

**THE WORD:  
SCOPE OF COPYRIGHT PROTECTION FOR LIVE-ACTION  
CHARACTERS—AN ANALYSIS OF STEPHEN COLBERT’S  
CHARACTER “STEPHEN COLBERT”**

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*Videri quam esse*<sup>1</sup>

**INTRODUCTION:  
STEPHEN COLBERT BECOMES “STEPHEN COLBERT”  
AS TRUTHINESS BECOMES TRUMPINESS**

On July 18, 2016, in the midst of the Republican National Convention, *Late Show* host Stephen Colbert revived his old character from *The Colbert Report*, Stephen Colbert (the “Character”), to explain, as only the Character could, the nomination of Donald Trump as the Republican party’s nominee for president. The revival started with Colbert (the person) running off into the wilderness to find Jon Stewart, former host of *The Daily Show*, hidden away in a cabin. And after giving Colbert a spit-take (of what may or may not have been urine) and a few one-liner jokes about Trump—all prompted by Stewart’s

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<sup>1</sup> *Stephen Colbert’s New Latin Motto*, TALK SHOW NEWS (Jan. 7, 2010), <http://talkshownews.interbridge.com/2010/01/stephen-colberts-new-latin-motto.html> [hereinafter *Motto*]. This motto hung above the fireplace on the set of *The Colbert Report*; it is latin for: “to seem to be, rather than to be.” *Id.* It is a play on “esse quam videri,” the state motto of North Carolina. *Id.*

surprise in hearing that Donald Trump was the Republican party's presidential candidate—Stewart then proceeded to summon *The Colbert Report* host Character, who was also hiding in the cabin. The Character, eyebrow cocked, eagle crying, and holding Captain America's shield and Bilbo Baggins's sword Sting, was informed of Trump's nomination. He returned the spit-taking favor to Stewart and charged off into the wilderness towards *The Late Show*'s studio in Manhattan.<sup>2</sup>

The Character returned to *The Late Show* set in grand fashion, wheeled in on a golden chariot pulled by buff, shirtless Uncle Sams while a flute played "Yankee Doodle." The Character began with "Hello Nation" in his old *Colbert Report* opening salutation, quickly redecorated *The Late Show* set to look more like his old *Colbert Report* set while a distorted *Colbert Report* theme song played, and then launched into a signature bit from the *Report*, "The Wørd." That night's "Wørd" centered on "Trumpiness"—an echo of "truthiness," a term coined by Colbert on *The Colbert Report*'s first episode in the same bit—an explanation of how Trump has surpassed the Character's own flexible notion of facts, and how Trump's nomination is suited to and a consequence of many Americans' "legitimate" frustration and anger about the current political climate.<sup>3</sup>

A little over a week later, Colbert announced during *The Late Show* that immediately after the revival of *The Colbert Report*'s Character, "another company" (presumably Viacom, owner of Comedy Central, the network that aired *The Colbert Report*) had contacted CBS's top lawyer and claimed the Character as their intellectual property. Colbert remarked that he

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<sup>2</sup> *The Late Show with Stephen Colbert: Zoe Saldana* (CBS television broadcast July 18, 2016) [hereinafter *Late Show: Zoe Saldana*]; The Late Show with Stephen Colbert, *Only Jon Stewart Can Make Sense of the Trump Candidacy*, YOUTUBE (July 18, 2016), [https://www.youtube.com/watch?v=-GFVKMTJUos&list=PLiZxWe0ejyv80dprAb-CPuvR\\_qPYiSUtt&index=4](https://www.youtube.com/watch?v=-GFVKMTJUos&list=PLiZxWe0ejyv80dprAb-CPuvR_qPYiSUtt&index=4) [hereinafter *Only Jon Stewart*].

<sup>3</sup> *Late Show: Zoe Saldana*, *supra* note 2; The Late Show with Stephen Colbert, *The Word: Trumpiness*, YOUTUBE (July 18, 2016), [https://www.youtube.com/watch?v=NqOTxI3Bsbw&list=PLiZxWe0ejyv80dprAb-CPuvR\\_qPYiSUtt&index=5](https://www.youtube.com/watch?v=NqOTxI3Bsbw&list=PLiZxWe0ejyv80dprAb-CPuvR_qPYiSUtt&index=5) [hereinafter *Trumpiness*].

never considered the Character “much of an intellectual” and sadly admitted that the Character will never be seen again, causing the audience to boo loudly. Colbert quipped: “I understand, but what can I do? The lawyers have spoken. I cannot reasonably argue I own my face or name.” Colbert then introduced the Character’s identical twin cousin, Stephen Colbert, which is Colbert wearing an American flag short-sleeve shirt.<sup>4</sup>

The entire incident prompts a number of intellectual property questions—a common issue in the world of late night talk-shows<sup>5</sup>—but the most fundamental, and perhaps most novel is this: is the character even copyrightable and capable of being owned?

Colbert describes the Character as “a well-intentioned, poorly informed, high-status idiot.”<sup>6</sup> And while most people know the Character from *The Colbert Report*, the Character actually began much earlier, on *The Daily Show*, when Colbert joined the cast in 1997 and began portraying the Character—then merely a correspondent. At first the Character was apolitical but distinctively high-status, inspired by Geraldo Rivera’s news reporting, with Colbert stating: “I loved the way Geraldo made reporting a story seem like an act of courage.”<sup>7</sup> Over the course of Colbert’s time at *The Daily Show*, Stewart pushed him to

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<sup>4</sup> *The Late Show with Stephen Colbert: John Oliver, Jai Courtney, Charlamagne Tha God* (CBS television broadcast July 27, 2016) [hereinafter *Late Show: John Oliver*]; *The Late Show with Stephen Colbert, WERD: The Lesser of Two Evils*, YOUTUBE (July 27, 2016) <https://www.youtube.com/watch?v=LvkFkzpVYJ4&feature=youtu.be> [hereinafter *The Lesser of Two Evils*].

<sup>5</sup> See Eriq Gardner, *Can Viacom Really Stop Stephen Colbert from Playing “Stephen Colbert”?*, THE HOLLYWOOD REPORTER (July 28, 2016, 12:40 PM), <http://www.hollywoodreporter.com/thr-esq/can-viacom-stop-stephen-colbert-915340>.

<sup>6</sup> Talks at Google, *Stephen Colbert: “America Again: Re-Becoming the Greatness We Never Weren’t”*, YOUTUBE (Dec. 14, 2012), <https://www.youtube.com/watch?v=-HpBHWUPa8Q&feature=youtu.be>.

<sup>7</sup> Charles McGrath, *How Many Stephen Colberts Are There?*, N.Y. TIMES MAG. (Jan. 4, 2012), [http://www.nytimes.com/2012/01/08/magazine/stephen-colbert.html?pagewanted=1&\\_r=3&](http://www.nytimes.com/2012/01/08/magazine/stephen-colbert.html?pagewanted=1&_r=3&).

make the Character more political, and finally helped pitch the Character as the host of its own show, *The Colbert Report*, which debuted in 2005.<sup>8</sup> By that point the Character was an amalgamation of pundits Bill O’Rielly, Aaron Brown, Dan Abrams and Joe Scarborough, espousing a right-leaning political stance and an aversion to facts and logic.<sup>9</sup> Nine years and 1,446 half-hour episodes later, the Character signed off as host of *The Colbert Report* as one of the biggest names in late night TV.<sup>10</sup>

In contrast, Stephen Colbert the real person currently hosts *The Late Show*, taking over for David Letterman in 2015.<sup>11</sup> He grew up in Charleston, South Carolina, the youngest of eleven children.<sup>12</sup> Colbert lost his father and two older brothers when they died in a plane crash when he was ten-years-old.<sup>13</sup> By high school he was an avid reader, loved science fiction and Tolkien, and enjoyed playing Dungeons and Dragons.<sup>14</sup> Colbert studied theater at Northwestern and after graduating became a member of the Second City improv group.<sup>15</sup> He worked on numerous TV shows, most notably the *Dana Carvey Show*, *The Daily Show*, and of course *The Colbert Report*.<sup>16</sup> Colbert is a

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; Jacques Steinberg, *The News Is Funny, as a Correspondent Gets His Own Show*, N.Y. TIMES (Oct. 12, 2005), <http://www.nytimes.com/2005/10/12/arts/television/the-news-is-funny-as-a-correspondent-gets-his-own-show.html>.

<sup>10</sup> Mariam Jaffery, *Stephen Colbert Doesn’t Own His “Colbert Report” Character*, L. STREET (July 29, 2016), <http://lawstreetmedia.com/blogs/ip-copyright/stephen-colbert-own-character-colbert/>; David Sims, *Stephen Colbert’s Alter Ego Is Back*, THE ATLANTIC (July 19, 2016), <http://www.theatlantic.com/entertainment/archive/2016/07/stephen-colbert-returns-to-late-night-just-in-time/491954/>; *The Colbert Report: Episode Guide*, COMEDY PARTNERS, <http://www.cc.com/shows/the-colbert-report/episode-guide> (last visited Apr. 17, 2017).

<sup>11</sup> McGrath, *supra* note 7; James Poniewozik, *Stephen Colbert Introduces Himself as CBS’s New Late Show Host*, TIME (May 13, 2015), <http://time.com/3857917/stephen-colbert-cbs-late-show/>.

<sup>12</sup> McGrath, *supra* note 7.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

married father of three, a practicing Catholic, and even teaches the occasional Sunday-school class.<sup>17</sup>

In order to fully explore whether the Character is copyrightable, this article first briefly explore the basics of copyright. This section focuses on the purpose of copyright law, as stated in the Copyright Clause of the Constitution and the Court's interpretation of the Clause. This section then discusses copyright's requirements, specifically the idea/expression dichotomy that creates the boundary between works protected and unprotected by copyright. Additionally, this section discusses the manner in which a copyrighted work may be infringed, i.e. literal and "nonliteral" copying.

Next, this article explores the specific approaches courts have taken towards copyrighting characters, keeping in mind the policies underlying copyright. This section focuses on Judge Learned Hand's opinion in *Nichols v. Universal Pictures Corp.*,<sup>18</sup> the first case to specifically address the idea of whether characters are copyrightable, distinct from the works in which they appear. Next, the article discusses two separate outgrowths from the *Nichols* opinion, the first representing the "character is the story" standard, as stated in *Warner Bros. Pictures, Inc. v. CBS*,<sup>19</sup> and the second showing the different treatment courts give graphic, versus purely literary, characters. The section concludes with a discussion of the application of those principles to characters portrayed by real persons in costume, i.e. live-action characters.

Then, in light of Colbert's actual use of the Character, this article discusses the fair use doctrine, a defense that allows use of copyrighted material without an author's express consent. This section lays out the policies behind the fair use defense, and explores the factors used in analyzing fair use claims and the Court's unique treatment of parodic uses of copyrighted works.

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<sup>17</sup> *Id.*; Frank Rich, *The Real Stephen Colbert is a Sunday-School Teacher. His Key to Late-Night Success Is Avoiding Piety.*, N.Y. MAG. (Sept. 9, 2015, 1:19 PM), <http://nymag.com/daily/intelligencer/2015/09/promise-and-challenge-of-colberts-late-show.html>.

<sup>18</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

<sup>19</sup> *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945 (9th Cir. 1954).

And because of Colbert's unique position as a potential defendant who was also the author of the allegedly infringed work, this article then discusses how the general treatment author-defendants receive from courts in the copyright infringement context.

Last, this article returns to Colbert and the Character and analyzes whether the Character is copyrightable. For sake of argument, the article further analyzes, under the assumption that the Character is copyrightable, the potential success of a fair use claim by Colbert to justify his revival of the Character on *The Late Show*.

The analysis of this article is limited to whether the Character is copyrightable, and whether Colbert's use of the Character was fair. Thus this article will not discuss potential copyright issues beyond the Character, or any other types of federal or state intellectual property law issues potentially arising from the incident. Additionally, this article will not discuss ownership or contractual issues, such as the "work made for hire" doctrine or any similar issue potentially arising from the incident.

