Beyond Copyright: Applying a Radical Idea-Expression Dichotomy to the Ownership of Fictional Characters

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ABSTRACT

Copyright protection for fictional characters in the United States is expanding on an uncertain and incoherent basis. With the event of the case Towle v. DC Comics, courts have now applied three different tests to discern a character's copyrightability. Towle was a significant decision because it was the first time a US court had held that a car (the Batmobile) was a copyrightable character. Although courts have utilized the ideas-expression dichotomy to differentiate unprotectable character 'ideas' from protectable character 'expressions', the dichotomy is unlikely to alleviate the law's uncertainty and incoherence. Both the US ideas-expression dichotomy and character copyrightability doctrines have been highly influenced by the case of Nichols v. Universal Pictures. In this case, Judge Learned Hand espoused an ideas-expression dichotomy that expanded copyright to cover more than the literal words of a text, and so could potentially cover a text's characters. Nevertheless, Learned Hand admitted that this dichotomy was vague and arbitrary.

This Article combines legal and philosophical perspectives to shed light on the problems of uncertainty and incoherence in the law of fictional character ownership. In 1793, the German philosopher Johann Gottlieb Fichte published a radical ideas-expression dichotomy, wherein copyright was restricted to the literal words of a text. Under a Fichtean perspective, fictional characters would be ideas that were beyond copyright, residing perpetually in the public domain. Although Fichte's dichotomy was based upon a natural law conception of copyright, a

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natural law conception of copyright can arguably further utilitarian goals. This is illustrated by the case study of Friedrich Nicolai’s parody of Johann Wolfgang Goethe’s book The Sorrows of Young Werther. This Article proposes that adopting a Fichtean perspective on fictional character ownership can enrich our understanding of how fictional characters can be owned in a copyright sense. If judges adopt language that more closely reflects Fichte’s philosophy, a more detailed analysis of the facts in character copyrightability cases will likely ensue.

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I. INTRODUCTION

Owning rights to a fictional character can be a lucrative affair. Forbes Magazine has reported that “character-based goods brought in nearly $113 billion worldwide in 2015.” This figure amounted to nearly half of the total retail sales of all licensed products recorded by the Licensing Industry Merchandisers’ Association (LIMA), the leading trade group for the global licensing industry. The large amount of money at stake may explain why owners of fictional characters are motivated to maximize exclusive control over their characters. Thus, the question of what it means to own a fictional character becomes a pressing one for many owners, and also many prospective users of fictional characters.

The Ninth Circuit Court of Appeals has recently grappled with this question. In 2011, DC Comics brought a lawsuit against Mark Towle, a mechanic who made replicas of the Batmobiles featured in the 1960s Batman TV show and the 1989 Batman movie. One cause of action in the lawsuit was copyright infringement. Towle admitted that he copied the designs of both Batmobiles and deliberately marketed the cars as Batmobile replicas. Towle inter alia argued that the Batmobile existed in too many inconsistent manifestations to be copyrightable. This was not persuasive to the Ninth Circuit. After reviewing the relevant case law, the Court laid down a new three-part test for character copyrightability. The Court then found that the Batmobile was a copyrightable character under this test—ultimately concluding that Towle had infringed DC Comics’ copyright in the Batmobile.

This was a significant decision because it was the first time that a US court held that an object could be a copyrightable character.

2. Id.; see also Id. LIMA, https://www.licensing.org/about/ (last visited Sept. 15, 2018).
3. DC Comics v. Towle, 802 F.3d 1012 (9th Cir. 2015); see generally Batman (ABC 1966–1968) (starring Adam West as Bruce Wayne or Batman).
5. Towle, 802 F.3d at 1017.
6. Id.
7. Id. at 1022.
8. Id. at 1021.
9. Id. at 1022.
10. Id. at 1027.
11. See id. Previously, courts generally held that a car could be copyrightable, provided that other requirements were met. See, e.g., Halicki Films, LLC v. Sanderson Sales & Mktg., 547
Characters previously found to be copyrightable have had, at the very least, some sort of sentient personality. Aside from Batman, such copyrightable characters have included Godzilla and Jonathan Livingston Seagull.

In some ways, the decision was not surprising. Batman may be an iconic American superhero with over seventy-five years of comic book history, but his primary means of transport—the Batmobile—has also become a pop culture icon in its own right. Evidence of this iconic status includes the fact that the armored twenty-foot vehicle designed for Batman v. Superman attracted substantial media interest in the lead up to the film’s premiere. However, it is worth noting that the Batmobile has greatly evolved over the years. In 1941, the Batmobile first appeared in Detective Comics #48 as a red sedan with a bat-shaped hood ornament. Nowadays, the Batmobile is more often recognized as a sleek, black or grey car that is equipped with bat-themed features and a range of high-tech mechanisms. The Batmobiles from the 1960s television show and the 1989 Batman movie look quite different. It can be hard
to discern exactly what Batmobile was being copyrighted in *Towle*,
given the differences among the Batmobiles put forward by DC
Comics.\(^22\)

*Towle* is the latest in a web of tangled cases that address the
copyright protection of fictional characters.\(^23\) The web’s genesis lies in
the Second Circuit’s decision *Nichols v. Universal Pictures Corp.*,
wherein Judge Learned Hand in obiter entertained the possibility of
copyright protection for a fictional character, independently of works in
which that character appeared.\(^24\) Subsequent courts developed his
comments into the first test for character copyrightability, called the
“sufficiently delineated” test.\(^25\) Later, remarks from the Ninth Circuit’s
decision *Warner Bros. Pictures, Inc. v. CBS, Inc.* were applied as a
second copyrightability test, known as the “story being told” test.\(^26\)

Today, courts tend to favor applying the sufficiently delineated test.\(^27\)
However, case law has been inconsistent as to whether and to what
extent the story being told test can still be applied—especially in
relation to characters portrayed textually.\(^28\) As commentators have
persistently complained over the past sixty years, the law on fictional
character ownership is uncertain and incoherent.\(^29\) *Towle*’s test for

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\(^22\) See infra Part II.

\(^23\) See infra Part II.

\(^24\) *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

\(^25\) See infra note 96 and accompanying text.

\(^26\) *See*, e.g., *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1176 (9th Cir. 2003); *see also* *Warner
Bros. Pictures, Inc. v. CBS, Inc.*, 216 F.2d 945, 950 (9th Cir. 1954).

\(^27\) *See* AARON SCHWARACH, FAN FICTION AND COPYRIGHT: OUTSIDER WORKS AND
INTELLECTUAL PROPERTY PROTECTION 33 (2011) (“Even within the Ninth Circuit, the ‘story being
told’ test is now viewed warily.”).

\(^28\) See infra Section II.C.

\(^29\) *See*, e.g., SCHWARACH, supra note 27, at 44 (noting that the place where the line is
drawn between protected and unprotected characters “remains unclear”); E. Fulton Brylawski,
describing the legal doctrines surrounding character copyright as “rather inconsistent, unclear
REV. 429, 437 (1986) (stating that courts have applied legal doctrines “inconsistently” and so it
was “difficult to predict what elements of a character will be protected”); Michael V. P. Marks, *The
Legal Rights of Fictional Characters*, 25 COPYRIGHT L. SYMP. 35, 36 (1975) (describing the law as
“unclear and inconsistent”); Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on
a Legal Problem*, 35 CARDOZO L. REV. 769, 772 (2013) (“[T]he law in this area is very unclear.”);
Kathryn M. Foley, Note, *Protecting Fictional Characters: Defining the Elusive Trademark-
Copyright Divide*, 41 CONN. L. REV. 921, 926 (2009) (“The development of copyright protection for
fictional characters has been riddled with uncertainty and inconsistency . . . .”); Kenneth E. Spahn,
Comment, *The Legal Protection of Fictional Characters*, 9 U. MIAMI ENT. & SPORTS L. REV. 331,
331 (1992) (“Fictional characters] still do not enjoy well defined legal protection against
infringement.”).
character copyrightability is unlikely to provide adequate remedy for the law’s problems. Instead, the courts need better rules for drawing the boundary lines of character copyrightability and better reasoning for supporting such rules.

