

Character Culture:
The Cultural Bargain Between Ownership and Appropriation

Franco Chinappi
Graduate Program in Communication Studies
Department of Art History and Communication Studies
McGill University
Montreal, Quebec, Canada

December 2001

**A Thesis submitted to the Faculty of Graduate Studies and Research in
partial fulfillment of the requirements of the degree of Masters of Arts**

© Franco Chinappi, 2001



National Library
of Canada

Acquisitions and
Bibliographic Services

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque nationale
du Canada

Acquisitions et
services bibliographiques

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

Our file Notre référence

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

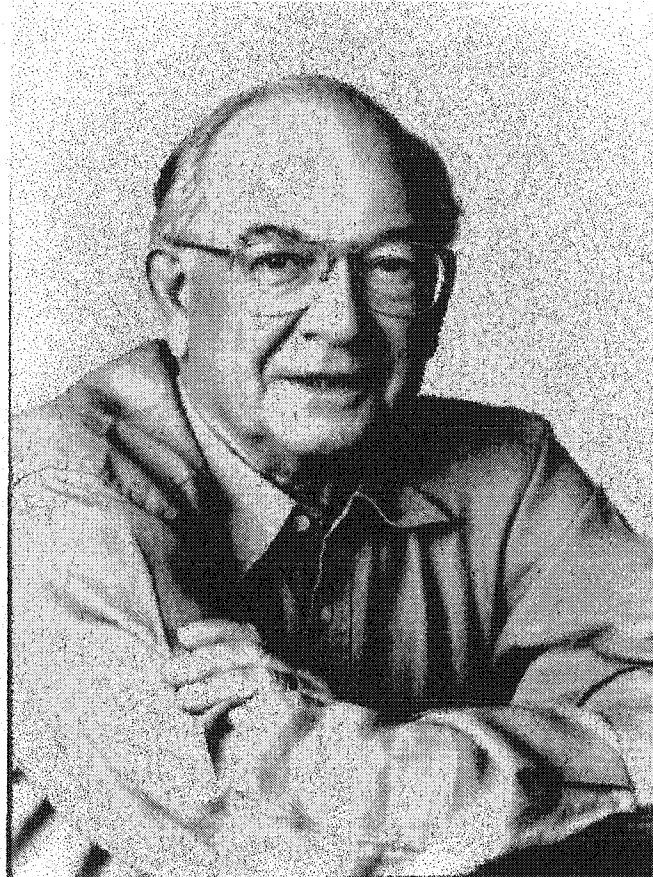
L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-78998-5

Dedicated to the memory of
Ernie Coombs and "Mr. Dressup"

1927-2001



This study is dedicated to the late Ernie Coombs, also known to Canadians as the character Mr. Dressup who on August 13, 2001 granted me what became his last recorded interview just four short weeks prior to his final departure earlier this year. His untimely passing has left a great emptiness for those of us who grew up learning from him, and those of us who got to meet with him, even if only a for a brief time. Ernie Coombs had a way of touching people of all ages, deep inside each of us, in that special place where we cherish our most pleasant memories. That place of new possibilities, new learning experiences that place where we find our connection with the people and world around us. His gift of being able to magically connect with everyone who knew him, or of him, was also the lesson he taught others to share with one another. When looking to achieve greatness in children's television, it is Mr. Dressup that has set the standard to strive for. This study is dedicated to his legacy,

and for anybody who ever set out to achieve a *"big fat idea"*.

Table of Contents

Title Page	
Dedication page	
Table of Contents	ii
Abstract	v
Acknowledgements	vi
<u>Chapter One</u>	
Introduction	1
Characters defined, three streams of thought	6
Definition of Audience, and the Audience/Affect relationship	11
The Character Creation Process	13
The External Tangible Characterizations	14
The In-Tangible Sentience	14
Character-First Process	15
Story Vehicle Process	15
Character Process and the Law	16
Endnotes	21
<u>Chapter Two</u>	
Introduction	23
Intellectual Property	25
Fictional Characters and the Law	26
Copyright	26
Characters and the Copyright Acts	28
Establishing Character Ownership:	29
Author, the Owner, and the Creator	29
Joint Creations	29
Work-for-Hire,	
Service Contracts and Spec-Sit	30
Fair Copying	32
Parody	34
Copyright Term Duration, and the Public Domain	35
Public Domain	37
Copyright Extension and New Rights Granted	38
International Copyright and the Conventions	40
Rights of Adaptation and Derivative Works	41
Moral Rights and Droit Moral	44
People-Linked Characters and the Law	45
Neighboring Rights	45
Personal Rights	46

of Privacy Law	46
Defamation, Libel and Slander	47
Life Story Rights	48
of the Right of Publicity & Right of Personality	49
Commodity Industry Characters and the Law	50
Trademark	50
Unfair Competition	52
Merchandising	53
Endnotes	55
 <u>Chapter Three</u>	
Introduction	57
The Moral/Property Argument	61
For Authors	61
For Audiences	63
The Labor Argument	66
For Authors	66
For Audiences	69
The Public Argument	72
For Authors	72
For Audiences	75
Final Summary	78
Endnotes	81
 <u>Conclusion</u>	
Introduction	82
A Possible Solution	83
First Stage: The New Cultural Bargain	85
Second Stage: Towards a working definition of Character	87
The Definition of Character and the New Cultural Bargain	93
Harry Potter Revisited	93
The Journey's End	94
Endnotes	95
 <u>Appendix I: Different Categories of Character Types and the Law</u>	96
Fictional Characters	96
People-Linked	101
Commodity Industry Characters	104
Default Categories	107
Endnotes	108

<u>Appendix II: Character Definition Checklist</u>	109
<u>Appendix III: Images</u>	118
III.1 Sac a Dos	118
III.2 The Last Pancake Breakfast	119
III.3 Breakfast of Saviors	119
III.4 Christians... They're grrreat!	120
III.5 The Sacrifice of Sprout	120
III.6 The Lamentation	120
III.7 Expulsion from Paradise	120
<u>Works Cited</u>	121

Abstract:

This thesis is about the cultural bargain; the balancing relationship between author monopoly and user affect desires, as applying to the ambiguity of characters. Character culture is a hybrid of the characters that are created and sold by authors with artistic and legal concerns, and the character-affect-relationship of the audience users of those characters. This study examines the law and industry practices in the United States and Canada as it relates to character and the limited scope of the law in defining just what exactly a character is. Also, I examine the major issues in the cultural bargain between the ownership of characters of authors, and the appropriation of characters by audiences, through the dominate arguments for both authors and audiences and the issue of privileged accessibility to characters. By “appropriate”, I am referring to any act of an audience member, utilizing a character they do not own, in new ways, that the original author of the character did not give permission for, or approve. Finally, I present my analysis of how the cultural bargain may experience a balance between both authors and audience, by defining characters using the audience affect interpretation as criteria.

Résumé:

Cette thèse traite de l'échange culturel; l'équilibre entre le monopole de l'auteur et la relation que l'auditoire entretient avec un personnage, tel qu'appliqué à l'ambiguïté générée par la définition de ce qu'est un personnage. La culture du personnage est un mélange des personnages créés et vendus par les auteurs ayant des préoccupations artistiques et légales, et de la relation que l'auditoire entretient avec un personnage et l'utilisation qu'il en fait. Cette étude examinera les lois et pratiques de l'industrie aux États-Unis et au Canada relativement aux personnages et la portée limitée de la législation dans la définition d'un personnage. En outre, je me pencherai sur les questions majeures de l'échange culturel entre la propriété des personnages par les auteurs et l'appropriation des personnages par l'auditoire en utilisant les arguments principaux, tant pour les auteurs que pour l'auditoire relativement à l'accès privilégié des personnages. Par «appropriation» j'entends toute nouvelle utilisation, par un membre d'un auditoire, d'un personnage dont il n'a pas la propriété d'une manière à laquelle l'auteur du personnage n'a pas donné la permission ou n'a pas approuvé. Enfin, je présenterai mon point de vue sur la manière dont l'équilibre entre les auteurs et l'auditoire pourrait être atteint dans le domaine de l'échange culturel en ajoutant à la définition de personnage le concept de la relation de l'auditoire avec un personnage.

Acknowledgments

And may I say Thank You...

To my parents, Nicola and Emilia Chinappi, for encouraging me to quit when it looked like I wasn't going to make it (knowing full well of course that I always do the opposite of what they tell me). My brother Tom, my sister-in-law Lina, my sister Rita, my brother-in-law Victor, my nieces, Amanda, Vanessa, Sonia, and my nephew Nicholas.

To the law firm of Davis Ward Phillips & Vineberg (your work ethic was an inspiration) Robert Vineberg, George Hendy, Guy Dupont, Silvanna Conte, Shahir Gundi, Louise Gendron, Diane Sauve, Carmy Zolla, Terry Chinappi, Carmen Mangiola, Scott Robertson, Ted Grigg, Cristina Ng, Pascalle Lamonde, Mary Kelly, Fabio Ciccocopo and especially Fred Dado, Jonathan Elkin, Abraham Avo Tachjian, and Tony Braca.

For their insight and support, Matthew Binks, Raffi Rosenwald, Richard DeJong, Regine Day, Paul McIntyre, Kathleen Guillot, Vito Balenzano, King Wei Chu, Runfang Zhang, Ahmed Farag, Derek Allyne, Robert Bachkhang, Kosta Kokosopolous, Agata DeSantis, William Dick Dousett, Liard Stevens, Sergio Naveretta, Allesandra Piccone, M.J. Di Rocco, Matthead, David Dalglish, David Rome Anderson, Kathleen Linhares, Julie Allen, Tom Moss, Zoltan Szomoru, Lisa Neufeld, Rick Curran, Natalie Sarno, David Newman, Silvio Ursino, Vito Ricci, Claudio Masi, Richard Emond, Gary Johnson, Howie Silbiger, Paul Renis, Jean-Pierre Bourre, Dara Gilbey, Tyler Gilbey, Hugo Lalonde, Emet Perach, Michelle Tracy, Tommy Chinappi and Kaisa McCandless.

And also to Claude Brunet, Claire Benoit, Chris Crilly, Joseph Beard, Michael Madow, Francis Levine, Stuart Macfadden, Mary McGrane, Michael Edelberg, Peter Kiss, Veronica Pross, Suzanne Lyon, Rachel Rajput, Martine Ouellet, Yves Pepin, André Cardinal (MUCTC Concepteur-graphiste), Dick Detzner, Paul Roe, Jill Peterson (The Jim Henson Company), Stephen Braswell (Sesame Workshop), Joel Press (DC Comics/Mad Magazine), Cinar, Mark Chernin, Saskia Latendresse, Debbie Beaulieu, Katherina Huck, Max Oliveras, Evelyne Forget, Evelyn Antosz, Suzie Fortin, Marc Tonelli, Marie-Josée Corbeil, John McCarragher, Cheri Bell, Jeff Wise, Andy Gryn, Mr. Dressup, Cathie MacKinnon and the estate of the late Ernie Coombs.

To my many educators, Gertrude (GeeGee) Robinson, William Straw, Lise Ouimet, Charles Levin, David Crowly, Frances Leeming, Michael Prupus, Daniel Levinson, Sylvie Platt, all students in TV Aesthetics and Simulation of Culture, Nikos Metallinos, Bob McDevitt, Stephen Snow, Henry Lemmetti, Fred Ward, and Paul Ivan Labelle.

A super extra special thanks to my thesis supervisor Sheryl Hamilton. You understood what it was that I was trying to accomplish even better than I did, and your guidance was groundbreaking. All elements of this study considered being of a high grade of quality are no doubt a direct result of your attention to it. Couldn't have done it without you.

Chapter One: Introduction to Character Culture

Once upon a time there was an author named J. K. Rowling who wrote a children's book centered around the character of Harry Potter. It was so highly popular with children that two more books followed. At one point, all three were best sellers. The hype was on, as a fourth book was preparing to make its way into the market place and more and more of the public began to take interest in Harry Potter. About that time, Warner Bros. had contracted with author J. K. Rowling for rights in the Harry Potter books in order to produce a movie and other media materials, including web site rights. However, by the time that Warner Bros did in fact acquire the rights in Harry Potter, a number of Harry Potter fans had established web sites in honor of their favorite character and his companions. As a means of protecting their investment in the Harry Potter works and in the name of consumer protection in source identification, Warner Bros. sent legal "cease-and-desist" letters to web site managers and owners. It turned out that the managers and owners were mostly children aged 16 and under (the very target audience to which WB were aiming to sell the Potter movies). Warner Bros. has come under heavy criticism from both children and parent followers of Harry Potter. As a result some of the Harry Potter fans, especially those that had Potter-related websites, tried to organize a boycott of the movie once released. Author J. K. Rowling has not publicly commented on the situation. And Harry Potter is still a character, oblivious to the issues that tug away at his stardom.

Just what is a character anyway? It seems like an innocent enough question until one tries to answer it. It seems to be that characters fall into that non-existing area of common sense. Everybody knows what a character is, or at least they know one when they see or read one. Or do they? There are plenty of books written about how to create and develop characters, their importance to plot, stories, consumers, advertisers, corporations, children, fanatics, readers, watchers, performers, but how are "characters" defined exactly? Most technical and entertainment industry literature available on characters discusses their relationship with their audiences, their place in a story, their effect on the plot or theme of the script. More has been written to describe specific given

characters, than on the general definition of character. For most people, a character is simply something that is recognized when seen. What is clear from the Harry Potter example is that characters are complex cultural agents that focus on relationships between entertainment industry players, consumers/audiences, and authors/creators.

Characters are the ambiguities of creation. One can own the copyright in a story, but not the characters those stories are about. One can claim to have authored song lyrics, but not the elements that inhabit the characters of the song. One can own the recording of a commercial, but not the characters that appear in that commercial. One can own the visual depiction of a character, but not own what the character embodies or represents. Characters are not real, but they are spoken of, remembered, and related to as if they were. Characters can stay the same, even if the story changes, but the story always changes if the character does. Characters are a combination of tangible and intangible elements, real or make-believe, lovable or dastardly, strangers and family, all at the same time.

Legally, characters are protectable and protected by different overlapping bodies of law, but the one area that seems to be most applicable to the protection of characters is copyright law. More often than not, legal cases involving characters will cite copyright precedents for issues of protection, damages and infringement. Copyright is a body of intellectual property law that has always been a tricky area to maneuver through, and characters are its epitome. In fact, not even the *Canadian Copyright Act* has a definition for "character".

Characters have the unique ability to transcend the original form in which they were introduced, and to grow beyond their originally designed framework of intention. For example, the character of Ebenezer Scrooge, began his "life" in a story entitled, A Christmas Carol (1843) authored by Charles Dickens, but today we can regularly see this character, with his partner Santa Claus, around mid-November up to early January, in Canadian-Tire commercials. Also, unlike a derivative work, which is presenting an original work in a new medium (transferring a novel into movie script into a motion-picture), characters can be plucked out of the original work, and have new works created

around them. These new works can be and usually are completely different in story-line, plot, adventure, circumstance, medium, and expression, yet the characters are always familiar and recognizable. A very good example of this is the character of Superman. He originally appeared in comic book format (Action Comics # 1) in 1938. Ever since, the character has appeared in and on, radio series broadcasts, live-action and animation television series, movies, graphic novels, the internet, birthday cards, newspaper comic strips, sunglasses, 7UP bottle caps, bubble-gum cards, parodied on Saturday Night Live, plastic figurines, toys, stickers, posters, T-shirts, and a host of other products, while continuing to survive in the comic book medium under more than one regularly printed title. Not bad for an unidentifiable entity. But each time the character appears, regardless of the battle he fights, regardless of the actor who plays him, regardless of the way he is drawn, he is still recognized as Superman by his audience.

Audiences' experiences play a significant role in the construction of characters. Characters can appear in literary form (Edgar Allen Poe's Annabel Lee), comic books (Marvel Comics' Spiderman), on a theatrical stage (Rum-Tum-Tugger of *Cats*), on television (Dan Connor played by John Goodman on *Roseanne*), in movies (Martin Riggs played by Mel Gibson in *Lethal Weapon* (1987)), the internet (Mr. Wong), radio broadcasts (The Lone Ranger), in audio recordings (Froo-Froo the Cat by Radio Free Vestibule), or the characters that exist in songs (Motley Crue's Dr. Feelgood). There exists a special relationship between an audience and the character to which that audience is exposed regardless of the medium in which the character is produced. It is uncertain whether or not audiences live through characters, or if characters are merely vessels for the audience to identify with, or if characters act as reflections of audiences, at the same time as audiences perceive characters as separate from them. What is more certain is that through the special relationships that exist between a character and its audience, audience appropriation of characters seems almost inevitable. By "appropriate", I am referring to any act of an audience member, utilizing a character they do not own, in new ways, that the original author of the character did not give permission for, inkind, or approve. Whether out of some sense of praise of, distaste for, loyalty and or attachment to the

character, audiences may feel perfectly justified in finding new uses for the characters that the original character creators and/or owners never intended. Audiences play a tremendous role in the "life" of a given character, by involving the character, experiencing the character, following the exploits of said character, and even helping to terminate the life of characters by rejecting presented characters in a market place or by direct active participation.¹

But, does the significant position that audiences have in relation to the characters they experience, give them the right to appropriate the characters? Could it not be argued that audiences are in part creators of the characters and should have the same freedoms to those characters that the original character creators have? There is no dispute that audiences are not authors of characters in the current legal definition of author.² However, the audience uses the characters, makes meanings of them, and depending on the situation such as an on-going television series, can make suggestions and influence the development of the characters. If audiences' participation in the "life" of a character involves their attention, investment, and emotional connection, then should not audiences be free to exploit the characters in uses that were not originally part of a character design? What is the law as it relates to characters, and does it meet with adequacy the needs of the audiences? What does it mean for the audience to appropriate a character? In order to answer these questions, first "character" has to be defined. Once defined, it is important to understand how characters can be categorized, and what legal doctrine affects them. Furthermore, how are characters treated in their role and function in the industry in which they are first presented? Do current legal regulations consider the needs an audience has to use characters in ways not permitted by character authors? Finally, given the audience's role in the life of a character, how do the needs of the audience balance out against the rights of individual creators and owners of the character?

Character culture is the term I am using to denote a hybrid of the characters that are created and sold by authors with artistic and legal concerns and the character-affect-relationship of the users of those characters falling into popular culture. However, who owns those characters and what freedom of use does that entitle? What are the issues

when characters are both introduced to, and are appropriated by audiences in economic spheres? Authors cannot use any one particular body of law to identify characters as property. Audiences make meanings of characters that the author cannot claim to control. This thesis is about the cultural bargain: the balancing relationship between author monopoly and user affect desires, as applied to the rich cultural resource of characters. This thesis will attempt to answer and address the foregoing questions.

It is important to note the limitations of this thesis. The following discussions and perspectives are that of a communications scholar, an artist, a businessman, a creator, a user, and an aficionado of pop-culture characters. Although this thesis will be examining certain laws as they pertain to characters, the analysis in this document is not legal analysis. This is an attempt to clarify thought and theory on the subject, and will argue various aspects that may be in contradiction with current practices. Also, the nature of the research that has gone into this document should be detailed. This thesis will be considering legislation and case law from both Canada and the United States of America. At times European precedents or case law may be referred to, but only in passing. The laws surrounding character creation are different between the two countries, but given that the Canadian and American entertainment industries impact one another, it is important to know how procedures in relation to characters will affect character creators, owners and end users alike on both sides of the border.

The methodology for this thesis involved extensive readings, interviews with character industry professionals, lawyers, office workers, artists, and others, as well as and random sampling in on-line e-mail message surveys. The readings involved both primary and secondary sources from law, literature and the cultural industries. A specific note about the methodology of this thesis is the use of various examples of characters. I have purposely included both familiar and common examples of characters found in popular culture, and have also included many more obscure character examples as well. The reason for this is to show the incredible diversity of characters available to the public. By presenting both well recognized examples, and some not so well known, I aim to guide the reader to experience characters not only under a sense of familiarity, but also

present characters as a concept of thought, to envision. Well recognized characters do not require an audience to conceptualize the idea of their character, but more obscure characters mandate that the audience evoke such an effort, basing their thoughts on a communicated character concept. Furthermore, some characters change so much over a relatively short period of time that a number of examples need to be given so that should one character change and not be no longer applicable to that concept, the other characters listed will still be relevant.³

Characters defined, three streams of thought

As theorist John Frow noted, a character's "sheer obviousness disguises the conceptual difficulties it presents."⁴ Before providing my definition for "character" in this document, I will briefly explore how others define characters. Here a distinction must be made between defining how to make a character better and believable and defining exactly what a character is. There are countless resources advising writers and creators how to develop their characters.⁵ However not all of them take the time to define what (or who?) a "character" is, for it is easier to improve on a character you recognize as a character, even if you do not know why it is recognizable as a character.

Most attempts to define characters can be organized into three streams of thought. The first involves the structuralist thread, which takes a very historical approach in defining characters as part of, and not separate from, the literature text and plot of a story. The second are writers who work in the entertainment industry and are the predominant modern character creators; their views posit a separation between character and characterization. Lastly, we have the legal and business perspective that incorporates the idea of character to organize, label and attach value to the character as a property and sales tool.

Under the historical and structuralist thread, even though characters have been objects of commentary since Aristotle's *Poetics* (Fourth Century B.C.) there is also a sense in which, until the start of the eighteenth century, characters did not exist.⁶ Aristotle was of the mind that character comes in as subsidiary to the actions⁷ because for him, a character, when it figures in texts, is seen to function in terms of the ordinary laws

of psychological causality: the laws of love, hate, jealousy, and other emotions.⁸ "Aristotle weighed each side and concluded that story is primary, character secondary. His view held sway until, with the evolution of the novel, the pendulum of opinion swung the other way. By the nineteenth century many held that structure is merely an appliance designed to display personality, that what the reader wants is fascinating, complex characters."⁹ Baruch Hochman author of Character in Literature (1985), has defined the subject matter of his book claiming,

I have limited myself to figures that are directly presented as characters. On the whole, those that are named, that are endowed with traits, and that "ask" us to envision them, for a moment at least, on the model of people...as they figure in surface structure of the text-that is, its manifest world of actions and agents.¹⁰

Vladimir Propp's structuralist theory of characters suggests that they are agents of the plot, secondary elements necessary to the enactment of the story.¹¹ Novelist and structuralist as well, Henry James said, "Character is plot".¹² Therefore, for the structuralist, the character is there to carry forward the action or (for the less radical) to amplify the theme.¹³ On the whole, the structuralist view has held that character does not emerge as a detachable or independent element in our consciousness during or after reading.¹⁴ Character in itself does not exist unless it is retrieved from the text by our consciousness together with everything else in the text. They, like everything else in the text, exist meaningfully only insofar as they come to exist in audience consciousness.¹⁵

It is Romantic-period characters who first succeed in prompting their readers to conceive of them as beings who take on lives of their own and who thereby escape their social as well as their textual contexts.¹⁶ The Romantic interest in personality, individuality, and originality had directed the attention of nineteenth-century readers of literature to the motivations of the characters they were experiencing. More than that they spoke of these characters as though they had really lived, and critics felt free to discuss dimensions of the characters' experience that went well beyond the boundaries of the works in which they appeared.¹⁷

The second thread of thought on characters predominantly originates from the modern character creators, the writers. There are two major running themes in these character definitions. The first is the acknowledgement that characters are not real, but fictitious simulations of life. The other theme is that there is a sentience that exists beyond the text and presentation of the character. This "spiritual" element requires just as much attention, if not more, than other story elements. "A character, first of all, is the noise of his name, and all the sounds and rhythms that proceed from him,"¹⁸ says novelist William H. Gass. For something to "proceed" from a character there must first be a belief that characters are more than material representations. "Character is a product of combinations...an ever-changing adjective rather than a thing or noun" comments Roland Barthes¹⁹. Andrew Horton, author of Writing the Character-Centered Screenplay (1999), interprets Barthes' definition to mean that "Character is never complete, set, finished but always glimpsed in motion from a certain perspective."²⁰ Robert McKee author of Story (1997) defines characters by first stating they are not human beings. He then goes on to say that "a character is a work of art, a metaphor for human nature, made up of two primary aspects: Characterization (the sum of all observable qualities that are unique) and the True Character (which can only be expressed through choice in dilemma)"²¹

Dwight V. Swain refers to characters throughout his book Creating Characters: How to Build Story People (1990) as story people that are not real; an imitation of an individual, and a sense of caring exists at its core.²² Linda Seger, author of Creating Unforgettable Characters (1990) notes that "character is created through a combination of knowledge and imagination."²³ "Human nature being what it is, a character is always more than just a set of consistencies"²⁴ which again seems to indicate that characters are more than the material representations we attach to them. Characters are interpreted by Nancy Kress, author of Dynamic Characters (1998), through actions as, "...what characters do, how they react to story events, must grow naturally out of their individual natures."²⁵ "In short, a real human being. A character with genuine, tangled, messed-up, mixed-bag characterization. Just like all of us."²⁶ Kress also notes that "You create characters out of everything you are: your perceptions, emotions, beliefs, history, lifelong

reading, desires, dreams. It's not a mappable process, or a simple one, or a straight-line one."²⁷ Similarly, author Marc McCutcheon of Building Believable Characters (1996) refers to characters as a "...construction of a living, breathing, three-dimensional being that readers can relate to, love, hate, love to hate or hate to love."²⁸

The third thread of thought defining characters comes from legal theories of economic spaces. Here, defining characters is not just a matter of recognizing sentience, but trying to define it for the purposes of establishing a property right for categorization, sale, legal protection and economic order, and not only cultural or artistic reasons. Author Ron Suppa of This Business of Screenwriting (1999) notes that, "characters should be multidimensional, motivated and vulnerable."²⁹ He also states that "the setting for your story is also a character."³⁰ Buck Houghton, author of What a Producer Does (1991) briefly mentions the topic of character by describing "...attractive lead and subsidiary characters..." as givens for a good story.³¹ Stephen F. Breimer author of The Screenwriter's Legal Guide (1999) lists characters under Merchandising Rights as needing to be "...sufficiently detailed in its description so that any merchandising efforts involving that character clearly differentiate it from any similar merchandise on the market."³²

Michael C. Donaldson author of Clearance & Copyright (1996) gives two separate categories for defining characters which he claims are identifiable and sometimes valuable. He cites Visual Characters (those that are recognizable for facial and bodily characteristics, usually cartoons (like Mickey Mouse); and Story Characters as the other category. Story characters first appear in literature, can be played by different performers, and are primarily defined by their dialogue, plot and interaction with other characters. Physical appearance does not a Story Character make.³³ Francis M. Nevins Jr, in his article "Copyright + Character – Catastrophe" gives the following for helping to identify characters, "They can give it a name, a voice or other ability to communicate, clothes, and sometimes just the addition of a pair of eyes is enough to identify sentience of some sort. Mostly though, a borrowing of the Judge Learned Hand theory of "well developed" strikes the mind and the criteria for character identification."³⁴ Michael Hauge

author of Writing Screenplays that Sell (1991) believes that any character is made up of 3 facets: 1} Physical makeup (age, gender, appearance), 2} Personality (intelligence, emotional makeup) and 3} Background (everything that happened to the character prior to his appearance.³⁵ And finally, Richard Wincor, author of the book The Art of Character Licensing (1996) describes characters as, "the stateless persons of the law"³⁶ and "imaginary being that provide royalties."³⁷ Wincor also provides this example of some basic legal language for defining characters in a contract:

The character(s) (hereinafter "the Property") are those fictitious or fictitious versions of animate and/or inanimate beings originally published or otherwise released to the public on the date and in the medium and territory and under the name(s) and in visual form(s) (if applicable) listed in Exhibit I, and except where varied explicitly in this Agreement the Property comprises (but without requiring their collective appearance) each and every past, current and future version, depiction and component element including without limitation group and individual name(s), art work, key phrases, musical signatures, accompanying props and other devices ever created by the Owner, by Licensee or by third parties anywhere, together with all existing and all subsequently restored or acquired copyrights, trademarks, goodwill, moral rights or the equivalent and whatever new additional rights arise or become recognized in one or more identifiable characteristics likely to cause recognition by an intended readership or audience.³⁸

Thus far, characters have been defined as non-existent, fictional, as having a presence beyond representational text and other elements, based on the idea of people, made up of many parts including personality and descriptions, and created to be sold and categorized as valuable property. Unfortunately, all these definitions also all have an underlying theme: You know them when you see them. What none of these previous definitions do however is issue criteria that irrevocably and irrefutably offer a definition of character that go beyond simply knowing it when seen.