## **I. COPYRIGHT IN GENERAL: ITS HISTORY AND BASIC REQUIREMENTS**

### **A. THE CONSTITUTION AND THE COPYRIGHT ACTS**

The United States Constitution states:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.<sup>20</sup>

Congress put this power to use in short order, enacting the United States' first statutory copyright scheme in 1790,<sup>21</sup> and in subsequent acts extended the length of the protection period

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<sup>20</sup> U.S. CONST. art. I, § 8.

<sup>21</sup> Eldred v. Ashcroft, 537 U.S. 186, 194 (citing Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (amended 1831)).

afforded to copyrighted works.<sup>22</sup> Courts have found Congress’s extension of a work’s copyright protection by a subsequent act constitutional.<sup>23</sup> The current iteration of the Nation’s copyright laws was enacted in 1976.<sup>24</sup>

## B. THE PURPOSE OF COPYRIGHT

The Supreme Court holds Congress’s power to enact copyright laws is based on the underlying purpose—as expressly stated in the Constitution—of “creat[ing] a ‘system’ that ‘promotes the Progress of Science’” and the useful arts.<sup>25</sup> As such, the Copyright Clause both grants and limits Congress’s power to create a statutory copyright scheme.<sup>26</sup> Thus protections afforded to an author’s work via copyright are merely a means to serve, and are limited by, that end.<sup>27</sup> Elaborating on this, the Court has stated that copyright’s limited grant of protection to authors aims “to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”<sup>28</sup> As Justice Blackmun put it: “[t]he monopoly created by copyright thus rewards the individual author in order to benefit the public.”<sup>29</sup>

This limited grant of monopoly<sup>30</sup> appears to present a conflict between constitutional protections, as the owner of the copyrighted work has the ability to use that monopoly in limiting

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<sup>22</sup> *Id.* (citing Copyright Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (amended 1909); Copyright Act of Mar. 4, 1909, ch. 320, §§ 23–24, 35 Stat. 1075, 1080–81 (amended 1976)).

<sup>23</sup> *Eldred*, 537 U.S. at 200–05.

<sup>24</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

<sup>25</sup> *Eldred*, 537 U.S. at 212 (quoting *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966)).

<sup>26</sup> *Id.*

<sup>27</sup> *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991).

<sup>28</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

<sup>29</sup> *Id.* at 477 (Blackmun, J., dissenting).

<sup>30</sup> *See* 17 U.S.C. § 106 (2012) (granting certain exclusive rights to a copyright’s owner limited only by other statutory provisions).

another's free speech.<sup>31</sup> But the Court has found this to be a non-issue, stating the short temporal space between the adoption of the Copyright Clause and the adoption of the First Amendment shows the Framers believed that copyright's limited monopoly is compatible with free speech principles protected by the First Amendment.<sup>32</sup> Moreover, in light of the express purpose of the Copyright Clause, the Framers likely intended copyright's limited monopoly to be a vehicle for free expression.<sup>33</sup> Copyright achieves this aim by "establishing a marketable right to the use of one's *expression*," thus supplying the economic incentive "to create and disseminate *ideas*."<sup>34</sup>

### **C. THE IDEA/EXPRESSION DICHOTOMY: WHAT IS PROTECTED BY COPYRIGHT, AND WHAT ARE THE REQUIREMENTS FOR COPYRIGHT PROTECTION?**

The boundary between what is copyrightable, and what is not, is the difference between an expression and an idea. It is this dichotomy that "strikes a definitional balance between the First Amendment and the Copyright Act."<sup>35</sup>

The Supreme Court states the difference between an idea and an expression hinges on whether the work is original to the author.<sup>36</sup> This "originality requirement is constitutionally mandated,"<sup>37</sup> and Congress enshrined the originality requirement in section 102(b) of the Copyright Act of 1976.<sup>38</sup> In doing so,

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<sup>31</sup> Compare *id.*, with U.S. CONST. amend. I.

<sup>32</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

<sup>33</sup> *Harper & Row, Publishers. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

<sup>34</sup> *Id.* (emphasis added).

<sup>35</sup> *Id.* at 556 (quoting *Harper & Row, Publishers. v. Nation Enters.*, 723 F.2d 195, 203 (1983)).

<sup>36</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 344–45 (1991) ("[t]he sine qua non of copyright is originality."); *Harper & Row, Publishers*, 471 U.S. at 556.

<sup>37</sup> *Feist*, 499 U.S. at 347, 351.

<sup>38</sup> 17 U.S.C. § 102(b) (2012); H.R. REP. NO. 94-1476, at 51 (1976); S. REP. NO. 94-473, at 50 (1975). The other requirement for a work to receive copyright protection is that the work must be "fix[ed] in tangible form." H.R. REP. NO. 94-1476, at 51; S. REP. NO. 94-473, at 50. This requirement was also made explicit in section 102 of Copyright Act of 1976. 17 U.S.C. § 102 (2012).



Congress explicitly mentioned that section 102(b) incorporated “the scope of copyright protection” as it then stood, and section 102(b)’s purpose is merely to “restate . . . that the basic dichotomy between expression and idea remains unchanged.”<sup>39</sup>

Originality only requires that the work be new to the author and has a minimal amount of creativity.<sup>40</sup> Thus a work may be original even if it is not completely novel, so long as the similarities between the work and another are not the result of copying.<sup>41</sup> Furthermore, facts themselves are not the original work of an author, but are “merely discovered.”<sup>42</sup> But, an author can create a copyrightable expression through arrangement and selection of facts, if done with a minimal amount of creativity.<sup>43</sup> However, copyright protection would only extend to components that are original to the author, i.e. the selection and arrangement.<sup>44</sup>

Just as the line between an idea and its expression is unclear sometimes, the scope of copyright’s protections may be ambiguous. While literal copying of a protected work is clearly barred, copyright’s protections are not limited to a copyrighted work’s exact expression, as this would allow “immaterial variations.”<sup>45</sup> Thus copyright protects more than exact duplication of a copyrighted work; it also protects against “nonliteral” copying of a protected work, i.e. paraphrasing.<sup>46</sup> But this presents an issue of when similarities of a new work constitute nonliteral copying of a protected work’s expression, as opposed to its mere unprotectable ideas. This issue was best illustrated by Judge Learned Hand in *Nichols v. Universal*

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<sup>39</sup> H.R. REP. NO. 94-1476, at 57; S. REP. NO. 94-473, at 54.

<sup>40</sup> Feist, 499 U.S. at 345.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 347.

<sup>43</sup> *Id.* at 348.

<sup>44</sup> *Id.* at 347–49; Harper & Row, Publishers., 471 U.S. at 547 (“The copyright is limited to those aspects of the work -- termed ‘expression’ -- that display the stamp of the author’s originality.”).

<sup>45</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>46</sup> 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1] (rev. ed. 2017).

*Pictures Corp.*<sup>47</sup> while discussing whether one play violated another play's copyright protection:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.<sup>48</sup>

Thus, courts tend to apply some variant of a substantial similarities test when determining if nonliteral infringement has occurred.<sup>49</sup>

## II. THE DISTINCTIONS & APPROACHES TO COPYRIGHT PROTECTION OF CHARACTERS

### A. LEARNED HAND'S TAKE ON COPYRIGHTABLE CHARACTERS

Judge Learned Hand's opinion in *Nichols* is not only informative on the general understanding of whether a work as a whole is an expression, but also whether the individual aspects within a work are copyrightable expressions, separate from the copyright for the work as a whole. The dispute in *Nichols* centered on whether one play infringed on the copyright of another when both plays involved families, one Jewish and one Irish Catholic, with fathers at odds with one another while the children fall in love and start a family.<sup>50</sup> The quoted passage above refers to infringement via the copying of a play, but the plaintiff in *Nichols* also argued that the father characters, one a

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<sup>47</sup> 45 F.2d 119 (2d Cir. 1930).

<sup>48</sup> *Id.* at 121.

<sup>49</sup> 2 HOWARD B. ABRAMS, LAW OF COPYRIGHT §14:5 (2016)

<sup>50</sup> *Nichols*, 45 F.2d at 120–21.

Jew and the other an Irish Catholic, were themselves copyrightable and were infringed.<sup>51</sup>

The *Nichols* court held there was no infringement as to the characters, but Judge Hand expressly stated that it was possible that characters could be copyrighted separate from the copyright for the work in which they appeared.<sup>52</sup> Judge Hand considered the characters at issue in *Nichols* to be merely “stock figures,”<sup>53</sup> as they were merely angry fathers belonging to a particular group, and therefore insufficiently delineated to be copyrightable.<sup>54</sup>

But, Judge Hand arguably went even further in setting the bar when he turned to an example from Shakespeare:

If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast *a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress*. These would be no more than Shakespeare’s ‘ideas’ in the play.<sup>55</sup>

Ignoring the color of Judge Hand’s language, one should note the various descriptors used in describing these character-ideas. Consider the ‘stock character’ Sir Toby Belch—he belongs to a particular class/group,<sup>56</sup> with a particular disposition<sup>57</sup> and habits,<sup>58</sup> and has a defined relationship with his surroundings.<sup>59</sup>

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<sup>51</sup> *Id.* at 121–23.

<sup>52</sup> *Id.* at 121.

<sup>53</sup> *Id.* at 122.

<sup>54</sup> *See id.* at 122–23.

<sup>55</sup> *Id.* at 121 (emphasis added).

<sup>56</sup> *See id.* (“knights”).

<sup>57</sup> *See id.* (“riotous”).

<sup>58</sup> *See id.* (“kept wassail”); *Wassail*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/wassail> (last visited Apr. 17, 2017) (likely means “riotous” or “excessive drinking”); *see Twelfth Night: Character Analysis Sir Toby Belch, Sir Andrew Aguecheek, and*

The stock character Malvolio extends this idea to include motives and even changes in character.<sup>60</sup> All of these aspects can occur in a single character, yet the character would remain insufficiently delineated and beyond copyright protection.<sup>61</sup>

#### **B. WHY HOLDEN CAULFIELD IS COPYRIGHTABLE BUT SAM SPADE IS NOT? BECAUSE HOLDEN CAULFIELD IS THE PLOT**

The *Nichols* standard for whether a character is copyrightable sets the bar quite high, at least for literary characters.<sup>62</sup> This was particularly apparent in *Warner Bros. Pictures, Inc. v. CBS*.<sup>63</sup> In *Warner Bros. Pictures*, the Author of the detective story *The Maltese Falcon* was sued for copyright infringement by Warner Bros.—the story’s copyright holder—after the Author had used the characters from *The Maltese Falcon*, including lead-character detective Sam Spade, in later works.<sup>64</sup> In *Warner Bros. Pictures* the court held the character was not copyrightable, and thus could be used by the author in sequels.<sup>65</sup> In doing so, the court echoed the ideas espoused by Judge Learned Hand in *Nichols*, but went even further, stating that “characters of an author’s imagination . . . are *always* limited and *always* fall into limited patterns.”<sup>66</sup> Furthermore, the *Warner Bros. Pictures* court described characters as mere “vehicles for the story told,” and found the idea that ownership of a story’s copyright automatically imparting ownership of the story’s characters was “unreasonable” and contrary to the Copyright Clause’s purpose of “encourag[ing] the production of the arts.”<sup>67</sup>

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*Maria*, CLIFFSNOTES, <https://www.cliffsnotes.com/literature/t/twelfth-night/character-analysis/sir-toby-belch-sir-andrew-aguecheek-and-maria> (last visited Apr. 17, 2017).

<sup>59</sup> See *Nichols*, 45 F.2d at 121 (“to the discomfort of the household”).

<sup>60</sup> See *id.* (“who became amorous of his mistress”).

<sup>61</sup> See, e.g., *id.* at 121.

<sup>62</sup> See *infra* notes 69–87 and accompanying text for information on characters with visual images.

<sup>63</sup> *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945 (9th Cir. 1954).