These boundary lines are especially important considering that the constitutional objective of copyright is to promote the arts. This utilitarian rationale for copyright forms the framework from which courts interpret the principles that define the boundaries of copyright. Copyright grants authors exclusive rights so that they have incentives to create works of art; however, those rights are limited to allow the public to access and build upon those works. Inherent in copyright is an attempt to carefully balance the need for protecting copyrighted works against the need to allow public access to those works. Simply put, there can be a concern that overprotection strangles access, whilst underprotection jeopardizes incentives to create. The law’s trend towards increased copyright protection for fictional characters suggests a possibility of overprotection. Boundary lines are needed to strike a proper balance between underprotection and overprotection.

One copyright principle that has been said to define the copyright boundary and limit the scope of copyright is the idea-expression dichotomy. Codified in statute, the idea-expression dichotomy provides that copyright only protects the expression of ideas.

30. Towle, 802 F.3d at 1021.
31. See infra Part II.
33. See, e.g., Ladd v. Law & Tech. Press, 762 F.3d 809, 812 (9th Cir. 1985).
37. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“[T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); see also Feist Publ’ns, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340, 349–50 (1991) (“[C]opyright encourages others to build freely upon the ideas and information conveyed by a work.”).
38. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (discussing the “inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it”); see also William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 LEGAL STUD. 325, 326 (1989) (“Striking the correct balance between access and incentives is the central problem in copyright law.”); Mary W. S. Wong, “Transformative” User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?, 11 VAND. J. ENT. & TECH. L. 1075, 1138 (2009) (recognizing the current copyright balance and urging the of consideration of a system that regards “both authors and users (who are sometimes one and the same) as equal and integrated members”).
39. See infra Part II.
not the ideas themselves. US courts have relied on this dichotomy in the past to define the boundaries of character copyrightability, distinguishing unprotectable character ideas from protectable character expressions. However, the idea-expression dichotomy has been subject to trenchant criticism for setting a vague and arbitrary standard. Hence, applying the dichotomy to fictional characters may not assist in achieving clarity and certainty in the law of character copyrightability. This proposition becomes more tenable upon reexamining the case that was key to developing both the idea-expression dichotomy and character copyrightability in the United States: Nichols v. Universal Pictures Corp. In this case, Judge Learned Hand espoused an idea-expression dichotomy that expanded copyright to cover more than the literal words of the text, and entertained the possibility of copyrightable characters. Although Judge Learned Hand admitted the dichotomy was vague and arbitrary, he also argued that this dichotomy was essential to copyright law.

Long before Towle and Nichols were decided—and indeed before copyright even existed in most countries—the German philosopher Johann Gottlieb Fichte published his article, Proof of the Unlawfulness of Reprinting, in 1793. Through distinguishing a book’s “content” from its “form,” Fichte espoused a radical idea-expression dichotomy wherein copyright was restricted to the literal words of the text. Ideas were to be owned as common property, whilst expression could be owned as

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41. See, e.g., Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978) (citation omitted) (“[W]hile many literary characters may embody little more than an unprotected idea, a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression.”); Warner Bros. Pictures, Inc. v. CBS, Inc., 216 F.2d 945, 950 (9th Cir. 1954) (stating that if the character is not the “story being told,” he is not in the subject area of copyright protection); Nichols v. Universal Pictures Corp., 45 F.2d. 119, 121 (2d Cir. 1930) (“[A] vain and foppish steward who became amorous of his mistress . . . would be no more than Shakespeare’s ‘idea[,] . . .’.”).
43. Nichols, 45 F.2d. at 121.
44. Id.
45. Id. at 122.
47. Id. at 447, 453, 468.
exclusive property. Fichte’s dichotomy was based upon a presumption relating to the uniqueness of a person’s learning process, and the dichotomy itself formed the natural law foundations for Fichte’s system of copyright. The German philosopher’s system of copyright both foreshadowed and diverged from the current copyright system in the United States.

This Article proposes that considering a Fichtean perspective on fictional character ownership can enrich our understanding of how fictional characters can be owned in a copyright sense. A Fichtean perspective entails viewing fictional characters as ideas, unable to be owned by anyone as exclusive property. Once published, fictional characters ought to reside in the public domain as common property. Conversely, what people can own exclusively are their expressions of fictional characters. Copyright infringement is limited to more or less exact copying. If a Fichtean perspective is applied to the law of character copyrightability, many of the law’s current problems of uncertainty and incoherence could be avoided. Furthermore, although a natural law conception of copyright may seem at odds with a utilitarian conception, it is plausible that applying a natural law conception can still help bring about the consequences sought after by a utilitarian conception. A concrete example of this point can be found in 1793, when the German writer Friedrich Nicolai appropriated characters from Johann Wolfgang Goethe’s book The Sorrows of Young Werther to write his parody, The Joys of Young Werther. Goethe’s reaction illustrated what could happen if a Fichtean perspective on fictional characters is put into practice—the creation of more art.
Academics have recognized the need to adopt broad cross-disciplinary approaches when assessing and critiquing copyright law.58 In Professor Zahr K. Said’s 2013 article, Fixing Copyright: Literary Perspectives on a Legal Problem, she argued for “the benefits of an interdisciplinary approach to the problem of copyright’s internal inconsistencies.”59 In her article, Said observed that the copyright conception of character was significantly different from the literary conception of character.60 If the literary conception was utilized, this pointed against *inter alia* owning fictional characters as independent copyrighted works.61 The subsequent Parts both build upon Professor Said’s more specific research in relation to fictional characters and support her wider push for cross-disciplinary research. This Article’s objective is not so much widespread copyright reform, but rather a call to view fictional character ownership in a different way. That call has been expressed through presenting a philosophical perspective on the matter from eighteenth century Germany, where characters were not copyrightable, and copyright itself was yet to be legislated.

This Article starts in Part II by giving readers an overview of US copyright law and the legal ownership of fictional characters, highlighting problems of the law’s uncertainty and incoherence. Part III then describes the philosopher Fichte’s idea-expression dichotomy in precopyright Germany and compares his system of copyright to the current system of copyright in the United States. Part IV applies Fichte’s philosophy to construct a Fichtean perspective on fictional character ownership and uses it to illustrate how such a perspective can avoid the legal problems discussed in Part II. Part V illustrates the Fichtean perspective in practice through examining Nicolai’s appropriation of Goethe’s characters, thereby also showing how a natural law conception of copyright can complement a utilitarian conception. Part VI discusses the implications of this Article’s research, proposing the judiciary adopt language that better reflects Fichte’s philosophy. Part VII provides the conclusion.

60. Id. at 774.
61. Id. at 827.
II. PROBLEMS IN THE LANDSCAPE OF FICTIONAL CHARACTER OWNERSHIP

A. Overview of Current Law

As previously discussed, the US Constitution defines the purpose of copyright in utilitarian terms, with copyright’s stated purpose being to “promote the progress of science and useful arts.” Section 102 of the Copyright Act defines the statutory scope of the subject matter of copyright. Subsection (a) provides that copyright subsists in “original works of authorship fixed in any tangible medium of expression” and subsection (b) provides that copyright protection does not extend to the ideas “embodied” in protected copyrighted works. From this, courts have derived at least four doctrines that help to draw the primary boundaries of copyright law: originality, fixation, works of authorship, and the idea-expression dichotomy.

Generally speaking, the first owner of a copyrighted work is the work’s author. Copyright’s grant of exclusive rights is broad and includes the right to reproduce the work as well as the right to make derivative works such as a translation or adaptation. Copyright infringement occurs when someone has made an unauthorized copy of the owner’s work, and the two works are substantially similar. One exception to infringement is a person’s fair use of a copyrighted work.

The Copyright Act gives a nonexhaustive list of what works of authorship are. The list includes literary, pictorial, and graphic works as well as motion pictures and other audio-visual works. As a result, there are two main ways that a person can own copyright in a fictional character in the United States.