I argue that characters do not even exist unless there is an audience to flesh them out. Thus if a character does not exist independently of an audience, then the participation of the audience is a necessary criterion in trying to establish a definition for character. The meaning is not in the character unless the audience brings knowledge to the character. This is separate from the characterization, which exists, even if an audience has

never been exposed to a character. Audiences can react to characters, they can reflect on why they react to a character, and they can also relate to a character by putting the character into the context of their own lives.

Audiences do not create characterizations; they have an interpretive experience with the characterizations, and fill in the gaps within the character authors' already set conditions of restrictions. The audience is the end user of characters, and the action these users embark upon is the production of internal meanings. These internal meanings can then manifest themselves in the form of audience appropriation of the characters that the audiences connected with, as the internal meanings are reconstructed and recreated into tangible and fixed forms of expression, that among other things, may enter the legal realm of copyright infringement.

Despite the audiences' role as producers of these new internal meanings derived from characters, they are not recognized, legally, as having the right to do so. Except in incredibly limited capacities set out in law under the idea of fair copying, which will be discussed in greater detail in the next chapter, audience access to characters is not broad. "Character" is an undefined entity, yet at the same time "character" or more appropriately, "characterizations" are treated like property. In order to better understand the tensions in the cultural bargain, the nature of the audience-character relationship needs further examination.

The Definition of Audience and the Audience/Affect Relationship

Audience members do not simply recognize characters, audience members experience characters and make internal meanings of them, by filling in of the characters structures what they do not know, from elements of themselves and their experiences. Audiences experience characters in affect relationships with the characters' simulated sentience. The culture of character exists between the authors of characters who offer them to audiences, and the audiences who experience them. I define *audience* not singularly as the people who are sitting in a designated enclosed seating area such as a cinema or live-theatre audience, but as any natural person who is exposed to the character within a given space where the character is exhibited. The audience is often a sub-culture

within popular culture that interprets characters through signifying practices. In short, the term audience in this text will refer to all people who have been exposed to a given character, regardless of the nature of the medium of expression and whether or not the audience prefers that character, provided it has made some meaning of that character.

To borrow terminology used by Raymond Williams, an audience experiences characters as works and practices of intellectual and especially artistic activity whose principle function is to signify, to produce or to be the occasion for the production of meaning.³⁹ When using the term of popular culture here, I evoke Williams' meaning of well liked by many people, deliberately setting out to win favor with people, and culture actually made by the people for themselves. This includes the obvious starting point that popular culture is simply culture, which is widely favored or well liked by many people.⁴⁰

The difference between *audience* and *public* is that, under law the mass society at large is often referred to the public. However, the audience is a specific sub-set of the public delineated by its specific activity of popular culture consumption. The public at large may not be able to identify a specific character by name or source, even if a character is identifiable as simply a character. The public at large can not be expected to experience the deep affective relationship that a character's audience will have. Character affect of the audience is an example of popular culture that originates from the people.⁴¹

By the term "affect" I evoke Lawrence Grossberg's definition:

Affect is perhaps the most difficult plane of human life to define and describe...because there is no critical vocabulary to describe its different forms and structures. But this does not mean that affect is some ineffable experience or a purely subjective feeling. Affect is a plane of effects, a matter of "actualization, effectuation, practices...an ability to affect and to be affected. It is a pre-personal intensity corresponding to the passage from one experiential state of the body to another and implying an augmentation or diminution in that body's capacity to act. Affect is closely tied to what we often describe as the "feeling" of life. One can understand another person's life, share the same meanings and pleasures, but still not know how it feels.... The same experience will change drastically as its affective investment or state changes. The same object, with the same meaning, giving the same pleasure, is very different in different affective contexts....Affect operates across all of our senses and experiences, across all the domains of effects which construct daily life.

Affect is what gives color tone or texture to the lived.⁴²

What Grossberg refers to as *Affect*, I develop as recognizing the sentience of the character. It is more than just having an aesthetic experience; it is an intimate relationship between an audience and the character's sentience. When a being has sentience, then the viewing audience will fill in what they do not know about this new character, with elements from their own sentience or experience. They will base those elements from whatever signals the new character sends out via characterizations (gestures, expressions, and any other criteria that the performance is trying to embody).

Characters capture and lead an audience's imagination. That is the affect relationship that audiences have with characters. An audience's imagination is led by the character's sentience. The higher degree the affect, the more the character leads the audience imagination. The lower the degree of affect, the more the audience imagination leads the character. The higher the degree of affect, the easier the audience recognizes a character for identification purposes. The lower the degree of affect, then the harder for the audience to recognize the character for identification. Affect, regardless of the degree, identifies a character. The lack of affect disqualifies character identification.

The Character Creation Process

Character creation is comprised of two processes. The first is the two components of which every character is made up. The second, are the two methods whereby characters relate to stories. I examine this because it is important to understanding distinctions made by the industry, by creators, by audiences, and by the law that mediates their relations.

In the first part, I examine the characterizations of a character and the personality sentience of a character as being separate in the creation process, but equal in the embodiment of the character as a whole. There are two components that make up the construct of a Character:

- A) The External Tangible Elements (Characterizations)
- B) The Internal Intangible Elements (Sentience)

A) The External Tangible Characterizations

The external tangible characterizations are the external expression we recognize as the character, which can also be termed the material representation. It is these elements which are, for the most part, protected by law (specifically copyright). These external factors can be expressed in fixed tangible forms, such as a drawing of a character in a visual depiction, or the sound recording of its voice, or a well written character synopsis. This "Characterization" is best defined by Robert McKee as

the sum of all observable qualities of a human being, everything knowable through careful scrutiny: age and IQ; sex and sexuality; style of speech and gestures; choices of home, car, and dress; education and occupation; personality (type) and nervousity; values and attitudes - all aspects of humanity we could know by taking notes on someone day in and day out. The totality of these traits makes each person unique because each of us is a one-of-a-kind combination of genetic givens and accumulated experience.⁴³

B) The Internal In-Tangible Sentience

The In-tangible Sentience is the internal pattern that is not protected by law. One cannot copyright a character's wit, thinking and motivations. These are elements of the character that can be described, but not fixed in a tangible state. Only the description of this is tangible, not the quality itself. Here I refer to the sentience of the character, the feeling of the character's inner being. This consists of the beliefs that character has, and the choices that a character makes both in times of leisure and those of stress. The character's intangible sentience can be recognized, but not specifically defined. This is the part of the character that audiences connect with and with which they form an affective relationship.⁴⁴

There are two distinct methods of character creation, each with their own legal standing. The first is the character-first creations, and the second is creating characters as vehicles for storytelling. These processes are directly related to the character's relationship with the storytelling. It is not an issue of which is more important (the story or the character) but rather which is the leading ideology. The story helps to define the

character. When the character reacts to a situation in the story, the reaction demonstrates a specific aspect of the character's personality. But whether the story acts as a communication tool for the personality of a character to an audience, or whether the character is the communication tool of the story is directly dependent on the intent of the creation process.

Character First Process: This is when the character is truly well developed. In these instances, the character is usually created first incorporating various characterizations and personality traits that will dictate the action and decision making of the character in a story. They are known in the industry as characters who write themselves because of the premise of predictability of their internal resources, as they direct the story to an outcome in line with the way the character moves through its existence. These characters capture and lead the imagination of the audience. The character's pre-existing development will decide actions taken and therefore story is subject by the character. If you replace the character in a given story with a well-developed character, you are going to have a different story. The way Mickey Mouse would react to seeing a bus accident is not going to be the same way Homer Simpson reacts. In this way, the character perspective becomes the story perspective.

Story Vehicle Process: In this process, the plot of storyline comes first, and characters are created to specifically suit the character-roles that the plot requires. These characters are much more stereotypical character prototypes, which can be replaced by other similar characters of the same prototype, and the story will change little if at all. Here the external characterizations of the character are much more developed than the personality of the character. Very little thought goes into the internal elements of the character. Although these characters can be identifiable as separate from plot, the way a character can be defined in this document, they are so tied with the story, that it is the story that captures the imagination and leads an audience, not the characters in that story. Therefore, in this process, the story perspective becomes the character perspective.

When does a story vehicle character become a well-developed character, which effects the story such that the story must change significantly to maintain character

continuity? The answer is that it is more than just substantial use of the character. A character that is used many times, can gain an air of being well developed, but only if there is significant sentence development. A character which has been used little, but is highly developed is much more delineated from the story than a character that has been used on multiple occasions, and not had further development. Repeated use does not necessarily produce a well-developed character. When such changes occur is, for example, in a spin-off of an original work. The character from the original work, on which the spin-off is based, may in fact have been created as a vehicle for that particular story. However, if the new spin-off is created around the idiosyncrasies of that character, and the character is no longer part of just another story telling then the character has crossed the line to becoming a character which belongs in the character-first creation process. That is to say the character significantly influences the new story telling such that the absence of the character becomes the absence of that story.

Character Process and the Law

Character creative processes, the relationship between character and story, have a very significant representation in copyright law. Two of the most important character law cases in fact call on these creation processes to determine exactly whether or not a character should in fact be subject to copyright protection. There are two main ideas about characters and copyright protection: the "Character Delineation Test" and the "Story Being Told Test". The Character Delineation Test was first dictated (cir. 1930) by Judge Learned Hand who presided over the case of Nichols vs. Universal Pictures Corp., where he allowed that literary characters may be protected "quite independently of the plot."⁴⁵

The issue at hand was author/playwright Anne Nichols suing Universal Pictures Corp for copyright infringement. Nichols claimed that Universal's 1926 comedy movie *The Cohens and The Kellys* copied the plot and the characters from her smash hit stage play *Abie's Irish Rose*.⁴⁶ Both works involve conflicts between Jewish and Irish families where the child of one family marries and procreates with the child of the other family. There are four characters common to both plays. The caring and fertile lovers and their

fathers. This, however, is where the similarities stop. Nichols' play has both fathers as widowers, both are religious fanatics of their respective faiths, and the lovers have twin children. The conflict is eventually resolved by the grandfathers' mutual desire to see the grandchildren. In Universal's work, there is no fanaticism where religion is concerned, both mother characters are alive and well, and there is only one child born of the lovers. The conflicts are resolved from the honesty of one father and the generosity of the other, and have little or nothing to do with the birth of the grandchild.

These works were similar in plot, but not similar enough for there to be an infringement. Judge Hand then considered the characters, and whether or not the characters constituted a substantial copying. He found none, stating that these characters were closer to prototypes, and did not really separate themselves from the plot of the story. As prototype characters cannot be the subject of copyright right protection, it stood to reason that there could not be infringement unless the characters could separately constitute enough characterization originality and fixation of their own merit. Thus Judge Hand dismissed the claim against Universal, given that plot is not copyrightable, and as part of that judgement wrote the Character Delineation test, meaning a character not delineated enough to be considered separate from plot accrues the same copyright protection given to plot, namely none.

Judge Hand wrote: "...the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too distinctly."⁴⁷ The test that is suggested by this dictum is that a poorly developed character constitutes nothing more than an "idea" not meriting copyright protection.⁴⁸ The issue here is that the case never exactly defined "well developed", and offered no significant analysis system.

I argue that what Learned Hand labels well-developed, is the affect relationship that a character has with the imagination of the audience. The more a character captures and leads the imagination, the more it is well developed. A character that forces the audience members to use more of their own imagination (character-types) because the character cannot lead the imagination, the less developed it is.

For example, the North American audience at large is familiar with both Bugs Bunny and Miss Piggy (see image on this page). What if a story were to have these two interact? Consider Bugs Bunny's "wrascally" behavior meets Piggy's temperament. One doesn't have to try hard to image the outcome for these two characters as we interpret them. They lead our imaginations. However, what if the situation were an interaction between the ("The one as big as me?") small lad from *A Christmas Carol* in a story with Dasher, Dancer and Prancer (3 of Santa Clause's flying reindeer)? An imagination would have to go into overdrive to fill in what has not been developed and or communicated by the original authors about these characters. Incidentally, in the last example, all four characters mentioned are well known, but are not what Judge Hand refers to "well developed".



Miss Piggy. TM and ©
The Jim Henson Company
These materials are used
with the permission of
The Jim Henson
Company Inc

The Story Being Told Test (cir.1954) was written by Judge Stephens in the case of Warner Bros. Inc vs Columbia Broadcasting System (CBS) also known as the "Sam Spade Case". The issue was that Warner Bros. had purchased various media rights (including radio rights) to the literary work The Maltese Falcon (1930) from author Dashiell Hammett, featuring the detective character Sam Spade. About 16 years later the CBS network contracted with Hammett to use only the Sam Spade detective character in a new radio series, but did not use any other material from The Maltese Falcon original work. If the character was in fact subject to copyright protection, then Warner would own the rights to it, and the Sam Spade radio series was a violation of the Warner-Hammett contract. If Sam Spade did not enjoy copyright, then there was no violation in licensing or using the Spade character. In this particular case, Judge Stephens ruled that

the Spade character did not enjoy copyright because, borrowing from the Character Delineation test of Judge Hand, he further interpreted that:

It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of protection afforded by the copyright. (Thus)...even if the owners assigned their complete rights in the copyright to the Falcon, such assignment did not prevent the author from using characters used therein, in other stories. The characters were vehicles for the story told, and the vehicles did not go with the sale of the story.⁴⁹

This case has encountered rejection, engendered confusion, and generally not been followed.⁵⁰ My extensive review of entertainment industry contracts revealed that characters are listed separately, as part of the transaction of a larger work (like a script) which characters inhabit. It is interesting to note that although characters are not easily definable, they can still be listed and identified, for all concerned to understand their place in the transaction. It would seem that this inclusion of characters as a separate element to the transaction of a larger work may be a response to the above-mentioned ruling.

Although this judgement provided for short term gain for Hammett who, under this judgement was not in breach of contract and for CBS for lack of copyright infringement, Judge Stephens really did not do either of those parties (including Warner) any good in the long term. If there is no copyright in the character Sam Spade and therefore no identifiable property right, then that may mean not only did CBS pay a license fee for something that cannot be owned, but also, anybody can use Sam Spade the detective character. If anybody can use him, the public gains access, but Sam Spade loses his economic value. There is little reasonable interest to pay for something that can be used for free. Warner lost out because even though Warner's copyright claim in The Maltese Falcon was not in question, all of the time, energy and money they invested in their version of Sam Spade of the Maltese Falcon is no longer part of their monopoly interest. The loss of value is most relevant to the original author, Hammett, because he cannot license what he cannot legally own. This judgement in fact, was not in Hammett's interest, as Hammett endeavors can no longer be rewarded in the Sam Spade character.

But CBS demonstrated there was initially a value to the character. They could have used any detective character for their radio program, but they did not. They chose Sam Spade. That particular detective character was recognized by CBS as being a reasonable interest. Now that a property right cannot be associated with the character, and anyone can use it, Hammett's Sam Spade is no longer Hammett's, anymore than the story plot belongs to its author. The premise behind this decision makes sense. If copyright protection were to apply to characters that are merely character-types, with no recognizable distinctly unique characterization combinations, then not allowing copyright protection has merit. However, it was applied to a character named Sam Spade, notwithstanding a license agreement between Hammett and CBS indicating the fact that the author, CBS and Warner Bros. recognize it as being a property of reasonable interest. In fact, the legally binding contract, the substantial fee, and even the lawsuit itself indicate a perceived value.

The most important consideration in looking at these two tests brings up the issue of when do vehicle characters become delineated? In neither case is criteria established to acknowledge when that moment of change, or that boundary of crossing, when a character has entered the kingdom of "well-developed-ness" and becomes deserving of copyright protection.

The next chapter will examine the law and industry practices in the United States and Canada as they relate to character. This provides a solid basis for understanding how the law currently handles the needs of an audience (if at all) and the limited scope of the law in defining just what exactly a character is. Also it provides a necessary basis of understanding for a discussion in the third chapter of this thesis, where I examine the major issues in the cultural bargain between the ownership of characters of authors, and the appropriation of characters by audiences. In Chapter Three I examine the three dominant arguments for both authors and audiences and the issue of privileged accessibility to characters. In Chapter Four: the conclusion, I present my ideas on how the cultural bargain may provide a balance between both authors and audience, by defining character using the audience affect interpretation as criteria.

Endnotes for Chapter One

¹ For example, in the Batman comics story line titled, *A Death in the Family*, comic book fans were asked to vote via special telephone numbers whether or not the character Jason Todd, should die in an explosion set by villain character The Joker. At the time, Todd was the second character to assume the role of "Robin" Batman's sidekick. The majority of the comic book audience voted him to die, and thus in Batman Comics # 428, Robin's sentence was carried out

² There is no direct definition for "author" in either the Canadian or the United States copyright acts. The definition is based in case law. According to the case law, the author is the person who creates the work (at times hires and oversee others who create the work) or is the first person to express the idea in fixed form that is subject to copyright. An author may also be the person or entity that has acquired the right, under contract, to use the term "author". Audiences are not character creators (authors) under this understanding of the term.

³ For example, Marvel Comics' Incredible Hulk has gone through significant changes over the last 25 years. When first issued the Hulk was gray. Later the Hulk became the green rampaging monster the character is most remembered for. At one point the David Bruce Banner character and the Hulk were separated. Later they reemerged and the Hulk turned gray again, but this time developed a distinct personality with a bad attitude. Eventually the Incredible Hulk character were three persons living in the same body (The Gray, The Green and Banner). Finally all three persons merged again to a composite Hulk with the body of the Green Hulk, the intelligence of Banner and the Attitude of the gray Hulk. The ongoing continuity includes a future self of the Hulk having gone mad named Maestro.

⁴ Deidre S. Lynch, *The Economy of Character*, Chicago, University of Chicago Press, 1998. p.1

⁵ See the list of books in the bibliography of this thesis

⁶ Lynch p.14

⁷ Francis Ferguson, *Aristotle's Poetics*, New York, NY, Hill and Wang, 1961. p22

⁸ Baruch Hochman, *Character in Literature*, NY, Cornell University, 1985. p29

⁹ Robert McKee, *Story*, New York, NY, Regan Books, 1997. p100

¹⁰ Hochman, p.8

¹¹ *ibid*, p.20

¹² Nancy Kress, *Dynamic Characters*, Cincinnati, Ohio, Writer's Digest Books, 1998. p.1

¹³ Hochman, p.21

¹⁴ *ibid*, p.23

¹⁵ *ibid* p.32

¹⁶ Lynch, p.8

¹⁷ Hochman, p.16

¹⁸ Andrew Horton, *Writing the Character-Centered Screenplay*, Los Angeles, CA, University of California Press, 1999. P.25

¹⁹ *ibid*

²⁰ *ibid*

²¹ McKee, p. 375

²² Dwight Swain, *Creating Characters*, Cincinnati, Ohio, Writer's Digest Books, 1990. p. 3, 8

²³ Linda Seger, *Creating Unforgettable Characters*, New York, NY, Henri Holt and Company, 1990 p. xiii

²⁴ *ibid* p. 32

²⁵ Kress, p. 4

²⁶ *ibid*

²⁷ *ibid*

²⁸ Marc McCutcheon, *Building Believable Characters*, Cincinnati, Ohio, Writer's Digest Books, 1996. p. 2

²⁹ Ron Suppa, *This Business of Screenwriting*, Los Angeles, CA, Lone Eagle Publishing Co., 1999. p.37

³⁰ *ibid* p.43

³¹ Buck Houghton, *What a Producer Does*, Beverly Hills, Silman James Press, 1991. p.2

³² Stephen Breimer, *The Screenwriter's Legal Guide*, New York, NY, Allworth Press, 1999. p.52

-
- ³³ Michael Donaldson, Clearance & Copyright, Los Angeles, CA, Silman James Press, 1996. p.16-17
- ³⁴ Francis Nevins, "Copyright + Character = Catastrophe", Journal, Copyright Society of the U.S.A.
p.312-313
- ³⁵ Michael Hauge, Writing Screenplays that Sells, New York, NY, Harper Perennial, 1991. p.41
- ³⁶ Richard Wincor The Art of Character Licensing, Little Falls, NJ, Glasser LegalWorks, 1996. p.4
- ³⁷ *ibid* p.VI
- ³⁸ *ibid* p..51-52
- ³⁹ John Storey, An Introduction Guide to Cultural Theory and Popular Culture, Georgia, University of Georgia Press, 1993. p.2
- ⁴⁰ *ibid* p. 6 - 7
- ⁴¹ *ibid* p.12
- ⁴² Lawrence Grossberg, We Gotta Get Out of This Place: Popular Conservatism and Postmodern Culture, New York, Routledge, 1992. p.80
- ⁴³ McKee, p375
- ⁴⁴ In the case of Hidden Characters, (See Appendix I) which are not directly identifiable by an audience, it is this sentence that the audience still recognizes unconsciously, as it speaks to audiences through affect.
- ⁴⁵ Steven Netmetz, "Copyright Protection of Fictional Characters", Intellectual Property Journal, December 1999. p.74
- ⁴⁶ *ibid*
- ⁴⁷ *ibid* p 64
- ⁴⁸ *ibid* p 75
- ⁴⁹ *ibid* p 78
- ⁵⁰ *ibid* p 79

Chapter Two: Characters, Law and Industry

In this chapter, I examine what laws exist, and how they relate to characters. It will present law from Canada, the United States of America, and even some law that is practiced in Europe. I also examine entertainment industry practices that, although not laws, act as a form of regulation. The legal information that follows creates a context for considering what allowances an audience has to character creations (if any) and whether or not the current legal status of characters takes into consideration the changing state of that status and the effects on the public at large. In the context of this document, the following rights and regulatory constructs are of particular significance. This chapter elucidates a discussion of character to provide the reader of this study with an understanding of the legal issues raised by characters, and not only to explain the law.

First, I identify three broad character categories, which have been designed to reflect the different bodies of law to which those characters are subject. Then I outline the different types of law and legal terms that are relevant to those character categories. During the course of the discussion I will explain how those laws relate specifically to characters, and I offer a very brief account of the differences in Canadian and American concepts of those laws and legal terms. The three main character categories I have identified (each with sub-groupings), which will guide the information to follow are: 1) Fictional Characters, 2) People-linked Characters, and 3) Commodity Industry Characters.

Fictional characters are created without being directly based on real existing people, and do not have a direct economic commodity industry related link. It is these characters which are most subject to Learned Hand's "Character Delineation" test to decipher the "Well Developed" characters and Judge Stephens "Story being Told" test, whether a character is merely a vehicle for a storytelling. The area of law to which these characters are most subject is copyright and copyright-related practices, (such as parody and moral rights of the creators). There are nine sub-groupings including Name, Literary, Speech, Graphic, Figure, Anonymous, Composites-and-Divisible, Group, and T.A.C.tors characters. (For an accounting of the sub-group characters, please refer to Appendix I). People-linked characters are subject to all the same laws as fictional characters, but in

addition, because these characters are linked with real people, both living and dead, they bring with them a multitude of other legal considerations beyond the boundaries of intellectual property rights. These include Personal Rights, Rights of Privacy, Rights of Publicity/Right of Personality, Defamation, and Neighboring Rights for performers. There are seven sub-groupings including Repurposoids, Story, Sound, Historical-Person, Real-Based, Real-Person, and Performance Art characters. (For an accounting of the sub-group characters, please refer to Appendix I). Commodity Industry characters are subject to all the laws that apply to both fictional characters and people-linked characters, but these characters directly represent economic concerns of owners, authors, and other interested third parties. They represent products, services, teams, goodwill, quality assurances and other economic concerns. They require Trademark and Unfair Competition regulations. There are five sub-groupings including Real-sponsor, Literal, Mascot, Product, and Hidden characters. (For an accounting of the sub-group characters, please refer to Appendix I)

As I have presented in the earlier chapter, the law's position on characters is that characters are not deserving of property rights, unless in the express circumstances of a character being sufficiently well developed. At the same time, the law does not offer criteria to define "well-developed". The law focuses on how it can be applied to character, but does not specifically define the term "character". What the law can take account of is the copyrightability of the characterizations (i.e. the image of a character), but not the combinations of characterizations and inner sentience with which an audience experiences affect. The current legislation has allowances for audiences to use copyrightable works without permission under the terms of fair copying, (which will be examined later in the chapter), but just how that applies to the ambiguousness of characters is a gray area. If characters (both characterizations and sentience) are not usually seen to merit property rights, then characters should be appropriatable by audiences without question. However, such a practice is not the case as authors retain the power to take action against audience appropriation, through the protection of the intellectual property rights of the characterizations, and the economic concerns of character authors and interested third parties.

In order to understand why character appropriation is legally prohibited by authors, it is necessary to examine the current status of the law (in North America for the purposes of this study), the original reason the law was developed, and how it has changed in the last hundred years or so. The majority of legal protection afforded characters falls under the category of intellectual property.

Intellectual Property

Intellectual property is a term referring to the rights in the tangible results and fixed expressions of ideas, but not the ideas themselves. They are organized by legal frameworks and rights granted by government. Intellectual property policies have been developed to encourage the creation and sharing of an author's intellectual property with the public.¹

The word "intellectual" is used to distinguish it from "physical" property. Intellectual property law refers to and protects the intangible or "intellectual" nature of an object, whereas physical property law refers to and protects the tangible or physical aspects of an object. By owning the physical or intellectual property in a creation, you do not necessarily own the other sort of property in it.²

Canada and the United States do not have the same laws for intellectual property, although precedents from one jurisdiction can sometimes be used in the other. (Their laws are organized differently) Thus works such as certain types of computer software, which may be covered by patents in the U.S. might fall under copyright in Canada. This thesis will make an effort to distinguish the most significant of those differences in the bodies of law explored, specifically as they relate to characters. Canada's intellectually property laws include patents, trademarks, industrial design, confidential information and trade secrets, copyright, plant breeders' rights and personality rights. The United States intellectual property laws include patents for utility, designs, plants, trademark, service mark, trade secrets, copyrights, and the right of publicity. Characters are not fully covered by any one body of law, but rather, different aspects of a character are protected by a variety of different, sometimes overlapping, bodies of laws. I consider each of the types of characters-Fictional, People-Linked and Commodity Industry characters- in relation to their legal protection.

Fictional Characters and the Law

The area of law that Fictional Characters are most subject to is Copyright. In the following discussion I examine copyright related bodies of law and practices, as they relate to fictional characters, including such issues as authorship, owners and creators, joint-creations, work-for-hires and service agreements, on-spec projects, fair copying, parody, term duration, public domain, international conventions, adaptations and derivatives, and moral rights.

Copyright

Copyright is the monopoly right to copy. It is a bundle of different rights granted to the owner of the copyright in a work (who may be the creator of the work but not necessarily) sole and exclusive rights. Only the owner of the copyright in a work can authorize, and benefit from, its reproduction, its performance, its display, its publishing, its modification, or association with other entities. The owner can agree to let others use the copyright rights in the work in verbal or written agreements.

One should also keep in mind that a copyright is divisible under the copyright law. Not only can it be broken down into the rights as noted above, but also by medium. Thus, one can convey motion picture rights in one's screenplay and the copyright in the motion picture rights and retain live stage rights and the copyright therein. Or one can convey television rights and retain publishing rights. There are numerous commutations and permutations.³

Copyright is automatic. Once the work is in a "fixed" (tangible) form, copyright automatically exists. Thus it protects the expression of an idea, but not the idea itself. Understanding this definition is of the utmost importance. There are a number of items that cannot be protected by copyright such as facts of actuality, real-life events, and historical details. News programs can all report the same news and facts, but each has a separate copyright on the audio/visual or written form their version of the news takes.