<sup>64</sup> *Id.* at 946–49.

<sup>65</sup> *Id.* at 950.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

This statement by the *Warner Bros. Pictures* court appears to imply that it believed no character could be copyrighted. But the court proceeded to step back from such a position when it stated that, when “[i]t is conceivable that the character really constitutes the story being told,” as opposed to being merely “the chessman in the game of telling the story,” the character would be sufficiently delineated and copyrightable.<sup>68</sup> This would allow the copyright holder to bar subsequent use of the character.<sup>69</sup>

*Salinger v. Colting*<sup>70</sup> was the one case that did satisfy the standard set in *Warner Bros. Pictures*. In *Salinger*, Colting had written a new novel, *60 Years Later: Coming through the Rye*, which Colting held out as a sequel to J. D. Salinger’s *Catcher in the Rye*, and used Salinger’s Holden Caulfield character, this time reappearing as a 76-year-old man.<sup>71</sup> Salinger’s estate sued Colting claiming copyright infringement, specifically that Caulfield was a copyrighted character and that Colting had impermissibly used the character.<sup>72</sup>

The court found Holden Caulfield worthy of copyright protection,<sup>73</sup> stating: “Holden Caulfield is quite delineated by word. [*Catcher in the Rye*] is a portrait by words . . . . It is difficult, in fact, to separate Holden Caulfield from the book.”<sup>74</sup> This language appears wholly in line with the standard set forth in *Warner Bros. Pictures*, as this “portrait by words” and

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<sup>68</sup> *Id.* at 950.

<sup>69</sup> *See id.*

<sup>70</sup> *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

<sup>71</sup> *See id.* at 71–72.

<sup>72</sup> *Id.* at 70–72. Such defense of *Catcher in the Rye* and Holden Caulfield from being used in any way is typical of Salinger’s wishes; neither *Catcher in the Rye* nor Holden Caulfield has ever been licensed.

<sup>73</sup> *Id.* at 73 (citing *Salinger v. Colting*, 641 F. Supp. 2d 250, 254 (S.D.N.Y. 2009), *rev’d on other grounds*, 607 F.3d 68 (2d Cir. 2010)).

<sup>74</sup> *Id.* at 73 (quoting *Salinger v. Colting*, 641 F. Supp. 2d 250, 254 (S.D.N.Y. 2009) (Special App. 8 (Hr’g Tr. 24), *rev’d on other grounds*, 607 F.3d 68 (2d Cir. 2010))).

difficulty separating Caulfield from *Catcher in the Rye*<sup>75</sup> shows that Holden Caulfield “really constitutes the story being told.”<sup>76</sup>

### C. WHEN A PORTRAIT OF WORDS BECOMES A PORTRAIT BY SHAPES, COLORS, & REAL PEOPLE: COPYRIGHT PROTECTION FOR VISUAL CHARACTERS

#### 1. Foundation

In *Nichols*, a case from 1930, the court speculated that a character could be sufficiently delineated and worthy of copyright protection separate from the work itself, but had never come across such a case.<sup>77</sup> The trial court’s protection of Holden Caulfield in *Salinger* was decided in 2009.<sup>78</sup> But, it did not take seventy-nine years for the first character to receive copyright protection separate from the work in which it appeared.

In fact, a separate line of cases analyzing the potential of characters having independent copyright protection had already begun with *Hill v. Whalen & Martell*<sup>79</sup>—a case from 1914.<sup>80</sup> In *Hill*, the creator of two cartoon characters brought suit after two actors appeared in costume and performed as the characters, thus borrowing their language and appearance.<sup>81</sup> While the court did not explicitly state that the characters were copyrightable, the court held that the creator’s copyright had been infringed and the court’s analysis focused entirely on the characters.<sup>82</sup>

In contrast to *Hill*, *Detective Comics, Inc. v. Bruns Publ’ns, Inc.*<sup>83</sup> explicitly held that a comic, with its pictorial and literary form and unique arrangement of events related to characters, could be copyrighted, but the character itself could

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<sup>75</sup> *Salinger*, 607 F.3d at 73.

<sup>76</sup> *Warner Bros. Pictures, Inc. v. CBS*, 216 F.2d 945, 950 (9th Cir. 1954).

<sup>77</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>78</sup> *Salinger v. Colting*, 641 F. Supp. 2d 250, 254 (S.D.N.Y. 2009).

<sup>79</sup> *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 359 (S.D.N.Y. 1914).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 359–60.

<sup>83</sup> *Detective Comics, Inc. v. Bruns Publ’ns, Inc.*, 111 F.2d 432 (2d Cir. 1940).

not.<sup>84</sup> Thus the character's pictorial representation was an element of the author's copyrightable expression in the work as a whole, but did not sufficiently delineate the character itself.<sup>85</sup>

Three things should be noted about *Detective Comics, Inc.*: (1) two of the judges deciding *Detective Comics, Inc.* sat on the *Nichols* court, including Judge Learned Hand;<sup>86</sup> (2) when comparing the two works and deciding that the new work infringed, the court's analysis exclusively focused on the appearance and specific acts of the characters;<sup>87</sup> and (3) despite finding that the character was not protected on its own, the court's amendment to the trial court's order still barred the portrayal of "any of the feats of strength or powers performed by [the character] or closely imitating his costume or appearance *in any feat whatever*."<sup>88</sup> These points, taken together with the prior analysis of Judge Learned Hand's statement in *Nichols*'s regarding Sir Toby Belch and Malvolio, would appear to show that *general character traits*, even in conjunction, do not warrant

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<sup>84</sup> *Id.* at 433 ("So far as the pictorial representations and verbal descriptions of 'Superman' are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author, they are proper subjects of copyright . . .").

<sup>85</sup> *See id.*

<sup>86</sup> *Id.*; *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120 (2d Cir. 1930).

<sup>87</sup> *See Detective Comics, Inc.*, 111 F.2d at 433 ("The attributes and antics of 'Superman' and 'Wonderman' are closely similar. Each at times conceals his strength beneath ordinary clothing but . . . stand[s] revealed in . . . a skintight acrobatic costume. . . . Each is shown running toward a full moon . . . and each is shown crushing a gun in his powerful hands. 'Superman' is pictured as stopping a bullet with his person and 'Wonderman' as arresting and throwing back shells. Each is depicted as shot at by three men, yet as wholly impervious to the missiles that strike him. 'Superman' is shown as leaping over a twenty story building, and 'Wonderman' as leaping from building to building. 'Superman' and 'Wonderman' are each endowed with sufficient strength to rip open a steel door. Each is described as being the strongest man in the world and each as battling against 'evil and injustice.'").

<sup>88</sup> *Id.* at 434 (emphasis added).

protections, but the *specific acts* resulting from those traits are entitled to protection, as seen in the amended order in *Detective Comics, Inc.*<sup>89</sup>

This makes sense considering the idea/expression dichotomy and its relation to a work's potential copyright protections. General character traits are only ideas, whereas the specific acts are the author's original means of expressing the general traits (ideas).<sup>90</sup> And, based on the language from *Detective Comics, Inc.*, the court believed the visual appearance of the character fell into the specific 'expression' category despite finding that the character itself was not worthy of copyright protection.<sup>91</sup>

## **2. The Happiest (and Most Copyrightable) Place on Earth: Explicit Protection of Visual Characters**

The determination that a character's visual appearance is significant in delineating the character was finally made explicit in *Walt Disney Prods. v. Air Pirates*.<sup>92</sup> In *Air Pirates*, Disney sued a group of individuals and magazine publishers who had used a number of "well-known Disney cartoon characters" and placed them in a "free thinking, promiscuous, drug ingesting counterculture" setting.<sup>93</sup> The *Air Pirates* court distinguished cartoon characters from literary characters and found that merely "copying a comic book character's graphic image constitute[d] copying" sufficient to find infringement.<sup>94</sup> In doing so the court noted that, unlike literary characters, graphic characters have both "physical as well as conceptual qualities" and thus "[are] more likely to contain some unique elements of expression."<sup>95</sup>

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<sup>89</sup> Compare *id.*, with *supra* notes 46–52 and accompanying text.

<sup>90</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345–48 (1991).

<sup>91</sup> See *Detective Comics, Inc.*, 111 F.2d at 434 (ordering the bar of portrayals of "any of the feats of strength or powers performed by 'Superman' or closely imitating his costume or appearance in any feat whatever.").

<sup>92</sup> *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

<sup>93</sup> Kevin W. Wheelwright, *Parody, Copyright, and the First Amendment*, 10 U.S.F. L. Rev. 564, 582 (1976).

<sup>94</sup> *Air Pirates*, 581 F.2d at 755–56.

<sup>95</sup> *Id.*



This duality mitigates the difficulty of delineating a character enough for its own copyright separate from the work in which it appears.<sup>96</sup> This sufficient, though not *per se*, ground for character delineation accords with the general concept of Judge Learned Hand's standard laid out in *Nichols*,<sup>97</sup> as it allows pictorial stock characters to be deemed insufficiently delineated.<sup>98</sup>

But since the *Air Pirates* decision, what constitutes a copyrightable visual character and a copyrightable literary character has diverged even further based on the physical qualities of visual characters. For example, in *DC Comics v. Towle* the court found the Batmobile a copyrightable visual character.<sup>99</sup> Three aspects of the *Towle* decision are noteworthy. First, the court noted the relevant inquiry was “whether the character conveys a set of distinct characteristics,” regardless of whether the character in question was merely an object.<sup>100</sup> This would appear to afford protection to visual characters in circumstances beyond potential protection of literary characters, as delineation of objects in a literary work almost undoubtedly fails either the *Nichols* or *Warner Bros. Pictures-Salinger* tests.<sup>101</sup> Second, the court found the Batmobile's image aided its delineation, despite the Batmobile's image changing over time to reflect the latest technology and automotive design styles.<sup>102</sup> Thus the physical qualities aiding a visual character's delineation need not be a consistent expression, but need only cohere to a similar theme.<sup>103</sup> Last, the Batmobile was also found

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<sup>96</sup> *Id.* at 755.

<sup>97</sup> Compare *id.*, with *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (requiring in either situation that, “the less developed the characters, the less they can be copyrighted . . .”). In essence, even if the character has a visual image, if the character is not sufficiently developed, it is not worthy of copyright protection. See *Air Pirates*, 581 F.2d at 755.

<sup>98</sup> *E.g.*, *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003).

<sup>99</sup> *DC Comics v. Towle*, 989 F. Supp. 2d 948, 966–70 (C.D. Cal. 2013), *aff'd*, 802 F.3d 1012 (9th Cir. 2015).

<sup>100</sup> *Id.* at 966–67.

<sup>101</sup> See *Warner Bros. Pictures, Inc.*, 216 F.2d at 950; *Nichols*, 45 F.2d at 120–123; see ABRAMS, *supra* note 49, at §14:5.

<sup>102</sup> *Towle*, 989 F. Supp. 2d at 966–67.

<sup>103</sup> See *id.* at 967.

copyrightable as a pictorial work, as defined by section 102 of the Copyright Act of 1976, further grounding the Batmobile's protection on its image.<sup>104</sup> Aside from the Batmobile's image, the court also found the Batmobile's character was delineated based on its "swift, cunning, strong, and elusive" nature, and its strong ties with Batman.<sup>105</sup> None of these aspects appear sufficient to pass Learned Hand's test set forth in *Nichols*, nor the *Warner Bros. Pictures-Salinger* test.<sup>106</sup>

The key beneficiaries of this distinction are the authors and copyright holders of cartoon characters, with Disney and its corporate family being particularly litigious in protecting its copyrighted characters.<sup>107</sup> Moreover, courts have been able accomplices in helping Disney protect these copyrights, with courts recognizing the "strong market for counterfeit Disney products" as the sole basis for granting injunctive relief—even if the infringement was a solitary incident and unintentional;<sup>108</sup> and finding infringement of Disney characters prior to the allegedly infringing work even being published.<sup>109</sup> Thus it appears the courts have recognized a truly different level and scope of protection, and willingness to enforce that protection, for visual characters.