First, a person may own copyright in a work that falls within the enumerated statutory list. Fictional characters contained in the work...
may be protected as part of the work.\footnote{See, e.g., Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1266–67 (11th Cir. 2001).} For example, in \textit{SunTrust Bank v. Houghton Mifflin Co.}, the Eleventh Circuit was tasked with reviewing the district court’s granting of a preliminary injunction to the plaintiff SunTrust Bank.\footnote{Id. at 1260.} It was undisputed that SunTrust Bank owned copyright in the literary work \textit{Gone with the Wind}.\footnote{Id. at 1266. See generally MARGARET MITCHELL, GONE WITH THE WIND (1936).} On its own review, the court also found that the defendant’s book—\textit{The Wind Done Gone},\footnote{Alice Randall, \textit{The Wind Done Gone} (2001).} a parody of \textit{Gone with the Wind}—had made “substantial use” of \textit{Gone with the Wind}, having appropriated “numerous characters, settings, and plot twists” from the original book.\footnote{Suntrust Bank, 268 F.3d. at 1267.} Hence, the Court accepted that for the purposes of applying for a preliminary injunction, the plaintiff had established the defendant’s prima facie copyright infringement of \textit{Gone with the Wind}.\footnote{Id. at 1265–67.} The defendant’s character appropriation contributed to that conclusion.\footnote{Id. at 1267.} However, the Eleventh Circuit ultimately decided that it seemed like the defendant had a “viable fair use defense,” and so reversed the district court’s decision, remanding the case for further proceedings.\footnote{Id. at 1277.}

The second way a person may own copyright in a fictional character in the United States is through directly owning copyright in the character itself—indirectly owning any of the works in which the character appears. For ease of reference, this Article will subsequently refer to this capacity of owning a character as an “independent copyrighted work.” As no statute explicitly recognizes fictional characters as a type of work of authorship, legal authority for this proposal comes from case law.\footnote{See Nicole J. O’Hara, The Arc and Art of Protecting Fictional Characters, LEGAL INTELLIGENCER (Apr. 2, 2018, 9:40 AM), https://www.law.com/thelegalintelligencer/2018/04/02/the-arc-and-art-of-protecting-fictional-characters/ [https://perma.cc/YH49-VLAX]; see, e.g., Detective Comics, Inc. v. Bruns Publ’ns, Inc., 111 F.2d 432, 433–34 (2d Cir.1940) (holding that the character Superman is protected by copyright independent of the works in which he appears).} Unfortunately, contradictory case law exists, making it hard to state general principles of law.\footnote{See infra Section II.B.
works, literary works, and also audio-visual works can be protected by copyright—indeed, independently of the works in which the characters appear.

The ability to own a character as an independent copyrighted work is most significant in situations where a second-comer copies an author’s character, but the copying does not reach the threshold of “substantial similarity.” This generally occurs when the second-comer has put the author’s character in a context or plot that departs from the author’s source work. Towle provides a good example of this situation. By making Batmobile replicas, Mark Towle had essentially decontextualized the Batmobile from the fictional settings and narratives of the Batman films. As a result, it is understandable why DC Comics did not allege Towle infringed copyright in the Batman films, because Towle’s replicas would not have reached the threshold of being substantially similar to any of the Batman films. However, because the court found that the Batmobile itself was copyrightable, it was then easier to find that Towle’s replicas were substantially similar copies and therefore infringing.

Although it is now settled that fictional characters can be copyrightable, the questions of when a fictional character will be copyrightable or when copying a fictional character will constitute copyright infringement have far from steady answers. Courts have found it difficult to discern whether a fictional character is an unprotectable idea or a protectable expression. They have also struggled with ascertaining whether a defendant has only copied the

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83. See, e.g., Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757–58 (9th Cir. 1978) (holding that various comic book Disney characters including Mickey Mouse and Donald Duck were copyrightable); Detective Comics, 111 F.2d 432, 433–34 (holding that comic book character Superman was copyrightable).

84. See, e.g., Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496, 503 (7th Cir. 2014) (holding that the literary characters Sherlock Holmes and John Watson were copyrightable); Burroughs v. MGM, Inc., 519 F. Supp. 388, 391 (2d Cir. 1981) (holding that the literary character Tarzan was copyrightable).

85. See, e.g., DC Comics v. Towle, 802 F.3d 1012, 1022 (9th Cir. 2015) (holding that the Batmobile, as portrayed in comics and movies, was a copyrightable character); MGM, Inc. v. Am. Honda Motor Co., 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (holding that the James Bond movie character was copyrightable); Anderson v. Stallone, No. 87-0592 WDKGX, 1989 WL 206431, at *6 (C.D. Cal. Apr. 25, 1989) (holding that various primary and secondary characters from the Rocky movies were copyrightable).

86. See, e.g., Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1073 (2d Cir. 1992) (discussing substantial similarity); see also 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03 (Matthew Bender rev. ed. 2018) [hereinafter Nimmer on Copyright].


88. Towle, 802 F.3d at 1017.

89. Id. at 1025–26.

90. See infra Section II.C.
idea of a fictional character or when expression has been copied. Lastly, some courts have also treated characters portrayed through text (literary characters) differently from how they have treated characters portrayed through graphical images (graphical characters) and audio–visual media (audio–visual characters). The resulting case law is inconsistent, resulting in legal uncertainty. Furthermore, judicial reasoning has also been incoherent, making it difficult to deduce any general principles of law.

B. Legal Uncertainty

Courts have applied three different tests to determine the independent copyrightability of a fictional character:

1. The sufficiently delineated test from Nichols
2. The story being told test from Warner Bros.
3. The three-part test from Towle

The sufficiently delineated test—the first test applied by the courts—requires that a character must be “sufficiently delineated” in order to be protected by copyright. The test’s wording is derived from the comments of Judge Learned Hand in Nichols who stated that “the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.” The test seems to favor well-developed characters, especially if they have been developed over multiple works. It has been applied to successfully to protect characters including Mickey Mouse, James
Bond,\textsuperscript{100} and Tarzan,\textsuperscript{101} as well as many characters from the Rocky movies.\textsuperscript{102} A line, however, was drawn in \textit{Rice v. Fox Broadcasting Co.}, where the court held that a magician in a home video was not copyrightable.\textsuperscript{103} The court reasoned that a magician “dressed in standard magician garb” and whose role was “limited to performing and revealing the magic tricks” was not “especially distinct.”\textsuperscript{104}

The second test applied by courts is the story being told test. In order to be copyrightable, the character must constitute “the story being told.” In other words, “[I]f the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.”\textsuperscript{105} Although seen as more restrictive than the sufficiently delineated test,\textsuperscript{106} the story being told test has also been successfully applied to protect characters including James Bond\textsuperscript{107} and many characters from the Rocky movies.\textsuperscript{108} However, even the protagonists of novels have failed this test. In \textit{Warner Bros.}, the court found that Sam Spade did not pass the test even though he was the protagonist of \textit{The Maltese Falcon}.\textsuperscript{109} Unsurprisingly, the magician character in \textit{Rice} failed the story being told test as well.\textsuperscript{110}

Until \textit{Towle}, the sufficiently delineated and story being told tests were the only standards applied by courts to discern character copyrightability, and courts have struggled with both tests.\textsuperscript{111} For example, in \textit{Walt Disney Prods. v. Air Pirates}, the Ninth Circuit declined to apply the story being told test, referencing its application to literary characters, and applied the sufficiently delineated test to the graphical characters at issue (i.e., Mickey Mouse).\textsuperscript{112} Yet, in \textit{Gaiman v. McFarlane}, the Seventh Circuit stated that the \textit{Warner Bros.} decision regarding Sam Spade and applying the story being told test was

\textsuperscript{103} Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003).
\textsuperscript{104} Id.
\textsuperscript{105} Warner Bros. Pictures, Inc. v. CBS, Inc., 216 F.2d 945, 950 (9th Cir. 1954).
\textsuperscript{106} See, e.g., SCHWABACH, supra note 27, at 31.
\textsuperscript{109} Warner Bros. Pictures, 216 F.2d at 950; see generally DASHIELL HAMMETT, THE MALTESE FALCON (1930).
\textsuperscript{110} Rice v. Fox Broad. Co., 330 F.3d 1170, 1176 (9th Cir. 2003).
\textsuperscript{111} For a detailed discussion of the case law in relation to the story being told test until 2011, see SCHWABACH, supra note 27, at 28–45.
\textsuperscript{112} Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978) (“Because comic book characters therefore are distinguishable from literary characters, the Warner Brothers language does not preclude protection of Disney’s characters.”).
“wrong,” and it had been “killed” by the Ninth Circuit. Nevertheless, courts outside the Seventh Circuit have occasionally applied the story being told test in conjunction with the sufficiently delineated test to audio-visual characters. For example, at least two Ninth Circuit District Courts applied both tests to find James Bond and characters from the Rocky movies copyrightable in the context of considering motions for an injunction and summary judgment, respectively. Most recently, the District Court for the Southern District of New York applied the sufficiently delineated test to find the literary character Holden Caulfield copyrightable; however, the court did not mention the story being told test in its judgment. These cases are but a sampling of the messy state of affairs that existed at the time Towle was decided.