They each own their expression of those facts, but not the facts themselves. To further clarify this understanding, below is a chart of some more concrete examples:

Non-copyright protected idea:

Copyright protected expressions:

Aliens from outer space come to live among us on earth	<i>Alf, My Favorite Martian, Mork and Mindy, Alien Nation, 3rd Rock from the Sun,</i>
Real live Courtroom cases presented in a television program	<i>Judge Wapner, Judge Judy, Divorce Court, Power of Attorney</i>
Talk show featuring guests with unusual situations of interest	<i>Oprah, Donahue, Jerry Springer, Rickie Lake</i>
Inter-racial families coping with modern society	<i>Diff'rent Strokes, Webster</i>
Situation Comedy about a family unit, and growing up	<i>Family Ties, Cosby Show, Family Matters, Malcolm in the Middle</i>
Possible destruction of the earth due to falling asteroid	<i>Deep Impact (1998), Armageddon(1998)</i>
Person(s) with super abilities & resources fights the forces of evil	<i>Greatest American Hero, The X-Men, Kid Super Power Hour</i>
Large reptilian creature staring in children's television program	<i>Barney, Duddley the Dragon</i>
Higher Being sends his only Son to earth and Son becomes the Savior of the World, dies and is resurrected and represents all things that are Good	<u>The New Testament</u> , <u>The Death of Superman</u> (1993) & <u>World Without A Superman</u> (1993) & <u>The Return of Superman</u> (1993) Trade Paperbacks

Important to keep in mind is that copyright was not initially developed to protect artists, creators or owners of copyrightable material from audience appropriation, but it was designed to protect the audience from monopoly ownership of the works. The law was written to give creators/owners, a limited monopoly, which include restrictions they could put on how audiences may use their copyright works. What we now know as copyright law, is currently used primarily as a means of protection to benefit authors and other creators, but when it originated in England, copyright law was intended as protection against authors. In 1710, the *Statute of Anne* was produced in response to complaints by a guild of established publishers loyal to the Crown because independent publishers were taking business away from the guild. This Statute gave the guild some relief, but the wording of the Statute included that authors be granted certain protections

for their works. Given its ultimate goal of the enhancement of the public welfare through the dissemination of knowledge, the Statute stated that its purpose was "the encouragement of learned men to compose and write useful work." On this foundation modern copyright law was subsequently constructed.⁴

In 1790, the first *United States Copyright Act* came into being.⁵ In America there are state and federal regimes of copyright, and the Federal overrides the State schemes in cases of conflict. About 134 years later, the *Canadian Copyright Act* came into being on January 1, 1924 and states that copyright protection in Canada only exists by virtue of the Act.⁶ Both copyright acts have been amended a several times since their enactment, and revisions are a continuous process, as new technologies are developed and new media are conceived. Under both copyright acts, individuals are responsible for enforcing their rights, while the government is responsible for the administration and revision of the acts.⁷ Both copyright acts provide the copyright owner the sole and exclusive right to a work. These rights give rights holders the ability to benefit, monetarily and otherwise, from the exploitation of their works, and in some cases protects the reputation of creators.

Characters and the Copyright Acts

There are not significant differences under the respective copyright acts of England, the United States, and Canada relative to fictional characters.⁸ Whether or not characters per se incur copyright protection is based on a confusing and inconsistent set of standards. There is more jurisprudence in the United States than in Canada.

In any legal suits dealing with the violation of copyright of a fictional character, a successful defense must show a similarity in the expression of the idea of the character in the original and copied versions of the character. It must be proven that the character has significant importance to the original work, and that the character possesses original and distinctiveness characteristics. Also the character must have certain popularity, including one in the eyes of the violator that entices a deliberate appropriation of the character.⁹

Here, I take up the issue with the definition of the word *original*. "A work will usually be considered original if it is independently created (as opposed to copied from other works) and if it possesses at least a minimal degree of creativity."¹⁰ The copyrightable expression of a character is much more than just the character's physical

appearance; it includes the specific name, physical appearance, and character traits of that character.¹¹ However, there have been cases that have been decided on the image of a character alone.¹²

Establishing Character Ownership: Author, the Owner and the Creator

The owner of the copyright is the person or entity who owns the rights in the work, but not necessarily the person or entity that created it. The "author" of the work is a legal term to mean both the owner of the copyright in a work at the time of creation, and at the same time, the creator of the work upon whose life span the copyright term of duration is based. A character can be developed by a creator, as part of a work that is overseen by another person named the "author", and then all rights sold to a third party or parties, the "owner(s)". When audiences appropriate characters, there may be a number of different individuals that will be affected, as those individuals share in the existence of that character, and not just any particular "author".

Depending on the circumstances at the time of the creation process, the author of the material in which the character exists (legally referred to as the "work") may not own the copyright in the work. Copyright may belong to the author at the time of creation and be sold or given away, at a later date to a new owner or multiple owners. In some cases, the author of a work may be in a situation where the ownership of a work is predetermined to be someone else even before the work is conceived. For example, in music publishing contracts, a publisher is assigned copyright in a musician's music works, usually for a period of 2-5 years. Thus, the publisher also will own the copyright on musical works that are not yet created but that will be created in the course of the 2-5 year term that the contract.

Character Ownership: Joint Creations

Known as a Joint-Work in the U.S. and Joint-Authorship in Canada, a joint creation is created jointly by the efforts of two or more people, where the contribution of one creator is not distinct from that of the other collaborator(s). The key to this is in the intention of joint-creation in the work, at the time of creation, with separate contributions being merged into a singular unit.¹³

In the U.S., either of the authors/owners of joint-works can make non-exclusive deals regarding the joint-work, subject to the obligation to pay the other person his or her share of any proceeds. That means a co-owner may give all the non-exclusive licenses he or she wants, subject to paying the other collaborator(s). However, if a co-owner wants to give an exclusive license to, or sell the joint-work, the co-owner requires the written permission of all collaborators. The one exception to the rule is that any co-owner of the copyright may assign his/her entire interest to a third party, who then steps in into the shoes of the assigning co-owner, unless a written contract states otherwise. In Canada, copyright law requires the permission from all the collaborators of a work of joint authorship to allow the creation to be licensed, sold, or other uses. Unlike the United States, Canada makes no distinction between exclusive and non-exclusive deals of use. The collaborators are co-owners of the copyright of the work in question. The presumptions with any joint creation is that the co-owners each own an equal share (50 % each if there are two, 33.33% each if there are three) unless there is an agreement to the contrary.

It is important to note, that audience members who attempt to gain character owners' permission to use characters (that are joint-creations) have an easier time in the United States than in Canada, because the U.S. requires only one of the owner's permission, whereas in Canada, multiple permissions are required under law. This is an example where the cultural bargain which is suppose to balance the ownership of copyrightable works, and the public access to it, is out of balance, between territories.

Copyright Ownership: Work-For-Hire, Service Contracts and Spec-Situations

Work-for-hire is a concept that is applicable in the United States and not Canada. According the *United States Copyright Act*, an employee who creates a work within the scope of his or her employment produces a "work made for hire". Copyright in that work is owned by that employee's employer. A work made for hire does not automatically result every time a work is commissioned for monetary remuneration. A special commissioned work can be a work made for hire, but only if there is a written agreement specifically commissioning the work as a work made for hire.¹⁴

There is no work-for-hire mandate in the *Copyright Act* in Canada. In fact, in Canada, a work-for-hire contract will not be recognized. What has thus been the trend is to evoke the American definition of work-for-hire in Canadian entertainment industry contracts. Such a clause shall appear as "This agreement shall be regarded as a work-for-hire contract as recognized and defined by the *United States Copyright Act*".

The Canadian *Copyright Act* does state that in an employer-employee relationship, the employer will be considered the owner of the copyright in any work produced by the employee within, and limited to, the scope of the employment. This means that if writing a particular script is the job of an employee, then the copyright of that script is owned by the employer; however script material that the employee writes outside the scope of the employment relationship belongs to that employee. Canada has made a very interesting distinction in the area of service contracts. When a copyrightable work is commissioned (for example an exchange of services for money or other considerable values, but not a direct employer-employee relationship) the wording of the type of contract has been used in court to determine copyright ownership. In short, there are two distinct types: Contracts-*OF*-Service, and Contract-*FOR*-Service. Contract-Of-Service is more akin to the work-for-hire theory, and the person who commissions the work is the owner of the copyright. In the case of a Contract-For-Service, the person creating the work retains the copyright, even if the person commissioning the work has paid for it, and is in possession of the item. An example of this is a wedding videographer. The videographer is paid for the time and expertise of making the wedding video, and the marrying couple may even own, or be in possession of the master edit video, but the videographer still retains copyright in the video. This prevents the married couple from making further copies of the video to distribute to friends and family, and gives the videographer recourse to collect any lost revenues from those illegal copies.

The nature of the entertainment industry, which uses, and is in some cases is built on, characters, may involve the Spec Situation. This means that the producer is not sure the writer can write a script the producer would buy, so the writer writes a spec script, retaining all rights in the script until the producer actually buys or options the script.¹⁵ The writer, or creator of the spec script, owns the characters in that script, because unlike

a commissioned work, the spec script is an existing script that the writer wrote with only a speculation that someone may buy it. Character creators in a spec situation thus retain all rights in their work including the characters in those works.

Audiences do not have legal permission to appropriate characters; thus should an audience member appropriate a character, the audience member cannot know who (persons responsible for the character creation) is directly being appropriated from. Most agreements surrounding character creation are held to be confidential, and audience access to them is quite limited. The argument here is that the difficulty of audiences getting direct permission lies in the fact that the information they seek may not be made directly available to them. One argument against character appropriation under the cultural bargain is the difficulty of an audience member knowing exactly whose permission is required and how to go about getting it. However, the research required to get permission is a deterrent for audiences, and may actually encourage acts of character appropriation. Another argument for audience character appropriation is to look at the context of the use of the character that is being appropriated. If the context constitutes a fair copying, the law already states that it is allowable without the audience obtaining the authors' permission. However, what exactly is considered fair copying for characters is fairly ambiguous. Under the cultural bargain, fair copying is one of the few recourses audiences have from the monopoly ownership of copyright holders of characters. The next section examines how fair copying is not specifically defined, and that the difficulty in applying fair copying to characters does not provide audiences the access it desires to characters.

Fair Copying

The main and best-known exception to copyright infringement is fair copying. It is the legal copying of copyrighted material, where one does not have to obtain permission from the owner of the copyright. In both Canada and the United States, there are instances where a less-than-substantial portion of a work may be copied without asking permission or paying a fee. There are only general guidelines as to what constitutes a fair copying, and ultimately only a judge is authorized to make any final

decision. The purpose of these exemptions is to balance the interests of audience users and copyright holders under the cultural bargain.

If anything less than a substantial part is used, the copyright owner has no right to prevent its use. However, the law does not define clearly what constitutes a substantial part of a work. No case has clearly established what exactly constitutes fair copying. Copyright law applies to only a *substantial* part of a work. When considering whether or not something can qualify as fair copying, a judge will look at some of the following criteria, which will be more or less important depending on which side of the border the issue is taking place.

One must look at the extent and number of items copied, the manner in which the copy is used, whether or not it falls under specific provisions outlined by the territorial district, the purpose of the copying, commercial or non-profit nature of the use, the nature of the original work it was copied from, the portion copied in relation to the copyrighted work as a whole, and the effect of the copy upon the potential market for or value of the copyrighted work.¹⁶

In the United States this exception is known as *fair use* and includes purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. A parody may also constitute fair use of copyrighted work under criticism.¹⁷ In Canada, the exception is known as *fair dealing*, and includes the purposes of private study, research, criticism, and review or newspaper summary. The Canadian fair dealing is much narrower than the American fair use. Whereas fair dealing is accepted as a defense to copyright infringement only for the purposes of research, or private study, and, on certain conditions, for criticism, review or news reporting, parody is not covered by the exception.¹⁸

Here the obvious question is whether or not characters count as a substantial part of the works in which they are presented. Does a character have to be "well-developed" to be a substantial part? If the character is only a vehicle in telling a story, it then only qualifies as a less-than-substantial part and can be appropriated without permission. When does a character constitute a complete and substantial work unto itself, if ever? Is character substantiality based on popularity? In cases where a defendant is pleading fair copying, it is these questions which will be considered by a judge.

Fair Copying: Parody

Parody is the act of communicating through the practice of making fun of and criticizing a culture's icons, characters, public and celebrities. It exists when a piece of work or individual, is imitated for a humorous or satirical effect. Thus the very nature of parody inevitably makes use of another creative work. This inherently creates a conflict between the creator of the original work, or the person that is being parodied and the creator of the parody. As copyright holders are generally reluctant to allow permission to parody creators, the parody creator relies heavily on the interpretation of fair copying to bypass any legal permission required and defend against any legal recourse that copyright holders may take against the parody creator. The fair copying defense will only be successful when the newly created work that purports it to be parody is a valid parody based on certain factors. These factors include the purpose and nature of the use (commercially motivated or nonprofit educational), the nature of the original work, the quality and quantity of the amount copied and economical effect of the use upon the potential market for or value of the copyrighted work.¹⁹

Canada is much stricter than the U.S. on the defense of parody. Parody is not specifically mentioned in the Canadian *Copyright Act*, and for the most part is considered a copyright infringement without proper permissions.²⁰ This is completely opposite the American interpretation of parody. In the United States, parody is interpreted as a form of criticism and falls under fair use, and free speech. Historically courts have been sensitive to the interaction between parody as a means of entertainment and as a form of social commentary and criticism and First Amendment values. The public interest in such expression could be construed as outweighing the rights of the copyright owner.²¹

Most parodies are character based. In fact, one cannot parody a work that includes characters, without parodying the characters. Furthermore, characters can be parodied without directly indicating their works of origin. For example, when *Saturday Night Live* does a parody of comic book superhero characters, they do so by presenting the characters as audiences recognize them in new situations, and do not parody any particularly specific comic book issue.

Because fair copying is a trade-off for audiences under the cultural bargain, it is interesting to note just how limited it is. Furthermore, if fair copying can only truly be decided by a judge, then audience access is never actually permissible, it is only tolerated until a legal authority figure claims otherwise. The example of parody more clearly illustrates how the balance of the cultural bargain differs depending in what territory the audience is using the characters, and that fair copying as an audience resource to characters is quite inadequate. Lastly, as the next section will explain, audiences access under fair copying has remained relatively unchanged since the inception of the copyright law in Canada and the United States. In direct contrast to this, new law in support of copyright holders has increased the term duration of the copyright holder thus pushing the cultural bargain even more out of balance.

Copyright Term Duration, and the Public Domain

The term of copyright is how long the copyright will last in a work. Copyright is finite. At some point, it ends, and the owner or creator of the property will not be able to restrict use of the work or financially benefit from this unrestricted use. When copyright runs out, the formerly copyrightable material becomes part of the collective "public domain". Internationally speaking, terms of foreign copyright protection vary, with some countries giving shorter protections and others longer. Both the American and Canadian copyright acts have had a number of recent revisions, usually adding new items that can enjoy copyright and allowing copyright extensions for longer terms. Significantly, when the term of copyright is extended, it only applies to those works that are currently protected by copyright at the time the extension comes into force, or those works that have yet to be created. A general assumption is that anything that enters into the public domain stays there. However, this has not been proven to be the case according to some fairly recent legislation, which will be further explored when the topic of "public domain" is explored later in this document.

At the present time in Canada, the general principle is that copyright subsists during the life of the author, the remainder of the calendar year in which the author dies, and 50 years following the end of that calendar year. In the case of a work of joint authorship, copyright subsists during the life of the author who died last, for the

remainder of the calendar year in which that author dies, and 50 years following the end of that calendar year. One of the exceptions to the general rule in Canada is photographs. If the owner of a photograph is a corporation, the photograph will enter public domain 50 years after the death of whomever the majority shareholder is. If there is no majority shareholder in the corporation, the term is 50 years from the year of the creation of the initial negative. In Canada, another exception is anonymous and pseudonymous works, where as the copyright term duration ends 50 years from publication date, or 75 years from the date of creation, whichever comes first. In Canada, cinematographic works such as documentary films (classified as lacking choreographed dramatic context) are only protected for 50 years following first publication.²²

Current term duration of copyright for the United States (and the European Union) is life of the author plus 70 years (for works created after Jan 1, 1978). In the case of joint works, copyright subsists during the life of the author who died last, for the remainder of the calendar year in which that author dies, and 70 years following the end of that calendar year. The exceptions for the United States include corporate copyright (ie, for works made for hire) where the duration is 120 years from the year of creation or 95 years from publication, whichever comes first. Further, another U.S. exception is an anonymous or pseudonymous work, where the duration of copyright is 95 years from first publication or 125 years from creation, whichever is shorter.²³

The cultural bargain states that authors are given a limited monopoly through their copyright, which is supposed to be finite. Characters in works still subject to copyright are generally restricted from audience access. Characters that exist in works where the copyright expired can be freely appropriated. The current state of law would seem to indicate that although audiences are currently restricted for access to certain characters, in a simple matter of time, audiences will eventually gain the access they desire when the copyright runs out. This is not the case, however. In fact, to understand exactly how audiences have less access now to characters, than they ever had in the past, I present the following section on "public domain". It illustrates that the current status of law is in fact part of an ongoing trend of copyright extension, and further audience rights restrictions. Whereas copyright holders have been given increasing copyright terms and more rights,

fair copying exceptions and audiences' access have either remained the same or decreased.

Public Domain

Public domain is the term to define the cultural status of all things in which copyright has expired or in which copyright does not exist. This includes facts, ideas and copyrightable works in which copyright has expired. Typically, as the copyright of copyrightable works ran out, and new copyrightable works were regularly created, the public domain was sure to continue to increase in size year after year. However, recently copyright term duration extensions have forbidden the entry of copyrightable works into the public domain as those works are never permitted to have their copyrights expire. Furthermore, some new legislation has decreed that certain works, which entered the public domain, may have their copyright restored. This means that the public domain which was at one time an ever growing space, not only experienced a slow down in growth, but began to actually decrease in volume. This is because both the Canadian and American copyright acts have had numerous revisions which have increased the copyright term duration on copyrightable works, or recognized new enforceable copyrights or both. As more and more works are prevented from going into the public domain, the balance that exists between the creators and authors of works and the end users of works has now been tipped to favor authors, giving them longer monopolies, at the expense of the public access to works. All characters that exist in works, to which the audiences would have had access to once the works entered public domain, will be denied to audiences as those works continue to enjoy copyright. Because the interpretation of fair copying has not broadened, while copyright extensions have increased, the cultural bargain is more out of balance than it has ever been since the inception of copyright law.

It was once very likely that a work would enter the public domain within the lifetime of anyone who was around long enough to be exposed to the original publication of the work. The balance of the cultural bargain provided limited monopolies to authors in favor of the eventual free public access to the works authors created. Now, it is very unlikely for anyone to be witness to the entering into the public domain of any work created during that potential-user's lifetime.

Public Domain: Copyright Extensions and New Rights Granted

In 1924 the Canadian *Copyright Act* came into affect and the term of copyright in Canada has always been life of the author plus 50 years after death. There have been changes to the copyright act in Canada but these changes had less to do with copyright extension, and more to do with bringing the act in line with international copyright treaties which recognize more works as copyrightable, and more people and entities as having enforceable rights. Furthermore, as the years went by copyrightable works that were exceptions to the rule (such as cinematic film and photographs) which initially enjoyed a shorter copyright, now through amendments, have been brought in line to enjoy the term duration of the general rule. For example, prior to January 1, 1999, photographs entered public domain 50 years after the production of the initial negative. As of January 1, 1999 photographs fall under the life-of-author plus 50 years term. In the case of materials that currently do not enjoy the general copyright protection rule in Canada, it is more likely than not, that they will eventually be made equal to the term of copyright for other works in Canada. Rarely has Canada revoked or reduced copyright protection, with one major current exception of posthumous works. A posthumous work is a copyrightable work, never published during the life-plus-fifty year term of copyright that protects it. (For example, if someone were to discover an unpublished play written by William Shakespeare, the work would be considered posthumous as all of Shakespeare's works are now public domain). In this case, copyright will continue to exist for such a work, until such a time that it is published, and then continue to exist for 50 years from the year of its publication. This concept is known as "Perpetual Copyright" it limits access to users (going against the spirit in which copyright laws were originally intended for under the cultural bargain) and constitutes a means of over-protection. As of December 31, 1998 new Canadian legislation was adopted, that will obliterate perpetual copyright altogether for any author who dies after December 31, 1998, and the general rule of life-plus-fifty will be applied whether or not a work has been published. A transmittal provision exists, in the case where an author died before December 31, 1998, and the work was not exploited, the protection lasts only until December 31, 2003.²⁴

In 1790 the first United States *Copyright Act* was enacted and supported a term duration of 14 years from the date of publication, or from the date of registration in the case of unpublished works, with privilege of renewal for term of 14 years. (Under early American law, copyright had to be renewed by the author, and failure to do so under a prescribed time limited forced the work into the public domain.) The first copyright extension came in 1831 where the term of copyright was extended to 28 years with privilege of a renewal for term of 14 years. The second copyright extension came in 1909, where the renewal term extended from 14 to 28 years. The third copyright extension in the 1976 Act extended the renewal term to 47 years, giving a total of 75 (28 + 47) years of protection to works that have properly copyrighted and renewed under the 1909 copyright extension.²⁵ In 1976, the fourth copyright extension was signed and came into effect on January 1, 1978 which brought the United States *Copyright Act* in line with Canada's. Thus copyrightable material created post 1978 have a copyright period of life of the author plus 50 years with the following exceptions. Works made for hire, and works published under pseudonyms, had a copyright term of a flat 75 years from the date of initial publication, or 100 years from the date of creation, whichever expires first. The fifth copyright extension, not only halted works from entering the public domain, but decreased the volume of the existing public domain. Signed on December 8, 1994, *The Uruguay Round Agreements Act* restored copyright to certain foreign works under protection in the source country but in the public domain in the United States. The sixth and most current copyright extension (*The Sonny Bono Copyright Term Extension Act*) was signed in October 1998 and immediately extended the term of copyright an additional 20 years.²⁶ Thus the current result in the United States is a longer protection period, eg. life of the author plus 70 years (applying to work created after Jan 1, 1978) with certain notable exceptions. The exceptions include corporate copyright (ie, for works made for hire) where duration is the shorter of 120 years from creation or 95 years from publication and anonymous or pseudonymous work, where the duration of copyright is 95 years from first publication or 125 years from creation, whichever is shorter.²⁷

A character becomes part of public domain when the work in which that character was first presented enters the public domain, regardless how recently the character was

last used. However, if the character is used in subsequent works, copyright owners of the subsequent works may still be in a position to continue to enforce copyright. For example, consider the case of a TV series in reruns, where the first season has entered the public domain, but the second season is still copyright. Or consider when the same character that has been used over the course of many years in different works, where the first work is public domain, but the most recent use was the current year. In both these cases an argument can be made that although the original works are public domain, taking from those works may infringe elements in still copyrighted works.

Copyright was originally designed to protect audiences from author monopoly; it is interesting to study the history of copyright extension (and new precedents affecting public domain) to see how this legislation has now become the very reason why audiences have less free access to creative materials than ever before. This is most significant in the discussion of characters, as characters are at the heart of infringement and appropriation more so than any other element in an original work including plot, storyline, ideas, and generally works as a whole. In fact, you cannot infringe on a whole work without infringing the rights in character (whichever may exist), but you can infringe the rights in a character without infringing the right in the original work in which that character first appeared.

International Copyright and the Conventions

There is no International Copyright Law. Copyright laws are territorial. Each country sets up its own copyright laws, and if a given country decides to become a member of copyright treaty conventions, it means that the copyright law of that country matches certain shared minimum protection terms and clauses. In the event where a country's copyright law does not match the regulations of the convention, its laws will be altered to equal the minimum provisions set by the convention. One of the most relevant aspects of international copyright conventions is that Canadian and American characters are protected in the other member countries under those countries' copyright laws. Characters from other countries will be protected in Canada and the United States under the terms of Canadian and American copyright laws. Thus if something is public domain in one country, it may still enjoy copyright in another country, and depending on the

circumstances, have more or less protection as the case may be. Copyright protection in Canada and the United States collectively ensures protection in more than 140 countries around the world. Also, a copyrightable work will be protected in a country for the term of copyright that exists in that country's legal framework, even if that work was created in a different country. In other words, a work that was created by Canadians, and created in Canada will be protected in the United States under American copyright law and vice versa.

Under the current law, characters that are protected in the United States, because of their longer-term duration copyright period, may be in the public domain in Canada. This is another example of how the cultural bargain is out of alignment from territory to territory as regards audience access to authors' works, while rights in favor of authors' continuing monopolies are encouraged.

Right of Adaptations and Derivative Works

A derivative work is a work that derives at least a portion of its existence from another work that is subject to copyright protection. A derivative work is subject to the restriction that use of the preexisting work must be with the permission of the copyright owner. A derivative work is so tied to the original work that there must be agreement with the holder of the rights in the underlying material.²⁸ The owner of the derivative work will solely benefit from the copyright and economic gain of the derivative work, unless a written agreement states otherwise. This includes a monopoly on anything new that appears in the derivative work that was not a part of the original underlying work such as new characters. Copyright in a derivative work will not extend the copyright term on the original work on which it is based. The changes that are made to the original work are subject to a new different copyright. Generally, at some point in time the copyright in the original work will expire and the original work will go into the public domain, but the changes added for the new edition will still be under copyright protection. As a practical matter this means that the new edition as a whole is protected, but anyone is free to produce a different revised edition of the original work.²⁹

Economically, the derivative work may effectively make the original worthless, destroying the market for the original. Nonetheless, the original still retains copyright

protection, and anyone wanting to borrow material from the original work or to create a different sort of derivative work would still need to obtain appropriate permission from the original rights holder.³⁰ Lastly, anyone looking to make a derivative work of a derivative work would need the permission of both the original owner of the underlying copyright material, and the owner of the first derivative work. For example, the owner of a novel agrees to have someone create a derivative work of a movie based on that novel. Then later a third party wants to issue a comic book, based on the movie that was based on the novel. The comic book creator would have to get permission from both the movie owner, and the novel owner.

New characters that are created as part of a derivative work are solely the property of the author of the derivative work. Even if the new characters are based on the existing character of the underlying original work on which the derivative is based. For example, consider an underlying work is based on a young female character named Kaisa, and a derivative work (for example a film) is made about a story starring Kaisa and her grandmother. If the derivative work author created the grandmother character and this character never appeared or was mentioned in the underlying work, the grandmother character would be owned fully by the author of the derivative work. Thus the author of the derivative work would own all character rights including merchandising, economic rights and copyright, recognized by government, unless there is a written agreement to the contrary. This position is also echoed by CAVCO: Canadian Audio-Visual Certification Office Film or Video Production Services Tax Credit (PSTC) guidelines regarding what qualifies as copyright ownership of the derivative work.

For the purposes of the PSTC, the copyright owner will be the person(s) or entity(s) which has the rights to produce the accredited production (based on the acquisition of underlying rights sufficient to produce the production) and retains legal copyright ownership of the production. Where for example, a character previously exists, the owner would not have to acquire all the rights to that character. To be the copyright owner (of the derivative work) for the PSTC, one would, at minimum, have to acquire a license to produce a production based on that character and retain legal copyright ownership of the finished production.³¹

Stephen Breimer, an Entertainment Attorney and author of The Screenwriter's Legal Guide (1999) states that any merchandising based solely on a movie (such as any new characters created for the movie) will usually belong solely to the producer of the derivative work.³² When an author of a work is contracting to have a derivative work created based on the original work, inevitably all sequel, prequel and spin-off rights must be given away. Usually though, the author retains at least a financial benefit from the continued use of any characters that will be used and or modified.³³

In most cases, original authors will usually negotiate a part ownership or share of any revenues, even if the characters in the derivative work are substantially different from those of the original work. Derivative works that are adaptations of the original also includes Spin-offs, Sequels or Prequels. A story that uses familiar characters in a different setting and time is called a sequel. A prequel is a slang term used to describe a new setting and timeframe featuring familiar characters, that occurs prior to the original story in which the characters first appeared.³⁴ A spin-off is when a creator takes, usually a minor character, from an existing copyright work, and bases an entirely new (and likely continuous) different work around that character. Spin-offs really focus in on one, two or a group of specific characters, and create a whole new world around them that is distinct from the original. Examples of this phenomena are: *Happy Days* series spinning off the television series *Mork and Mindy*, *Laverne and Shirley*, *Joannie Loves Chaci*, and *Yesterland* (an animated spin-off, wherein the Fonz, Richie, Ralph and Fonzie's dog Mr. Cool, accidentally join a time-traveler on her misadventures).