Judge Posner's clever quotation and statement from *Gaiman v. McFarlane*<sup>110</sup> may best illustrate (if that's the proper word) the difference in protection in literary and visual characters:

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<sup>104</sup> *Id.* at 968–70.

<sup>105</sup> *Id.* at 967.

<sup>106</sup> *See Warner Bros. Pictures, Inc. v. CBS*, 216 F.2d 945, 950 (9th Cir. 1954); *Nichols*, 45 F.2d at 120–123; *see also* ABRAMS, *supra* note 49, at §14:5.

<sup>107</sup> *See, e.g., Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Disney Enters., Inc. v. Away Disc.*, No. 07-1493, 2010 U.S. Dist. LEXIS 86119 (D. P.R. Aug. 20, 2010); *Disney Enters, Inc. v. Law*, No. 6:07-cv-1153-Orl-18UAM153, 2008 U.S. Dist. LEXIS 6431 (M.D. Fla. Jan. 3, 2008); *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C. Cir. 1990); *Walt Disney Co. v. Best*, No. 88 CIV. 1595, 1990 U.S. Dist. LEXIS 12604 (S.D.N.Y. Sept. 26, 1990); *Walt Disney Prods. v. Filimation Assocs.*, 628 F. Supp. 871 (C.D. Cal. 1986).

<sup>108</sup> *Best*, 1990 U.S. Dist. LEXIS 12604, at \*8–10.

<sup>109</sup> *Filimation Assocs.*, 628 F. Supp. at 877.

<sup>110</sup> *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004).

The description of a character in prose leaves much to the imagination, even when the description is detailed--as in Dashiell Hammett's description of Sam Spade's physical appearance in the first paragraph of *The Maltese Falcon*: "Samuel Spade's jaw was long and bony, his chin a jutting v under the more flexible v of his mouth. His nostrils curved back to make another, smaller, v. His yellowgrey eyes were horizontal. The v *motif* was picked up again by thickish brows rising outward from the twin creases above a hooked nose, and his pale brown hair grew down--from high flat temples--in a point on his forehead. He looked rather pleasantly like a blond satan." Even after all this, one hardly knows what Sam Spade looked like. But everyone knows what Humphrey Bogart looked like.<sup>111</sup>

### 3. The Idea/Expression Dichotomy in Visual Characters

The protection of graphic characters is not limited to cartoon or artistic renderings of characters, but can be applied to characters portrayed by real persons,<sup>112</sup> i.e. live-action characters.<sup>113</sup> This appears contrary to the fact that a person's face or likeness is deemed a fact, and thus cannot be

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<sup>111</sup> *Id.* at 660–61. Humphrey Bogart played "Sam Spade" in the movie adaptation of the *The Maltese Falcon*. MALTESE FALCON (Warner Brothers 1941).

<sup>112</sup> *E.g.*, Anderson v. Stallone, No. 87-0592, 1989 U.S. Dist. LEXIS 11109 at \*1, 20–23 (C.D. Cal. Apr. 25, 1989) (affording copyright protection to live-action character 'Rocky Balboa,' played by Sylvester Stallone).

<sup>113</sup> *Live-action*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/live-action> (last visited Apr. 16, 2017) ("[O]f, relating to, or featuring cinematography that is not produced by animation.").

copyrighted.<sup>114</sup> Additionally, the protections afforded to a copyrightable work only cover those aspects that qualify as copyrightable expressions of the author—thus facts or ideas are not protectable.<sup>115</sup> In a related vein, “[h]uman clothing is considered utilitarian and unprotectable.”<sup>116</sup>

Such concepts illustrate the differing results in how the courts might look at a character’s visual appearance, based on whether the character is animated (i.e. a cartoon), or a real person in costume (i.e. live-action). For example, in *Detective Comics, Inc.* the court protected the animated Superman from new works with characters “closely imitating [Superman’s] costume or appearance.”<sup>117</sup> But if the original Superman character was created and portrayed first in live-action, the costume—even if it matched the animated version—would be unprotectable because it would serve the utilitarian purpose of being human clothing.<sup>118</sup> The same would also apply to the various bodily aspects of the character.<sup>119</sup> This contradiction leads to the determination that the visual appearance of a live-action character is a factor in sufficiently delineating the character, but is not a fully protectable aspect of the character.<sup>120</sup>

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<sup>114</sup> *E.g.*, *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000) (also noting that names and personas were not copyrightable); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (noting that voices are also beyond copyright protection).

<sup>115</sup> *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350–51 (1991).

<sup>116</sup> *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 916 n.12 (9th Cir. 2010) (contrasting doll clothing and human clothing). The *Mattel* court reasoned that because dolls have no concerns about modesty or temperature, their clothing has no utilitarian function and as such is copyrightable. In contrast, human clothing is a “useful article” based on its “intrinsic utilitarian function” and thus is not protected by copyright. *Id.* (citing 17 U.S.C. §§ 101, 102(a)(5) (2006)).

<sup>117</sup> *Detective Comics v. Bruns Publ’ns*, 111 F.2d 432 (2d Cir. 1940).

<sup>118</sup> *See Mattel, Inc.*, 616 F.3d at 916 n. 12.

<sup>119</sup> *See Towle*, 989 F. Supp. 2d 948, 966–67 (C.D. Cal. 2013).

<sup>120</sup> *Compare Feist*, 499 U.S. at 350–51, and *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978), with *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000), and *Mattel, Inc.*, 616 F.3d at 916, n. 12 (acknowledging that while a person’s image and clothes are always

As such, it is plausible that a court would afford less or no significance to a character's visual appearance if the character was portrayed in live-action versus animation, potentially resulting in the character being insufficiently delineated and unprotectable.<sup>121</sup> Thus the relaxed standard for delineating animated characters because of their visual qualities may not readily apply to live-action characters.

### III. THE FAIR USE DOCTRINE

#### A. A SHIELD AGAINST A SHIELD: THE HISTORY AND PURPOSE OF FAIR USE

Returning to the constitutional balancing issues stated above, the First Amendment and the Copyright Clause itself—based on its purpose—allow for the limited monopoly granted by copyright to be violated in certain circumstances.<sup>122</sup> As Justice Story put it:

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.<sup>123</sup>

Courts have found that authors impliedly consent to reasonable, or fair, use of their copyrighted works, based on the Copyright Clause's explicit purpose "[t]o promote the Progress of Science and the useful Arts."<sup>124</sup> Such uses are permissible because they allow subsequent authors to "improv[e] upon prior works," and

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unprotectable ideas, these ideas can still be arranged into a protectable expression that constitutes a character's visual image).

<sup>121</sup> See *Feist*, 499 U.S. at 349–51; *Air Pirates*, 581 F.2d at 755.

<sup>122</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985).

<sup>123</sup> *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

<sup>124</sup> U.S. CONST. art. I, § 8; *Harper & Row Publishers Inc.*, 471 U.S. at 549.

any bar on those uses would “frustrate the very ends sought to be attained” by the Copyright Clause.<sup>125</sup> This is the basic premise behind the fair use doctrine.<sup>126</sup>

The fair use doctrine was only a common law doctrine until 1976, despite the existence of the Copyright Clause in the Constitution and the enactment of many statutory copyright schemes prior to that point.<sup>127</sup> The Copyright Act of 1976 finally codified the fair use doctrine in section 107 of the Act,<sup>128</sup> with Congress adopting the courts’ common law fair use doctrine.<sup>129</sup>

## **B. THE FOUR FACTORS OF FAIR USE**

Section 107 of the Copyright Act of 1976 lists four factors to be used in determining whether a new work’s use of the original copyrighted work is a “fair use:”

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>130</sup>

These factors are essentially the same factors as those listed and used in an 1841 opinion written by Justice Story.<sup>131</sup> But even though these statutorily enumerated factors have been long used and are often important in a fair use analysis, they are not

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<sup>125</sup> *Harper & Row*, 471 U.S. at 549 (citing HORACE G. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

<sup>126</sup> *See id.*

<sup>127</sup> *See id.* (discussing section 107’s codification of the fair use doctrine); *see also* *Folsom v. Marsh*, 9 F. Cas. 342, 348–49 (C.C.D. Mass. 1841) (No. 4,901).

<sup>128</sup> 17 U.S.C. § 107 (2012).

<sup>129</sup> *See* H.R. REP. NO. 94-1476, at 66 (1976); *see also* S. REP. NO. 94-473, at 62 (1976).

<sup>130</sup> 17 U.S.C. § 107 (1992).

<sup>131</sup> *See Folsom*, 9 F. Cas. at 348.

exclusive.<sup>132</sup> The fair use doctrine is “an equitable rule of reason” requiring each case to “be decided on its own facts.”<sup>133</sup> In a similar vein, the Court has held that the factors are not considered in isolation, with all factors “to be explored, and the results weighed together, in light of the purposes of copyright.”<sup>134</sup>

### 1. Purpose of the Use

The central question at issue in this factor is whether the new work adds some “new expression, meaning, or message,” or merely supersedes, the original work.<sup>135</sup> Essentially, this factor asks “to what extent the new work is transformative?”<sup>136</sup> Transformative value—achieved through expressing a new meaning or message—tends to show the new work is in furtherance of the purpose of copyright as a whole.<sup>137</sup>

Thus the more the new work incorporates some new expression, meaning, or message, and thus is more transformative, the more this factor weighs in favor of fair use.<sup>138</sup> This is true even if the new work is a commercial work, an aspect of a new work’s purpose that typically weighs against fair use.<sup>139</sup> In contrast, if the new work’s purpose in using the original was merely “to get attention or to avoid the drudgery in working up something fresh,” the transformative value is lessened or nonexistent, and this factor would weigh against a fair use finding.<sup>140</sup>

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<sup>132</sup> *Harper & Row*, 471 U.S. at 560.

<sup>133</sup> H.R. REP. NO. 94-1476, at 65.

<sup>134</sup> *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 578 (1994).

<sup>135</sup> *Id.* at 579 (citing *Folsom*, 9 F. Cas. at 348).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Campbell*, 510 U.S. at 579.

<sup>140</sup> *See id.* at 580. While the *Campbell* Court was specifically discussing parody’s use being transformative or not based on its purpose, the principle seems to apply more generally, as any use of an original to avoid coming up with something new or to gain attention would have to potential to harm the value of the copyright, thus undermining the scheme of copyrights being economic incentive to promote useful new works. *Compare id. with Sony Corp. of Am. v. Universal City Studios*,

In general, the for-profit versus nonprofit nature of the new work is only one aspect to be considered when analyzing this factor.<sup>141</sup> The Court has noted that the nonexclusive list, explicitly stated in section 107, of potential new works that might fairly use an original are generally commercial works.<sup>142</sup> Moreover, while new work's commercial purpose tends to weigh against fair use or its nonprofit purpose tends to weigh in favor of fair use, categorization as either does not trigger a *per se* finding in any way.<sup>143</sup> Furthermore, the tendency towards either fair or impermissible use, based on the new work's commercial or nonprofit purpose, "will vary with the context."<sup>144</sup>

## 2. Nature of the Copyrighted Work

"[S]ome works are closer to the core of intended copyright protection than others," making fair use of their material by a new work more difficult.<sup>145</sup> Generally unpublished works are granted greater protection, as their nature as unpublished works implicates the author's First Amendment right to remain silent, and right to first publication.<sup>146</sup> Works of fact generally have less protection, based on the society's interest in the dissemination of facts—although the extent of such mitigation of protection can be dependent on a work's nature and purpose.<sup>147</sup>

## 3. Amount & Substantiality of the Portion Used

This factor asks whether the quantity and quality of the original used by the new work is "reasonable in relation to the purpose of the copying" and the "character of the use."<sup>148</sup>

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Inc., 464 U.S. 417, 429 (1984) (showing that when parody uses the borrowed material to imbue it with new ideas the parody conforms with copyright's purpose of disseminating ideas).