In Towle, the court’s review of the case law led it to conclude that precedent had established a “three-part test for determining whether a character in a comic book, television program, or motion picture is entitled to copyright protection.” The three parts are as follows:

1. “[T]he character must generally have ‘physical as well as conceptual qualities.’”
2. “[T]he character must be ‘sufficiently delineated’ to be recognizable as the same character whenever it appears. Consider the character as it has appeared in different productions, it must display consistent, identifiable character traits and attributes, although the character need not have a consistent appearance.”
3. “[T]he character must be ‘especially distinctive’ and ‘contain some unique elements of expression.’”

The test has, so far, only been applied in Towle, wherein the court held that the Batmobile passed the test. It is easy enough to see the three-part test as an evolution of the sufficiently delineated

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113. Gaiman v. McFarlane, 360 F.3d 644, 660 (7th Cir. 2004) (citing Walt Disney Prods., 581 F.2d 751 and Olson v. National Broadcasting Co., 855 F.2d 1446 (9th Cir. 1988)).
117. Salinger, 607 F.3d at 69.
118. DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015).
119. Id. (citations omitted).
120. Id. at 1022.
Nichols test, given its citing of previous cases\textsuperscript{121} and phrasing like “sufficiently delineated.”\textsuperscript{122} However, the three-part test explicitly applies only to graphic and audio-visual characters, seemingly leaving literary characters out.\textsuperscript{123} In contrast, the sufficiently delineated test has been applied to literary characters like Holden Caulfield.\textsuperscript{124} This seems to distinguish the three-part test from the sufficiently delineated test.

Unfortunately, which test applies to literary characters remains unclear.\textsuperscript{125} The Ninth Circuit in \textit{Toule} neglected to address the story being told test. During its review of case law, the Ninth Circuit simply stated that in \textit{Air Pirates}, “we distinguished a prior decision suggesting that literary ‘characters ordinarily are not copyrightable,’ on the grounds that a comic book character ‘has physical as well as conceptual qualities’ and ‘is more likely to contain some unique elements of expression than a purely literary character.’”\textsuperscript{126} Thus, it is unclear whether the story being told test should apply to literary characters or whether some new standard, also comprising of an evolution from the sufficiently delineated test, needs to be laid down for literary characters. In short, the case law on fictional characters has been continuously unclear and is likely to remain unclear in the near future.

\textit{C. Legal Incoherence}  

Clarity will not necessarily come if the courts choose any one of the above-mentioned tests as the only test to apply to fictional characters—whether literary, audio-visual, or graphical—because each test contains elements of incoherence.

The story being told test has been criticized for being “somewhat unintelligible,” especially given that \textit{Warner Bros.}, the case which created this test, failed Sam Spade even though he was the protagonist of the story at issue.\textsuperscript{127} In \textit{Air Pirates}, the court attempted to explain \textit{Warner Bros.’} outcome by distinguishing between literary and graphical characters. The court intriguingly referenced the idea-expression dichotomy: “[W]hile many literary characters may embody little more
than an unprotected idea, a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression.\footnote{128} This line of reasoning was continued by Judge Posner in \textit{Gaiman v. McFarlane}, who reasoned that while “[a] reader of unillustrated fiction completes the work in his mind; the reader of a comic book or the viewer of a movie is passive.”\footnote{129} However, using this line of reasoning may lead to an aesthetic bias in copyright protection, where graphical characters are more likely to be protected than literary characters.\footnote{130} This, in turn, seems to be at odds with \textit{Bleistein v. Donaldson Litographing Co.}'s holding that courts should avoid basing the test for copyright subsistence on aesthetic judgements.\footnote{131}

Furthermore, even assuming post-\textit{Towle} that the sufficiently delineated test will continue to apply, whether as a standalone test or as the first part of \textit{Towle}'s three-part test, problems will still arise. In \textit{Burroughs v. MGM, Inc.}, the court found that the literary character Tarzan was sufficiently delineated.\footnote{132} In justification, Judge Werker stated, “Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle and strong. He is Tarzan.”\footnote{133} The response of critic Aaron Schwabach is apt; he asked, “What, really, does that tell us about Tarzan?”\footnote{134} Schwabach went on to describe other protagonists of adventure films with Tarzan’s traits, such as Rudyard Kipling’s Mowgli.\footnote{135}

This reasonably abstract and generalized manner of character description also occurred in \textit{Towle}, wherein the Ninth Circuit applied its three-part test to the Batmobile.\footnote{136} The court found that the Batmobile was “sufficiently delineated,” having “maintained distinct physical and conceptual qualities” since its first comic book appearance.\footnote{137} These qualities included its status as a “highly-active vehicle, equipped with high-tech gadgets and weaponry used to aid Batman in fighting crime,” and being “almost always bat-like in appearance . . . even though the precise nature of the bat-like
characteristics have changed from time to time.” The Ninth Circuit then cited specific examples of these characteristics from various Batman comic books, as well as a television series and film.

Towle pointed out occasions where the Batmobile appeared without bat-like features, such as when the Batmobile appeared as a heavily armored tank in a 1988 comic book. However, the court rejected Towle’s argument. To the Ninth Circuit, such changes “resemble[d] costume changes that do not alter the Batmobile’s innate characteristics, any more than James Bond’s change from blue swimming trunks (in Casino Royale) to his classic tuxedo affects his iconic character.” Hence, the court ultimately had to describe the Batmobile at a high level of abstraction in order to excuse the Batmobile’s “costume changes.” This gave rise to repeated criticism from commentators that the court seemed to protect an idea and not an expression, particularly due to the large inconsistencies between various cited portrayals of the Batmobile.

Using such generalized, abstract language seems to greatly expand the scope of a fictional character on a vague, notional basis. For example, MGM, Inc. v. American Honda Motor Co. involved defendant Honda’s intended use of a blonde male character driving a car in an advertisement. The blonde character’s passenger was an attractive young woman, and, in the intended advertisement, their conversation was interrupted by a nemesis appearing to apprehend the duo in a helicopter. As in many James Bond films, the blonde male character effortlessly disposed of the nemesis. The court held that the plaintiff, Metro-Goldwyn-Mayer, Inc. (MGM), was likely to own copyright in the

138. Id.
139. Id. at 1021–22.
140. Id. at 1022.
141. Id.
142. Id.
143. Id.
144. Brenner, supra note 125, at 499 (“The problem is that in the court’s identification of certain traits that shape a character, the original character is reduced nearly to an idea, losing the nuances that might differentiate it from the allegedly infringing work.”); Huthwaite, supra note 21 (“Judge Ikuta comes close to defining the Batmobile as an idea that can be expressed in any number of ways.”); Mike Masnick, Appeals Court Says the Batmobile is a ‘Character’ Covered by Copyright, TECHDIRT (Sept. 24, 2015, 5:34 AM), https://www.techdirt.com/articles/20150923/15591132350/appeals-court-says-batmobile-is-character-covered-copyright.shtml [https://perma.cc/RRL3-FDW5].
146. See MGM, 900 F. Supp. at 1291; see also ibpimin, supra note 145, at 0:26.
147. See MGM, 900 F. Supp. at 1291; see also ibpimin, supra note 145, at 0:45.
Another issue was whether there was substantial similarity between the two characters, such that infringement was likely and provided grounds for ordering of a preliminary injunction. In sum, the court found that infringement was likely. In Schwabach’s review of the case, he made the incisive remark that “[w]hile the basic aspects—couple in a car, pursuing helicopter, weird villain, quip after casually defeating villain—can be found in the James Bond movies, they can also be found throughout the action movie genre.” In other words, when characters are described in such abstract fashions, it soon becomes too easy to include an entire genre, whether action or jungle orientated, into the scope of a single character.