Spin-offs, Sequels and Prequels are directly built and fabricated on the affect that exists between audience and characters. For example, the television program *Frasier* is a result of the affect that existed between the character Frasier and the audience that was developed when the character Frasier was part of the cast of characters on the long running hit sitcom program *Cheers*. The current state of law is designed to continually support authors of characters, by allowing frameworks for them to continue to freely exploit their characters, but does not take into account the audience-character affect-relationship. In this respect the law is incomplete.

Moral Rights and Droit Morale

Moral rights protect the personality or reputation of an author. Because these rights attach to the personality of an author, an author retains them even after he or she has assigned the copyright in a work. This is a very important concept. An older English case described the moral rights concept in the following phrase, "to protect the copy after publication." Another case described the same concept stating that "after the author has parted with his pecuniary interest in the manuscript, the author retains a species of personal or moral right in the product of his brain." Since moral rights are so personal to an author, they cannot be assigned for subsequent copyright owners to exercise, except upon the death of an author. Moral rights can be divided into three categories. The first is Right of Paternity meaning the right to be associated with the work by name, under pseudonym, or to remain anonymous. The second right is the Right of Integrity. This right prevents any distortion, modification or changes to the work that is prejudice of the honor or reputation of the author as proven with the testimony of witnesses. Finally is the Right of Association. This right covers issues associating the author, or the author's work with a product, service, cause, or institution without the authors' consent, which could also be prejudice to the honor and reputation of the author, again as proven by testimony of witnesses.³⁵ Notwithstanding that moral rights cannot be assigned or sold or licensed, authors can agree to have their moral rights waived. A "waiver" means the rights are always present, but a person agrees not to act on them. Moral rights cannot be acted upon by any person other than the author (or an heir), and subsist for the same term duration as copyright

In Canada, all works are protected under the moral rights doctrine. The author may waive his or her moral right in whole or in part. For instance, an author may accept not to assert paternity in a work but refuse to abandon his or her integrity right. There is no particular requirement with respect to the form in which a waiver can be made. Finally, where the author of a work and the owner of the work are not one and the same person, the author always retains moral rights in the work. In the U.S., the moral rights protection offered is very limited because it only applies to visual art. What the United States does acknowledge is the "Droit Morale". American contracts require the author to

waive the right of "Droit Morale". These laws limit the changes that the buyer of an author's work can make. The moral rights of authors ensure that the writer be named as the author and specifically prevent the buyer of a work from making changes which deform or mischaracterize the original intent of the author or reflect poorly on the author's professional reputation. They also prevent the buyer from falsely attributing written material to an author (for instance when a famous writer's work had been changed, yet the publisher or studio still wants to exploit the famous writer's name).³⁶ Both the Canadian Moral rights and the American Droit Morale, are based on the same concept of the European concept of "Droit-en-suite".³⁷

The most peculiar aspect of this definition, is that it is based on the idea that identifying the "author" of a work is a simple issue. As I have presented in this chapter, the identity of the author of a character is not always easily determined. Usually, the author is someone who is agreed to receive the title of author under some form of written agreement. The law takes into account all the different people it takes to build a character, and finds a way to deal with them all in copyright and contract law. However, the law is unable to do so for the audience, a necessary party in identifying characters, who are not recognized as having any rights for the role they play in the existence or definition of a character.

People-Linked Characters and the Law

These characters are subject to all the same standards as fictional characters. In addition, because these characters are linked with real people, both living and dead, they are also covered by other bodies of law. In the following discussion I look at the additional laws that apply to people-linked characters and examine neighboring rights, personal rights which cover both privacy law, and the right of publicity/right of personality, defamation (libel and slander), and life-story rights.

Neighboring Rights

Neighboring rights protect the performer of a character. These include actors, singers, performers, broadcasters, and certain types of sound producers. Neighboring rights are separate from copyrights. Where as copyright deals with the actual work,

neighboring rights cover the people involved with the work. Neighboring rights covers the actual performer's performance, and not what is being performed. So for example, person "A" writes a musical monologue, and person "B" performs it on video. In order for an audience member to use that recorded performance, the audience member must get the copyright clearance of person "A", and the neighboring rights clearance from person "B".

Characters that are performed for audiences are usually separate from the performer (see Appendix I for more details). Audiences that desire to appropriate a certain character may inadvertently infringe on the rights of a performer. Character actors have rights in the performance itself, of the characters they portray but also, in the use of their personal images which will be discussed below.

Personal Rights

Personal rights are rights held by individuals and are based on the notion that every person has the right to control the way they are presented in public, unless they have placed themselves in the public eye or are participants in matters of public interest. Even then, individuals have the right to insist on accuracy and this right allows an individual to prohibit the unauthorized commercial use of his or her image, and particularly of a photograph in which he or she is recognizable. There are two distinct branches of Personal Rights. The first is the Right of Privacy; the second is known as an economic right generally referred to as the Right of Publicity in the United States, and as Right of Personality in Canada. Characters that are based on real people are subject to Privacy laws. The right of Publicity/right of Personality applies to using the images of real people for characters.

Personal Right of Privacy law

The right of privacy is an individual's right to control information concerning his or her person and generally disappears on the death of an individual.³⁸ The right of privacy has various forms. It includes the right to be left alone and free from intrusion. It includes the right not to be portrayed in a false light. It includes the right to not bring to light embarrassing facts, which may have been buried and unknown to the public for a lengthy period of time. Once the right of privacy is exposed, it may not be protectable

thereafter. The courts have taken differing approaches, but the general concern is that once someone gives permission to waive their privacy right, the privacy right disappears. Thus, it is not a right that may be assigned or passed on by will. Therefore, a story about a person who does not have a public persona may violate that person's rights of privacy. Also, a license of the right of privacy for only one motion picture may extinguish that right completely for the individual.³⁹ This particular right overlaps with, Defamation, Libel, and Slander and Life Story Rights that are discussed later.

A character creator that creates characters based on people who really lived must clear the right of privacy with all the individuals that may appear in the authors' work. For example, a movie based on the life of a dead, and relatively unknown soldier of war, may require releases from all the real people that surrounded the life of the soldier, and if they have characters based on them, in the movie. Audience members that desires to appropriate a character of this nature may inadvertently present the character in a way that is contrary with the individuals those characters were based on.

Privacy Law: Defamation, Libel and Slander

Audience members that desire to appropriate characters that are based on real people must be aware of defamation laws so that, when actually appropriating, audiences will not present the character in a way that will not only challenge the author's rights in a character, but also challenge the defamation laws that are relative to the character, and the real person the character is based on.

Defamation consists of publication of a falsehood that damages an identifiable person or corporation. A falsehood is anything that cannot be proven to be true. Even if something is true, proving it in court, under the rules of evidence, may not be easy. A statement is defamatory if it tends to damage a person's reputation. The term "Libel" is used to identify a defamatory statement or act in written form such as letters, posters, scripts and in some American States even broadcasts. When the same act is done orally it is called "Slander", such as during speeches, and radio transmission.

Characters that are based on real people are subject to defamation law. Creators must take care when portraying people in the public eye, and extra special care when portraying living individuals who are not public figures or public officials.⁴⁰ The

presentation of the character must be as accurate as possible. If it is at all inaccurate, the creator must change the character so significantly, that not even the person's acquaintances will be able to identify the character as being based on the real person. Also important to note is that as Defamation does not require the victim to be known to the defamer, a character creator can be sued by a person she or he never met. For example, a creator creates a character that works for an organization that actually exists (like the FBI, Department of Heritage Canada) and uses a proper, yet common name. If it happens to be the same name as a real person once employed by that organization at any point in time, the character creator may be sued for libel by that real person if that person felt any reputation-related damage.⁴¹

Privacy Law: Life Story Rights

"Life story rights" are a group of real and imagined rights that are not clearly defined other than that they are held by living individuals. Life-story-rights are actually waivers from individuals who have characters based on them in order to portray events that happened in the real person's life. It may not even be necessary if the life story being told is reasonably accurate and based on certain information that is considered public domain, such as facts that are reported in newspaper articles or court transcripts.⁴²

Everything that has been covered in this study regarding privacy rights is to indicate to the reader that audience-character appropriation is not simply a matter of audiences being denied access to characters from corporate owners. It is to demonstrate that depending on the nature of the character, and especially with people-linked characters, that much law and regulation goes into the creation process of a character. Authorship issues alone, do not merit a complete argument to character appropriation as for every character there are more than just the individuals who create the character to consider, and there are concerns that go beyond the economic savings of the appropriators. There are the real people who inspire, influence and give persona to the stories that house characters who have just as much an interest as the character creators themselves, for controlled audience access to characters.

Personal Rights of : Right of Publicity & Right of Personality

The right of publicity has become so expansive that the easiest way to think of the action is that there is a potential case for liability any time anybody uses anyone's name, likeness, or voice (or imitation thereof) for any reason. Beyond that, it is a matter of what defenses, if any, might apply.⁴³

The right of publicity is an American doctrine defining an individual's inherent right to control the commercial use of his/her image. Specifically, using someone's face or name to sell a product without permission.⁴⁴ The term duration of this right may be infinite. Unlike the right of privacy that ends upon the death of the person, the right of publicity may well exist forever, akin to trademarks. In fact, a number of estates of deceased celebrities have their images aggressively protected from users who wish to associate their products or services with them. In about ten states in the United States, the law recognizes that the estate of the deceased personality is entitled to continue to receive royalties accruing from the use of the likeness of the personality. On this basis the estate of Elvis Presley has received a lot more money since the entertainer's death than he had ever received during his lifetime.⁴⁵ This right extends to stopping the use of imitations, which are so similar to a well-known person, and obviously not in the context of a parody, that it would confuse the public audience that the person in question had endorsed the product or service.⁴⁶

Canada has a right of personality instead of right of publicity, but both bodies of laws regard the exact same type of offense. Generally, this tort recognizes the existence of a proprietary right in a person's personality, image or name for the purpose of marketing. It usually applies to a person who enjoys some celebrity status, and where there is an implication that the person endorsed the user's activity. It is an offence under Canadian law to do anything that could falsely suggest a connection with an individual. The term duration in Canada for right of personality survives the death of the person whose personality is misappropriated for at least 14 years as interpreted by Judge Lederman

ruling in Gould Estate vs. Stoddart Publishing Company.⁴⁷ It is the opinion of this author that as more cases are litigated under this tort that the term duration will continue to expand as in the case with the American precedents.

Again, a character creator that creates characters borrowing the images of people who once lived or are still alive must clear the right of publicity in the United States, and the right of personality in Canada with all the pertinent individuals. This includes performers who are thought to lend their bodies and images in the interpretation of characters through their performance. Audience members that desire to appropriate a character of this nature will not be affecting only the character copyright holders, but also the people and estates who own the images that were incorporated in the presence of the character.

Commodity Industry Characters and the Law

Commodity Industry characters are subject to all the same standards as fictional characters and people-linked characters. These characters are different from the first two types because these characters are associated directly with business and economic concerns. They represent companies, services, and products and not the author of the character. Their primary goal is to attract attention for sales, advertising and marketing purposes. In addition, because these characters are associated with economic spaces, other bodies of law and industry practices also cover them. In the following discussion I look at the laws and practices that apply to commodity industry characters which are Trademark Law, Unfair Competition and the practice of Merchandising.

Trademark

When characters can be identified with a particular source, the image of that character may qualify as a trademark. (Bugs Bunny, Porky Pig and today Michigan J. Frog are all identifiable with Warner Bros). The graphic depiction of the character is already protected by copyright, but trademark gives additional protection because unlike copyright, which has a limited term, and which will eventually expire, trademarks can (at least theoretically) last forever. As long as a trademark continues to be re-registered, and the owner of the trademark is actively protecting the distinctiveness of the mark, it can

continue to be protected even if the copyrightable portion has entered public domain. Characters used as trademarks may work better than logos or slogans because character trademarks have the ability to evoke emotional responses. Characters instill confidence, trust, integrity and honesty in products, services or the source responsible for those products and services. Faith in corporations may be shaky, but belief in characters persists.⁴⁸

A trademark is a word, symbol, picture, logo, design or shaping of goods, or a combination of these elements, used to distinguish the goods or services of one person or organization from those of another in the market place. A trademark allows its owner exclusive use of that mark to be identified with certain goods or services.⁴⁹ In Canada a trademark has to be re-registered every 15 years, whereas the United States requires a re-registration every 10 years. Trademark owners will not be stopped from registration unless it can be proven that the general public at large no longer associates a trademark with the distinct features of a particular entity from another entity. This aspect is what forces trademark owners to be more vigilant with unauthorized users than with copyright infringement. For example, "Coca-cola" and "Coke" are trademarked names for a line of products from the same entity, which primarily includes a soft drink. If however the general public at large began to use the word "Coke" to describe any and all soft drinks, "Coke" would lose its distinctiveness for that entity and be prevented from being re-registered which can conclude in having anyone using the "Coke" name to sell goods. When this happens, both the entity and the public will suffer. The entity has lost its distinctive mark, and with it the ability to identify their truly direct association products, thus confusing a public which thinks it may be making purchases and connections with one sources entity, but in effect, has been duped. For this reason,

...the stronger the trademark for a character becomes, the less willing the owner of a character is allowing uses of the character, such as fair use, that may be permitted under copyright law. Trademark will not permit a graphic character to be trademarked solely for its own protection, however, it does permit the character's name and likeness to be trademarked when the function of that trademark is to indicate the source of the products and services bearing that mark.⁵⁰

Unlike most other characters, characters that qualify as trademarks carry the added element of source identification. Here it is not just the author's moral rights that come into play, but the investment of organizations that use characters as a symbol for all things they represent. For this reason, character appropriation here is seen almost as a deterrent to consumer protection. The idea behind the trademark law is to identify the goods and services of one source from another, and trademark characters are those identifying signals. When they are appropriated, the very nature of the good faith that is supposed to exist between merchants and consumers is threatened, as the character is not merely a form of entertainment, but a reminder of the familiar quality that consumers have come to expect from a particular producer. However audience appropriation tends to happen most frequently to those characters that are so well embedded in the fabric of our culture as cultural commodities. Trademark characters are part of that fabric. Within a predominately capitalist culture (such as in North America), trademark characters are abundant in advertising, marketing and penetrate the everyday life of audiences. I will argue they are too familiar, too recognizable, and evoke too much audience-affect, to avoid their being inevitable targets of character appropriation.

Unfair Competition

The law of unfair competition is where I borrowed the term "appropriation" (from misappropriation) for the initial idea for this study. Under this law the concern is not for the social or cultural status of the character, but the source identifying power that characters have as business signifiers. As discussed under trademark law, characters as signifiers of product and service sources encourage incredible investments from business corporations, and the appropriation of those characters further complicates a businesses' means to control their message to their consumers. But as I also stated earlier, it is characters which are predominately used as signifiers that carry more value for audiences as appropriation tools, precisely because those particular characters are so engulfed with meaning making affect.

Unfair competition is a legal principle stating that using a character (for source identification) without authorization equals unfair competition with the individual who created the character and invested considerable sums of money to develop it.⁵¹ The law

of unfair competition is primarily concerned with causing an economic injury to one business through a deceptive or wrongful practice from another business or individual.⁵² Unfair competition laws involve a variety of different causes of action and those that are character related primarily fall into three categories: misrepresentation, sponsorship and misappropriation. Misrepresentation occurs when a party represents that a particular character is associated with their product or service, when in reality, it is not. Sponsorship occurs when a party indicates that a particular character has endorsed its product or service when it has not. Misappropriation, which is most relevant with the protection of characters, occurs when a party, in essence, reinterprets another's character in order to associate it with their product or service. Therefore when one brings an unfair competition action, the injured party is claiming that their character has been wrongly associated with another party's product, service, person, company, or idea.⁵³

Merchandising

Merchandising is a commercial, not a legal practice, yet it is based on legal rights that I have already described. I have included it here for one reason. Sometimes an audience appropriates a character, and does so in a way that may resemble an act of merchandising. I want to present to the reader how the commercial industry defines merchandising in order to present both sides of this cultural bargain argument.

A merchandising property is anything that is capable of being licensed. The most common reason character merchandising occurs is the opportunity to buy instant goodwill for a product by associating it with a famous character. These are clear cases of added value, in that the character changes a product in such a manner as to make it the overriding reason for the consumer to purchase the product. It is very important to make sure there is a good "fit" between the merchandising property and the product or service to be sold in association with it.⁵⁴

Merchandising rights can be extremely profitable. In 1987, sales of licensed products in the United States were approximately 56 billion dollars. However, the character creator may not see a share of merchandising royalties if the creator is not the person investing the money to produce the merchandising item. The top royalty that may be paid to the original creator is 15%-20% of the licensor merchandising profits for

characters that have previously been merchandised. If the merchandising has never been exploited for a particular character, the royalty will generally be less.⁵⁵

When an audience appropriate a character, beyond the cultural desires of that audience are economic, moral, and personal concerns of the authors, owners and investors of characters. Under the terms of the cultural bargain, neither side is no more and no less important, but changes in the law over the last near century have indicated a trend to favor the position of the rights holders of characters, and restrict audience access to characters. The law and commercial practices surrounding character acknowledge a public audience as consumers and appropriators, but not as participants in the definition of characters, nor does it acknowledge the desire of audiences for characters in any means beyond those of economic exchange. The law is incomplete, as the cultural bargain (which the copyright law was initially based on) has fallen out of balance, and audience access to authors' work is not only stagnated, it is decreasing.

Endnotes for Chapter Two

- ¹ Andrew Alpern, 101 Questions about Copyright Law, Mineola, NY, Dover Publications Inc, 1999. p.2
- ² Lesley E. Harris, Canadian Copyright Law, Toronto Ontario, McGraw-Hill Ryerson Ltd, 2001. p.2
- ³ Stephen F. Breimer, Clause by Clause, New York, NY, Dell Publishing, 1995 p. 24
- ⁴ Alpern, p. 1
- ⁵ Alpern, p. 1-2
- ⁶ Harris, p. 12
- ⁷ Harris, p. 16
- ⁸ Steven Netmetz, "Copyright Protection of Fictional Characters", *Intellectual Property Journal*, December 1999. p. 68
- ⁹ Harris, p. 70
- ¹⁰ Bob Sotiriadis, "A Summary of some Distinctions between Canadian and American Copyright law and practice", www.robic.ca, 1998. p. 1
- ¹¹ Lloyd L. Rich, "Protection of Graphic Characters", <http://publaw.com/graphical.html>, 1998. p. 3
- ¹² In a number of cases where cartoon characters were reproduced as three-dimensional dolls or figures, copyright infringement was found without any regard to the issue of copying the plot or personality of the character. I argue this is because dolls and figurines have no other context than what we already know to exist for the said character. Affect is produced within the eye of the beholder, thus where no other context for the character is available, it stands to reason that the affect is already accounted for, and that the graphic depiction of the character is the limited recourse of action.
- ¹³ Alpern, p. 42
- ¹⁴ *ibid* p. 12
- ¹⁵ Breimer, Clause by Clause, p. 10
- ¹⁶ Bob H. Sotiriadis, "A Summary of some Distinctions between Canadian and American Copyright law and practice", www.robic.ca, 1998 p. 15
- ¹⁷ *ibid*
- ¹⁸ *ibid*, p. 16
- ¹⁹ Lloyd L. Rich, "Parody: Fair Use of Copyright Infringement", <http://www.publaw.com/parody.html>, 1999. p. 1
- ²⁰ Harris, p. 129
- ²¹ Rich, "Parody: Fair Use of Copyright Infringement", p. 1
- ²² Harris, p. 95-104
- ²³ *ibid*, p. 216
- ²⁴ *ibid* p.95-104
- ²⁵ Howard Blumenthal and Oliver Goodenough, This Business of Television, New York, NY: Billboard Books, 1991. p. 171
- ²⁶ Harris, p. 216
- ²⁷ *ibid*
- ²⁸ Alpern, p. 30-31
- ²⁹ *ibid* p. 16
- ³⁰ *ibid* p. 31
- ³¹ "Film or Video Production Services Tax Credit (PSTC) Guidelines", Canadian Audio-Visual Certification Office (CAVCO), http://www.pch.gc.ca/culture/cult_ind. 1998.
- ³² Stephen F. Breimer, The Screenwriter's Legal Guide, New York NY, Allworth Press, 1999. p. 31
- ³³ Breimer, Clause by Clause, p. 25
- ³⁴ Michael C. Donaldson, Clearance & Copyright, Los Angeles, CA, Silman-James Press, 1996. p. 25
- ³⁵ Harris, p. 118-120
- ³⁶ Breimer, Clause by Clause, p. 160
- ³⁷ The concept is that the original creator of a work retains certain rights in their creations, and that they should continue to benefit economically or otherwise for the continued use of their works. The Droit-en-Suite is the right for a visual artist to continue to be made aware of and share in any proceeds from the

ownership exchange of an artist's visual works. It was developed in the spirit of the special nature of visual works (such as paintings that can be sold only once by the artist and can not enjoy the same style of diverse adaptations as other works). Recognized as a right in parts of Europe, but not recognized as a right in neither Canada nor the United States the Droit-en-Suite survives in contract law. This allows an artist to keep up to date to know who has just acquire physical possession of the work the artist first created, and to collect a percentage of whatever monetary value (if any) that changed hands in the exchanges. Under the Droit-en-Suite idea, visual artists can negotiate this as a term in contracts that cover the sale of their visual art, and the characters those works incorporate. This right may include a set percentage (10-20%) of the resale price every time the physical work changes ownership and the obligation to inform the artist when such a change occurs. Also, the artist may negotiate an exhibition clause which allows the artist to take back the visual work once every five years, for a 60 day period, for the artist to use in an exhibition of the artists overall work.

³⁸ Donaldson, p. 41-42

³⁹ Paul D. Supnik, "Life Story Rights", <http://www.supnik.com/lifestor.htm>, 1999. p.2

⁴⁰ Mark Litwak, Litwak's Multimedia Producer's Handbook, Beverly Hills, CA, Silman-James Press, 1998. p.43-44

⁴¹ Debra Purdy Kong, "A Lesson in Libel", Q-Write, Quebec Writers' Federation Newsletter, Vol.1 No.4, Summer 1999. p. 8

⁴² Supnik, p. 1-2

⁴³ Schuyler M. Moore, The Biz, Los Angeles, CA Silman-James Press, 2000. p. 161

⁴⁴ *ibid*, p. 42-43

⁴⁵ Daniel R. Bereskin, "Merchandising Licensing and Personalities", www.bereskinparr.com/art-pdf/MerchandisingPersonalities.pdf 1997. p. 2

⁴⁶ *ibid*

⁴⁷ Susan H. Abramovitch, "Misappropriation of Personality", *Canadian Business Law Journal*, Vol. 33, 2000. p. 239

⁴⁸ John Mendenhall, Character trademarks, San Francisco, CA, Chronicle books, 1990. p. 7

⁴⁹ Harris, p. 5

⁵⁰ Rich, "Protection of Graphic Characters", p. 5

⁵¹ Johanne Daniel, "Copyright Clearance Guide: A Practical guide on Copyright Clearance for Multimedia Producers", Department of Canadian Heritage & Interactive Multimedia Producers Association of Canada (IMPAC), http://www.pch.gc.ca/culture/cult_ind/copyymm_e.htm, p. 11

⁵² Unknown, "unfair competition law: an overview" The Legal Information Institute, Cornell Law School, http://www.law.cornell.edu/topics/unfair_competition.html

⁵³ Rich, "Protection of Graphic Characters", p. 6

⁵⁴ Bereskin, p. 1

⁵⁵ Breimer, Clause by Clause, p. 35-37

Chapter Three: The Three Arguments for Authors and Audiences

An example of modern day author monopoly:

Bill Watterson and Audience access to *Calvin and Hobbes*

I spent nearly five years fighting my syndicate's pressure to merchandise my creation. In an age of shameless commercialism, my objections to licensing are not widely shared. I believe licensing usually cheapens the original creation. When cartoon characters appear on countless products, the public inevitably grows bored and irritated with them, and the appeal and value of the original work are diminished. I don't want some greeting card company using Calvin to wish people a happy anniversary, and I don't want an animation studio giving Hobbes an actor's voice. I don't think of Hobbes as a doll that miraculously comes to life when Calvin's around. Neither do I think of Hobbes as the product of Calvin's imagination. The nature of Hobbes's reality doesn't interest me, and each story goes out of its way to avoid resolving the issue and I don't want the issue of Hobbes's reality settled by a doll manufacturer. When everything fun and magical is turned into something for sale, the strip's world is diminished. *Calvin and Hobbes* was designed to be a comic strip and that's all I want it to be. It's the one place everything works the way I intend it to. Who would believe in the innocence of a little kid and his tiger if they cashed in on their popularity to sell overpriced knickknacks that nobody needs? Unfortunately, the more popular *Calvin and Hobbes* became, the less control I had over its fate. I am probably the only cartoonist who resented the popularity of his own strip. When I didn't license, bootleg *Calvin and Hobbes* merchandise sprung up to feed the demand. Mall stores openly sold T-shirts with drawings illegally lifted from my books, and obscene or drug-related shirts were rife on college campuses. Only thieves and vandals have made money on *Calvin and Hobbes* merchandise. For years Universal Press Syndicate pressured me to compromise on a "limited" licensing program. The idea of bartering principle was offensive to me and I refused to compromise. I will not license *Calvin and Hobbes*.¹

-Bill Watterson, Author, *Calvin and Hobbes*

It was intellectual property attorney and scholar Michael Shapiro, who coined the phrase "the cultural bargain", that I use in this study. Shapiro describes it as a belief that, "our copyright law is based on the conviction that encouraging individual creativity by personal gain is the best way to advance the public welfare."² He is identifying two sides in this bargain; the authors, creator and owners of copyrightable work on the one side,

and the public audience end users on the other. In effect, creators must have an incentive to create, to produce new works that will enrich a society. This incentive is the finite monopoly they are granted to control and profit from the use of the works. In exchange for this incentive, once the limited monopoly expires, the copyrightable work becomes public property (enters into the public domain) and audiences are free to use it without author permissions or consent. So copyright evolved in North America with its core philosophy being a balance of often opposing views: the balance between the economic rights of the creator and the public good.³ Within this cultural bargain, characters, of the copyrightable works, are the currency exchanged as part of that bargain. However, as I examined the current legal status of characters in Chapter Two, it is evident that the cultural bargain is not in balance. The balance of the cultural bargain is shifting due to new copyright precedents. The economic aspect of the copyright equation (giving creators a limited monopoly on their works) is receiving increasing emphasis at the expense of the other end of the equation (the public good).⁴ The debate in question boils down to who gets privileged; and can be presented under three main argument headings, each one with a strong case for both the author of the work, and the audience that desires to use and sometimes appropriate characters. This chapter will consider the arguments for each side of the cultural bargain debate.

The example of author Bill Watterson's modern day author monopoly, with regards to limiting audience access to his comic strip *Calvin and Hobbes* is an excellent study to draw out the three main arguments and the cases for each side of the cultural bargain debate. Watterson is the author of *Calvin and Hobbes*, and one of the few authors that refused to fully economically capitalize on the success of his creations. This caused tension between him (the creator of the strip) and his syndicate (his distributor, with which he had signed a contract). Effectively, with the signing of the contract, Watterson is confirmed as the creator of the work, and the syndicate as the owner (both of whom would share in the title and privileges of "author"). Luckily, the syndicate chose to respect Watterson's property rights and wishes about merchandising, as contractually they were under no obligation to do so. As Watterson refused further access to his characters, the

audience-character affect relationship caused a desire so strong bootleg (acts of appropriation) merchandise began to appear to fill the demand by audience members and businesses alike. It is possible that some of the people who purchased the bootleg merchandise may have surmised that Watterson had authorized such practices, and thus assume that not only was Watterson approving of the use, but that he was profiting from it, causing confusion in source identification. However, anyone truly a fan of *Calvin and Hobbes* would be able to distinguish that at least the obscene materials were genuinely counterfeits by taking into account the context of the use of the material. At one time, an audience member could have free access to an author's work within the scope of that audience members' lifetime as copyright was set to expire within decade or two, of the work being created and /or published. If the authors' work was issued the same year that the audience member was born, the work would enter the public domain by the time the audience member had reached adulthood. Under the current legal status, that action would unlikely be available during the audience member lifetime as I have already demonstrated in Chapter Two. In order to further encourage Watterson to continue creating his cartooning and sharing it with his audience, he had to be given property rights as an author, to restrict the appropriating, which was itself an act of creativity and self-expression of the appropriators. In the meantime, none of the legal regulations in place addressed the desires of the audience based on the affect relationships they formed with the characters of Calvin and Hobbes.