<sup>141</sup> *Campbell*, 510 U.S. at 584.

<sup>142</sup> *Id.*; S. REP. NO. 94-473, at 61(1976).

<sup>143</sup> *Campbell*, 510 U.S. at 584.

<sup>144</sup> *Id.* at 585.

<sup>145</sup> *Id.* at 586.

<sup>146</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559–60, 564 (1985).

<sup>147</sup> *Id.* at 564.

<sup>148</sup> *Id.* at 586–87.



Regarding quantity, even if a new work only uses a small amount of the original, it may still be an unreasonable amount.<sup>149</sup> Moreover, substantial use of the original's material—as well as verbatim copying compared to looser translations of the original—may be informative of the qualitative value of the material used.<sup>150</sup> Additionally, under certain circumstances a new work may fairly use the qualitative “heart” of the original work, but such use without the new work adding or changing aspects of the borrowed material favors finding that the new work's purpose is merely to supersede the original.<sup>151</sup> As such, the analysis of this factor aids the analysis of the first factor (purpose of the use) and fourth factor (effect on original's market).<sup>152</sup>

Most importantly, this analysis only applies to the aspects of the original work worthy of copyright protection.<sup>153</sup> As such, it will only focus on the copyrightable expression of the original work, and not facts or ideas that are beyond the scope of copyright protection.<sup>154</sup>

#### **4. The Effect of the Use Upon the Original's Market Value & Market for Derivatives**

The fourth factor of the fair use analysis focuses on how the new work's use affects the market value of the original work, and market for derivatives of the original work.<sup>155</sup> There is no presumption of market harm when a new work uses an original, unless the new work amounts to mere duplication.<sup>156</sup> The only harm to the original that should be considered is harm stemming from the new work's usurpation of the market's demand for the original; “[b]iting criticism [that merely] suppresses demand” for the original is not cognizable harm to the original.<sup>157</sup>

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<sup>149</sup> *Id.* at 585.

<sup>150</sup> *See id.*

<sup>151</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 587–89 (1994).

<sup>152</sup> *Id.* at 586–87.

<sup>153</sup> *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 347–51 (1991).

<sup>154</sup> *Id.*

<sup>155</sup> *Campbell*, 510 U.S. at 590.

<sup>156</sup> *Id.* at 591.

<sup>157</sup> *Id.* at 592 (citing *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

Additionally, the only harm to the original's market for derivatives should focus on those potential derivative uses that the original's author "would in general develop or license others to develop."<sup>158</sup> Thus, like the concern with market usurpation, the only harm cognizable to derivatives is market substitution.<sup>159</sup>

### C. PARODIC USES

How a court should consider the fair use factors obviously is dependent on the nature of the use. But the Supreme Court specifically addressed the calculus of fair use claims in the context of a parodic use in *Campbell v. Acuff-Rose Music*,<sup>160</sup> as parodies further the purpose of copyright.<sup>161</sup> The *Campbell* Court also defined when parody occurs in the fair use context: when the new work uses "some elements of" another author's work "to create a new one that, at least in part, comments on that author's work."<sup>162</sup> Finding that the new work is a parody is not dependent on the effectiveness of the new work's commentary; instead "the threshold question . . . is whether a parodic character may reasonably be perceived."<sup>163</sup>

In the context of the first factor (purpose of the new work's use), the *Campbell* Court recognized that parodies have "an obvious claim to transformative value" as they necessarily "mimic an original to make [their] point."<sup>164</sup> As such, parodies have some right to fair use of the original, but only to the extent that use relates to the parody's comment on the original work.<sup>165</sup>

The *Campbell* Court also manipulated the value of the second factor (nature of the copyrighted work) when an existing work is used by a parody, noting that "since parodies almost invariably copy publicly known, expressive works," an existing work fitting into that category adds little weight against fair

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<sup>158</sup> *Id.* at 592 (citing *Fisher*, 794 F.2d at 438).

<sup>159</sup> *Id.* at 593.

<sup>160</sup> *Campbell*, 510 U.S. at 569.

<sup>161</sup> *See id.* at 579.

<sup>162</sup> *Id.* at 580.

<sup>163</sup> *Id.* at 582.

<sup>164</sup> *Id.* at 579–81.

<sup>165</sup> *Id.*

use.<sup>166</sup> The *Campbell* Court did not address parodies of lesser-known works.

In the context of the third factor, the *Campbell* Court's consideration of a parodic use centered on the distinction between qualitative and quantitative use.<sup>167</sup> Parody is an example of when this use of the original work's "heart" is more likely to be permissible, if the parodist has justification for the use.<sup>168</sup> One common justification for the parodist's use may be to "conjure up" the original work in the audience's mind, a necessary context for the parody's commentary on the original.<sup>169</sup> But any use beyond what is needed to conjure up the original must serve the parody's commentary, i.e. have justification specific to the idea(s) expressed by the parody.<sup>170</sup>

Last, the *Campbell* Court stated parodies will likely "not affect the market for the original . . . because the parody and the original usually serve different market functions."<sup>171</sup> By definition parodies comment on the original work, thus are more likely to provide biting criticism of the original, a non-cognizable harm.<sup>172</sup> Moreover, parodies usually fall in the derivative market for criticism of the original, which is generally not licensed by the original work's copyright holder and thus is not protected.<sup>173</sup>

#### IV. AUTHORS AS DEFENDANTS

In reference to the lack of protection afforded to Sam Spade in *Warner Bros. Pictures*, Judge Posner wrote:

That decision is wrong, though perhaps understandable on the "legal realist" ground that [the Author] was not claiming copyright in Sam

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<sup>166</sup> *Id.* at 586.

<sup>167</sup> *See id.* at 586–90.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 588–89.

<sup>170</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001) (citing *Campbell*, 510 U.S. at 588).

<sup>171</sup> *Campbell*, 510 U.S. at 591.

<sup>172</sup> *Id.* at 580, 591.

<sup>173</sup> *Id.* at 592–93.

Spade--on the contrary, he wanted to reuse his own character but to be able to do so he had to overcome [the Copyright Holder]'s claim to own the copyright.<sup>174</sup>

Regardless of the accuracy of Judge Posner's assertion, the fact remains that unique issues arise when a work's copyright is owned by someone other than the author and is enforced against the author. The Copyright Clause's stated purpose is "[t]o promote the Progress of Science and useful Arts."<sup>175</sup> The limited monopoly granted to protect the work is intended as an economic incentive to encourage the dissemination of ideas through the creation of new works.<sup>176</sup> But when the copyright holder is no longer the author, and suppresses the author's further development on the copyrighted work, one can understandably ask: has copyright law frustrated its constitutional purpose?

Few cases have directly addressed the issue, and never has the infringement issue squarely reached the Supreme Court; however, courts appear sympathetic to the defendant-author. Similar to *Warner Bros. Pictures*, defendant-authors have received favorable decisions when creating new works in a similar style as the protected work, even when the copyright for the prior work is held by another party.<sup>177</sup> The basis for such protection stems from the idea that an author may and should be allowed to create variations on a subject matter theme or style, so long as there are sufficient differences to create a unique expression in each work.<sup>178</sup> This adheres to the idea/expression dichotomy because the variation's differences create something

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<sup>174</sup> *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004).

<sup>175</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>176</sup> See *supra* notes 27–28, 109–112 and accompanying text.

<sup>177</sup> See *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 555–58 (9th Cir. 1996) (affirming the trial court's award of attorney's fees premised on finding that author's successful copyright defense allowed for himself and others to create new works in a similar style); *Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc.* 575 F.2d 62, 65–67 (3d Cir. 1978) ("The similarities here are of a nature not calculated to discourage an artist in the development of a specialty yet sufficiently distinguishable to protect his creativity in that sphere.").

<sup>178</sup> *Franklin Mint*, 575 F.2d at 66–67.

that is not a copy of the original, and the theme or style constitutes only an unprotectable idea.<sup>179</sup> The author's protection from infringement liability is heightened when the original work's protectable expression and the unprotectable idea converge, i.e. is primarily based on fact or closely resembles the idea being expressed.<sup>180</sup>

## V. BACK TO YOU STEPHEN: IS THE COLBERT REPORT CHARACTER COPYRIGHTABLE?

### A. MAN, MYTH, OR SUFFICIENTLY DELINEATED CHARACTER CAPABLE OF COPYRIGHT PROTECTION?

#### 1. Stephen Colbert is Merely Stephen Colbert

His name is Stephen Tyrone Colbert (pronounced "col-bear"), he grew up in Charleston, South Carolina, he is a Catholic.<sup>181</sup> And the same is true for the host of *The Late Show*, Stephen Colbert.<sup>182</sup> Coincidentally, they also look alike and even have the same fashion-sense.<sup>183</sup>

In light of those facts, is it possible that there is no "character" at all and the host of *The Colbert Report* was actually just Colbert, being himself and making his own jokes based on his own sense of humor and his own observations (while looking like himself and wearing his own clothes)?

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<sup>179</sup> *Id.* at 66.

<sup>180</sup> *See id.* at 65.

<sup>181</sup> Avery Gordon, *Stephen's Bio*, COLBERT NATION, <http://www.colbertnation.com/cn/stephens-bio.php> [https://web.archive.org/web/20080325224351/http://www.colbertnation.com/cn/stephens-bio.php] (last visited Apr. 17, 2017) [hereinafter *Character's Biography*]; *How Stephen Colbert Endured Tragedy and Became One of the Greatest Political Satirists of Our Time*, BUS. INSIDER (Sep. 16, 2015, 1:55 PM), <http://www.businessinsider.com/stephen-colbert-bio-2015-9/#stephen-colbert-was-born-on-may-13-1964-in-washington-dc-he-is-the-youngest-of-11-children-1>.

<sup>182</sup> ArchieLeach, *Stephen Colbert Biography*, IMDB, [http://www.imdb.com/name/nm0170306/bio?ref\\_=nm\\_ov\\_bio\\_sm](http://www.imdb.com/name/nm0170306/bio?ref_=nm_ov_bio_sm) (last visited Oct. 22, 2016) [hereinafter *Stephen Colbert's Biography*].

<sup>183</sup> *See, e.g.,* Jaffery, *supra* note 10.

Returning to the Character's *Late Show* appearance, he arrives wielding a sword and shield.<sup>184</sup> The sword appears to be Bilbo Baggins's Sting,<sup>185</sup> while the shield belongs to Captain America.<sup>186</sup> The shield was given to Colbert—not the Character—and Colbert brought it to *The Colbert Report* as a representation of the Character's ego.<sup>187</sup> The sword, however, is representative of another shared attribute between Colbert and the Character—their fascination with the works of J. R. R. Tolkien.<sup>188</sup> Thus while the Character had both the sword and shield on display in *The Colbert Report*, they also illustrate how the minutiae of Colbert's personal life, his personal interests, and interactions with others, were brought into the Character.<sup>189</sup>

Other examples of this are plentiful. When Colbert broke his wrist during taping of *The Colbert Report*, suddenly the Character, obviously wearing the cast, became an advocate for stopping “wrist violence.”<sup>190</sup> The Character's long running and frequently referenced fear and hatred of bears is based on

<sup>184</sup> *Trumpiness*, *supra* note 3.

<sup>185</sup> Compare *id.*, with *Sting The Sword of Bilbo Baggins*, THINKGEEK, <http://www.thinkgeek.com/product/f2bc/> (last visited Oct. 22, 2016).

<sup>186</sup> Compare *Trumpiness supra* note 3, with Marc Storm, *The History of Captain America's Shield*, MARVEL (Aug. 18, 2010), [http://marvel.com/news/comics/13640/the\\_history\\_of\\_captain\\_america\\_s\\_shield](http://marvel.com/news/comics/13640/the_history_of_captain_america_s_shield).