The case law trend, prima facie, seems to be a general expansion of copyright protection for fictional characters. Starting with Judge Learned Hand’s openness to the copyrightability of fictional characters in 1930, copyright was then found to subsist in the comic book character Superman in 1940. Although it seemed that, at first, copyright protection would be denied for literary characters, in later years it appeared that this was no longer the case. This was exemplified by the Second Circuit’s acceptance of copyright in the literary character Holden Caulfield in 2011. Most recently, Towle’s holding that the Batmobile was a copyrightable character further increased the scope of fictional characters that can be copyrighted.

Increased copyright protection is not necessarily a bad thing. However, given copyright’s utilitarian purpose, copyright should only be strengthened so far as it will help to promote the progress of the arts. It is outside this Article’s scope to conduct an empirical discussion of whether the current law of fictional character ownership optimally promotes copyright’s objectives. However, when copyright protection is increased on an uncertain basis and upon reasoning that contains incoherent elements, the courts, the copyright owners, and the public should reflect on whether such increased protection actually fulfills copyright’s constitutional objective.

149. Id. at 1297–99.
150. Id. at 1298.
151. SCHWABACH, supra note 27, at 36.
152. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
154. Salinger v. Colting, 607 F.3d 68, 83 (2d Cir. 2010).
155. DC Comics v. Towle, 802 F.3d 1012, 1027 (9th Cir. 2015).
156. See supra notes 32–33 and accompanying text.
157. Such concerns have been expressed repeatedly in the literature. See, e.g., Kurtz, supra note 29, at 524 (“Overextending character protection impoverishes the public domain and
D. Reconsidering Nichols and the Idea-Expression Dichotomy

One possible solution to the law’s incoherence and uncertainty could be more robust discussion and application of the idea-expression dichotomy in fictional character cases. After all, such discussion was markedly lacking in the Towle case. However, the idea-expression dichotomy, as presently construed by the law, will not offer much assistance. To understand why, a reconsideration of Nichols is in order, as this case significantly influenced both the development of the sufficiently delineated test and the idea-expression dichotomy in US copyright law. Nichols involved the reproduction of nonliteral elements from the plaintiff’s play in the defendant’s play. Although no precise words were reproduced, both plays featured feuding Jewish and Irish families whose children’s ultimate marriage brought about reconciliation between the families. In justification, Judge Learned Hand famously stated:

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. Nobody has ever been able to fix that boundary, and nobody ever can.

To Judge Learned Hand, the defendant only copied ideas of the plaintiff’s play and no expression had been taken. What was significant about Learned Hand’s reasoning was that he was careful to emphasize that the possibility of nonliteral copying being infringement. In such a case, a court would have to make an “abstraction” of the allegedly infringed work and compare it with an unnecessarily limits competition.

unnecessarily limits competition.

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158. See Said, supra note 29, at 812.
159. See generally Towle, 802 F.3d 1012.
160. See supra text accompanying notes 95–103.
161. See Samuels, supra note 42, at 344 (“After Nichols, there are hardly any more cases in which copying is an infringement only if it is literal.”); id. at 358–59 (discussing reliance by Apple Comput., Inc. v. Franklin Comput. Corp., 714 F.2d 1240 (2d Cir. 1983), on Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930)).
162. Nichols, 45 F.2d at 121–22.
163. id. at 122.
164. id. at 121.
165. id. at 121–22.
166. id. at 121 (“It is of course essential to any protection of literary property . . . that the right cannot be limited literally to the text.”).
“abstraction” of the allegedly infringing work. Judge Learned Hand went on to hypothesize that detailed enough copying of a character that was also sufficiently detailed, such as Malvolio from Shakespeare’s play *Twelfth Night*, could be sufficient to constitute copyright infringement, thereby also inspiring the sufficiently delineated test:

If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare’s “ideas” in the play, as little capable of monopoly as Einstein’s Doctrine of Relativity, or Darwin’s theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.\footnote{168}

This was a significant moment in US copyright law in light of earlier cases, which seemed to operate on a stricter version of the idea-expression dichotomy. In these cases, only the “literal” words of the author were construed as protected expression. For example, in *Stowe v. Thomas*, a translation of a novel was deemed to not infringe on the copyrighted work. In contrast, Judge Learned Hand had a broader, indeterminate conception, whereby expression could be something a bit more abstract. Learned Hand was well aware of the consequences of his indeterminate conception—that copyright would be forever intertwined with a certain vagueness, a certain impossibility of drawing the boundary between ideas and expression.\footnote{172}

The problem of this vagueness is that it seems to result in judges deciding cases on a variety of non-legal factors. Edward Samuels put it this way: “[The idea-expression dichotomy] doctrine is so general in its statement as to defy particular application. It is not a doctrine that can be used predictably ... instead, it seems to be an ex post facto characterization that justifies an outcome based upon other, more concrete, factors.”\footnote{173}

Samuels’ point is well illustrated by the cases littering the law of fictional character ownership. Each of the three cases—*Nichols*,\footnote{174}
Warner Bros., which laid down a new test for character copyrightability—seems best explained by recourse to the court’s intuitions as to where the justice of the case lied, as opposed to just a straightforward application of existing legal precedent. This is not to say that legal precedent has played no part in how the law has developed. However, given past strained use of legal principles, it seems more than plausible that these personal judicial intuitions form part of the “other, more concrete, factors” that affect a judge’s decision as to whether a character is an unprotectable idea or protectable expression.

Reacting to Towle, a fair number of commentators have expressed sentiments that the case’s outcome was right, despite their criticism of the Ninth Circuit’s reasoning. One commentator put it well: “Part of the Towle decision surely was the desire to punish a bad actor . . . . However, the analysis that reached the desired result required a tortured reading of the law and a willfully blind consideration of facts . . . .”

In relation to Warner Bros., the source of the story being told test, it is important to note that the court deciding Sam Spade was not a copyrightable character favored the interests of Dashiell Hammett, the creator of Sam Spade, because the main issue of the case was whether Hammett had contracted away his right to write new stories about Sam Spade. The Ninth Circuit ultimately decided that parties did not intend for Hammett to contract his rights away. In dicta, the court concluded that even if the parties did intend for Hammett to contract away his rights in his book, The Maltese Falcon, Sam Spade still would not have been contracted away. He was just a vehicle for the story being told and so “did not go with the sale of the story.” Hence, one commentator wondered whether the court “went out of its way to create a test under which Hammett would win” due to

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176. DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015).
177. Samuels, supra note 42, at 324; see also supra note 173 and accompanying text.
178. Alphonso, supra note 125, at 8 (“Although the Ninth Circuit ultimately reached the appropriate outcome by protecting the Batmobile, these three factors [used by the Court] do not ensure a fair and just result in all similar cases.”); Brenner, supra note 125, at 506 (“Finally, even though the Ninth Circuit likely reached the right result, its reasoning for protecting the Batmobile was improperly based on the inconsistent or uncopyrightable traits of the Batmobile.”); Huthwaite, supra note 21 (“How then do we justify the Court of Appeals decision, and was it the correct result reached through the wrong means?”).
179. Brenner, supra note 125, at 515.
181. Id. at 950.
182. Id.
183. Id.
Hammett’s status as creator.\(^{184}\) This view has some ancillary support from the case of *Gaiman v. McFarlane*.\(^{185}\) Judge Posner stated that although he thought the decision was “wrong,” it was “perhaps understandable on the ‘legal realist’ ground that Hammett . . . wanted to reuse his own character.”\(^{186}\)

Finally, in *Nichols*, Judge Learned Hand firmly believed in the necessity of the vagueness that opened the door for character copyrightability.\(^{187}\) This belief was underpinned by another strong intuition that copyright also had to cover nonliteral copying.\(^{188}\)

As a result, it seems doubtful that greater recourse to the idea-expression dichotomy will help alleviate the current problems apparent in the law of fictional character ownership. Indeed, it is more likely that use of the dichotomy will result in judges veiling the possible influence of extralegal factors on their reasoning. Nevertheless, the idea-expression dichotomy is still a fundamental principle of copyright law, and copyright law clearly covers cases of nonliteral copying today.\(^{189}\) The resulting question, though, is whether the vagueness is necessary and whether copyright needs to cover nonliteral copying. This may seem like an absurd question today, but perhaps considering another perspective can show that what may seem like a necessity can in fact be a choice. Hundreds of years ago, Johann Gottlieb Fichte proposed a way to fix that impossible boundary.