There are three main analytic arguments present in this example. The first is the moral/property argument. Here the case for authors is that they have been given a property right (copyright and other intellectual property) in the works they create, and that it is wrong for anyone to appropriate the property of another, for their own means, without the consent of the property owner. The case for audiences under the moral/property argument is that, under the cultural bargain, the audience was originally meant to have complete access to the works of authors, after a reasonable limited monopoly. However, as the monopolies have grown in new rights recognized for authors, and longer-term duration, the present trend indicates that fewer works shall enter the

public domain. Audiences have lost access to characters as meaning signifiers due to the changing regulations of public domain. At the same time, the interpretation of audiences' fair copying exceptions have not increased but stayed relatively the same while authors continue to enforce the preferring meaning of characters, leaving audiences at a loss for global communication tools that characters perform as.

The second argument is the labor argument. Here the case for authors is that for any character, there are multiple persons who claim the "author" title including creators, owners and many others who contribute to the existence of a character, such as performers, designers, writers, and so on. There are numerous contributors, all of whom have a vested interest (financial and/or creative) in not seeing character appropriation happen. Such appropriation may confuse other audience members, who consume characters, into thinking the result of the appropriating practice is in fact endorsed by the original and possible multiple author(s). The case for audiences comes in two parts. First is that the context of the appropriation needs to really be considered carefully. Not all appropriation of characters will confuse consumers of characters, and in fact most of the readily identifiable appropriation, is readily identifiable precisely because audiences can distinguish it from material that is representative of the goodwill of source identification. Character appropriation is not, nor should it be a shield for fraudulent business practices. Character appropriation is a means by which audiences express the affect relationship they celebrate with characters. The second is that audiences also perform a form of "labor" in the existence of character beyond the character-affect relationship. Audiences play a direct role in the popularity and success of a character. Audiences confer meanings in characters, celebrate characters, promote characters, and provide economic incentives of authors in the culture of character. Generally, in a liberal capitalist society, if one invests labor in something, one gets some rights back in exchange. The audience does commit an act of "labor" in the existence of characters, but it is different from that of authors, and is not quantified "labor" in the law (or under the cultural bargain) as meriting rights in characters.

The third argument is the public argument. Here the case for authors is that without restricting the activities of character appropriators, authors may lose incentives to be creative, and will definitely lose incentive for sharing any of their further creations. If their earlier creations are all but completely appropriated in ways they can not control or take action against, authors will not invest the creativity, time and efforts to create more work in the future that is just going to be lost to them. For authors, the good of the public is interpreted as their being able to control the creative expressions of their work, so that the public will not be denied future publication of their newer works. The case for audiences is that they enter into affect relationships with the characters of authors' works. Audience desire to appropriate characters is based on this relationship and restricting such access does not serve the public good, as the act of appropriation is a means by which the audience may express itself using familiar characters as representative signifiers. The audience affect relationship is not at all recognized under any legal status, as a property right or otherwise, and is completely absent from current regulations surrounding characters. For audiences, the good of the public is interpreted as the freedom to use the characters they experience affect with in a manner that allows them to experience different meaning-making of the characters, that should not be controllable by authors/owners.

The Moral/Property Argument for Authors

When copyright was first developed, it was not in the name of protection for authors, but to prevent authors from having a long lasting monopoly control of the works they create, which would prevent audience access. In exchange for the eventual allowance of audience free access to authors' works, authors were encouraged to create works and share them with the public audience by being given property rights in the works created. Since this initial creation of copyright in authors' works, copyright term durations have increased, and the number of rights recognized has also increased.

Jane Gaines, author of Contested Culture The Image, the Voice, and the Law (1991), gives an analysis of John Locke's definition of property right. "Property is premised upon freedom, the ownership of oneself and one's own labor, for if you can not

own yourself, you can not own property, and if you can not own property, you can not own yourself."⁵ A right is a moral principle defining and sanctioning a person's freedoms based on a person's fundamental right to a person's own life.⁶ The right to life is the source of all rights, and property rights is their only implementation. Since a person has to sustain life through action and effort, the person who has no right to the product of those efforts has no means to proper survival.⁷ The right to property means that a person has the right to take the economic actions necessary to earn property, to use it and to dispose of it; it does not mean that others must provide that person with property.⁸ Thus morally, an author should not be deprived the opportunity to hold on to the rights of the fixed tangible expressions the author has created.⁹

The nature of the rights in question allows for more than one interpretation of "author". The title of author can refer to the person who created the work, the person owns the rights in the work, the person who commissioned the work, the person who acquired the rights in the work, the person who was the directing mind that oversaw the creation of the work, the person who invests in the work, the person who contractually can act as if the person were the author, an employer, a business entity, or a combination of any of the above. Individuals that create works, but do not own the copyright, and thus forfeit their title of author to another person or entity is not the same situation as when an author retains rights in a work, and the work is appropriated by another person or entity. In the first scenario, the individual always has a choice in the matter and the opportunity to obtain financial remuneration (or another form of exchange). The individual is fully aware that the copyright and other intellectual property does not rest with him/her, and there is usually a signed agreement to that effect. If the individual is not in favor of such an arrangement, the individual can simply choose not to enter those types of agreements. In fact, the title of author that entitles the rights in a work (such as copyright) also carries with it added responsibility. It is the author of the copyright and other intellectual properties who is responsible for protecting the work from infringement, appropriation, legal concerns (such as proper registration), business & financial management, document control, and maintaining the integrity of the work. This responsibility also includes

responding to legal actions taken against the author, including nuisance cases (cases which there is no legitimate claim, but are simply individuals attempting to take advantage of others' success demanding payoffs). Other than creator ownership can also have many benefits such as the name recognition that will be associated with the work being created. A single creator may create a marvelous work in which copyright vests in him or her. However, in economic spaces the creator would enjoy much more financial success having a name like Paramount to influence the attention the work would receive. In either case, the individual has a choice whether or not to share or separate from the property rights in the works created.

Works (and the characters they bear) that are appropriated, leave no such freedom of choice for the author. The authors' endeavor is taken hostage by audience affect desire. Character creators are given a living wage to compensate them for their quantifiable time and effort which includes research, reflection, consultation, trial and error, and taking financial and reputation risks. The creators and rights owners have earned the right to their property rights; appropriators have not. Authors' works and the characters are the should be free from audience interference, coercion and appropriation and an author should be able to enter into license-use agreements in a completely voluntary fashion.

The Moral/Property Argument for the Audience

Copyright was originally designed to protect the public from authors' monopolies, it is interesting to study the history of copyright extension to see how this legislation has now become the very reason why audiences have reduced free access to creative materials than ever before. This is most significant in the discussion of characters, as characters are the subject of infringement and appropriation moreso than any other element in an original work. Current treatments of intellectual property conflicts that are treated in the judicial system today are primarily economic in nature. The cultural bargain that supports public access to author's works is seldom considered in case law. The result is that the public's interest in access to author's works is underrepresented.¹⁰

The paradox here is that the owners of popular forms, which constitute our most widely shared culture, are in the contradictory position of encouraging the wide spread uses of characters (such as Batman,

Superman and Snow White). But when these forms are used spontaneously, as in the cases of Snow White parody on the Academy Awards show, the owners want to take them back. In aggressive monitoring the uses of a popular form (character) worldwide, does the entity (author) that circulates the popular form (character) also attempt to enforce what the popular form means?¹¹

Authors attempts to control the meanings of the characters they create stifle the audience opportunity to use those characters as personal signifiers, for audience members to express themselves with symbols (characters) that have communal meanings already assigned to them. At one time, the cultural bargain provided that authors have short monopolies over their works, so that the authors could control the meanings of those works for a limited time only. When those works entered the public domain, audiences would have complete access to new meaning signifiers that they could use without the interference of the authors/owners attempting to influence their expressions of internal meaning. This arena for audience-global communication has all but vanished due the to changing nature of the public domain. In order to understand the effect of the changing public domain on the freedom of audience-global communication, I present the argument below on the public domain, and the limited resources audiences have to appropriate characters freely.

There are only two avenues for audiences to legally appropriate characters. They are fair copying and the public domain, both of which have been discussed in Chapter Two. However, as authors enjoy more power and are having more rights recognized, the audience has been practicing under the same limited definition of fair copying and a decreasing public domain. The law needs to have a broader interpretation of fair copying, just as the U.S. has a broader scope of parody than Canada does. There are two identifiable values associated with fair copying and the public domain. The first is that society bases some of its creative works upon the earlier work of others. The richer our interpretation of fair copying and public domain, the more creative works a society has available without restriction, the more "fodder" a society has for the creation of new works.¹² The second value is that fair copying and works in the public domain cost

nothing to use, as the original author can not charge a fee or royalty for access to the work.¹³

There have been up to four ways for copyrightable materials to enter into the public domain. Two of which no longer apply under current legal statutes, one of which is becoming increasingly rare and a last one is not directly addressed by law. They are: 1) Failure of registration and proper notice 2) Failure to renew a copyright 3) Copyright expiration and 4) Author mandated public domain.

Failure of registration and proper notice, and failure to renew a copyright refers to a time when the copyright laws when the lack of a proper copyright marking on the work, or the lack of renewing copyright with the government meant an automatic forfeiture of copyright in the work.¹⁴ For example, Filmmaker Frank Capra's movie, *It's a Wonderful Life* (1946), fell out of copyright for failure to renew.¹⁵ However the laws in Canada and the U.S. are different today, and such practices are no longer followed or required, and copyright remains intact regardless of registration or renewal. Copyright expiration refers to works in which the copyright simply expires. This situation however, as has been presented earlier in this study, is becoming less common due to copyright term duration extension. Lastly, author mandated public domain refers to situations where the author of a copyrightable work willingly puts the work into the public domain prior to any expiration of the copyright. This is when the author has made the conscious choice to give up, or waive copyright. Currently, the law simply does not address this issue and it is rare. What an author can do is include a notice on the work that copying (or a limited copying) is permitted.¹⁶

The current trend seems to indicate that eventually, authors will enjoy perpetual copyright, and such a precedent has already occurred in England for the work of *Peter Pan* (1904). The late Author J.M. Barrie assigned all the rights and royalties from his play *Peter Pan* to the Great Ormond Street (London) Hospital for Sick Children in his will. The copyright in *Peter Pan* was due to expire in 1989 (50 years after the authors' death). However in 1988, one year before the work entered the public domain, The British Parliament under Prime Minister Lord Callaghan presented a new Copyright Bill and

amended the law as to assign the *Peter Pan* work perpetual copyright in the care of the Hospital.¹⁷ This means that Peter Pan, Tinker-bell, Captain Hook, Wendy, and all other characters from this story will also be denied entry into the public domain for the territory of England. Therefore, Steven Spielberg had to make peace with the Children's Hospital in London, which owns the copyright to Peter Pan, before he could distribute the film *Hook* (1991) (a derivative work of *Peter Pan*) in Great Britain, even though *Peter Pan* is public domain in the U.S. where the film was made.¹⁸

As the public domain continues to decrease, and the stagnate interpretation of fair copying, the balance of privilege is tipping, and it is not towards the audience end users. The term duration of the copyright limited monopoly is still limited compared to infinity, but unlimited compared to the life expectancy of an individual audience member. If a person is born the same year that a work is issued, on life expectancy statistics alone, the copyright in the work will last longer than the person shall live. This is a far cry from the term of copyright expiring in a couple of decades, well within a reasonable lifetime. Audiences need more room for appropriation, as the law has pushed limited and free access so far out of their livable reach. As Gaines notes, "The doctrine of secondary meaning tells us that some signs take on new commercial connotations through their wide circulation and the new meaning becomes so common that it comes to seem the natural meaning of the sign (character)." ¹⁹ Without the cultural bargain in reasonable balance, and authors controlling the meanings of characters, audiences are left without the global-communication tools of characters to further explore the relationships their internal meanings have with similarly related global audience communities.

The Labor Argument for Authors

The labor argument for authors comes in three sections. The first is the idea that there are multiple people that being injured through appropriation, when audiences appropriate characters. The second is the economic issue of source identification and consumer protection of audiences threatened by character appropriation. The third is the labor that goes into how authors and others make character meaningful and affect-possible for audiences. As was discussed earlier in this chapter, there are a number of

people who can qualify for the title of author, and although only very few of these acquire the title, behind the existence of every character are a multiple of players. Some of those have been explored in Chapter Two. The people who participate in the existence of characters can include the writer who conceives of it, the illustrator of a visual depiction, the investors who fund it, the employees that are hired to add to the character existence (such as animation designers and marketing consultants) and so on. These also include producers, directors and other contract workers in the various media in which that character is presented. The actors, performers and voice workers that present characters include make-up artists, plastic surgeons, puppeteers, set and model designers, agents, lawyers, managers, as well as suppliers, distributors and sales personal that contributed to getting the characters accessible to the public consumption. As stated throughout Chapter Two, an audience appropriator of characters is not just effecting the author (in the copyright definition of the word), but all the people who participate in the existence of the character who may still be sharing in the characters' continuing success (such as merchandising royalties).

The second argument for more protection for authors is the issue of source identity and consumer protection. By "source identification" I mean that when an appropriator uses a character, without permission of the character author, it may be highly possible that audiences of the appropriation will assume that the outcome is fully endorsed by the original character author. Thus, the audience is confused regarding the source of the appropriation with the source of the original character. The source of the appropriation is the appropriator. The source of the original work is whomever the original author may license such rights to, or the original authors themselves. In the case of the appropriator, there is no value for the appropriator to maintain any sense of quality associated with the character, for the long term. The audience suffers and blames the original author. The original author of the character is greatly concerned with establishing the good will and quality with the character audience as the original author is looking to establish a long term economic and cultural-affect relationship with the audience. The premise that this argument is based upon is the idea that the public knows the value of

characters to authors. As an audience becomes aware of corporate licensing arrangements, it became feasible for them to believe that all uses of characters must have their authors consent.²⁰ Also, because the general public is aware that the onus is on the rights holder to take action against infringements, the public will think (unless they have situated knowledge to the contrary) that all character related products *must* have the rights holder permission. Many character owners do not themselves manufacture the product on which the character appears. Authors allow or license a company to manufacture and sell a product under their character mark. The essence of the licensor-licensee relationship is the control by the licensor over the use of the character and quality of the goods manufactured and sold by the licensee.²¹ A character author who allows a third party to use its character mark to decorate shirts would not want that mark to be associated with a shirt of inferior quality. Legal implications aside, this is simply a dollar and cents proposition.²² Characters have incredible power as signifiers of source, and the appropriation of such characters not only infringes on the multiple authors that participate in the existence in the character, but directly infringe on the opportunity of producers that use characters to communicate to specific market audiences.

The third labor argument is that character authors aspire to make character meaningful to audiences. No character is created by mistake, and there are an unlimited number of techniques to make characters meaningful. The author finds something in common among a large group of people in a certain era; once they articulate this, it materializes into the cultural product of character. Thus the "people" become "audiences", actively interpreting character. There are storytelling standards solidly structured to deliver a satisfying emotional experience to an audience.²³ Some of the other tools that the industry uses to make characters connect with audiences include stability factors, such as consistency. In these cases, characters typically stay the same age, maintain same appearance, and same outfit no matter how things change in the real world. (*Sesame Street's* Big Bird aged about 3 years over the course of the 20 years that the show has been on air). Also, characters will go through certain predictable and reoccurring events and situations overly frequent, with only minor variations (Charlie Brown never kicking

Lucy's football after 50 years of trying).²⁴ Characters are created with intent to attract affect relationships with audiences. Characters represent the fruits of labor of a multiple of players (some of which are authors), and act as signifiers and authors calling cards. They embody that labor. Allowing appropriation of characters encourages acts of fraud against authors and character-audience consumers, and discourages motivation for the authors and other participants from creating more characters.

The Labor Argument for the Audience

Audiences have a desire of character appropriation that goes beyond the economic concern of authors as an access to communicative resources so as to construct public identities of expression. Here I look at two arguments. The first is the labor of the audience in the existence of characters, and the second is at the context in which some character appropriation may exist. For the labor argument, as Richard Dyer notes

The agencies of fan magazines and clubs, as well as box office receipts and audience research, mean that the audience's ideas about a star (read: character) can act back on the media producers of the (character's image). This is not an equal to-and-fro. The audience is more disparate and fragmented and does not itself produce centralized massively available media images.²⁵

The situated position of the audience does not allow for the labor audiences invest in characters to be regarded by legislation related to characters. Audiences are restricted from the character properties they helped influence the character development of, and encourage the continued character existence in economic spheres.

Earlier in this study, I acknowledged the difficulty in defining what a character is. Although not yet a direct contributor in the definition of character, "context" was in fact considered as necessary in the first attempts to define character, as examined in Chapter One. That is to say, to define a character, one has to examine the context in which character is used. As a study of the context in which a character is presented is absolutely necessary for attempting to defining characters, so too must a study of the context be absolutely necessary to understand where the line must be drawn for acceptable character appropriation. The labor argument for the audience agrees that characters are not created in a vacuum; they are created primarily to develop deep affect connection with audiences.

The intent of affect behind the creative process of character development is precisely the reason that audience appropriation desire occurs, thus audiences are merely responding in the manner that authors themselves invoke.

When a character enters into an economic space to be absorbed and consumed by audiences, it is the audience that decides if a character fails or succeeds economically. It is the audience that enters into audience-character affect relationships and manifests that relationship with buying character merchandise, putting up homage web-sites, watches television, rents the videos, buys the book, tells other potential audiences members about it and decides the business-related fate of characters. This form of labor, on the part of audiences is not recognized as quantifiable labor under law as akin to author labor. The cultural bargain originally intended authors to initially profit from audience-character affect relationship, and then allow for full audience access after authors' limited term duration. As the law changed, the limited access for audiences to the character they made famous was never balanced out with a broader interpretation of audience rights (in the form of better fair copying access). As Michael Madow suggests in his article "Private Ownership of Public Image", fame is a relational phenomenon, conferred by others. A character can be made (created) but cannot be made famous on its own. "It has less to do with the intrinsic merits or accomplishments (of the character) and has more to do with the needs, interests and purposes of their audience."²⁶ I interpret Madow's definition of "fame", to also include the concepts of financial success, and as an example of the labor an audience inputs into characters, for which audiences receive no property rights in the form of rights of access to characters beyond the narrow means of fair copying. As I presented in Chapter Two, fair copying allows audiences to use a less than substantial portion of a copyrightable work for purposes of research, criticism, commentary, news reporting, teaching, education, private study, review, and news summary. Depending on the territory there are varying interpretations of fair copying that could be more or less flexible. Character appropriation is a style of copying that may go beyond the parameters of fair copying. As to whether or not a character constitutes a substantial part of a copyrightable work, or a work unto itself, is based on non-specific criteria, and ultimately

is for a judge to decide. This ambiguousness in the law is further compounded by the fact that characters can embody the meanings of the works they reside, and then carry those means beyond the confines of the original parameters of those works. Furthermore, character is also indefinable by law, and its own ambiguous nature does not incorporate the affect relationships that it develops with audiences; audiences that can use characters as cultural symbols and signifiers of ideas and images by in works that originally intended by authors.

The intent of the cultural bargain was to provide authors with limited property rights generating economic incentive to create works, and giving audiences fair copying privileges during the copyright term of the work, and complete access at the expiration of copyright. Now that authors' property rights are no longer quite so limited, audiences' access to works, (and especially characters) should accommodate audience appropriation of works that although may go beyond fair copying, which would still not endanger the source identification argument of author.

For example, the artwork of Dick Detzner whose art collection entitled *Corporate Sacrilege* is a true embodiment of character appropriation. Detzner uses well known trademark characters from breakfast cereals, food products, Disney and McDonald's and appropriates them in original works in religious-parody setting mimicking scenes from the Bible (See Appendix III, image III.2 to III.7). This social commentary ranks characters in our culture as being akin to religious deities would probably fall under the fair copying doctrine of the United States, as it parodies recognizable characters and settings in new ways to interpret familiar images, causing the audience to rethink the meaning behind those images. Any audience member who clearly grasps the intent and character references in Detzner's work would have to come to the conclusion that his images are not synonymous with the intent of the original author. In fact, it is precisely the fact that his images counter the preferred image of the original authors that Detzner's works communicate so well, and cause no confusion of source identification. Other examples of this are fan fiction (which appropriates well known characters into original stories and published on the Internet for example) and Characters Tattoos. In both

contexts, there is no doubt in the mind of the audience that these expressions are not synonymous with the intent of the original authors, thus no source confusion identify issue. In fact, fan fiction has a well established *modus operandi* to openly acknowledge that those stories do not reflect the values of the original authors, and in practically all instances, there is no commercial economic value attached to these technically illegal works. In tattoo culture, the state of the business is characters inscribed into someone's flesh that lives and breaths, taking on another form in the skin. The fact that tattoos work inside the human body is an angle that makes this an even more complex legal issue.²⁷ This personal use of characters in tattooing does not cause confusion in the general audience as the nature of tattoo circles simply does not affect source identification, but tattooing is not listed as a fair copying, under the law.

The author argument for source identification and consumer confusion is a strong one, but an outlawing of all appropriation would be against the very nature of why fair copying and public domain existed under the cultural bargain to begin with. I argue that instead of a full banning on the practice of appropriation, first consider that the audience, although not an author of a character, has committed acts of labor in the existence, and furthermore economic success or failure a character. Second, the context of the appropriation should be considered in light of its use. What the labor arguments calls for our cultural needs is better legal regulations for appropriation, to allow audiences to once again enjoy a balance of the cultural bargain and access to characters for self-expression that would not infringe on the author's concern of source identification. In instances where a direct infringement occurs when one author attempts to profit from the consumer confusion of the audience with character-related materials under the guise of being from the original character source, we can identify that fraudulent act as being a legitimate claim for damaging character appropriation. However, that reasoning alone should not cause all character appropriation to be forbidden.

The Public Good Argument for the Author

The argument for the public good on the side of authors includes the further encouragement of creativity and continued growth of an intellectual industry. Here,

copyright, and other bodies of intellectual property law, are looked at as concepts of value in the definition and structuring of value relationships. Authors are encouraged to create and develop characters, and in exchange for these endeavors, authors are recognized as retaining rights in the work, and that precedent is the basis for other authors to produce more works, as opposed to new authors reusing already existing works. By limiting access to already existing works, authors of those existing works are able to control and maintain the integrity of their original creations, and receive proper compensation when their works are used with permission. New authors, facing the lack of access, will be encouraged to create their own works, so that they too, may enjoy the benefits of the authors before them. The cultural bargain promotes creativity by promoting the sharing of creativity.

It should be made clear that creativity of authors exists regardless of the status of law. What the law does, as an agent of the cultural bargain, is encourage the sharing of that creativity, in the fixed tangible expressions that are subject to copyright protection, with audiences of the public. This issue is not the aspect of creativity of authors, but the dissemination to the public of authors' work. It is not the creativity that is encouraged, it is simply suggesting that if any financial profit results from the authors' creativity, then the author will profit. There are authors who create for the fun of it, with a lack economic incentive, but those authors usually do something else for a living. Restricting appropriation enables authors to make an economic living from being authors. Authors are just as creative regardless whether their rights are protected as an author. However, authors are more likely to start a business venture based on their developments if the risk of appropriation is minimized by legal protection. Even if an author's works were stolen in the past, the author may continue to be creative in private and choose not to make new works public. However, the author will choose not to create a business venture based on those works, which would share those works with the public, which is for the benefit of the public good. Creativity is independent of whether copyright is protected or not. However, if the author knows property rights are active, the author will be secure in showing and sharing the creation with the public by having the work published,

circulating copies, or self-publishing it. Creation is private; property rights come into play when the creation leaves the private sphere to be consumed in the public sphere.

In order to encourage creativity (of authors), certain creativity (of appropriators) must be discouraged. That is the paradox. Without public domain access to particular authors' works, would-be users of works, who wish to create their own versions of the works, must create their own unique works instead. Newer works constantly being created serves the public good. When authors only create based on the same works, as oppose to facing restrictions to certain materials, the public good is not serviced, as the only newly created works, are repackaged similar works with little or no new creativity. What good would the public enjoy if the only newer works being created were repackaged versions of the same story and the same characters? How does the public good prosper when there is no incentive for authors to create new works, and the only works that are shared with a public are slightly different versions of *The Three Little Pigs* a public domain tale? Restrictions for both appropriators, and authors looking to create derivative adapted works, encourage those authors to be more imaginative, creative and productive to create different works, which they too shall enjoy property rights in, and will restrict access to other would be creators. Creators are in constant search of something original that has not been done yet, which forces them to seek new allies and new forms of inspirations.

A good example is the true story of an imaginative, cynical, hard working would be writer and director who was also a big Flash Gordon fan. He wanted to make a Flash Gordon movie, but after attempting to negotiate permission to do so, he found that he was unable to get the rights. Discouraged but not giving up, he simply decided to create his own story characters, and proceeded to make his own movie. The script went through many drafts as he toiled away with great effort to distinguish his creation from those of his influences. The name of the author is George Lucas, and the result of his endeavors is what the public has come to know as *Star Wars* (1977). Lucas owns all the property rights to this work, and the public good is better served with more works for it to absorb.

It is in the interests of the public good to continue to respect authors' property rights in created works. The cultural bargain, and the laws that act as its agents do not encourage creativity, which I have argued exists separately from the status of law and rights in creative works; the cultural bargain was designed to encourage creativity so that it would be shared with the public. If an author's incentive to share the created works is disregarded, so too will the society that can build and grow based on those works be disregarded. Restricting character appropriation is a measure to offer authors a motivation to create fuller, richer and well-developed characters free from appropriators. By restricting the creativity of audience appropriators, authors are motivated to evolve their creations. The public good is enriched when authors, can continue to be authors and enjoy property rights in those works, earning a living being authors. Without respect to those property rights no author could fully earn the means to sustain their own life, without diverting attentions to other needs, instead of practicing the act of authorship. What good is the public, without the creations of the public's authors?

The Public Good Argument for the Audience

Under the public good argument for the audience I take issue with the fact, that nowhere, is the audience-character affect relationship taken into account in the laws that govern the use of author's works by audience users. The relationship that exists between an audience experiencing what they identify as a character, is a missing element in the quest to find a definition for character. The relationship also encourages the desire for audiences to appropriate characters in methods that are separate from the preferred image of characters that authors wish to enforce. Here the issue is the authors' attempt to control the meaning of characters in public spaces and the audiences' freedom to make new meanings of the characters in the public space. The cultural bargain was designed to allow for audience experience of authors' work; however, that experience is being co-opted by authors who attempt not only to control the use of characters by audiences, but to control what those characters mean to audiences, under the banner of economic protection.

Richard Dyer has pointed out, "stars (read: characters) appear before us in media texts, but unlike other forms of representation (they) do not only exist in media texts. To say that (they) exist outside of media texts in real life would be misleading, but (they) are carried in the person of people who do go on living away from their appearances in the media."²⁸ The audience-character affect relationship is a necessary component to first identify what Dyer calls "Stars", that I interpret as "characters". In a very real sense, characters can be akin to stars in our culture. However, in the current situation, intellectual property laws often operate to stifle audience practices in the public sphere. "The law acts in preventing audiences from using the most powerful, prevalent, and accessible cultural forms (in this case the characters they experience affect with) to express themselves in alternative visions that character authors wish to bar."²⁹ The cultural bargain was established to allow for some reasonable form of audience access, but as the law changed, and the balance between authors and audiences shifted, so that currently authors control their works far beyond their economic encouragement, and into the public spaces. As well, public domain becomes a space of controlled private property interest. The current trend to increase power for authors has not taken account of the original intention of the cultural bargain nor the audience affect relationship that specifically characters (over other elements in a work) have with audiences.