<sup>187</sup> Greg Gilman, *Stephen Colbert Explains Origins of That 'Captain America' Shield on 'Colbert Report' Set*, THE WRAP (Sept. 3, 2014, 7:38 AM), <http://www.thewrap.com/stephen-colbert-explains-origins-of-that-captain-america-shield-on-colbert-report-set-video/>; see Jason Hughes, *Marvel Reveals New, Black Captain America on 'The Colbert Report'*, THE WRAP (July 17, 2014, 12:40 AM), <http://www.thewrap.com/marvel-reveals-new-captain-america-on-the-colbert-report/> (“[The Character]’s been ready to defend freedom and punch Hitler in the face for years.”).

<sup>188</sup> Talks at Google, *supra* note 6.

<sup>189</sup> Gilman, *supra* note 187; Sarah Moran, *Stephen Colbert and Frodo Baggins Geek Out*, NERDBASTARDS.COM (Nov. 16, 2011), <http://nerdbastards.com/2011/11/16/stephen-colbert-and-frodo-baggins-geek-out>.

<sup>190</sup> Brian Stelter, *2 Out of 3 Anchors Join Colbert in Wrist Stunt*, N.Y. TIMES (Aug. 27, 2007), <http://www.nytimes.com/2007/08/27/business/media/27colbert.html>.

Colbert's own fear of bears.<sup>191</sup> And when Colbert was listed as the second-most influential person in *TIME* magazine's 100 Most Influential People, the Character started a feud with Rain, the Korean pop-star who beat Colbert to the top spot.<sup>192</sup>

But even more than bringing these elements of Colbert's real life into the Character's life and show, it was Colbert's talents, skills, and opinions that created the Character. Colbert designed the Character to be an amalgamation of Bill O'Rielly, Geraldo Rivera, Aaron Brown, Dan Abrams and Joe Scarborough, borrowing different aspects of each to create the Character's beliefs, and speech and behavioral patterns.<sup>193</sup> But this does little to define the Character's real-time actions and reactions, and this is where Colbert's own abilities and opinions come to the fore. As Colbert's long-time comedic partner Jon Stewart described Colbert's portrayal of the Character: "Stephen

<sup>191</sup> Megh Wright, *Stephen Colbert Finally Ends His Nine Year Grudge Against Bears*, SPLITSIDER (Nov. 18, 2014), <http://splitsider.com/2014/11/stephen-colbert-finally-ends-his-nine-year-grudge-against-bears/>; see Ellen Gray, *The 'Real' Stephen Colbert? Still Scared of Bears*, PHILLY.COM (Aug. 11, 2015, 6:48 AM), <http://www.philly.com/philly/entertainment/television/Colbert-Still-scared-of-bears-.html>.

<sup>192</sup> EW Staff, *25 Best 'Stephen Colbert' Moments: 21. Colbert and K-pop Star Rain's Dance-off*, ENT. WKLY. (Dec. 15, 2014, 8:00 PM), [http://www.ew.com/gallery/25-best-stephen-colbert-moments/754730\\_21-colbert-and-k-pop-star-rains-dance](http://www.ew.com/gallery/25-best-stephen-colbert-moments/754730_21-colbert-and-k-pop-star-rains-dance).

<sup>193</sup> Maureen Dowd, *America's Anchors*, ROLLING STONE (Oct. 31, 2006, 9:54 AM), [http://www.rollingstone.com/news/coverstory/jon\\_stewart\\_stephen\\_colbert\\_americas\\_anchors](http://www.rollingstone.com/news/coverstory/jon_stewart_stephen_colbert_americas_anchors) [[https://web.archive.org/web/20070818095819/http://www.rollingstone.com/news/coverstory/jon\\_stewart\\_stephen\\_colbert\\_americas\\_anchors](https://web.archive.org/web/20070818095819/http://www.rollingstone.com/news/coverstory/jon_stewart_stephen_colbert_americas_anchors)] (quoting Colbert: "'When [O'Reilly] had Geraldo on, talking about Mel Gibson, they talked about Gibson for maybe thirty seconds. And then they go, 'If you're rich and you're famous, everybody guns for you.' And Geraldo's like, 'Guys like us.' And O'Reilly's like, 'Exactly.'" And the next five minutes was just about them. I saw O'Reilly do an interview with President Bush, and he said, "Guys like us," and I said, "Shit, the most powerful man in the world and a guy with 2 million people a night watching his show." I keep that equation in the forefront of my character.');

Steinberg, *supra* note 9 (focusing on O'Rielly's use of "'talking points,'" Brown's "'folksiness,'" and Scarborough's "'common-sense answers'") (internal quotations omitted).

is rendering a character in real time. Typically, he's improvising with people who don't know they're in an improv scene.”<sup>194</sup> In another interview Stewart noted how Colbert’s humanity shines through the Character, which allows the jokes made by the Character to be funny rather than off-putting.<sup>195</sup> As an example of how the funny-versus-off-putting result of these jokes can shift, consider this description of an interview Colbert did on *The Late Show* when Colbert was just being himself and not portraying the Character:

There was a moment in September when Colbert was interviewing Jesse Eisenberg about Eisenberg’s new book. After Eisenberg made a remark about the book, Colbert replied that he hadn’t read the book. It was weird because the voice Colbert used was the same kind of voice he’d use on his old show, which would have gotten a laugh because *of course* “the character” hasn’t read Jesse Eisenberg’s book. But here, in this setting, it just sounded rude . . . even though I know Colbert didn’t intend it that way.<sup>196</sup>

As Stewart eluded, Colbert’s brilliance and the Character’s appeal is due to Colbert’s improvisation, a product of his wit and training.<sup>197</sup> Thus much of the Character’s ideological statements and personality are really the result of Colbert’s masterful improv comedy skills.<sup>198</sup> But even beyond that, the supposed distinction between Colbert and the Character—the Character’s political beliefs—is not the vast divide one might assume it to be.<sup>199</sup> As Colbert himself stated: “I meant a lot of it. I even

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<sup>194</sup> *Id.*

<sup>195</sup> See McGrath, *supra* note 7.

<sup>196</sup> Mike Ryan, *Stephen Colbert is Caught Between Himself and ‘Stephen Colbert’*, UPROXX (Feb. 4, 2016), <http://uproxx.com/tv/late-show-with-stephen-colbert-review>.

<sup>197</sup> *Id.*; Dowd, *supra* note 193; McGrath, *supra* note 7.

<sup>198</sup> Dowd, *supra* note 193; Ryan, *supra* note 196.

<sup>199</sup> See Gray, *supra* note 191.



agreed with my character sometimes, wearing the [Character] ‘like a cap,’ sometimes more lightly than others.”<sup>200</sup>

Last, and most telling, Colbert incorporated the Character into himself (or perhaps it was always an aspect of him).<sup>201</sup> While the Character is outwardly bold, Colbert states that the Character is inherent and internally weaker, with a “thin-skinned quality.”<sup>202</sup> Colbert enjoys that aspect the most about the Character because it is that weakness that Colbert finds familiar and believes they have that in common.<sup>203</sup> Colbert even admits that “I’m not as, um, well defined as he is, and I enjoy copping to that in my own behavior.”<sup>204</sup>

Thus I would argue the Character became incorporated into, or was always a part of, Colbert’s own personality, behavioral patterns and skills.<sup>205</sup> This would explain the ease and fluidity by which Colbert steps into and out of the Character—sometimes accidentally—and even why Colbert had difficulty keeping separate his own interests from those of his character.<sup>206</sup> The Character’s nature as a “well-intentioned, poorly informed, high-status idiot” is merely a means for Colbert to achieve his ultimate aim: to make people laugh.<sup>207</sup>

With that said, assuming the Character is actually a character and not just Colbert’s own personality . . .

## **2. Is the Character a Stock Character or Sufficiently Delineated & Copyrightable?**

The Character is best described as a self-absorbed right-wing TV pundit who is “well-intentioned, poorly informed,” and a “high-status idiot.”<sup>208</sup> Based on this description, is the Character sufficiently delineated when compared to Judge

<sup>200</sup> *Id.*

<sup>201</sup> Talks at Google, *supra* note 6.

<sup>202</sup> *Id.*

<sup>203</sup> *See id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Ryan, *supra* note 196; Talks at Google *supra* note 6.

<sup>207</sup> Dowd, *supra* note 193; Talks at Google *supra* note 6; *see* Ryan *supra* note 196.

<sup>208</sup> Talks at Google, *supra* note 6; *see* Steinberg, *supra* note 9.

Learned Hand's description of Sir Toby Belch or Malvolio in *Nichols*?<sup>209</sup> Judge Hand found that a combination of class/group membership, a particular disposition, habits, motives, and relationship to his surroundings, and even changes in some of those aspects during the course of the work, would not constitute a sufficiently delineated literary character.<sup>210</sup> Many of the Character's previously mentioned descriptors—self-absorbed, well-intentioned, poorly informed, and high-status idiot—merely set out the Character's particular disposition, and likely do not create a more nuanced disposition than either Sir Toby Belch's or Malvolio's disposition as described by Judge Hand.<sup>211</sup> Furthermore, the Character's employment as a right-wing TV pundit is likely no more than a class membership and particular relationship to his surroundings, similar to Sir Toby Belch's role as a riotous knight discomfiting the household or Malvolio's role as a steward enamored with his mistress.<sup>212</sup> Additionally, the minutiae of the Character are generally part of Colbert's personal history, opinions, wit or psyche,<sup>213</sup> and thus are merely discovered facts and add little to the Character's delineation.<sup>214</sup> Thus it is likely that the Character's nonvisual nature alone is insufficient to delineate the Character and make him worthy of copyright protection.

Moreover, the Character's visual aspect is likely worthy of minimal or no protection, and thus adds little to the Character's delineation. The Character's physical appearance is not worthy of copyright protection, as those features are Colbert's own physical features and thus are only facts.<sup>215</sup> And the combination of those features is also solely attributable to

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<sup>209</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>210</sup> See *supra* notes 48–54 and accompanying text.

<sup>211</sup> *Nichols*, 45 F.2d at 121.

<sup>212</sup> *Id.*

<sup>213</sup> See *supra* notes 179–87, 189, 192–99 and accompanying text.

<sup>214</sup> See *supra* notes 109–11 and accompanying text (illustrating that aspects of a person, including one's "persona," *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000), is not copyrightable).

<sup>215</sup> See *supra* notes 105–06 and accompanying text.

Colbert, so even their arrangement is not original.<sup>216</sup> Last, the Character's clothes are only protectable to the extent of their arrangement, as human clothing is utilitarian and not protectable, and that arrangement is of minimal creativity and thus warrants little protection.<sup>217</sup>

On the other hand, and as Colbert himself said, the Character is unlike other anchors who act as a conduit to convey the news and instead the Character actually "is the news;"<sup>218</sup> thus one could argue the Character "constitutes the story being told."<sup>219</sup> *The Colbert Report* centered on the Character, regardless of the material being covered;<sup>220</sup> and even when introducing a guest the Character acted to impliedly suggest he, and not the guest, was the one receiving applause.<sup>221</sup> Moreover the "WristStrong" movement,<sup>222</sup> Tolkien obsession,<sup>223</sup> fear of

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<sup>216</sup> 17 U.S.C. § 102(b) (2012); H.R. Rep. No. 94-1476, at 51 (1976); S. Rep. No. 94-473, at 50 (1975). The other requirement for a work to receive copyright protection is that the work must be "fix[ed] in tangible form." H.R. Rep. No. 94-1476, at 51; S. Rep. No. 94-473, at 50. This requirement was also made explicit in section 102 of the Copyright Act of 1976. 17 U.S.C. § 102 (2012); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344-45 (1991); Harper & Row, Publishers. v. Nation Enters., 471 U.S. 539, 556-58 (1985).

