "copycat" derivative versions of Japanese comics (*manga*) and comic book characters—thrives in a parallel commercial market despite the fact that these works violate Japanese copyright law.[164] The proliferation of *doujinshi* culture, and the commercial acceptance of this derivative market, turns copyright prosecution into a counterproductive legal tool.

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159. Chander and Sunder's description of the Indian version of Harry Potter, entitled *Harry Potter in Kolkata*, suggests this substitutional effect. Selling at thirty rupees (less than one U.S. dollar), it is described as the "poor man's Potter." Chander & Sunder, *supra* note 8, at 610-11.

160. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 487-88 (2003) (suggesting that unlimited use of a character could exhaust that character's commercial value).

161. *See supra* notes 23-25 and accompanying text.

162. Chander & Sunder, *supra* note 8, at 624 ("[H]uman beings have the capacity to hold multiple, even contradictory, meanings simultaneously.").

163. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1056 n.103 (2005) ("Where a work is truly iconic, even repeated debasement is unlikely to affect public perceptions.").

164. LAWRENCE LESSIG, FREE CULTURE 25-28 (2004).

Prosecution would stifle a concurrent derivative market that has little effect on the following for the original work.

Rather than saturating substitutable versions of the same character, secondary users are more likely to create unique and distinctive derivative works that do not compete directly with the original. Artistic and commercial considerations dictate this incentive. From an artistic standpoint, the secondary author arguably possesses the same desire for a creative license as the original author; the only difference is the secondary author's manifestation of this creativity through the reworking of an existing concept. *Doujinshi* works, for example, are not considered to be worthy of the *doujinshi* label unless they substantially transform the original work.[165] From a commercial perspective, derivative works that are substitutional in nature are more likely to lose out in a direct competition with the original;[166] the works lack the cachet of the original author's imprint, and they also fail to establish their own independent identity in the derivative market. In a creative culture in which recoded characters are allowed to exist in the market, secondary authors will give heed to the value of multiplicity and variation.

In addition to economic concerns, authors may object to the tarnishing of their original creations at the hands of secondary users, who may recode characters in a negative or distasteful way. Rowling, for example, openly disapproves of Harry Potter fan fiction writers who include elements of pornography in their writing.[167] Concerns about negative association are tied to the author's evocation of a personal and parental relationship with a character.[168] From the author's perspective, a controversial depiction of a character threatens both the integrity of the character and the reputation of the creator.[169] Authors emphasize that it is within their discretion to determine the uses to license and the uses to

165. *Id.* at 25-26.

166. The laws of trademark and unfair competition may also prohibit derivative depictions that are too similar in nature because of the potential for interference with the source-identifying function of the trademarked character. Kurtz, *supra* note 19, at 494-95.

167. *See supra* note 4.

168. For a discussion of authors' moral rights, see *supra* notes 36-43 and accompanying text.

169. Chander & Sunder, *supra* note 8, at 621, 623; Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79, 103-07 (1991).

reject. For example, although DC Comics is amenable to the concept of an evil Batman, it has openly objected to the presentation of Batman and Robin as gay lovers.[170]

Concerns about harming the integrity of the author's original work[171] are also unwarranted, given the societal ability to handle multiple interpretations of the same work simultaneously.[172] The burden of balancing contradictory depictions is not new to the field of copyright law: the mechanism of fair use, as it operates, already curtails the author's ability to police certain critical interpretations of her work.[173] The cultural appropriation defense is no different in this respect; the author's ability to control what she believes to be a negative association will be tempered by society's desire to inject variations of the character into the cultural dialogue. From a theoretical perspective, it is also questionable whether the purpose of copyright is to protect authors from unfavorable associations if there is no recognizable economic harm. In its most utilitarian sense, copyright law exists to protect and balance the author's economic rights, and only these rights, against the public's interest in the dissemination of creative expression.[174]

Concerns also emanate from the other side of the debate. Those who support readers' rights to recode original works may criticize the exception for culturally appropriated characters as being too narrow. Outside the example of Harry Potter, only a few characters have reached a similar iconic status. Hence, if courts use the Harry Potter phenomenon as the yardstick by which to judge a character's cultural prevalence, few characters will be able to replicate the type of resonance and exposure that would entitle them to the safeguards of the cultural appropriation defense.

Although there is no denying that the exception for culturally iconic characters remains very narrow, the slim latitude of this exception may be what allows it to operate within the existing

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170. Chander & Sunder, *supra* note 8, at 623.

171. *See, e.g.*, Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 940-66 (1999) (describing four reasons why nonowners value stable cultural meanings).

172. *See* Chander & Sunder, *supra* note 8, at 624; Lemley, *supra* note 163, at 1056 n.103 (providing an alternative critique to the cultural instability argument).

173. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994); SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1267 (11th Cir. 2001).

174. *SunTrust Bank*, 268 F.3d at 1263.

copyright framework without jeopardizing the underlying justifications for copyright protection. The goal of copyright law, and arguably all intellectual property disciplines, is to find the optimum balance between advancing the public good and protecting the incentive for the original author to create.[175] By maintaining a narrow exception for characters that in their own right have a strong argument for collective ownership, the line of demarcation between readers' rights and authors' rights is shifted slightly more towards readers' rights, but not in such a way as to upset the tentative balance between authors' entitlements and the public good.

CONCLUSION

The purpose of this Note is to suggest ways in which the courts should alter their judicial metric when considering infringement claims against the use of culturally iconic literary characters. A straightforward analysis of copyright principles, combined with a traditional application of the *Nichols* paradigm, does nothing to account for the ability of literary characters to affect the cultural landscape—especially in a society where readers' rights are beginning to infiltrate the long-standing principles of authorial ownership.

When characters enter into mainstream culture, they acquire unanticipated meanings and significances for which the author cannot account. Because the author is not singularly responsible for the cultural value of a particularly resonant character, the author should not be able to control the accessibility of the character to readers who wish to appropriate it for derivative use. The current framework of copyright law, with its objective of protecting the singular expression of the author, does not accommodate or anticipate the needs of society today. Cultural dialogue—which combats much of the isolation and disconnect in postmodern culture—depends on the fashioning of laws that will convey more freedom to the reader to recode and reinterpret original works, and, more specifically in the context of this Note, original literary characters.

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175. *See* U.S. CONST. art. 1, § 8, cl. 8.

If it serves as any consolation to the author, it can be said that by "releasing" her character out into the marketplace of ideas for others to appropriate, the author is essentially conceding her own interests for the best interests of the character.[176] By letting the character remain a fluid and redefinable entity, the original author ensures that the character has the freedom to develop in meaning and to remain culturally relevant in the hands of other writers who can enrich the preexisting creation.[177] For, although characters have the privilege of being eternal,[178] characters are more truly alive through readership and the enduring ability to resonate with the imagination of society as a whole.

Jacqueline Lai Chung[*]

176. *See* Rose, *supra* note 33, at 13-15.

177. *Id.*

178. *See* PIRANDELLO, *supra* note 63, at 14.

> [H]e who has the luck to be born a live character can even laugh at death. He will never die. The one who will die is the man, the writer, the instrument of the creation. The creation never dies. And for it to live for ever, it need not have exceptional talent or the ability to work miracles. Who was Sancho Panza? Who was Don Abbondio? And yet they live eternally, because, being live germs, they had the good fortune to find a fertile matrix, a fantasy that knew how to raise and nourish them, to make them live for eternity!

Id.

* J.D. Candidate 2008, William & Mary School of Law; B.A. 2004, Yale University. With thanks to Professor Laura Heymann for her encouragement and insightful commentary through the various stages of this Note. With love to the family.