As I stated earlier in this section, characters are made-meaningful, and authors are attempting to control a "preferred" meaning. The character that is now a popular property may be subject to quality control and design supervision up to the point at which it leaves its source. But once it has left the orbit of the owner, it can be reinterpreted and reinserted into the everyday lives of its users.³⁰ The point here is that precisely because a character has an existence beyond that of the original author, it is only logical that they become endowed with new meanings and interpretations. The author-controlled meaning of the character is only so good as the author retains secret possession of such an entity. Once the character is released into the public space, the author cannot control how audiences are going to continually interpret a character. The most an author can do beyond the initial attempts to influence a preferred meaning, is continually attempts to

influence the preferred meaning. Character meaning-making nature is exactly what makes it an ideal reference tool for communications and audience appropriators. A healthy public space is one that will allow for the greatest freedom of communication, which serves the public good of a society. There is a value in characters as identifiable cultural references. Value is something audiences confer upon objects like characters. However, once a character is publicly recognized, its meaning will also have a public value and that meaning belongs to the community in a communal memory bank. Authors own the tangible expressions of character. However, authors cannot own the meanings their characters may be endowed with, regardless of authors' attempts to control the audience communal meanings. Indeed if the cultural image has reached global proportions, seeking out distinct ownership can be a waste of time in cases where the context of the use does not address itself to the issue of authorship. Therefore, character appropriation by audiences is a reflection of the meanings of those character in public spaces.

Beyond the confines of authors' introduction of characters to the public, characters may take on a life of their own (albeit a simulation of life). You do not quote the author when quoting a character. Stan Lee, Matt Groening, and Friz Freleng's may have been the first authors to write "With great power comes great responsibility", "D'Oh!", and "Sufferin' Succotash" but it is the characters of Spiderman, Homer Simpson, and Sylvester the Cat that we name as having spoken them. One needs only to say Romeo, Tom Sawyer or Hollywood Hulk Hogan, to communicate so much more than the limits of characterizations. Characters act as the symbols of meaning, and currency of exchange in the cultural bargain between author and audiences.

Whether mythic, literary, cartoon, or live action, characters have an uncanny ability to achieve status in popular culture as imaginary companions, friends, heroes, idols, and role models. Characters can have an enormous life span all their own, crossing generation lines from parent to child, and experiencing renewed appreciation by adults seeking reminders of childhood.³¹

A healthy public space is one where audiences are free to grow culturally, remaining vibrant and healthy, and one of the ways to do that is appropriating characters to communicate ideas, themes and identity build communities and influence society.

Character appropriation by audiences is a sharing of information, building on the endeavors of others, uses characters as language tools, and character-audience affect has a context. A culture could not continue to exist if all appropriating were prohibited as culture is interdependent, and requiring each act of dependency to render an accounting to one or many authors, would destroy the synergy on which cultural life rests.³² Audiences need to be part of something greater than they are and associate themselves with characters that they feel best represent their internal meanings. Character images represent a time period, a generation, a lifestyle, or a "feeling" for many audience individuals. The characters that are appropriated by an audience are simply used to reflect some of, or much of, the audience. In these contexts, the ability of audience expression could outweigh any potential economic concerns of the original author.

Final Summary

To conclude this chapter, I will analyze my position on the cultural bargain. To do that, I must ask the question, what kind of a world do I want to live in? Do I wish to live in a world of strict property rights of intellectual creations? Or do I want to live in a world that appropriates works and discourages authors from creating more? Do I want to live in a world where the desire of a sharing society thrives at the expense of an individual's means to sustain that person's very existence? Do I want to live in a world where the author, under the banner of consumer protection, keep audiences safe from source identities fraud practices, but that also censor fan fictions, talented artists like Dick Detzner, or interfere with an individual's private choice of body art tattooing? My answer is, I want to live in a world where I could still wake up every morning and read *Calvin and Hobbes*.

Calvin and Hobbes ran from November 18, 1985 to December 31, 1995 when Watterson decided to end his strip stating that he was to move on to new challenges. As an author, his unique stance on merchandising and exploitation of his strip illustrated many of the arguments presented in this chapter. As an author, Watterson has property rights in his creation, and restricted access to his creation from the very audience he set out to attract with his affect generating characters. When an audience desired to acquire

character-related items to manifest their affect relationships and internal meaning that the audience interpreted, appropriation outcome items were developed by audience members to fill the demand. In some cases, there was source confusion, and only those audience members that had situated knowledge of the appropriation knew that Watterson was not economically benefiting from the sale of merchandise that was not clearly identifiable as appropriated without permission. Under the current state of law, appropriation outcome items, would be the only way that the audience would be allowed to manifest their affect relationship with Watterson's characters. At least for the period of the rest of Watterson's natural life and 70 years after his death (pending more copyright extensions) or depending on the exact use, and the territory, have a limited fair copying access to his works. Even then, the context of the fair copying would have to be carefully considered, and ultimately decided by a judge. But without Watterson's ability to control and create *Calvin and Hobbes*, it is arguable that there would have been no *Calvin and Hobbes* to speak. I definitely would not want to live in a world like that.

For the most part, I support the authors of works, because without supporting the authors, the vast variety of works would be greatly diminished. Without property rights in authors' works, what works are created would be easily co-opted by anyone with the authority or opportunity, and the original voice of the work is sure to be lost. I also acknowledge the intent of the cultural bargain, and the fact that as the law has shifted power to authors, and audiences have not gained the same opportunity to benefit from amending legislation. There is a definite calling to accommodate audience access to authors' works, but denying rights to authors, even if after an extended monopoly of their rights, does not quantify fair encouragement and compensation to authors, nor does it satisfy the desires of audience-character affect relationship.

My support for authors is also based on distinguishing the difference between "influence" and "copying". "Copying" is the direct mimicking of a work or character such that there is potential confusion in the mind of the public between the work being copied, and copied work, such that the public mind can identify them both as one and the same. "Influence" is when a work is similar to another work in theme, or plot, or in

image, but there is enough distinction between the new work, and the original work that inspired part or all of it. Authors produce original works, which enter the public space as influences. So, authors works in public space do add to the collective knowledge of that public, but the author must maintain copyright on the expression of those influencing ideas. The ideas themselves were never subject to property rights. Consciously or unconsciously, all human creativity is influenced to one degree or another on earlier works; no person labors totally in a vacuum.³³ All of culture's most original creations owe an immense debt to public fodder for creation. In a free, creative society, audiences can take as much as they need from public space, and may become authors themselves by adding enough of their own characterizations that it will be considered to be "original". Culturally speaking, there are no new thoughts, and no new ideas that are born of a void.

My support of authors is not an act against audiences. It is an acknowledgement in the spirit of the cultural bargain that encouraged authors to share their works with society for not only the economic benefit of the author, but the benefits of a society that can build on the influence of authors' works. This leads me to my final conclusion: the cultural bargain must have its balance restored by taking into account the desires of appropriation by audiences, and the public good that appropriation serves. Furthermore, audience access needs to be re-evaluated and a structure should be applied so that the broadest interpretation possible is levied across the borders of both Canada and the United States, so that fairness of audience appropriation is the same in both countries. The cultural bargain started on the basis that audiences needed to be protected from authors' monopoly, and the balance of power was with the audience. Today, the law has shifted the power in the cultural bargain such that the audience is exactly where the original intent of the cultural bargain did not want the audience to be: at the mercy of author monopoly. In Chapter Four-The Conclusion I present a possible resolution to the nature of the cultural bargain, a suggestion in the interpretation of fair copying for audience access, and address the character-audience affect relationship as a means of a working definition of character.

Endnotes to Chapter Three

- ¹ Bill Watterson, The Calvin and Hobbes Tenth Anniversary Book. Kansas City, Missouri. Universal Press Syndicate, 1995 page 10-22
- ² Michael Shapiro. "Not Control: Progress." Museum News 76, no. 5, September/october 1997. p. 37-38
- ³ Dinae M. Zorich, "Why the Public Domain is Not Just a Mickey Mouse Issue", <http://www.nich.org/copyright/townmeetings/chicagozorich.html>, 2000. p. 4
- ⁴ *ibid*
- ⁵ Jane M. Gaines, Contested Culture. Chapel Hill, NC. The University of North Carolina Press, 1991 p 19
- ⁶ Ayn Rand. The Virtue of Selfishness. New York, NY. Penguin Books, 1964 p. 110
- ⁷ *ibid*
- ⁸ *ibid* p.114
- ⁹ *ibid* p.116
- ¹⁰ Herrington, TyAnna K. "Intellectual Property Is Not Property: Debunking the Myths of IP Law", <http://english.ttu.edu/kairos/3.1/coverweb/ty/kip.html>
- ¹¹ Gaines p 228-229
- ¹² Zorich p 4
- ¹³ *ibid*
- ¹⁴ Andrew Alpern, 101 Questions About Copyright Law. Mineola, NY, Dover Publications, Inc., 1999 p. 8
- ¹⁵ Zorich. p. 3
- ¹⁶ "Copyright on the Internet", Government of Canada <http://publications.pwgsc.gc.ca/copyright/internet-e.html>, 2001
- ¹⁷ Ian Kitching, , "'Peter Pan' Copyright" <http://www.cam anglia.ac.uk/~systimk/Articles/Peter-Pan2.Html>. 1999.
- ¹⁸ Michael C Donaldson,. Clearance & Copyright. 1st edition, Los Angeles, CA. Silman-James Press, 1996. p. 38
- ¹⁹ Gaines p 232
- ²⁰ Rosemary J. Coombes,. The Cultural Life of Intellectual Properties. Durham, NC. Duke University Press, 1998. p. 65
- ²¹ Mark Gordon, "Character Marks" USTA Trademark Information for Management Executive Newsletter No. 32, The United States Trademark Association, 1981. p. 3
- ²² *ibid* page 5
- ²³ Ron Suppa, This Business of Screenwriting. Los Angeles, CA. Lone Eagle Publishing Company, 1999. p. 33
- ²⁴ Watterson p.7
- ²⁵ Michael Madow "Private Ownership of Public Image: Popular Culture and Publicity Rights." California Law Review 81.1 (1993). p.194
- ²⁶ *Ibid* p.188
- ²⁷ Paul Roe, E-mail to Author, July 13, 2001
- ²⁸ Joshua, Gameson, "Hunting Sporting and the Willing Audience: The Celebrity Watching Tourist Circuit," Claims to Fame: Celebrity in Contemporary America, Berkeley: University of California Press, 1994. p.139
- ²⁹ Coombes p. 42
- ³⁰ Gaines p. 232
- ³¹ Mark S. Lee and Alison Spear-Ullendorff. "Strength of Character", Los Angeles Lawyer Vol. 20, No. 2. Los Angeles County Bar Association, <http://www.lacba.org/showpage.cfm?pageid=790>, April 1997
- ³² Coombes p. 68
- ³³ Alpern p.47

Chapter Four: The Conclusion

There has always been a tension between the creators of intellectual property and the users of that property. The cultural bargain is the balancing the rights of authors of copyrightable works, and the sometimes-alternative uses of those copyrightable works by audience end users. The balance consisted of giving authors and creators limited monopolies on their creations to encourage creativity and sharing of their works with the potential audience, and allowing audiences fair copying uses of the material during the limited monopoly, and total free access once the monopoly expired. As this thesis has demonstrated, today, the cultural bargain is out of balance. From the time that copyright law was first issued to its current status, authors' limited monopolies have extended and with this trend, may eventually become perpetual. At the same time, audiences' fair copying access has remained the same, and access to works whose monopolies would have long ago expired under original legal precedents, still continue to enjoy its original (and not so limited) monopoly.

When the current status of the cultural bargain intersects with the ambiguity of characters, the situation becomes even more difficult as I have shown. There is no specific definition of character and the legal status of character is non-criterion based and ambiguous itself. In addition, characters form affect relationships with audiences, not recognized by law, but those relationships are precisely the reason why characters, over all other parts of a work (copyrightable or not), are subject to appropriation by audiences. The desire for appropriation is not a need per se, but as a direct result of the affect-driven industry that produces and promotes characters. The character industry has promoted a culture of character, which is designed specifically to attract audience attention. There is an attempt to control the meanings of character as signifiers by the industry in order to encourage audiences to enter into economic spaces as consumers only, not also as producers. These economic spaces of trade have a mandate for audiences to be given the opportunity to satisfy their affect character relationships desires in exchange for some form of compensation to be distributed to the author of the character, third party investors, or both. However, audiences re-interpret characters, assigning meanings of

their own, which the character producing industry cannot control, thereby practicing the act of character appropriation, when characters are used in alternative ways that the original authors (and other interested parties) may not have given permission for or approve of. The problem is that even if the cultural bargain was not out of balance (as it currently is), the cultural bargain would still not adequately apply to characters, as the specific status of characters, both legal status and a definition of character, are non-specific. Thus the solution I present comes in two stages.

A Possible Solution

The first stage is to restore the balance in the cultural bargain by taking the cultural bargain to the ultimate extreme, so that both players in the cultural bargain can benefit best in the ways that are most relevant to each side. In this new cultural bargain, an order is established for both authors of works and the audiences that consume them. Under the current cultural bargain, the trade off in giving authors a limited monopoly is the idea that eventually, they will lose their rights, and the work becomes a public property for audiences to use freely without restriction. Under the new interpretation of the cultural bargain, authors are allowed perpetual copyright, and the exchange is the broadest interpretation possible of fair copying as to counter balance for limitless monopoly. For the authors, creators and owners of characters this involves abolishing the notion that copyrightable works should ever enter the public domain and a new establishment of perpetual copyright (as was done for the work of *Peter Pan* (1904)) becomes the norm. This will come with specific provisions regarding the forbidding of retroactivity acknowledging copyright for works that have already entered the public domain. Prior to the new cultural bargain coming into force, all works, which are already in the public domain, stay there. This is to prevent the economic extortion of players who have created newer works based on the works that have entered the public domain. As these newer creations were created on the good faith of the cultural bargain at the time they were prepared, it would be unreasonable for those authors of newer works to now be responsible for royalty payments, or subject to negotiating a permission, after the newer work is completed. For audiences, this involves fair copying to be brought in line across

territorial borders, and to be taken in the broadest interpretation possible so that audiences have the maximum use of the works (and characters) allowable under specific regulations to safe guard the integrity, and economic concerns of the author.

The benefit of perpetual copyright for authors, is that the resources that authors divert to encouraging copyright extension legislation could then be redirected to negotiating license-use agreements (a process that this author found to be a long tedious one, during the course of this study). The benefit of perpetual copyright for audiences is that authors would no longer be able to restrict audience access to their works under the banner that characters would lose their value and possibly the legal protection they enjoy without such constant stringent restrictions. Furthermore, the benefits to the authors' heirs (including charity organizations such as the Children's Hospital and *Peter Pan*) mean that perpetual copyright could continue to provide the means of life sustenance for countless individuals and third parties. Copyright and other intellectual property are becoming the source for much of the wealth generated by new technologies in the coming millennium. The daunting truth is that copying products has never been easier.¹ Thus perpetual copyright, not only encourages further creativity and sharing of that creativity, it will provide great wealth and opportunity for survival in the growth industry information age.

The second stage of the proposed solution is to offer a definition of character based on a four-part criterion that encompasses the affect relationship between characters and audiences. This means presenting the audience, as an authority to recognize and identify the affect presence of character in order to simply define the character as separate from the other elements that may occupy the work with the character such as plot, theme, format, medium and other non-copyrightable elements. I argue that doing so would help establish a solid definition for character, while at the same time, disqualify the audience as a direct creator of the character. This means that the audience is excluded from any legal definition of "author" (and the rights that are associated with the title). This will in fact protect the actual authors, creators and owners of characters, as it was intended under

the original terms of the cultural bargain for authors to benefit from the fruits of their labor.

First Stage: The New Cultural Bargain

Under the new cultural bargain, authors are given a perpetual copyright in the works they create, and audiences get the broadest interpretation of fair copying available, for uses that which will not require author's permissions. As this study presented in Chapter Two, the definition of fair copying is different in Canada than it is in the United States. In cases like the act of parody, Canada has much stricter regulations, than the United States. Under the new cultural bargain, these definition of fair copying would be amalgamated into one body of law, retaining the interpretation of fair copying that is most favorable to audiences. With respect to the example of parody, Canada's definition of parody would relax to come in line with the parody interpretation of the United States. Furthermore, I propose that this newly acquired freedom must be tempered with regulation, so that the cultural bargain continues to enjoy a proper balance, without favoring either side. The regulations would be in respect to four important issues, designed to prevent authors from losing value in their newfound perpetual copyright, and also give audiences the guidelines to help preserve their side of the cultural balance. The four new regulations that I propose for audiences access to perpetual copyright works are:

- 1-Non-Economic Profiting
- 2-Respectful Consumer Protection
- 3-Absolution Disclaimers
- 4-Respecting an Authors' Moral Rights

Non-Economic Profiting

Under the new cultural bargain, economic rights of authors would be held in the utmost respect, and in order to balance the cultural bargain, audiences would be free to use works (and characters) in ways, which were non-economic. These methods include anything that done for personal and not for profit uses (such as unofficial web-sites where no monetary exchange takes place). This particular regulation also is an author's weapon

against users that may use works in ways that will damage the original author economic standing with the original work. As long as the use does not constitute a commercial purpose, it should be permitted.

Respectful Consumer Protection

The audience user must never use an author's work to confuse the public at large that the author endorses the use made under this new cultural bargain. Nor can the user use the new cultural bargain to commit acts of fraud in passing off the items of the users, as those of the original author. The mandate of the new cultural bargain shall not invalidate the laws of trademark or unfair competition. Nor should it be used as a shield to protect fraudulent actions of those individuals who would disrespect the good faith of the cultural bargain by taking advantage of the consumer reliance on authors taking actions against these types of practices.

Absolution Disclaimers

Earlier copyright legislation required authors to mark their works in order to retain rights. Eventually, that practice has been eliminated and now the author, regardless of whether or not works are marked, retains copyright. I argue that, in the name of fairness under the new cultural bargain, those users of copyrightable materials should be required to issue a disclaimer with their re-interpretation of the author's work. Such disclaimer should include a notice acknowledging that, the work is being appropriated without permission of the original author, and that the work shall not reflect upon the intent of the original author. For example, a fan fiction story on the Internet shall carry such a notice on its title page.

Respecting an Authors' Moral Rights

By moral rights, I refer to certain specific definitions of moral rights as defined under Canadian copyright law which include the right of paternity, the right of integrity, and the right of association. Under the right of paternity an audience member must give proper credit to the original author whose work is being appropriated. An appropriator must never take credit for creating something that was devised by an original author. The right of integrity is the defense of authors against any action that an appropriator would

take, that would harm the reputation and the honor of the original author causing provable damages. The right of association prevents an appropriator from associating an authors' work with any product, service, cause or institution that would be damaging to the honor and reputation of the author. All this of course, is in line with the other three criteria listed above; thus if the above criteria have been followed there should not be any damages to the author.

Under the new cultural bargain, if audiences can follow the regulations I propose above, authors need not feel threatened that their perpetual copyrights will ever become worthless due to outside audience practices. The main concerns for authors, including the economic, consumer protection, source identification, and the freedom from damages of appropriators have all been addressed, and thus authors cannot formulate arguments against audience-character appropriation.

Second Stage: Towards a Working Definition of Character

What is a character? This question appeared in the first pages of this thesis. I have presented a number of different perspectives on the definition of character, and none would adequately provide a measuring tool that could be applied to all different types of characters and none reflect all the considerations of a fair cultural bargain.

What my definition offers that draws upon earlier definitions is the idea that a character is a simulation, and that it has a sentience separate from the mode of presentation (text). What my definition also adds is the recognition of the roles, both the author of the character and the audience of the character play into its definition and identification. Furthermore, with my definition, both the character *and* the sentience of that character are considered simulations, because I make no distinction between the character, and the sentience of that character. The sentience is no more real than the character it represents. Lastly, I emphasize the fact that characters are created by authors for an audience, even if that "audience" is the author him/herself. At some level, there is creative endeavor, thought, work, inspiration, an action happening and a goal in mind. That particular issue is specifically relevant to defining *what* a character is, separate from *whom* a character is. Lastly, I have abandoned the notion of whether or not character is

plot. Character can be developed from plot (as was demonstrated earlier in Chapter One under the Character Creation Process), but a character is identifiable separately from the plot, and can transcend plot. Historically, this may not have been the case, however an understanding of history is what is needed to understand the roots of character identification, not to suggest unchangeability throughout history. As far as the elements that make up a character, I have included that in the section on the Creation Process, (see Chapter One) as the separate elements of a character do not define the character. A character is not made of any one thing, but a group of things, all of which must be present to be called "character". For the purposes of clarity, and in an attempt to define what a Character is (and is not); I will define "Character" as follows:

Character is a simulation of sentience that exists in a created context made specifically where the author presents it as a character and an audience identifies it as a character.

In order to be a character, a given character must have all four criteria.

- 1) Simulation of Sentience
- 2) Exist in a Created Context Made Specifically
- 3) the Author presents it as a Character
- 4) An Audience identifies it as a Character.

By *Simulation*, I mean the fact that as real as characters may be perceived, and however they may exist, and in whatever medium they are presented, characters are not real. They are illusions of reality, and not reality. They are fictional beings of the imagination. When authors create characters, they are not presenting real people, only simulations of people (even in cases where the character is being portrayed by the person the character is simulation (i.e such as when Tom Jones plays himself in various episodes of *Fresh Prince of Bel Air*). As author Ron Suppa of the book This Business of Screenwriting (1999) states about why creators do not transcribe reality, "...if people want to see reality, they need only look around them. The writer (creator) doesn't transcribe life - he dramatizes it, arranges it to delight, excite or surprise the audience... Characters in movies also do not speak as you and I would, they only seem to. They cut to the heart of any conversation and never waste words."² He also cites this

example, "The painter Matisse once presented one of his stylized portraits to a lady who exclaimed, "but a woman isn't like that." Matisse replied simply, "It isn't a woman, Madame, it's a picture." Likewise, the audience knows it is not life; it is a story. They make a deal with the film (character) makers to suspend disbelief in exchange for the chance to escape reality for two hours.³ This may be true from a creative standpoint, but at times audiences will not always remember to distinguish reality from a world of illusion, which may give some argument about the rights of audiences, and their rights of expression via the characters with which they have become entranced.

By *Sentience*, I mean that which an audience recognizes to be an identifiable human life spirit. Characters are the artificial people of a story, but they are presented not just as people in human bodies but in all sorts of vessels (animals, robots, monsters, and objects). So here I use the term sentience to refer to the intangible element that is recognized in the presentation of potential life spirit. The audience is able to identify the human qualities of having or showing qualities as rationality or fallibility, viewed as distinctive of people, and of belonging to, or typical of, humankind. Humanism and human nature is revealed to the audience through systems of thought or actions based on the nature, dignity, interests, and ideals of human qualities or characteristics of the character. Sentience as defined here must be taken as intangible as it cannot be touched. It is incorporeal and impalpable, and represents value, but has neither intrinsic value nor material being. This is the element of a character that cannot be easily defined, formulated, protected, or grasped for its vagueness. It is the state of the character with the capacity for feeling or perceiving; a consciousness that exhibits more than mere awareness or sensation that does not involve thought or perception. These are the senses of the character, giving the character the ability to take hold of, feel, comprehend, grasp mentally, take note (of), recognize, discern, observe and become aware (of) through sight, sound, or other senses (known or not understood). Here we find the character's comprehension, intuition, knowledge, understanding, and impressions. It could also be described as the character's source of vital energy, as the capacity for self-volition, the

occupying force or spirit which penetrates, inspires, occupies, and animates the body; its one defining characteristic is that it cannot be seen."⁴

Here we read more than just the character personality, which is also important. As written in the book The 50 Greatest Cartoons (1998) edited by Jerry Beck, personality has such an important role that, "some cartoons convey the personality of their animated stars with astonishing force, the cartoon is almost stream-of-consciousness, whose foibles and bickering, make us recognize their humanity."⁵ At times however, the audience will recognize a character as existing, such as a cartoon graphic representation, but not be exposed to the character's personality. Nevertheless, that graphic representation is still simulating the sentience that an audience can read and identify in the image through the characters ability of capturing and leading an audiences imagination by penetrating the audiences thoughts.

It is this simulation of sentience that is said to take a life of its own and that life goes beyond the creator's time and characters' intended performance. This part of the character is what audiences connect with and continue to interact with long after the book is put down, the curtains end the play, and the videotape goes back in its sleeve. It is this part of the character that may give just cause for audiences to feel the need to interact with the character long after the character intended context. The specific type of affect relationship that the sentience of a character has with its audience was discussed earlier in this study.

By "*Existing in a Created Context Made Specifically*" I mean the whole situational context, background, event, or environment relevant to a particular character creation. The situational context also includes the parts of a sentence, paragraph, discourse and medium immediately surrounding the character determining its exact meaning as a character. Thus, characters can be seen as a part of a fabrication weaving together as interwoven whole. In simpler terms, Created Context is the way in which a thing is put together in structure and composition that allows for a temporary suspension of audience belief to readily be open to characters. A character is not only a checklist of simulated facts, but the way those facts interact within the specifically made context.

Audiences will generally accept the character as "real", but not if the character is not in a plausible context. Without the explanation and rationalization of the specified context, there can be no suspension of belief. Audiences are ready to accept the impossible, but they will never easily accept the implausible. For example: talking rabbits are not realistically possible in our current reality. But if these talking rabbits are presented in a context that such characters can exist, they are then made plausible. Once audiences have been assured of the plausibility, the question of how real a character is becomes moot. Audiences know there are no such things as talking rabbits; however in the context of Loony Tunes Cartoons featuring Bugs Bunny, the context of the Trix Rabbit in Trix cereal television commercials, and the context of Toontown's Roger Rabbit from the movie *Who Framed Roger Rabbit?* (1988) all allow for these characters to be acceptably plausible, even though impossible. So regardless of any and all items listed in a character check list which may be documented, if a character responds in a manner which cannot be explained by the context it is in, whether or not it relates to the checklist, then the character stays impossible for an audience.

When saying "*the Author presents it as a Character*", I am highlighting the idea that Characters are not created by accident, but with intent. They are created for the purposes of connecting to an audience. Whether to help create atmosphere, move the story along, or to add a missing particle, all characters have some intended presence. A well revised script is a script that has the number of words reduced until there are just enough words for the script to make sense, but not one word more.⁶ Each word is written for a specific reason. The same principle applies to characters. It needs to be very clear that if an audience identifies a character where no character was created by the author with audience identification in mind, then notwithstanding the perception of the audience, there is no character present. For example, when looking at line patterns in wooden panels used for walls and floorboards, audiences of that line pattern may see or outline faces. But since there was no intention by the author of the line patterns, there is no character present. Another example of this is how the front of cars may look like human faces with the headlights serving as eyes, and the front grill serving as a metaphor for a

mouth. However, unless a car manufacturer intended to create a character face in the front of a car (such as the cartoon character Speed Buggy), there is no character present.

Lastly, the characteristic "*Audience identifies it as a Character*", means that if the author intended a creation to be considered a character, but the audience does not recognize the simulated sentience as such, it fails to be meaningful to the audience. There is no affect character-audience relationship present. Whatever that creation maybe considered, it simply is not a character. It can be described as something that has the potential to become a character, and it can be something that is in a fixed copyrightable expression, and it can be in the process to become a character, but whatever its description, it is not definable as a character. It is important to distinguish the difference between the audience as a creator of character, and the audience as an identifier of character. Audiences do have the ability to identify creation elements that they do not create. For example, an audience of a romance novel, can identify the novel itself (hard cover and pages), the plot of the storyline, the overall theme and genre of the writing style, the font of the writing, and the characters. The audience created none of these elements, but the audience recognized them all as being present within the communication from the author, through the medium of that novel. As merely identifiers of characters, to facilitate a working definition of character, audiences are not authors, creators, or owners of characters and thus do not partake in any of the legal rights afforded those titles under law. The ambiguity of characters however, calls on the requirement to have a criteria of audience recognition as unlike plot, theme, and other non-copyrightable ideas, characters, as has been demonstrated in the first chapter of this study, has no direct definition to be used as a segregation tool. For that reason, the audience affect relationship with characters, which is the motivation that audience desire character appropriation moreso than any other element of a copyrightable work, is included in providing a more complex definition of character.

The Definition of Character and the New Cultural Bargain

The cultural bargain historically is based on the idea that the eventual entry into public domain of the work is the trade off for an author's limited monopoly. The new cultural bargain allows authors' perpetual copyright, in exchange for a broader interpretation of fair copying. Using audiences as a necessity to identify (not create) characters, I suggest that the fair copying doctrine must be expanded to consider the audience affect relationship. The unique nature of some intellectual property requiring audience affect interpretation, beyond the tangible and fixed expression of characterization, is the argument that will permit various forms of fair copying of author's property, provided they follow the mandatory guidelines I have issued above, in this conclusion.