### III. Eighteenth Century Germany: The Philosophy of Johann Gottlieb Fichte

**A. Writing at the Dawn of Copyright**

Johann Gottlieb Fichte was a German philosopher who is mainly known today for his contributions to German idealism in the late seventeenth to early eighteenth century.\(^{190}\) His article, *Proof of the...*
Unlawfulness of Reprinting, was published in Berlin in 1793.\(^{191}\) In it, Fichte espoused a radical conception of the idea-expression dichotomy, restricting copyright to the literal words of the text.\(^{192}\) At the time the article was written, Germany did not possess any formal copyright laws except for the notion of privileges,\(^{193}\) which were effectively royal grants of temporary and exclusive rights to publish books.\(^{194}\) In Germany and in other countries, however, a vigorous debate on the existence and nature of copyright was occurring at this time\(^{195}\) when a string of cases working out the effects of England’s first copyright statute\(^{196}\) had recently been decided.\(^{197}\) The concept of “author” as romantic genius was emerging with its key advocate being Edward Young.\(^{198}\) Young argued that authors could create new ideas, as opposed to merely being inspired from nature or from the divine.\(^{199}\)

Fichte joined the intellectual property debate through his article. He sought to present a justification for how an author could have perpetual exclusive property in a book he had published, such that unauthorized reprinting could be shown unlawful.\(^{200}\) Fichte did this by dissecting a book into various aspects. He maintained that one aspect, the book’s “form,” was unique and inalienable to the author, and this was what gave the author perpetual exclusive property in a book—or in modern language, “copyright.”\(^{201}\) Fichte’s justification involved both an appeal to a logical deduction from an epistemological premise about the

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191. See generally Fichte, supra note 46.

192. See supra note 47 and accompanying text.


194. STEF VAN GOMPEL, FORMALITIES IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES AND POSSIBLE FUTURE 56 (2011).


196. Act for the Encouragement of Learning (Statute of Anne) 1710, 8 Ann. c. 19 (Gr. Brit.).


199. Id. See generally Edward Young, Conjectures on Original Composition: In a Letter to the Author of Sir Charles Grandison, in ENGLISH CRITICAL ESSAYS: SIXTEENTH, SEVENTEENTH AND EIGHTEENTH CENTURIES 270 (Edmund D. Jones ed., 1922).

200. See Fichte, supra note 46, at 443, 445–47. Fichte’s article was an explicit response to a J.A.H. Reimarus’ earlier article. See generally J.A.H. Reimarus, Publishing from the Perspective of the Writer, the Publisher, and the Public, Reconsidered, DEUTSCHES MAGAZIN 383 (1791).

201. Fichte, supra note 46, at 451.
human learning process, as well as an appeal to contemporary moral norms and writing practices.\textsuperscript{202}

Fichte’s views were influential. In Germany, the justification of copyright—especially as a natural right—is often attributed to Kant, Hegel, and Fichte.\textsuperscript{203} A preliminary paper to the Prussian Copyright Act of 1837 even gave indirect credit to Fichte.\textsuperscript{204}

The past influence of Fichte’s views suggests that it is worth investigating why his strict conception of the idea-expression dichotomy differs from Judge Learned Hand’s loose conception and to what extent it would be beneficial and also practicable to bring Fichte’s differences into today’s law.

\textbf{B. A Radical Idea-Expression Dichotomy}

Fichte’s goal was to find out whether there was any part of a book that an author could own as exclusive property.\textsuperscript{205} His starting premise was an axiom stipulating a condition for when a person could own something as exclusive property: “We are the rightful owners of a thing the appropriation of which by another is physically impossible.”\textsuperscript{206}

The following figure presents a graphical depiction of Fichte’s dissection of an object:

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure.png}
\caption{Graphical depiction of Fichte’s dissection of an object.}
\end{figure}

\begin{thebibliography}{99}
\bibitem{202} See \textit{id.} at 450 (“Each individual has his own thought processes, his own way of forming concepts and connecting them.”); \textit{id.} at 452–56 (discussing various social norms); \textit{id.} at 452 (“Up until now writers have never taken it amiss that we make use of their texts.”).


\bibitem{204} Philipsborn, \textit{Preliminary Paper to the Prussian Copyright Act of 1837, quoted in E. Wadle, Das Peuplische Urheberrechtsgesetz von 1837 Im Spiegel Seiner Vorgeschichte, in Wohier Kommt Das Urheberrecht Und WoHin Geht Es?} 55, 65 (R. Dittrich ed., 1988), quoted in Martin Kretschmer & Friedemann Kawohl, \textit{The History and Philosophy of Copyright, in Music and Copyright} 36 (Simon Frith & Lee Marshall Eds., 2004) (“What inviolably remains the author's and can be identified as the real intellectual property . . . is the particular form, in which he has expressed his thoughts. These principles are not new, they already have been laid down in the 90s of the last century by learned men . . . .”); see also Biagioli, \textit{supra} note 193, at 1853–54.

\bibitem{205} See Fichte, \textit{supra} note 46, at 443–45.

\bibitem{206} \textit{Id.} at 446.
\end{thebibliography}
Figure 1. Fichte’s Dissection of an Object

As demonstrated by the above figure, Fichte started with a physical object, such as a book, and dissected it into a physical and an ideal aspect. The physical aspect referred to what the object was made out of, such as the printed pages of a book. Fichte then dissected the object’s ideal aspect into content and form. Content referred to the ideas presented in the book, and form referred to “the way in which, the combination in which, [and] the phrasing and wording in which” the book’s ideas were presented. This dissection is the basis of what is now known as the idea-expression dichotomy.

Fichte seemingly conceptualized ideas as a particular viewpoint or perspective on a subject. For example, Kant’s opinions on epistemology—laid out in The Critique of Pure Reason—were labeled as “ideas” by Fichte. In contrast, Fichte constituted form, such as that in a book, as the precise “phrasing and wording” in which a certain idea is presented. By implication, the actual words that made up the text of The Critique of Pure Reason would likely be seen as form to Fichte.

C. Fichte’s System of Ownership

In his article, Fichte constructed a system of ownership for intangibles wherein the nature and scope of ownership differed depending on the nature of the intangible, asking whether it was an idea or form.

207. Id. at 447.
208. See id.
209. Id.
210. Id.
211. See id. at 448.
212. Id.
213. Id. at 447.
1. Ownership of Ideas

Fichte thought that the creator of an idea owned that idea as “exclusive property” until publication occurred. The creator had the right to exploit the idea in whatever ways she saw fit. Postpublication, however, the author was susceptible to the possibility of his idea becoming owned by others as “common property.” A person who purchased the physical aspect of an object had a “natural law” right to exploit the ideas presented by or underlying that object. Interested parties could, for example, purchase a physical book presenting the author’s idea and then undertake “assiduous and rational study” of that idea. If the reader understood and so assimilated the author’s idea into his or her own thinking processes, the reader would become an additional owner of the idea.