<sup>217</sup> See Gray, *supra* note 191; see, e.g., Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978); Walt Disney Co. v. Powell, 897 F.2d 565 (D.C. Cir. 1990); Disney Enters., Inc. v. Away Disc., No. 07-1493, 2010 U.S. Dist. LEXIS 86119 (D. P.R. Aug. 20, 2010); Disney Enters, Inc. v. Law, No. 6:07-cv-1153-Orl-18UAM153, 2008 U.S. Dist. LEXIS 6431 (M.D. Fla. Jan. 3, 2008); Walt Disney Co. v. Best, No. 88 CIV. 1595, 1990 U.S. Dist. LEXIS 12604 (S.D.N.Y. Sept. 26, 1990); Walt Disney Prods. v. Filmation Assocs., 628 F. Supp. 871 (C.D. Cal. 1986).

<sup>218</sup> Talks at Google, *supra* note 6.

<sup>219</sup> Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., 216 F.2d 945, 950 (9th Cir. 1954).

<sup>220</sup> E.g. Moran, *supra* note 189; Talks at Google, *supra* note 6.

<sup>221</sup> See Ben Lindbergh, *A Statistical Analysis of Stephen Colbert's First 100 Episodes of 'The Late Show'*, FIVETHIRTYEIGHT (Feb. 26, 2016, 1:07 PM), <http://fivethirtyeight.com/features/a-statistical-analysis-of-stephen-colberts-first-100-episodes-of-the-late-show/>.

<sup>222</sup> Stelter, *supra* note 190.

<sup>223</sup> Talks at Google, *supra* note 6.

bears,<sup>224</sup> and numerous other recurring bits like “Tip of the Hat, Wag of the Finger” from *The Colbert Report* centered on the Character, and were a means for expressing his views or highlighting events related to the Character itself, rather than presenting truly newsworthy events.<sup>225</sup> Just as with Holden Caulfield in *Catcher in the Rye*, where “it is difficult, in fact, to separate Holden Caulfield from the book,” it is difficult to separate the Character from *The Colbert Report*, and as such one could argue the Character is sufficiently delineated and thus copyrightable.<sup>226</sup> Last, the Character has a physical appearance, which strengthens the claim that the Character is copyrightable,<sup>227</sup> even if no single aspect of the Character’s appearance would be protected by copyright.<sup>228</sup>

A rebuttal to the Character “constitut[ing] the story being told” would argue that the Character is merely a “conduit” or lens for expressing the news, and that in fact the story being told is a joke, combing the Character and the news.<sup>229</sup> The fact that *The Colbert Report* often centered on less newsworthy events or events relating to the Character does not negate the Character’s primary function as a satirical foil in the presentation of information about events in the world to an audience, i.e. the news. As such, it is likely one can distinguish the Character from the story being told, whether it is a joke, an event of international concern, or Colbert breaking his wrist while preparing for that

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<sup>224</sup> EW Staff, *supra* note 192.

<sup>225</sup> Tim Grierson, *30 Best ‘Colbert Report’ Bits: 2. Tip of the Hat, Wag of the Finger*, ROLLING STONE (Dec. 15, 2014), <http://www.rollingstone.com/tv/lists/30-best-colbert-report-bits-20141215/tip-of-the-hat-wag-of-the-finger-20141215>.

<sup>226</sup> *Salinger v. Colting*, 607 F.3d 68, 73 (2d Cir. 2010) (citing *Salinger v. Colting*, 641 F. Supp. 2d 250, 254 (S.D.N.Y. 2009) (Special App. 8 (Hr’g Tr. 24), *rev’d on other grounds*, 607 F.3d 68 (2d Cir. 2010)).

<sup>227</sup> *See Anderson v. Stallone*, No. 87-0592, 1989 U.S. Dist. LEXIS 11109, at \*21 (C.D. Cal. Apr. 25, 1989).

<sup>228</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350–51 (1991); *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 916 n. 12 (9th Cir. 2010); *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

<sup>229</sup> *Warner Bros. Pictures, Inc. v. CBS*, 216 F.2d 945, 950 (9th Cir. 1954); *Talks at Google*, *supra* note 6.

night's show.<sup>230</sup> This is unlike the difficulty separating Holden Caulfield from *Catcher in the Rye*, which was a "portrait by words" of Caulfield.<sup>231</sup> Moreover, the combination of the Character with the news creates the ultimate aim, or story, of *The Colbert Report*: a satirical joke about modern events. Thus the Character is merely a single part of a duality necessary to create the joke, and thus does not "constitute the story being told."<sup>232</sup>

### 3. Summary: Is the Character is Copyrightable?

The Character likely is not copyrightable. The significant overlap between the Character and Colbert's own life make it virtually impossible to separate the two, thus any ability to delineate the Character is merely a result of Colbert himself being a unique person with unique opinions and talents.<sup>233</sup> And because much of the Character is unprotectable facts or ideas, combined with its function as a means to tell jokes about recent events in the world, it is likely that the even if the Character is a "character," it is insufficiently delineated to fall within the scope of a copyrightable subject matter.<sup>234</sup>

#### B. IS IT FAIR FOR STEPHEN COLBERT TO USE HIS OWN NAME & FACE? THE FAIR USE DOCTRINE APPLIED

Even if the Character is copyrightable, it is likely Colbert could successfully assert the fair use defense, as his use of the Character furthered the purpose of copyright by disseminating ideas, was parodic, and, particularly in light of Colbert's line of work and comedic style, provided a public benefit. The following analysis assumes the Character is copyrightable.

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<sup>230</sup> Stelter, *supra* note 190.

<sup>231</sup> *Salinger*, 607 F.3d at 73 (citing *Salinger v. Colting*, 641 F. Supp. 2d 250, 254 (S.D.N.Y. 2009) (Special App. 8 (Hr'g Tr. 24), *rev'd on other grounds*, 607 F.3d 68 (2d Cir. 2010)).

<sup>232</sup> *Warner Bros. Pictures*, 216 F.2d at 950.

<sup>233</sup> *See Feist*, 499 U.S. at 350–51; *Mattel, Inc.*, 616 F.3d at 916, n.12; *Brown*, 201 F.3d at 658.

<sup>234</sup> *See id.* *But see* *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978); *Anderson v. Stallone*, No. 87-0592, 1989 U.S. Dist. LEXIS 11109 at \*21 (C.D. Cal. 1989).

## 1. The Purpose of the Use

This factor likely weighs in favor of fair use, based on the parodic nature of Colbert's use of the Character.<sup>235</sup> While the primary purpose of Colbert's reintroduction of the Character on *The Late Show* was to comment on Donald Trump's presidential campaign,<sup>236</sup> the Character's use as a foil for that commentary involved parodic commentary on the Character itself.<sup>237</sup>

Colbert's use of the Character was a means to contrast the political climate that spawned the Character and *The Colbert Report*, embodied in the concept of truthiness, with the politics of today and Trump's nomination success, embodied in the term "trumpiness."<sup>238</sup> Truthiness, coined by Colbert in 2005, embodies the idea that politicians' statements felt true, but weren't necessarily focused on or even based in fact or logic.<sup>239</sup> Thus Colbert's Character—an advocate for and the embodiment of "truthiness"<sup>240</sup>—had no concern for fact.<sup>241</sup> In the Character's monologue on "trumpiness," the 2016 version of truthiness, the Character first explains the idea of truthiness and how he coined the word; then the Character compares himself to Trump,

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<sup>235</sup> See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 580 (1994); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997).

<sup>236</sup> Sims, *supra* note 10.

<sup>237</sup> See Jaffery, *supra* note 10; Sims, *supra* note 10.

<sup>238</sup> *Trumpiness*, *supra* note 3.

<sup>239</sup> Amée Latour, *Stephen Colbert's New Word "Trumpiness" Is the 2016 Evolution of "Truthiness"*, BUSTLE (July 19, 2016), <https://www.bustle.com/articles/173568-stephen-colberts-new-word-trumpiness-is-the-2016-evolution-of-truthiness>.

<sup>240</sup> *Trumpiness*, *supra* note 3; see Dowd, *supra* note 193; EW Staff, *supra* note 192; Steinberg, *supra* note 9. "Truthiness" is defined as "the quality of seeming to be true according to one's intuition, opinion, or perception without regard to logic, factual evidence, or the like." *Truthiness*, DICTIONARY.COM, <http://www.dictionary.com/browse/truthiness> (last visited Apr. 11, 2016). The word was first coined by Colbert/the Character on the first episode of *The Colbert Report*, and used to describe the state of politics and political commentary in 2005. See Latour, *supra* note 239.

<sup>241</sup> See Dowd, *supra* note 193; EW Staff, *supra* note 192; Steinberg, *supra* note 9.

showing their similarities.<sup>242</sup> But then the Character admits Trump has surpassed him because truthiness requires statements to “feel true, but Trumpiness, doesn’t even have to do that,” it just “need[s] a leader to feel things that feel *feels*.” voters now only care that a politician’s statements merely seem to voice the electorate’s emotions.<sup>243</sup> Essentially, Colbert’s use of the Character while explaining “trumpiness” is a parodic comment on the Character, showing the Character is out of date, as the political situation has devolved to the point that voters are no longer concerned that politicians’ statements even *feel* true. Instead, voters just want a candidate to be an “emotional megaphone” for their anger at the government, and Trump satiates that desire.<sup>244</sup> Thus the Character and his truthiness is contrasted with Trump to illustrate the Character’s inadequacy in explaining the change in political climate and voters’ motives, and the rise of Trump and his “trumpiness.”

A rebuttal to this comparison would argue Colbert’s use of the Character did not transform the Character, or did so only minimally, and primarily used the Character for commentary on Trump.<sup>245</sup> Consequently the purpose of using the Character was merely to “avoid the drudgery in working up something fresh.”<sup>246</sup> However, this argument likely fails as courts do not require substantial commentary on the original work; they only require that the new work’s parodic purpose “may reasonably be perceived.”<sup>247</sup> The statements that contrast the Character and Trump, and the explanations of truthiness and “trumpiness” are likely sufficient for parodic commentary, under the *Campbell*

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<sup>242</sup> *Trumpiness*, *supra* note 3.

<sup>243</sup> *Id.*

<sup>244</sup> Rebecca Kaplan, *Colbert: Trump is “My Old Character with \$10 Billion”*, CBS NEWS (Dec. 27, 2015, 12:12 PM), <http://www.cbsnews.com/news/stephen-colbert-donald-trump-is-my-old-character-with-10-billion/>; Latour, *supra* note 239; *Trumpiness*, *supra* note 3.

<sup>245</sup> See *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997) (finding that a new work’s use of the original to comment on a separate topic was not a transformative use).

<sup>246</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 580 (1994).

<sup>247</sup> *Id.* at 582.

Court's construction of parody.<sup>248</sup> Moreover Colbert's use of the Character in discussing in the change in political climate from 2005 to 2016 is transformative and beneficial commentary on its own.

Last, Colbert's commercial benefit from using the Character does not bar this factor favoring fair use. The Character was used on *The Late Show*, Colbert's current job, thus used for a commercial purpose, which cuts against fair use.<sup>249</sup> But this is relatively insignificant, as a use's commercial nature is only part of this factor and is not determinative of how the factor weighs, and the purpose of Colbert's use to provide parodic and critical commentary mitigates the weight given to the commercial nature of the use.<sup>250</sup>

Thus this factor would likely weigh in favor of fair use, based on Colbert's parodic and social commentary.

## 2. Nature of the Copyrighted Work

While the Character is a creative work, it is still mostly composed of unprotectable materials—particularly its appearance and political perspective.<sup>251</sup> Moreover, because Colbert's parodic use of the Character, the Character's notoriety is largely irrelevant.<sup>252</sup> Thus this factor would likely weigh against fair use, but only minimally.

## 3. Amount & Substantiality of the Portion Used

Related to the statements made in the preceding section, the Character's name, voice, and appearance are "facts," while his clothing serves a utilitarian function, and thus are not protected.<sup>253</sup> The Character's general viewpoints are ideas, thus are not worthy of copyright protection and also excluded.<sup>254</sup> Only

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<sup>248</sup> Compare *id.* at 583, with *Trumpiness*, *supra* note 3.

<sup>249</sup> *Campbell*, 510 U.S. at 584–85.