Harry Potter Revisited

I began this study with the story of Warner Brothers Inc. acquiring the rights to the Harry Potter character, and their attempts to protect their newly acquired property from on-line infringements. The actions Warner Brothers Inc. took inevitably caused them much negative publicity, especially with the fans of Harry Potter that the movies would eventually be marketed to, even though they were well within their rights under the law. However, as an example of how such negativity can be avoided in the future between the audience users and authors/owners of characters, I will present the same situation as applied under the terms of the new cultural bargain.

Warner Bros. would have contracted the Harry Potter Rights from author J. K. Rowling, and rightly so, as Rowling holds all rights, title and interest in the Harry Potter material, and Warner Bros. wish to make Harry Potter movies for commercial purposes, which also included Harry Potter web-sites. As rights holders, Warner Bros. would have the responsibility to ensure that their rights are not being infringed on. When Warner Bros. would discover the rogue web sites (mostly designed and web mastered by Harry Potter fans paying tribute to their favorite character), instead of "cease-and-desist" letters Warner Bros. would have sent letters to ensure that first, the web-sites were not non-commercial, that each web-site would carry a disclaimer, and clearly indicate that they

were not associated directly, or in-directly, with Warner Bros. or the original Harry Potter author, Rowling. Beyond that, any use of the copyrighted material would then be examined to see if it would constitute causing damages to the original work. In this particular case, most of the web-sites were fans celebrating the Harry Potter character, thus damages were not the issue. Warner Bros. would still have the power to protect their investment, and the fans of Harry Potter would still retain a forum for their appreciation of Harry Potter. There would have been no negative reactions, as the broader but regulated new interpretation of fair copying would allow both sides of the cultural bargain in character culture to benefit in the ways that are most important to each side.

The Journeys End

This study has been an incredible journey through the world of character culture, and it has come to an end. Along the way, I had the chance to revisit some old friends (Mr. Dressup, The Muppets, The Sesame Street gang and breakfast cereal advertising icons) and make some new ones (Ernie Coombs, Jill Peterson, Cathie MacKinnon, and Andy Gryn). Characters have become less real to me, now that I have taken on the intellectual challenge of studying their existence, but they have become more special to me than I ever understood was possible. To you the reader of this study I say thank you for taking this intellectual curious, legal researching, affect building, meaning making, author controlling, industry promoting, and audience appropriating journey with me. And thanks to the many characters that throughout my life have inspired me and encourage all of us to seek out happiness and fulfillment in our lives so that we all may live happily ever after. The End

Endnotes to Chapter Four: Conclusion

- ¹ Stuart Crainer, . Business The Rupert Murdoch Way. New York, NY. Amacom, 1999. p.99
- ² Ron Suppa, This Business of Screenwriting. Los Angeles, CA. Lone Eagle Publishing Company, 1999. p. 41-42
- ³ ibid
- ⁴ Dick Hebdige, "What is Soul?" Video: Icons and Values, Alan Olsen, Christopher Parr, and Debra Parr, Albany: State University of New York Press, 1991. p. 126
- ⁵ Jerry Beck. The 50 Greatest Cartoons As Selected by 1,000 Animation Professionals. North Dighton, MA. The JG Press, 1998. p.27
- ⁶ Suppa p. 42

APPENDIX I: The Different Categories of Characters Types and the Law

The following categories are not medium specific but attempt to take an overview of the different forms that characters can be presented and the significantly different ways they are dealt with under law. It is also important to note that it is very possible for a character to qualify for more than one category. These categories do not segregate characters by character traits. Whether or not a character is strong, weak, ugly, attractive, blue, red, protagonist, antagonist, major, minor, extra, etc...is irrelevant. The criterion here is based on the identification code of the character.

Fictional Characters

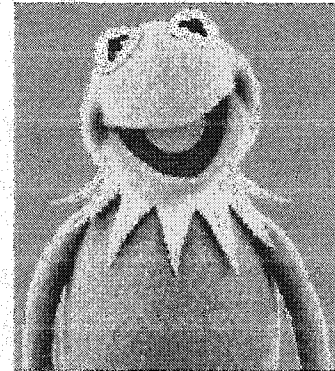
Name Character: These are characters that are never actually seen, heard or appear to the audience. These characters are spoken of and to by the other characters in the setting. Sometimes these characters may not even be given a proper name, but a nickname or alias that other characters refer to the Name Character by. Specifically, these characters are categorized by the fact that the only way they are recognized by the audience is through the descriptions of the Name Character by other characters, without the audience ever actually experiencing the Character for themselves directly. Examples of this type include Harry Stone's Mother of *Night Court*, Diane of *Twin Peaks*, Maryse from *Frasier* and Rosa Coletti of *Happy Days* (Al's famous lost love). They are also called Invisible Characters in some circles. Name Characters are almost impossible to protect with copyright. Without an image to gain copyright protect as an artistic or graphic work, the only way to protect this type of character is to copyright the work in which the character is mentioned. For example, you can copyright a recording of how other characters speak of the Name character or as a literature work in the word description grouping. It would probably still fail the Well-Developed test, and qualify as a story-being-told character equaling no copyright protection.

Literary Character: These characters appear in literary form such as a novel. Most characters begin as literary characters until such a time as a derivative work is made based on the literary work. Examples of this are the character Ozymandias from the poem of the same name by P.B. Shelly, Lenore of Edgar Allen Poe's *The Raven*, and Tarzan, a character that was one of the first to earn copyrightability. These characters, like Name Characters, are very difficult to protect without some added element, such as a drawing of the character. However their chances of achieving copyright protection are higher than Name Characters. Literary Characters not only garner much more vividly written descriptions, but some of the more popular characters may be sufficiently well developed enough to pass the character delineation test and fail the story-be-told test, qualifying the character as separately copyrightability from the literature it was born from.

Speech Characters: These are characters that exist in oral communication when there is no expression of the communication in a tangible fixation. As there is no copyright without fixation, there is no protection available for these type of characters. Examples of these are characters that are in folklore and stories that may be handed down from generation to generation through word of mouth, and characters in stand-up comics routines if they aren't written down or recorded.

Graphic Characters: This is when a character has an image that makes the character readily identifiable. Whenever you see a graphic character you know whom it is suppose to be. Examples of this are Donald Duck and other animation characters with established looks including computer animation such as Bob the Guardian from *Reboot*, The Ghost Rider and other comic book heroes, and the visual elements of characters that appear in newspaper comic strips such as *Blondie*. These visual and artistic works of course, are protected directly under copyright. Any accompany literature and literary works that accompany them (such as words in thought bubbles) are also protected by copyright.

Figure Character: A figure character is a three-dimensional model character. Unlike literary character, which cannot be touched or graphic characters, which can be seen but not embraced, these characters have a physical form. Examples of this are the clay-mation California Raisins, Mechanical Characters like the remote control robot model of R2-D2 used in the various star wars films, puppet characters like Kermit the Frog (see image), marionettes, masks and other costumes, and public statues in a story-telling context. This is not to be confused with merchandising units which are replicas of Figure Characters called Product Characters discussed later in this appendix. In the case of Muppet-style puppets I contacted Pat Brymer of *Patbrymer Creations*



Kermit the Frog.
TM and ©
The Jim Henson
Company
These materials are used
with the permission of
The Jim Henson
Company Inc

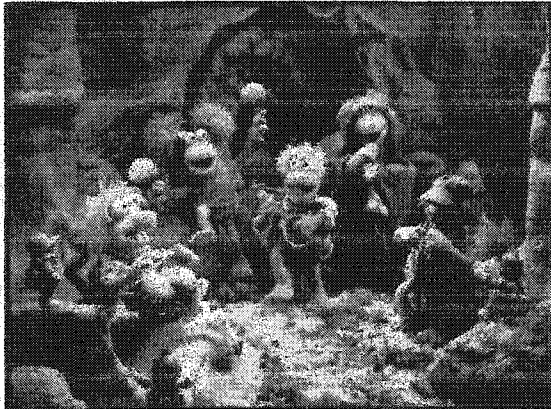
www.pbceregations.com. Brymer writes that as far as ownership rights to the character, generally, if the client provides the design and they build the character exactly as depicted, it is strictly a “work-for-hire” situation and the client retains all ownership rights in the character upon payment. But, each project has its own unique negotiation and in some instances, they may design the character at no charge in exchange for a percentage of ownership and a percentage of merchandising royalties at a later date. The cost of a custom puppet (in a style similar to Bert or Ernie from Sesame Street) would be about 2500\$ USD, plus the cost of any additional mechanical applications.¹ In Canada, the same principles apply, with costs as high as 10 000\$ USD for the creation of the same types of puppets (included in this higher costs is the price of imported materials from the United States). However, as puppets may be directly related as an extension of a puppeteers’ performance, some puppeteers retain rights in their puppets even when the puppets were created for the purposes of a project. For example, Judith Lawrence the puppeteer creator and performer behind Casey and Finnigan, Aunt Bird, and Alligator Al on the children’s television program *Mr.Dressup*, retains all rights in those puppets. When she retired from the show, the puppets disappeared with her.² Statues in public fall

under the except of permanently placed works in public places, which allows the copying of the object, in a painting, photo, etc...even publishing of those works, as long as the copying is not an architectural plan or drawing. The work in question simply has to be permanently fixed in place.³

Anonymous Character: Characters without proper names that the audience can still identify as characters. Examples of this type include the many character extras in visual scenes, the characters that interact with the main interest character such as waiters and delivery couriers. A great example of this is the character construction worker who co-starred in the Warner Brothers cartoon short *One Froggy Evening*(1955) with the singing Michigan J. Frog. They are usually associated with an image of some sort but other than the obvious image protection that copyright covers, as characters they usually fall short, unless the Anonymous Character takes on a primary role in the work as a whole. (See Appendix III, image # III.1, as all those characters are Anonymous Characters as well)

Composites and Divisible Character: Character that has more than one persona. Here we look at the fact that the personas are some how connected, but possibly separable depending on the circumstance. For example, there's the character turning from one persona to another such as Dr. Jekyll & Hyde and The Incredible Hulk & David Bruce Banner. The DC comic hero Firestorm was a merger of two distinct characters, each having a separate secret identity (making for three characters in all). Two characters sharing the same body such as the two-headed Mudslinger of *Groundling Marsh*, and the many personas of a multiple-personality character such as Vicky Carpenter of *One Life to Live* are also examples. Paradoxically, as each combination is still a single character, each persona can be classified as a different character as well. Each persona's image may be subject to copyright, but copyrightability as a character would still make it subject to the character tests of Judge Hand and Judge Stephens.

Group Character: Characters that are connected a by a philosophical belief, biological link, or chosen allegiance. They are referred to as a collective based on their common element. Here we have The Fraggles (see image below), *Star Trek's* The Borg, the



Transformers, and the many different groupings of prisoners in *OZ*.

The Fraggles. TM and ©
The Jim Henson Company
These materials are used
with the permission of
The Jim Henson
Company Inc

T.A.C.tor: Listed separately solely based on its technological use of displacement and their existence in audiovisual media. TACtors (Technology Animated Character actors) include all those characters that are separated from their medium of origin and re-purposed into a new work. They are best defined as characters that do not appear during principle photography and are inserted later in the editing process. These include Jar Jar Binks in *Star Wars: Phantom Menace* (1999), Roger Rabbit from *Who Framed Roger Rabbit?* (1988), and Porky Pig & Daffy Duck in *You Ought to be in Pictures* (1940). The technologies used surrounding this type of character would be protected under patents. Although not in any official law or industry regulation, one issue that may become a standard clause in actor's contracts, when those actors have to perform with T.A.C.tors is something I developed called "The Bob Hoskins Clause". This clause allows for substantial breaks for an actor performing with T.A.C.tors, and studio funded psychological or psychiatric therapy after the filming. This idea is based on the situation that actor Bob Hoskins found himself in after the filming of the movie "*Who Framed Roger Rabbit?*" as documented in the August 1998 magazine *Starlog*. That movie was a first of its kind that had live actors performing with animation characters for the full duration of the film. The live actors in *Roger Rabbit* were filmed before any of the animation, thus on set, in the absence of the real cartoon characters, which were to be

added later, Hoskins' imagination was aided by temporary stand-ins. Sometimes, it was very difficult to keep his hallucinations correct for size and perspective. So, he vigorously concentrated on his imagination and he managed to actually see them, which was all right, but he did it for 16 hours a day for five months. Hoskins started to lose control and hallucinate in all kinds of embarrassing places. At one point, it was quite frightening for him, with weasels (antagonist characters from the film) and all sorts of things turning up.⁴

People-Linked Character

Repurposoids: Celebrity T.A.C.tors. The significance of this as a category of character, is that it is specifically what makes the Character special that it is chosen to be repurposed. Examples of this include Gene Kelly dancing with Paula Abdul in Diet Coke commercials, Frankenstein as played by Boris Karloff co-starring with Honey Bee for Honey Nut Cheerios commercials, and the deceased U.S. Presidents in Forrest Gump. Also, the Sir Lawrence Olivia Diet Coke audio production by Radio Free Vestibule. These Characters are chosen primarily for their notoriety and are the story, not just the spectacle. Same legal issues as T.A.C.tors with the inclusion of Right of Publicity/Right of Personality.

Sound Character: Characters that are identified as characters because the audience hears them. If a character is only heard by other characters and not the audience, then it may only qualify as either a Name Character or Anonymous Character. They are absent of any visual presence, but the audience has some form of audible contact with the character. Examples of this are the adult characters of the *Peanuts* Cartoons, a Narrator, and various off-screen characters of *Bobino et Bobinette*. Also, here we address characters that appear strictly in audio form such as Froo Froo the Cat performed by Radio Free Vestibule. Legal protection includes copyright by the copyright holder for infringement of mechanical copyrights (the copyright in the recording of the sound). An industry regulation on in the area of voices and noises as characters, and applies to professional

voicers of animation programs is referred to as the "Mel Blanc Rule". This industry procedure demands that any person hired to do a series of character voices, will have sound-a-likes also hired, resulting in a work split of about 70%-30%. The premise here is that the first voicer is the lead getting the most work but if doesn't have the privilege to become too important to the role as there is already another voicer trained and ready to step up. This does two things. First, the first voicer can not become unreasonable during compensation negotiations, and the audience doesn't get used to exactly the same sound for a character, which makes a later replacement all the more difficult. This procedure is based on the days when Mel Blanc was a major voice-worker for Hanna-Barbara and eventually reached unprecedented compensation amounts.⁵

Story Character: Fictional characters that are required to be performed by a live real performer. Appearing in works like scripts, these characters call to a performer to interpret the character. They can not be identified by a graphic representation, as their look will change as the performer who plays them changes. Examples of this type are like James Bond and Frankenstein. Dialogue, plot and interaction with other characters define these (Story) characters. Various actors have played these two roles over the years. In spite of different physical attributes of the actors, the characters are the same. Physical appearance is not at the heart of a story character.⁶ The characters themselves are much more difficult to protect, as they do not have a specific physical visual image, they are protected by copyright as a part of another work (script). The criterion to be performed by an actor raises issues of using the actors' image for the character, falling under a Right of Publicity/Personality legal issues. The actor retains certain rights for their person (name, looks, and sound) and may have neighboring rights protection as well for performance issues. Although there is very little difference in terms of personality between entertainer Ernie Coombs and the character Mr. Dressup, one overwhelming difference is that Ernie Coombs was his own person, and Mr. Dressup was owned by the Canadian Broadcasting Corporation (CBC).⁷ An actor and an owner of a Story Character should very clearly outline ownership and image use issues prior to any commitment.

Historical Person Character: Characters that are based on people who really lived and are now dead, that may be recognized and famous for what transpired in their lives, but not necessarily. They can either be presented in works that either illustrate a telling of their life (the movie *Man on the Moon* (1999) about Andy Kaufman) or the taking of a historical figure and presenting that figure in a completely new story. Abraham Lincoln, Genghis Khan, Joan of Arc, Socrates, Billy The Kid, and Napoleon Bonaparte were characters in *Bill and Ted's Excellent Adventure*(1989)). The historical characters on the television program *Voyagers* about a time travelling duo would be classified here as well. Rights of Publicity/Personality may continue after death, but the Right of Privacy terminates upon the death of the person.

Real-Based Character: Characters that are based on people who really lived and are still alive, that may be recognized, but not necessarily famous for what transpired in their lives. They can be presented in a telling based on a true story, such as the movie *Ali* (2001) about the life of boxer Mohammed Ali was made and released while he was alive. This category also includes characters that are significantly influenced by real people that the creator knows personally in which the character resembles the real person influence so much that the real person is recognized by an audience for who the character is based on. Also, includes the taking of a real-based character and presenting that figure in a completely new story (the parodies of politicians on comedy programs like *Saturday Night Live* and *Royal Air Farce*).

Real Person Character: Real People who perform as themselves as Characters. Mel Tormé who guest-starred from time to time on *Night Court* is one example. Kareem-Abdul-Jabbar on *Webster*. Cher on *Will & Grace*, Dan Marino in *Ace Ventura: Pet Detective* (1994), Elizabeth Hurley on *The Job*, Tom Jones on *Fresh Prince of Belair*, Marshall McLuhan on *Annie Hall*, Peter Falk in *Wings of Desire*, Alice Cooper in *Wayne's World* (1992), Keith Hernandez, Jay Leno, Paul O'Neill, Corbin Bernsen, George Wendt, Fred Savage on *Seinfeld*.

Performance Art Characters: This is when the line between the performer and the performance is so gray and blurred that not even the performers themselves can absolutely distinguish all the difference between their personalities. The most highly publicized current example of this is the industry of professional wrestling where some of the wrestling characters of the ring and the wrestler performers themselves are very close to being one and the same. Also, it includes when a performer has played a character for such long time that the image of the performer has become synonymous in the public's eye as them being one and the same. (Roan Akison *is* Mr. Bean, Randy Poffo *is* Randy "Macho Man" Savage, and Enrie Coombs *is* Mr.. Dressup. The merger in the public's mind of the actors' images with the depiction of the characters they portray can allow protection of these characters on the grounds of the Right of Publicity/Personality.⁸ This also includes when a real person invents, creates and develops elements sufficient enough to be classified as a completely separate persona. Examples of this are food industry entrepreneurs Hector Boiardi and Harland Sanders. They each developed characters based on themselves and today those characters are still used and recognized by audiences respectfully as Chef Boy-Are-Dee and Colonel Sanders.

Commodity Industry Characters

Real-Sponsor Character: This is when a Real person is contracted to be associated with a product or service. The real persons in question are valuable for their celebrity or standing in the public eye. This also includes athletes and star performers who license their images and names away. Examples of this include Bill Cosby promoting Jell-O products, Brittany Spears Pepsi campaigns, and Tom Bosley for Glad Garbage Bags. They are characters in the sense that, although they are real people, they are assuming a character role, in a created context, to be presented as a sponsoring character (themselves) to be recognized as a (sponsoring) character by an audience.

Literal Character: Advertising Characters that are derived from the wares they help sell. Simply put, they are products and services given characteristics to make audiences identify them as characters. Some of the more well known are Mr. Peanut of Planters Peanut and Chocolate, Charlie Tuna of Star-Kist Foods, the Kool-Aid Pitcher of General Foods, and for service characters we have the classic Noid of Domino's Pizza emphasizing speedy delivery and Ol' Lonely, the Maytag repairman.

Mascot Character: Characters that are meant to bring good luck and be a representative of a team, product, service, event and are supposed to be media friendly. Mascots are characters with a specific job. Like corporate logos they specifically go out to represent more than itself, and draw in potential audience members in a way that corporate logos cannot using the affect that characters have that logo symbols do not. Found here are Ronald McDonald of McDonalds Restaurant and Tony the Tiger for Kellogg's Frosted Flakes. (Both of who are featured in the artwork of Dick Detzner presented in Appendix III, images III.2, III.4 and III.6)

Product Character: Listed here partly due to its economic inclination, a Product Character is just the opposite of a Literal Character. Under the term known as merchandising here the character is turned into a product. Best examples of these phenomena are coffee mugs in the shape of the heads of *Looney Tune* and *Star Wars* Characters. Also found in this category are when a Character appears as a design on a useful items such as pens, cereal bowls, glasses, hats, clothing, mouse pads and a variety of other gimmicks. This category includes the G.I. Joe action figures, Barbie dolls, teddy bears, Lego block people, puppets, costumes, statuettes, mannequins, and most any three-dimensional representations that can be identified as a character, not to be confused with Figure Characters. Figure Characters are the actual characters, Product characters are copies to be distributed to an adoring public.

Hidden Character: Used mostly in advertisements, this character does not appear to the untrained eye. This is not associated with "Where's Waldo" games, but based on even more subtleties. Existing in most in visual mediums this is when items or objects have character identifiable traits, designed to communicate to the audience at an unconscious level. The best example I can present is the advertisement used by the Montreal Transit System, in a promotion for students to take their backpacks off while standing in a bus. The posters had cartoons characters with backpacks. The backpacks that were held properly looked like happy faces and the backpacks that were interfering with other passengers looked unhappy (with zippers and pockets used to make up the contours of the eyes and mouth). The genius of this piece is that you actually had to look for the faces, because they weren't that obvious. They were *hidden* to the naked eye, but intentional created to communicate with audiences. They are the only character category not to require an audience direct identification to be considered a character. Hidden characters appear in a visual form that it falls under copyright protection, as part of a larger artistic or visual work. If it is in an advertisement, it may also qualify for trademark protection as part of the larger work. (See Appendix III Image # III.1)

The following Character Categories are default groupings. All Characters will fall into one of these two headings. These groupings are more related to the way the character is presented, and not a category in specific. They are:

Vessel Character: The idea behind this category is there exists a presumption all characters are human beings. What element helps the audiences identify a character makes the vessel of the character a secondary concern. Yet, with the about unlimited variety that exists in the way characters are presented it is necessary to include this final category as a miscellaneous grab bag to categorize any character that is not directly human or identifiable in any other category. They are different because of the Vessel they are presented in, not the persona traits they exhibit. Some examples are animal characters (talking or non-talking), robots, artificial life forms, supernatural, and inanimate-object characters. Inanimate-object characters are those where the initial idea of sentience isn't expected, but are presented to be identified as characters. Examples of the vast category are The Littlest Hobo, E.T., Father Time and Mother Nature of *the Smurfs* Cartoon, Death from Marvel Comics, ghosts, God as presented on *South Park*, Winnie the Pooh, monsters, vampires, zombies, and The Great Gonzo (see image), who was revealed in the most recent Muppets movie to be an alien from outer-space.



The Great Gonzo
TM and ©
The Jim Henson
Company
These materials
are used with the
permission of
The Jim Henson
Company Inc

Human Characters: These are characters identified by an audience as being human beings. This is the only distinction that separates them from Vessel Characters. These characters may also qualify in at least one or more other categories. Simply put, unless strictly described as not belonging here, and as stated earlier in this study that characters are defined as simulations of human life spirits, this category is for all those characters who don't specifically fall into any one of the other categories listed here. (See the human characters in Appendix III, image # III.1)

Endnotes to Appendix I

- ¹ Pat Brymer. Letter to the Author, February 22, 2001
- ² Ernie Coombs. Telephone Interview. August 13, 2001
- ³ Lesley Ellen Harris. Canadian Copyright Law. 3rd edition, Toronto, ON. McGraw-Hill Ryerson Limited, 2001. p. 132
- ⁴ Adam Pirani, "Bob Hoskins, Animated Investigator" Starlog , August 1988
- ⁵ Andy Gryn. Personal Interview. 2001
- ⁶ Michael C Donaldson. Clearance & Copyright. 1st edition, Los Angeles, CA. Silman-James Press, 1996. p.17
- ⁷ Ernie Coombs. Telephone Interview. August 13, 2001
- ⁸ Lee, Mark S. and Spear-Ullendorff, Alison. "Strength of Character", Los Angeles Lawyer Vol. 20, No. 2. Los Angeles County Bar Association, <http://www.lacba.org/showpage.cfm?pageid=790>, April 1997. p. 6

APPENDIX II: Character Definition Checklist

The following is a compellation of the different Character Checklists I have come across in my studies. This should be considered a useful tool to help creators flesh out their characters, but not a be all and end all description. Characters can evolve over time, and the following list is best used as a device of clarity. Character sentience is not something we see, thus what we call *character*, then, is just a huge collection of predisposition to act in a certain way, given certain types of situations. As such, no one can own a character per se. How could one? The number of possible predisposition anyone might have is theoretically infinite. You can own a name, a catch-phrase, a set of words (i.e. copyright), a particular likeness (a photograph), etc., but not a character. It is not important for all requested information be filled out for any given character, but that the creator be aware of what has been defined and what has not been defined and incorporate that in the context of how the character is presented. Even if every one of these criteria has information, we are only scratching the surface. Characters are more than that, and audiences fill in whatever is yet missing.