However, Fichte conceded that an exception to the use of ideas as common property needed to exist due to considerations of fairness. He used the example of what he called “works of the mechanical arts.” Although people had natural law rights to exploit the idea aspect of an object they bought, Fichte suggested that “the exercise of this right is not fair. It is not fair that the man who invested his money and years of hard work and effort should find himself robbed of the fruits of his labor as soon as he goes public with the results . . . .” Hence, the law needed to grant creators exclusive rights over their ideas, but only long enough to achieve the goal of “compensating the original inventor” for his labors in devising the idea. Afterwards, the general public could exercise its rights to exploit the creator’s ideas once again.

214. Id. at 448.
215. See id. at 466 (“[O]ne has the right to use one's own property however one wishes . . . .”).
216. Id. at 450.
217. See id. at 467.
218. See id. at 466.
219. Id. at 448–49.
220. Id. at 448.
221. Id. at 466–67.
222. Id. at 463–68 (using study lamps and paintings as examples of products of the “mechanical arts”).
223. Id. at 466.
224. Id. at 467.
225. Id.
2. Ownership of Form (System of Copyright)

To Fichte, a creator would own her form as exclusive property “forever,” regardless of whether publication had occurred.\textsuperscript{226} In modern day language, Fichte thought that creators should own their expression of ideas as perpetual copyright. “Form” was the part of a book that an author could perpetually own as exclusive property—it was a thing that was impossible for another person to appropriate from the author.\textsuperscript{227}

Fichte, an epistemologist, fittingly employed an epistemological justification for copyright.\textsuperscript{228} The philosopher started with a premise about the human learning process—that people learn things through “analogy.”\textsuperscript{229} In other words, when a person encountered a new idea, Fichte thought that the person would compare it with ideas she already knew. That person would then learn that idea by “reworking” the idea into his or her existing thought patterns.\textsuperscript{230} Since each person possessed a unique pool of ideas with which to analogize, that person would use a unique thought pattern to assimilate a new idea resulting in a unique way, or form, of expressing that idea.\textsuperscript{231} As a result, Fichte thought that if one person imparted an idea to another person, it would be “impossible” for the latter person to express that idea with the very same form.\textsuperscript{232} Fichte famously reasoned, “[E]ach writer must give his thoughts a certain form, and he can give them no other form than his own because he has no other.”\textsuperscript{233}

Ownership of form could not be transferred. Fichte thought this was “physically impossible.”\textsuperscript{234} It seems that he thought an author’s form was essentially as unique and inalienable to her as her own fingerprint.\textsuperscript{235} Copyright infringement was not so much theft but an unauthorized impersonation of the author. This explains why the philosopher then reasoned that an author’s rights over his form were...
not only perpetual, but also “absolute.” They included “the right to prevent anyone from disputing [the person’s] ownership of this form,” as well “the right to prevent anyone from infringing upon his exclusive ownership.”

Given Fichte’s strict notion of form, in his view, only word-for-word copying could suffice to infringe a person’s ownership of form. Plagiarism, understood as word-for-word copying that did not credit the form’s owner, therefore, was clearly infringing. He distinguished this from readers who appropriated the principles of a book and spread them. In relation to paintings, only another replica painting could constitute infringement—an engraving of a painting only exploited the painting’s ideas and therefore was noninfringing.

It is important to emphasize Fichte’s totalitarian conception of form ownership. The philosopher did not think there were true exceptions to such rights as he did for the ownership of ideas as public property. The closest he came to discussing exceptions to form ownership was when he discussed citations—where a person would reproduce the form of an author in short lengths and then attribute the form to the author. He observed the writing norms and practices of his contemporary community and concluded that authors seemed to give an implied “authorization” for the activity—an unspoken agreement among writers to cite each other by direct quotation of their own words. Nevertheless, Fichte classified this exception as an “authorization,” meaning authors could presumably withdraw such authorizations. In other words, Fichte thought there was a contemporary social norm whereby authors gave an implied license for anyone to replicate their words for the purpose of making citations.

236. Fichte, supra note 46, at 456.
237. Id. at 451–52.
238. Note, the Author’s interpretation appears different to that of Kretschmer & Kawohl’s, who calls Fichte’s concept of form “ambiguous.” Martin Kretschmer & Friedemann Kawohl, The History and Philosophy of Copyright, in MUSIC AND COPYRIGHT (Simon Frith & Lee Marshall eds., 2004). Given the amount of textual evidence for a singular strict concept, the Author prefers the interpretation set forth in this Article.
239. Fichte, supra note 46, at 453.
240. Id. at 454.
241. Id. at 468.
242. See supra notes 221–25 and accompanying text (discussing the exception for idea ownership, which relates to fairly compensating inventors).
243. Fichte, supra note 46, at 455.
244. Id.
245. Id.
D. Comparing Two Systems of Copyright

Fichte’s system of owning ideas and expressions both foreshadow and diverge from modern US copyright law in many significant ways. One of the most pertinent similarities between Fichte’s system and the present system is that both possess a similar conception of the originality doctrine. To Fichte, every person had a unique, or original, manner of expressing an idea.\(^{246}\) Although he gave exceptions for cases in which expression was constrained by functional considerations,\(^{247}\) the act of putting an idea into a person’s own words or images was enough to make a work original.\(^{248}\) This sounds similar to today’s copyright law, which requires a work to be independently created (the work’s expression has not been copied from other works) and possess a slight degree of creativity.\(^{249}\) Indeed, Fichte’s views seem to resonate with those of Justice Holmes in \textit{Bleistein}: “Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone.”\(^{250}\)

However, aside from the above, there are at least two noteworthy ways in which Fichte’s system sharply differs from the modern US copyright system. The first difference is the most important for the purposes of this Article and concerns the idea-expression dichotomy. Fichte adopted a radical conception of the idea-expression dichotomy wherein expression, or form, was limited to the precise words or images used to convey an idea.\(^{251}\) To Fichte, copyright essentially only prohibited literal copying. In contrast, Judge Learned Hand adopted a more indeterminate dichotomy in \textit{Nichols} wherein expression could be something more than the precise words or images used to

\begin{thebibliography}{9}
\bibitem{246} \textit{Id. at 451; see also supra text accompanying note 231.}
\bibitem{247} \textit{See Fichte, supra note 46, at 464 (“For products of the mechanical arts, it] cannot be said of this ideal aspect that it has a form unique to the maker because it is itself a concept which underlies a specific form – the form taken by the material, the relationship of the individual parts to the realization of the object’s intended purpose – and hence can be defined in only one way . . . .”). However, some of the form could still be unique to the maker: “Here it is rather the physical aspect that, insofar as it is not determined by the underlying concept, takes on an individual form.” \textit{Id.}}
\bibitem{248} \textit{See \textit{id. at 452–54}. Fichte discusses the dissemination of scholarly works and notes that “readers appropriated their principles, presented them from different points of view, and applied them to different subjects . . . [and] in the case of light reading, people have imitated the books’ manner.” \textit{Id. at 452}. He further noted that in such cases, “we make use of that which can be our joint property,” referring to ideas, and “demonstrate that this is so by giving it our own form.” \textit{Id. at 454.}}
\bibitem{249} \textit{Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).}
\bibitem{250} \textit{Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903).}
\bibitem{251} \textit{Fichte, supra note 46, at 447; see supra Section III.B.}
\end{thebibliography}
Copyright was extended to cover certain cases of nonliteral copying—such as the copying of fictional characters. The vagueness inherent in Judge Learned Hand’s conception is significantly reduced by the bright-line test that Fichte’s conception entails.

The consequences of Fichte’s bright-line test cannot be understated. Many acts that would likely be considered infringing under today’s law could well be considered original copyrightable works under a Fichtean framework of thinking. For example, the Copyright Act gives a copyright owner an adaptation right allowing the owner to prevent *inter alia* any unauthorized “translation,” “abridgment,” or “any other form in which [the] work may be recast, transformed or adapted.” In contrast, as has already been discussed, Fichte thought that making an engraving of a painting would never be copyright infringement. Fichte gave greater recognition to the original efforts of a nonliteral copier than the law does today. This did not mean that Fichte thought all nonliteral copying was acceptable—he discussed giving temporary exclusive rights to inventors postpublication. Essentially, Fichte thought copyright was not the way to regulate nonliteral copying. Other laws needed to be utilized.