<sup>250</sup> See *id.* at 584–85.

<sup>251</sup> See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

<sup>252</sup> See *Campbell*, 510 U.S. at 586.

<sup>253</sup> See *Gaiman v. McFarlane*, 360 F.3d 644, 658–62 (7th Cir. 2004).

<sup>254</sup> *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350–51 (1991); *Harper & Row, Publ'rs. v. Nation Enters.*, 471 U.S. 539, 556, 559–60 (1985).



specific aspects associated with the Character are potentially worthy of protection.<sup>255</sup> Thus this factor favors fair use due to these limitations on which aspects of the Character are copyrightable and the parodic nature of Colbert's use.

While there are numerous aspects of the Character that could be protected, only a few were used and present few issues. The sword and shield held by the Character during his entrance are items featured on *The Colbert Report*, but both items are associated with Colbert's own interests and belongings, and impart minimal originality to the Character; thus they likely only have weak, if any, copyright protection.<sup>256</sup> Moreover, this is a quantitatively minimal use of the Character, if it is at all, and likely a qualitatively minimal use as well considering other, used unprotectable aspects of the Character.<sup>257</sup> The one aspect that is solely attributable to the Character is the catchphrase "Hello Nation," with the phrase and word "Nation" likely referencing fans of *The Colbert Report*, which the Character referred to as "Colbert Nation."<sup>258</sup> Again, this use is likely both quantitatively and qualitatively minimal, based on the context.<sup>259</sup>

Moreover, Colbert's use of the borrowed aspects was likely permissible based on the parodic nature of the use. Parodies may permissibly use those aspects necessary to "conjure up" the original work.<sup>260</sup> This concept creates a unique issue in the context of Colbert's use of the Character, as Colbert inherently and unintentionally uses many unprotectable aspects of the Character without actually conjuring up the Character, i.e

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<sup>255</sup> See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 755 (9th Cir. 1978).

<sup>256</sup> See generally *Feist*, 499 U.S. at 348–49; 1World, *Peter Jackson Gives Stephen Colbert a Lord of the Rings Sword*, TG DAILY (Nov. 13, 2014), <http://www.tgdaily.com/happyplace/film/129466-peter-jackson-gives-stephen-colbert-a-lord-of-the-rings-sword>; Moran, *supra* note 189; Talks at Google, *supra* note 6.

<sup>257</sup> See *Feist*, 499 U.S. 340, 361–64.

<sup>258</sup> See *Character's Biography*, *supra* note 181 (noting the official fan website for *The Colbert Report* titled "Colbert Nation").

<sup>259</sup> See generally *Character's Biography*, *supra* note 181.

<sup>260</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001) (citing *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 588 (1994)).

the Character's name, voice, and appearance. Therefore, Colbert must necessarily use other aspects unique to the Character to truly conjure up the Character and differentiate the Character from himself. Thus Colbert's use of the Character's unique aspects—the sword, shield, and catchphrase—is likely permissible based on the parodic purpose of Colbert's use and the necessity to conjure up the Character.<sup>261</sup> As such, it is likely Colbert's relatively minimal use of the Character's protectable aspects, particularly in light of the use's parodic nature, would weigh in favor of fair use.

#### **4. The Effect of the Use Upon the Original's Market Value & Market for Derivatives**

The final conventional factor would likely weigh against fair use, but only minimally. While Colbert's use of the Character is more akin to cognizable market substitution versus biting criticism of the Character, that fact is mitigated by (1) the transformative and parodic nature of Colbert's use and (2) Viacom's inability to use the Character—aside from the Character's past performances—substantially diminishing the economic value of and harm on Viacom's copyright.<sup>262</sup> Concerns of substitution are limited by the new subject matter surrounding Colbert's use of the Character, i.e. the comparison with and criticism of the Trump's presidential nomination and explanation of the modern electorate's behavior. Moreover Viacom's lack of control over the Character limits Viacom's ability to further develop the Character, and license and develop their own derivative works.<sup>263</sup> Furthermore, Colbert used or performed as

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<sup>261</sup> See *Campbell* 510 U.S. at 588.

<sup>262</sup> See *The Colbert Report: Episode Guide*, *supra* note 10. No new episodes have been created since Colbert left. See *id.*; Sims *supra* note 10.

<sup>263</sup> See *The Colbert Report: Episode Guide*, *supra* note 10. It appears Viacom has no stake in the books Colbert has written as the character either. Compare Stephen Colbert, *America Again: Re-becoming the Greatness We Never Weren't*, AMAZON.COM, [https://www.amazon.com/dp/0446583995?\\_encoding=UTF8&isInIframe=0&n=283155&ref\\_=dp\\_proddesc\\_0&s=books&showDetailProductDesc=1#product-description\\_feature\\_div](https://www.amazon.com/dp/0446583995?_encoding=UTF8&isInIframe=0&n=283155&ref_=dp_proddesc_0&s=books&showDetailProductDesc=1#product-description_feature_div) (last visited Apr. 10, 2017) (publishing by Grand Central Publishing) and Stephen Colbert ET AL.,

the Character multiple times outside *The Colbert Report*, throughout the *Report*'s time on air.<sup>264</sup> Thus Viacom failed to enforce their copyright against Colbert, weakening any claim of economic harm from Colbert's use on *The Late Show* by not previously requiring Colbert to acquire a license.<sup>265</sup> Thus this factor will weigh against fair use because of the general similarity between the Character's use on *The Late Show* and its function on *The Colbert Report*, but only minimally, due to the parodic nature of Colbert's use and limits on Viacom's ability to use the Character.

## 5. Further Considerations

While not an express factor for determining fair use, the unique issues presented by Colbert's use of the Character warrants discussion of their inseparability, Colbert's ability to work, and potential limits on Colbert's comedic talents and freedom of expression generally. Moreover, consideration of these issues are permissible,<sup>266</sup> and the courts have generally favored author-defendants facing infringement suits, thus it

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*Stephen Colbert's Tek Jansen*, AMAZON.COM, [hereinafter *Tek Jansen*] [https://www.amazon.com/Stephen-Colberts-Jansen-John-Layman/dp/1934964166/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1475686348&sr=1-1&keywords=tek+jansen](https://www.amazon.com/Stephen-Colberts-Jansen-John-Layman/dp/1934964166/ref=sr_1_1?s=books&ie=UTF8&qid=1475686348&sr=1-1&keywords=tek+jansen) (last visited Apr. 10 2017) (publishing by Oni Press) and GRAND CENTRAL PUBLISHING, <http://www.grandcentralpublishing.com> (last visited Oct. 23, 2016), with *Viacom Brands*, VIACOM, <http://www.viacom.com/brands/pages/default.aspx> (last visited Oct. 23, 2016) (noting that Viacom has no ownership of the publishers that Colbert has used to publish books that use, at least in part, the Character).

<sup>264</sup> See McGrath, *supra* note 7 (appearing as the Character while testifying before Congress in 2010; while running for president in 2008; while performing at the 2006 White House Correspondents' Dinner).

<sup>265</sup> Cf. *Campbell*, 510 U.S. at 592 (protecting only derivative uses "that creators of original works would in general develop or license others to develop").

<sup>266</sup> See *id.* at 577–78.

appears that the flexibility afforded by fair use would consider these unique issues.<sup>267</sup>

As discussed above, Colbert and the Character share numerous characteristics, both physically, biographically, and behaviorally. Moreover, like the Character, Colbert hosts a television talk show that discusses the news and involves him interviewing guests.<sup>268</sup> Thus there is already substantial potential for infringement, and if Colbert makes a satirical and egotistical joke while on air, he's arguably slipped back into portraying the Character, even if unintentionally.<sup>269</sup> And the potential for unintentionally slipping back into the Character is further compounded by Colbert's reliance on his improvisational comedy skills.<sup>270</sup> Thus barring Colbert's use of the Character presents a significant limit to Colbert's ability to work as comedian or talk show host generally, and on *The Late Show* in particular based on the similarity format between *The Late Show* and *The Colbert Report*.

Moreover, since becoming host of *The Late Show*, Colbert has partially shifted away from the typical late night guests—actors, athletes, and musicians—to guests more associated with “serious” news topics like politics and business.<sup>271</sup> An analysis of Colbert's first hundred *Late Show* episodes reveals that political figures make up 11.4% of his guests—more than double the amount of his two main competitors; and Colbert's *Late Show* is the only one of the three shows to feature a business figure as a guest.<sup>272</sup> For example, in his first week hosting *The Late Show*, Colbert brought on Jeb Bush, Joe Biden, Elon Musk, and Justice Stephen Breyer; and subsequently hosted Donald Trump.<sup>273</sup> Thus, barring Colbert's use of the Character could substantially limit his ability to host *The Late Show* in its current style, as the chance for an

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<sup>267</sup> *E.g. Campbell*, 510 U.S. 569; *Franklin Mint Corp. v. Nat'l Wildlife Art Exch.*, 575 F.2d 62 (3d Cir. 1978).

<sup>268</sup> *E.g. Sims*, *supra* note 10.

<sup>269</sup> *E.g. Ryan*, *supra* note 196.

<sup>270</sup> *See Dowd*, *supra* note 193 (quoting Jon Stewart: “Stephen is rendering a character in real time.”).

<sup>271</sup> *Lindbergh*, *supra* note 221.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

inadvertent slip into the Character is not de minimis based on Colbert's comedic style and the subject matter he presents.<sup>274</sup>

Such a restriction on a person's ability to express himself and his opinions is undoubtedly contrary to the purpose of copyright, which is to facilitate the dissemination of ideas.<sup>275</sup> And based on the differences between Colbert and his competitors, it would appear that dissemination of different ideas is at least an implicit aim of Colbert on *The Late Show*. Moreover, Viacom's inability to continue to use the character to disseminate ideas, seen in light of its restrictions on Colbert's ability to express himself, would also weigh in favor of fair use.<sup>276</sup> These considerations, based on their closeness to the purpose of both copyright and the fair use doctrine, would substantially favor Colbert's use of the Character.<sup>277</sup>

### CONCLUSION

*Esse quam videri*, "to be, rather than to seem."<sup>278</sup> Stephen Colbert (the person) is Stephen Colbert (the Character). He is not pretending to be some character, presenting some carefully crafted fiction of "well-intentioned, poorly informed, high-status idiot" who fears bears, loves Bill O'Rielly, and has no concern for facts or logic. Colbert is simply being himself, improvising in his comfort zone on topics that he loves engaging in. Any appearance of a "character" is purely the result of Colbert's own wit and improvisation skill, his sense of humor, and his political views. Thus, the Character is not a character at all but in fact is merely—or perhaps utterly—Stephen Colbert the person. And even if the Character is a character, he is not copyrightable. His image is a collection of discovered facts with only a modicum of, if any, originality in their arrangement. The

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<sup>274</sup> See *id.*; Dowd, *supra* note 193; Gray, *supra* note 191 (quoting Colbert in part: "I meant a lot of it. I even agreed with my character sometimes," wearing the persona "like a cap," sometimes more lightly than others.").

<sup>275</sup> See Harper & Row, Publ'rs v. Nation Enters., 471 U.S. 539, 558 (1985).

<sup>276</sup> See generally *id.*

<sup>277</sup> *Id.* at 558.

<sup>278</sup> *Motto*, *supra* note 1.

Character still only constitutes an uncopyrightable stock character due to its nature as a self-absorbed, well-intentioned, poorly informed high-status idiot working as a right-wing TV pundit. Even considering *The Colbert Report's* focus on the Character's personal views and interests, the Character remains uncopyrightable because he functions as a conduit to inform the audience of events and present their humorous aspects. Last, if Character is copyrightable, when Colbert revived the Character on *The Late Show* he made fair use of the Character and should not be liable for infringement. His use of the Character commented on what Colbert saw as a changing political climate, and importantly commented on the Character itself, creating a parody under *Campbell*. As such, if the Character is protected under copyright, Colbert's parodic use of the Character on *The Late Show* is protected as a fair use.

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