1. Individual Name(s):
2. Group name(s)
3. Name Variants in Different Languages:
4. Nicknames:
5. Alias:
6. Character Category(ies): (as defined in Appendix I)
7. Living or Dead
8. Gender
 - Male__
 - Female__
 - Androgynous__
 - Unknown__
 - Non-applicable__
 - Hermaphrodite__
 - Transsexual: Male to Female__ Completed__
 - Transsexual: Female to Male__ Completed__
9. Age
10. Height
11. Weight:

12. Place of Birth
13. Place of Death
14. Race
15. Nationality
16. Citizenship
17. Ethnic background
18. Original language:
19. Class: lower, middle, upper
20. Personal status:
21. Color of hair
22. Color of eyes
23. Color of skin
24. Body Type:
25. Hair Style
26. General appearance (good-looking, average, homely, sloppy, neat, disheveled)
27. Clothing Styles/Favorite Outfit:
28. Recurring traits and other characteristics:
29. Any abnormalities (defects)
30. Distinguishing birthmarks
31. Physical Condition (Fit, unfit or something in between?):
32. Medical history
33. Distinguishing Features:
34. Physical Imperfections/Would Like Most to Change:
35. How well does your character groom him/herself
36. What is your character's pace of speech?
37. What kind of image does your character project?
38. What kind of posture does your character adapt?
39. General Health, Excellent, Below Average, Terrible or any current or chronic conditions
40. Current Address
41. Rented or owned?
42. Brief description of home (Apartment/tenement building/high-rent/low-rent/district/house/mansion/castle, etc.):
43. Other occupants of current home
44. Is your character from the area in which your story takes place or not? What influence on environment?
45. Description of Neighborhood:
46. Main habitat if on preexisting earthly or stellar maps or Main fictitious habitat with description and imaginary map if any annexed
47. Where would he/she prefer to live? Why doesn't he/she live there?
48. What kind of décor of personal space is controlled by this character? Is it carefully planned, Expensive, Neat, Clean, Comfortable, attractive, cluttered?
49. Main occupation/Job/career:
50. Current occupation

51. Current employer
52. Income / Income level:
53. Areas of Expertise:
54. Past Occupations/Significant past jobs
55. Attitude towards work and school
56. Organization to which character(s) belong(s) with rank or title:
57. What kind of cause beyond self would your character care about?
58. short-term Goals:
59. long-term Goals:
60. short-term Needs:
61. long-term Needs:
62. Education / Years of Schooling: (how much, what schools, kind of grades, likes, dislikes, aptitudes)
63. Major and Minor Studies in College:
64. Degrees:
65. Grades Achieved in School:
66. Skills, Abilities and Talents:
67. Military Experience:
68. Is your character deep in debt?
69. Does your character save money?
70. Does your character spend whatever he/she has, soon after acquiring it?
71. Is your character into criminal activities from financial need?
72. If he/she were suddenly much richer, what would he/she do with the money?
73. What is his/her stated dream in life?
74. Accomplishments in "society's eyes"
75. Name and summary of cause or philosophy identified with character(s):
76. Continuing project or mission?
77. People often found with outside of work?
78. How does he/she get to work?
79. Does he/she anticipate, dread, resent, etc. The work ahead?
80. Does he/she give the job genuine attention and effort?
81. Would he/she rather be doing something else and if so, what?
82. How long, and hard is the work day?
83. Does he/she stop for lunch? If so, where, eating what, typically and with whom?
84. What does he/she actively work to gain or keep or protect – not merely says is important, but actually invest time and emotion in – money, fame, family, love, country, revenge, etc.?
85. What is his/her earliest memory?
86. Who does he/she, in his/her deepest soul, really love best in the whole world?
87. What would he/she be willing to die for, if anything?
88. How would he/she describe himself/herself, if totally honest?
89. Is your character a father or son? Daughter or mother?
90. Father's Name
91. Father's current status (living or deceased)

92. Mother's name
93. Mother's current status
94. Brothers/sisters/significant-other relatives?
95. How many children if any?
96. Home life: relationship with parents; influence of parents; parents still living; divorced; any brothers and sisters and, if so, relationship with them.
97. Parent's profile including race/ethnicity/socioeconomic level, habits
98. Family structure/life (important to be able to imagine)
99. Marital Status and for how long?
100. Spouse's name
101. Name by which character addresses spouse
102. Spouse's occupation
103. Children and their ages:
104. What time does your character usually wake up and who is he/she with?
105. What wakes him/her up?
106. Type and Number of Close Friends:
107. Best Friend:
108. Other Friends:
109. Relationships with friends (who, how long)
110. What kind of vehicle does your character own? (make, model, year, condition)
111. Does your character have any pet(s) and why or why not?
112. Where did your character acquire his pet(s) if any?
113. What is your character's relationship to his/her pet?
114. What is your character's attitude in the morning?
115. What does he/she eat for breakfast?
116. What does your character do whilst eating breakfast?
117. What does your character do on a typical evening, where, with whom, and enjoy it?
118. What would he/she prefer to be doing instead?
119. Why doesn't he/she do that?
120. Is the evening atmosphere pleasant, calm, tense, frenetic, wary, fun, productive, other?
121. Does he/she usually go to bed at a consistent time?
122. When does bedtime occur at a different time?
123. Does he/she usually fall asleep right away?
124. If no, what is he doing in the meantime – reading, watching TV, sex, tossing and turning?
125. How much does he/she enjoy this activity?
126. Does he/she dream a lot, little, or never?
127. Are most of his/her dreams scary, pleasant, sexual, etc.?
128. Is any one dream recurrent?
129. Does your character sleep peacefully through the night, relentlessly, or very badly?
130. Favorite Physical Attributes in other people:

131. Attributes About Character That Turn On Opposite Sex:
132. Sexual Turn-Ons:
133. Sexual Turn-Offs:
134. What is the sexual orientation of the character?
135. Degree of religious practice
136. Religious beliefs, if any (what are they; and are they expressed)
137. What does he/she believe about God?
138. What does he/she believe the purpose of life?
139. Does he/she believe an afterlife?
140. Political views, if any (what are they; and are they expressed)
141. Hobbies/interests (sports, physical fitness, sailing, race track, gambling)
142. What does he/she really long for, underneath?
143. What event is he/she most afraid might happen?
144. What are the character's frustrations and disappointments?
145. What do you see is the biggest contradiction(s) your character lives out?
146. Temperament: pessimistic, optimistic, aggressive, easygoing
147. Attitude towards life: resigned, militant, defeatist
148. Complexes: obsessions, inhibitions, superstitions, phobias, quirks
149. Extrovert, Introvert, ambivalent
150. Main protagonist or antagonist?
151. Tends to be victim/persecutor/savior?
152. Intuition or sensation?
153. Tends to be innocent/imposter/ironic figure?
154. Mostly self-centered, Selfish? Selfless?
155. Judging or perceiving orientation?
156. More thinking or feeling?
157. What do you see is your character's core characteristic?
158. Qualities: imagination, judgment, taste, poise, social graces
159. I.Q.
160. Pet Peeves and Gripes?
161. Any favorite phrases or words?
162. What is your character's favorite gesture and when does he/she use it?
163. Usual cuss words, if any
164. Things That Make the character Uncomfortable or Embarrassing
165. Most Painful Things in One's Life:
166. Most hated activities
167. Most enjoyed activities
168. Deepest secret or wildest fantasy
169. Ever Been Arrested? (If so, for what?):
170. Political or Social Issues Most Important To You:
171. Opinion on Abortion:
172. Opinion on Environmental Issues:
173. Opinion on Homosexuality:
174. Opinion on Military intervention:

175. Opinion on Progress:
176. Opinion on Crime and Gun Control:
177. Opinions Peculiar to Character:
178. Which Political Party does your character support?
179. Liberal, Conservative, Middle of the Road, Radical:
180. Sense of Humor (None, dry, understated, witty, slapstick, dirty, etc.):
181. Fears:
182. Phobias:
183. Physical Illnesses or Afflictions:
184. Mental Disturbances:
185. Enjoys sports? Which?
186. Enjoys music? Which?
187. Enjoys reading? Which?
188. Enjoys dance? Which?
189. Enjoys Theater? Which?
190. Enjoys Movies? Which?
191. Enjoys the outdoors? Where?
192. Enjoys going out? Where?
193. Enjoys Shopping? Shopping for what? Where?
194. Favorite Pastime:
195. Favorite TV Shows:
196. Favorite Movies:
197. Favorite Travel Destination:
198. Pets:
199. Drinks Alcohol? (How often?): Favorite Alcoholic Drink:
200. Favorite Books:
201. Traumas/Psychological Scars from the Past:
202. Philosophy of Life:
203. Most Crucial Experience (experiences that mold character's personality or attitude):
204. Car: (Type/Color):
205. Drive Fast or Slow/Obey Traffic Laws:
206. Major Problems to Solve or Overcome:
207. Minor Problems to Solve or Overcome:
208. Solutions to Problems:
209. Which figure in history would your character most admire?
210. How much would it take for your character to do something seemingly contradictory or out of character?
211. Alcoholic or drug user or son/daughter of one or the other?
212. Is your character the right person at the right time in the right place? Or the wrong person at the wrong time in the wrong place or any combination of the above?
213. What would your character become during a New Orleans Mardi Gras?
214. What should you write on your character's tombstone?

215. A loner? Family oriented? Couple oriented?
216. Favorite music or group/favorite TV shows or films
217. Which photo in the family album best captures “everything” about your character (note: people who have absolutely no photos of themselves; this too is an option!)
218. Arrests or convictions, and if so, what for?
219. Sentences served?
220. How does the character treat and/or get along with:
 - Spouse?
 - Children?
 - Parents?
 - Siblings?
 - The opposite sex?
 - Children in general?
 - Neighbors?
 - Friends?
 - People more successful than he/she is?
 - People less successful?
 - Boss?
 - Underlings at work?
 - Competitors at work?
 - The local police?
 - The IRS?
 - Anyone who challenges him/her?
 - Anyone who angers him/her?
 - Anyone who helps him/her?
 - Anyone who asks for help?
221. Vegetarian or meat and potatoes or lean cuisine?
222. Is good food important to him/her?
223. What kind(s) of food?
224. Can he/she cook? How well?
225. Favorite Meal:
226. Diet (Rich, low-fat, low cholesterol, restaurant, etc.):
227. Favorite Restaurant/Ethnic Food:
228. Who prepares his/her meals?
229. Who does he/she eat them with?
230. What do the meals typically consist of?
231. Does he/she enjoy the meals and why?
232. What goes on during dinner – TV, conversation, fighting, reading etc,?
233. Who cleans up?
234. How would your character tend to react to:
 - Inheriting \$1 million
 - The death of a loved one
 - Two weeks on a Greek Island
 - A natural disaster: hurricane/earthquake, etc.

- Being fired
- Meeting an old friend or enemy not seen for years
- A blind date
- Children: having them/raising them
- Being raped/mugged/violated in some way
- An unexpected kindness or compliment
- A serious illness such as aids or cancer
- A flat tire on the expressway
- And unexpected day off
- An interracial relationship
- Five minutes on local or national TV
- 235. Slogan Phrases used to identify characters by themselves or by others:
- 236. Favorite Pet Sayings, Words/Idiolect:
- 237. Speaking Style (Talkative, taciturn, soft-spoken, loud, formal, casual, accent)
- 238. Voice (Shrill, Average, Deep, Unusually musical, Unusually authoritative, Other)
- 239. Characteristic Gestures:
- 240. Manias:
- 241. Does your character ever Smoke? ☐ No ☐ Former smoker
How much?
- 242. Does your character ever drink?
How much?
Was your character ever a drinker?
- 243. Does your character do Drugs?
- 244. What drugs and How much?
- 245. Props (recurring costumes, mascots, and other physical devices)
with names if any:
- 246. Identifying theme music if any: (Specify title and mention any Copyright
Registration recordings, broadcasts, and other transmissions worldwide.):
- 247. Foils and other ancillary characters included in the grant of rights subject to
contract provisions on "spin-off": (in some cases, these are best listed on separate
forms. Where not separately listed, a brief summary of their recurring elements
according with the form will be useful.)
- 248. Uses of character name(s) as book, production and game titles:
- 249. Name of the first book and/or publicly performed vehicle in which character(s)
first appeared anywhere: First publication date:
- 250. Is this Character in the Public Domain? What territory?
- 251. First United States publication date:
- 252. First Canadian publication date:
- 253. List concerning productions in all media where the character(s) appear(s):
- 254. Original literary author(s) and graphic creators(s) of each of these works
- 255. Date of death of any author(s) or creator(s)
- 256. Attached any and all character registration forms (copyright, trademarks,... for all
territories and terms)
- 257. What captioning must be presented with character? (Trademark captioning)

258. In new works, How has the character evolved or altering the character(s) after original depiction:
259. Approximate size of character's(s) audience worldwide to date via use in all media, including commercials and merchandising:
260. Currently outstanding licensee options or other circumstances indicating future continued use of character(s):
261. Proposed characters' alterations and new ancillary characters under consideration with authority of rights owner:
262. Any pertinent quotes from reviews or prize awards (Annex if lengthy):
263. Identification anywhere as commercial spokesperson(s) for a product or service:
264. Identification with any "live" performer, living or deceased, including voice only:
265. Name of any real character(s) on whom based:
266. Names and addresses of owners and licensing agents: (Questions of estate succession, previous licensees and other matters are left out because these and some of the points in this form belong properly in contract with warranties.):
267. Era(s) including any time period or event framework of significance
268. Would your character agree with your assessment? Why or why not?
269. If you could come up with a sound to illustrate your character, what would that sound be? (Attach recording)
270. What must the writer of the Character know that the audience will not be directly made aware of?
271. What Elements of the Character are based on the original author/creator/owner(s)?
272. What Elements of the Character are based on the new author/creator/owner(s)?
273. Is the character in an adaptation or translation of a copyrightable work?
274. Is there an exception to the law that allows you to use this character without obtaining permission?
275. Are you doing anything to this character that would be against the creator's moral rights?
276. Miscellaneous points as further description:

APPENDIX III: Images

"Sac à dos" Campaign
Image Created by Andre Cardinal
© STCUM
Used with Permission

**Apprivoisez
votre sac à dos**



Tenez-le par la main!

Image III.1

Can you see the Hidden Characters in the Backpacks?

The Last Pancake Breakfast © 2000 Dick Detzner
Part of the Corporate Sacrilege Art Series. Used with Permission

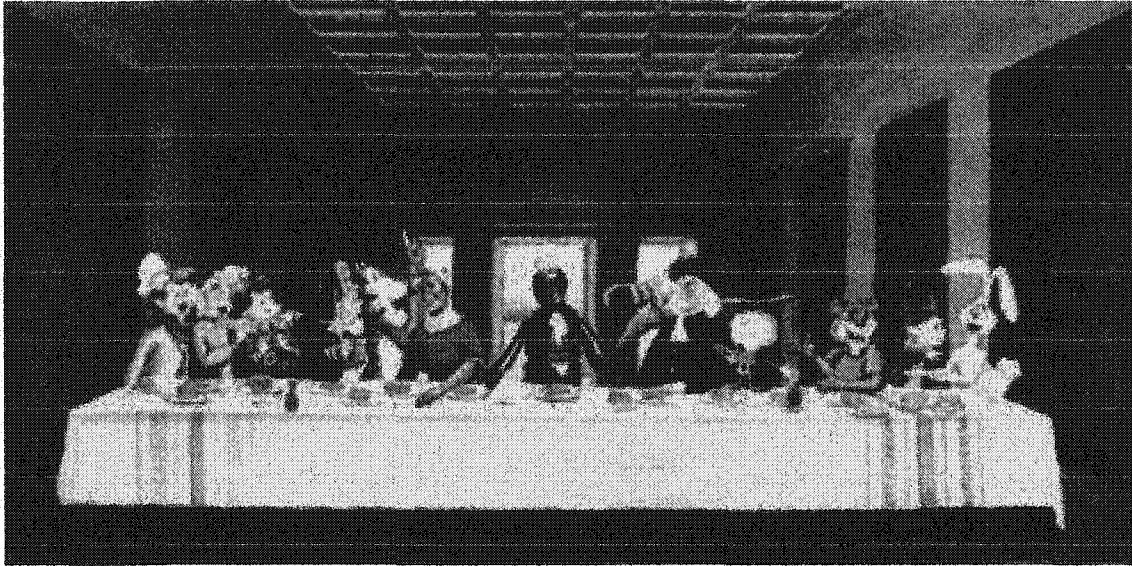


Image III. 2

Breakfast of Saviors © 1998 Dick Detzner
Part of the Corporate Sacrilege Art Series. Used with Permission

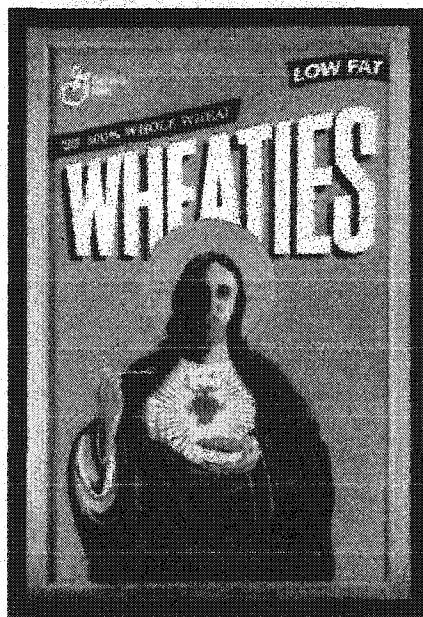


Image III.3

All Paintings © Dick Detzner
Part of the Corporate Sacrilege Art Series. Used with Permission

"Christians...they're grrrreat!" © 1999



Image III.4

"The Sacrifice of Sprout" © 1999



Image III.5

"The Lamentation" © 1998

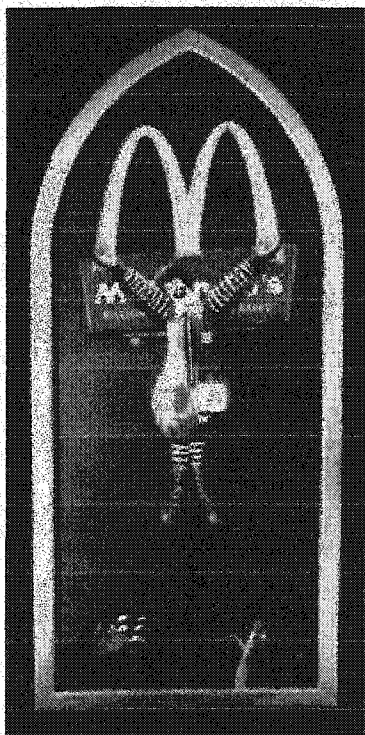


Image III.6

"Expulsion from Paradise" © 1998



Image III.7

Works Cited

- Abramovitch, Susan H. "Misappropriation of Personality." Canadian Business Law Journal 33 (2000). p.230-246
- Alpern, Andrew. 101 Questions About Copyright Law. Mineola, NY: Dover, 1999.
- Battersby, Gregory J., and Grimes, Charles W. The Law of Merchandising and Character Licensing. St.Paul, MN: West Group, 2000.
- Beard, Joseph. "Digital Actors: Not Just Hype." Entertainment, Arts & Sports Law Journal 8.1 (1996). p. 4-9
- . "Will the Reel, er, Real Bill Clinton Please Stand Up: The Unauthorized Use of the President's Image – A New 'Contact' Sport." Entertainment and Sports Lawyer 15.4 (1998). p. 3-6
- Beck, Jerry. The 50 Greatest Cartoons As Selected by 1,000 Animation Professionals. North Dighton, MA: J.G. Press, 1998.
- Bereskin, Daniel R. "Merchandising Licensing and Personalities."
www.bereskinparr.com/art-pdf/MerchandisingPersonalities.pdf. 1997.
- Blumenthal, Howard J., and Goodenough, Oliver R. This Business of Television. 2nd ed. New York, NY: Billboard Books, 1991.
- Breimer, Stephen F. Clause by Clause. New York, NY: Dell Publishing, 1995.
- . The Screenwriter's Legal Guide. 2nd ed. New York, NY: Allworth Press, 1999.
- Brymer, Pat. Letter to the author. February 22, 2001.
- Canadian Intellectual Property Office. A Guide To Copyrights. Ottawa, ON: Industry Canada Publications, 1994.
- Carter, Mary E. Electronic Highway Robbery: An Artist's Guide to Copyrights in the Digital Era. Berkeley, CA: Peachpit Press, 1996.
- Coombe, Rosemary J. The Cultural Life of Intellectual Properties. Durham, NC: Duke University Press, 1998.
- Coombs, Ernie. Telephone interview. August 13, 2001.

- Crainger, Stuart. Business The Rupert Murdoch Way. New York, NY. Amacom, 1999
- Cremer, Charles F. and Yoakam, Richard D. Eng: Television News and The New Technology. 2nd edition, New York, NY, McGraw-Hill, Inc., 1989
- Daniel, Johanne, "*Copyright Clearance Guide: A Practical guide on Copyright Clearance for Multimedia Producers*", Department of Canadian Heritage & Interactive Multimedia Producers Association of Canada (IMPAC), http://www.pch.gc.ca/culture/cult_ind/copymm_e.htm
- Donaldson, Michael C. Clearance & Copyright. 1st edition, Los Angeles, CA. Silman-James Press, 1996
- Dotz, Warren and Morton, Jim. What a Character!. San Francisco, Ca. Chronicle Books, 1996.
- Dyer, Richard, "*Charisma*," Stardom: Industry of Desire, Christine Gledhill, London: Routledge, 1991. p.207-229
- Ferguson, Francis. Aristotle's Poetics. New York, NY, Hill and Wang, 1961
- Field, Syd. Selling a Screenplay: The Screenwriter's Guide to Hollywood. New York, NY, Dell Publishing, 1989
- "*Film or Video Production Services Tax Credit (PSTC) Guidelines*", Canadian Audio-Visual Certification Office (CAVCO), http://www.pch.gc.ca/culture/cult_ind. 1998.
- Frank, Anne. Telling it. Toronto, ON. Doubleday Canada Limited, 1996
- Gaines, Jane M. Contested Culture. Chapel Hill, NC. The University of North Carolina Press, 1991
- Gameson, Joshua, "*Hunting Sporting and the Willing Audience: The Celebrity Watching Tourist Circuit*," Claims to Fame: Celebrity in Contemporary America, Berkeley: University of California Press, 1994.
- Giannetti, Louis. Understanding Movies. 5th edition, Englewood Cliffs, NJ. Prentice Hall, 1990
- Gledhill, Christine, "*Signs of Melodrama*," Stardom: Industry of Desire, London: Routledge, 1991. p. 207-229

- Gordon, Neal. "*Character Marks*" USTA Trademark Information for Management Executive Newsletter No. 32, The United States Trademark Association, 1981.
- Government of Canada. "Copyright on the Internet."
<http://publications.pwgsc.gc.ca/copyright/internet-e.html>. 2001.
- Gross, Larry, Katz, John Stuart, and Ruby, Jay. Image Ethics. New York, NY: Oxford University Press, 1988.
- Grossberg, Lawrence. "Mapping Popular Culture." We Gotta Get Out of This Place: Popular Conservatism and Postmodern Culture. New York, NY: Routledge, 1992.
- Gryn, Andy. Personal interview. September 20, 2001.
- Hartley, John. "Hail Fellow Well Met." Understanding News. London: Methuen, 1982.
p. 87-107
- Hauge, Michael. Writing Screenplays that Sell. New York, NY: Harper Perennial, 1991.
- Harris, Lesley Ellen. Canadian Copyright Law. 3rd ed. Toronto, ON: McGraw-Hill Ryerson Limited, 2001.
- Hebdige, Dick. "What is Soul?" Video: Icons and Values. Eds. Alan Olsen, Christopher Parr, and Debra Parr. Albany, NY: State University of New York Press, 1991.
p. 121-134
- Hegner, Barbara, and Sheffer, Andra. Making It. Toronto, ON: Doubleday Canada, 1995.
- Herrington, TyAnna K. "Intellectual Property Is Not Property: Debunking the Myths of IP Law." <http://english.ttu.edu/kairos/3.1/coverweb/ty/kip.html>.
- Hochman, Baruch. Character in Literature. 1st ed. Ithaca, NY: Cornell University Press, 1985.
- Hood, Ann. Creating Characters' Emotions. Cincinnati, OH: Story Press, 1998.
- Horton, Andrew. Writing the Character-Centered Screenplay. Los Angeles, CA: University of California Press, 1999.
- Houghton, Buck. What a Producer Does. 1st ed. Beverly Hills, CA: Silman-James Press, 1991.
- Irving, Joan. Selling It. Toronto, ON: Doubleday Canada, 1995.

Jasper, Margareth C. The Law of Obscenity and Pornography. Dobbs Ferry, NY: Oceana Publications, 1996.

Joyrich, Lynn. "Going through the Emotions: Gender Postmodernism and Affect in Television Studies." Discourses 14.1 (1991-92). p. 23-40

Kamarck, Mitchell D. "Empowering Celebrities in Cyberspace: Stripping the Web of Nude Images." Entertainment and Sports Lawyer 15.4 (1998). p. 1, 12-16

Key, Wilson Bryan. Subliminal Seduction. New York, NY: New American Library, 1974.

Kitching, Ian, "'Peter Pan' Copyright."
<http://www.cam.anglia.ac.uk/~systimk/Articles/Peter-Pan2.Html>. 1999.

Kress, Nancy. Dynamic Characters. 1st ed. Cincinnati, OH: Writer's Digest Books, 1998.

Kratz, Martin P.J. Canada's Intellectual Property Law in a Nutshell. Scarborough, ON: Carswell Thomson Professional Publishing, 1998.

Kong, Debra P. "A Lesson in Libel." Q-Write: Quebec Writers' Federation Newsletter 1.4, (1999).

Lee, John J. The Producer's Business Handbook. Woburn, MA: Butterworth-Heinemann, 2000.

Lee, Mark S., and Spear-Ullendorff, Alison. "Strength of Character." Los Angeles Lawyer 20.2 (1997). <http://www.lacba.org/showpage.cfm?pageid=789>

Legal Information Institute. Cornell Law School. "Unfair Competition Law: An Overview." http://www.law.cornell.edu/topics/unfair_competition.html.

Litwak, Mark. Contracts for the Film & Television Industry. 2nd ed. Beverly Hills, CA: Silman-James Press, 1998.

----. Dealmaking in the Film & Television Industry. Beverly Hills, CA: Silman-James Press, 1994.

----. Litwak's Multimedia Producer's Handbook. 1st ed. Beverly Hills, CA: Silman-James Press, 1998.

Lynch, Deidre Shauna. The Economy of Character. Chicago, IL: University of Chicago Press, 1998.

Madow, Michael. "Private Ownership of Public Image: Popular Culture and Publicity Rights." California Law Review 81.1 (1993). p.125 -240

Masters, Kim. The Keys to the Kingdom. 1st ed. New York, NY: HarperCollins, 2000.

McCutcheon, Marc. Building Believable Characters. Cincinnati, OH: Writer's Digest Books, 1996.

McKee, Robert. Story. 1st ed. New York, NY: Regan Books, 1997.

McCloud, Scott. Understanding Comics. Northampton, MA: Kitchen Sink Press, 1993.

McLuhan, Marshall. "Television: The Timid Giant." Understanding Media: The Extensions of Man. New York, NY: McGraw-Hill, 1964. p. 268-293

Mendenhall, John. Character Trademarks. San Francisco, CA: Chronicle Books, 1990.

Modleski, Tania. "The Search for Tomorrow in Today's Soap Operas." Loving with a Vengeance: Mass-Produced Fantasies for Women. New York: Methuen, 1982. p. 85-109

Moore, Schuyler M. The Biz. 1st ed. Los Angeles, CA: Silman-James Press, 2000.

Netmetz, Steven. "Copyright Protection of Fictional Characters." Intellectual Property Journal (December 1999). p. 59-108

Nevins, Francis. "Copyright + Character = Catastrophe." Copyright Society of the U.S.A. Journal. p.303 - 344

Passman, Donald S. All You Need to Know about the Music Business. New York, NY: Simon & Schuster, 1997.

Rand, Ayn. The Virtue of Selfishness. New York, NY: Penguin, 1964.

Resnik, Gail, and Trost, Scott. All You Need to Know about the Movie and TV Business. New York, NY: Fireside, 1996.

Rich, Lloyd L. "Protection of Graphic Characters." <http://publaw.com/graphical.html>.

1998.

----. "Parody: Fair Use of Copyright Infringement." <http://www.publaw.com/parody.html>. 1999.

Ringer, Robert J. Looking Out for Number One. New York, NY: Fawcett Crest, 1977.

----. Restoring the American Dream. New York, NY: Fawcett Crest, 1980.

Roe, Paul. E-mail to the author. July 13, 2001

Sanderson, Steve. Standard Legal Forms and Agreements for Canadian Business. North Vancouver, BC: Self-Counsel Press, 1989.

Sebert, Paul. "Kissing Cousins May Bring Controversy: Cartoon Network Juggles Controversial Topics Contained in the Sailor Moon-S Series." Daily Athenaeum 28 June 2000.

Seeger, Linda. Creating Unforgettable Characters. 1st ed. New York, NY: Henry Holt and Company, 1990.

Singer, Eric M. "The Development of the Common Law Tort of Appropriation of Personality in Canada." Canadian Intellectual Property Review (1997). p.65-80

Soocher, Stan. They Fought the Law: Rock Music Goes To Court. New York, NY: Schirmer Books, 1999.

Sotiriadis, Bob H. "A Summary of Some Distinctions between Canadian and American Copyright Law and Practice." www.robic.ca. 1998.

Squire, Jason E. The Movie Business Book. 2nd ed. New York, NY: Fireside, 1992.

Storey, John. An Introductory Guide to Cultural Theory and Popular Culture. Athens, GA: University of Georgia Press, 1993.

Supnik, Paul D. "Life Story Rights." <http://www.supnik.com/lifestor.htm>. 1999.

Suppa, Ron. This Business of Screenwriting. Los Angeles, CA: Lone Eagle Publishing Company, 1999.

Swain, Dwight V. Creating Characters. 1st ed. Cincinnati, OH: Writer's Digest Books, 1990.

Sweeney, Geraldo, and Williams, John. "Mortal Kombat: The Impact of Digital

- Technology on the Rights of Studios and Actors to Images and Derivative Works." Entertainment and Sports Lawyer 17.1 (1999). p. 1, 17-21
- Tamaro, Norman & McGuire, Christopher. 1997 Annotated Copyright Act. Toronto, ON: Carswell, 1998.
- Taylor, Diana. "Dancing With Diana: A Study in Hauntology." The Drama Review 43.1 (1999).
- Vogell, Harold L. Entertainment Industry Economics. 4th ed. Cambridge: Cambridge University Press, 1998.
- Watterson, Bill. The Calvin and Hobbes Tenth Anniversary Book. Kansas City, MI: Universal Press Syndicate, 1995.
- Wincor, Richard. The Art of Character Licensing. Little Falls, NJ: Glasser Legal Works, 1996.
- Wolf, Michael J. The Entertainment Economy. 1st ed. New York, NY: Random House, 1999.
- Vanpelt, Lauren. "Mickey Mouse: A Truly Public Character."
<http://www.public.asu.edu/~dkarjala/publicdomain/Vanpelt-s99.html>. 1999.
- Zorich, Diane M. "Why the Public Domain is Not Just a Mickey Mouse Issue."
<http://www.nich.org/copyright/townmeetings/chicagozorich.html>. 2000.