Secondly, Fichte’s system of copyright was founded on natural law reasoning, as opposed to the Constitution’s utilitarian objective for copyright. Fichte’s views were that a person had rights to things that could not be alienated from him. A person’s form—that person’s way of expressing a particular idea—could not be alienated from that person and was so owned by that person as exclusive property. Copyright had the nature of a “personal right” to Fichte, which explained why copyright owners gained a totalitarian ownership form as well as the right to prevent someone disputing ownership of that form. As a result, the philosopher effectively allowed no exceptions to copyright. This contrasts with the statutory exceptions in place today.

Furthermore, Fichte’s right to prevent someone disputing ownership of

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252. Nichols v. Universal Pictures Corp., 45 F.2d. 119, 121 (2d Cir. 1930); see supra Section II.D.
253. See supra notes 187–88 and accompanying text.
255. See supra note 241 and accompanying text.
256. See supra Section III.C.1.
257. Compare U.S. CONST. art. I, § 8, cl. 8, with Fichte, supra note 46, at 444–45.
258. See Fichte, supra note 46, at 451.
259. See id. at 451–52.
260. See supra Section III.C.2.
261. See supra note 71 and accompanying text.
form best correlates to the modern right of attribution.262 In the United States, however, this right is only granted to authors of visual works of art.263

Fichte was strongly opposed to founding any intellectual property rights on utilitarian grounds. He lamented: “When will people ever develop a feeling for the noble idea of justice, without any regard for utility?”264 Although Fichte’s proposal of granting temporary exclusive rights to ideas may remind us of today’s US patent system (also founded on a utilitarian basis),265 his “patents” were granted on moral grounds of fair compensation.266 Fichte was strongly motivated to base his copyright on moral grounds because this allowed him to sidestep an opponent’s utilitarian argument that copyright should not exist because it would ban the reprinting of books—a “useful practice.”267 The philosopher ended his article with a parody on utilitarianism, wherein a thief argued that his activity of stealing medicine ought to be lawful because it had greatly benefited the public: “As everyone knows, the only true measure of the excellence of our actions is their utility.”268

The upshot of this discussion is that there is indeed an alternative to Judge Learned Hand’s conception of the idea-expression dichotomy or even an alternative to the copyright system the law has in place today. Fichte defined the idea-expression dichotomy relatively strictly and used that dichotomy to mark out the boundaries of his system of copyright. However, as the next part of this Article shows, Fichte’s philosophy is not only different, but can also offer practical insights into the ownership of fictional characters today.

IV. APPLYING FICHTE’S PHILOSOPHY TO THE OWNERSHIP OF FICTIONAL CHARACTERS

Fichte did not explicitly have fictional characters in mind when writing his article. However, the principles of Fichte’s philosophy and

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262. The right of attribution is an author’s right to be attributed as the author of his or her work. See 3 Nimmer on Copyright, supra note 86, § 8D.03. The United Kingdom is one jurisdiction which has recognized this right in statute. See Copyright, Designs and Patents Act 1988, c. 48, § 77 (UK).
264. Fichte, supra note 46, at 460.
266. Fichte, supra note 46, at 466.
267. Id. at 444–45, 473.
268. Id. at 474–76. At the end of the thief’s argument, the story’s monarch “had the useful man hanged.” Id. at 483.
system of ownership can meaningfully be applied to fictional characters, resulting in a “Fichtean” perspective.

A. Seeing Fictional Characters as Ideas

Fichte’s system of ownership for ideas and expressions operates such that the nature of ownership applicable to a fictional character would depend on what type of entity a fictional character is.269 For the reasons that follow, it is most likely that Fichte would construe fictional characters as ideas.

A fictional character can be said to be some sort of individual that does not exist in real life. Articulating a more specific definition can quickly become difficult. As aptly demonstrated by a Time magazine article, “The Top 10 Fictional Characters of 2017,” fictional characters are a diverse group of entities.270 The article’s list ranges from characters like Wonder Woman to the dragon Viserion from Game of Thrones to Julia the Muppet.271 Fictional characters adopt various shapes and sizes and appear in all sorts of creative media. This is, again, reflected by the variety of fictional characters that have been protected by US courts.272 Fictional characters are also individually diverse. Much like the shapeshifting Proteus of Greek mythology, a single fictional character can also be subject to many diverse manifestations. This is exemplified by the Batmobile’s diverse appearances in Batman comic books, television series, and films over the years.273

Therefore, it does not seem appropriate to construe fictional characters as objects that can be dissected into physical and ideal aspects. This is because the objects Fichte dissected in his article were things that one tends to think of in their physical senses, such as a book,274 study lamp,275 or painting.276 He seemed to start with a physical object and then draw out the object’s intangible aspects.277 In contrast, one may not always think of a fictional character in its

269. See supra Section III.C.
271. Id.
272. See, e.g., supra text accompanying notes 11–15 (referencing the protection of Batman, Godzilla, and Jonathan Livingston Seagull); see also supra Part II (referencing the protection of Mickey Mouse, James Bond, and Holden Caulfield).
273. See supra notes 15–22 and accompanying text.
274. Fichte, supra note 46, at 447.
275. Id. at 468.
276. Id.
277. Id. at 447; see also, Biagioli, supra note 193, at 1864–65
physical sense, and, indeed, a fictional character may seem to have a multiplicity of physical senses—such as the Batmobile—which has been portrayed through both text and film.\(^{278}\) We do not point to a comic book panel that portrays the Batmobile and say that the comic book panel is the Batmobile—it is, after all, just a printed sheet of paper. Furthermore, even though we may have seen different iterations of the Batmobile in different mediums, we still seem to recognize all of these iterations as the same entity—Batman’s car. Given the dynamic and elastic nature of a fictional character, it seems artificial to classify a fictional character as an object like the book or painting referenced by Fichte.

It also seems artificial to classify fictional characters as “form,” given Fichte’s strict conception of the term.\(^{279}\) Just as a certain philosophical theory may have multiple modes of expression, so may any fictional character have multiple modes of expression. Commentators have continually recognized fictional characters as having the capacity to live “independent legal lives.”\(^{280}\) The very ability to recognize a fictional character in a context outside its original work\(^{281}\) points against a fictional character being reduced to a discrete expression. This also makes sense when considering that fictional characters are very much products of interpretation. As reiterated by Professor Said, fictional characters can be said to run “on minds of readers just as computer simulations run on computers.”\(^{282}\)

What follows from the above proposition is that when a person first conceives of a fictional character, that character is created as an idea in that person’s head. However, the creator will likely give this idea a certain expression and manifest that expression in a certain physical sense—such as writing a story about the character or drawing the character, for example. When the expression is manifested, it seems best to say that the fictional character is an idea that is described through a certain means of expression, embodied in a certain physical object. Given a fictional character’s dynamic nature, one might say that that a fictional character can grow more complex over time. As people

\(^{278}See\) \textit{supra} Part I.

\(^{279}See\) \textit{supra} Section III.B.

\(^{280}\) Kurtz, \textit{supra} note 29, at 430 (“A character, however, is a nimble creature. It is not confined to the work in which it first appears, but can be removed from its original context to lead a new and independent life.”); Said, \textit{supra} note 29, at 771 (“In a fundamental way, then, characters lead independent lives in their readers’ imaginations, in subsequent works of literature, and in the public sphere.”).

\(^{281}\) For example, many would recognize the Batmobile outside the context of a Batman film, television series, or comic book.

come up with additional ideas as to who the fictional character is, the fictional character becomes more complex, existing as an array of multiple ideas linked together.

**B. A Fichtean System of Fictional Character Ownership**

The most obvious implication of construing fictional characters as ideas is that they are not appropriate subjects of copyright. When a person creates a fictional character, that person will temporarily own that fictional character as exclusive property.\(^{283}\) The creator has the right to exploit the character in whatever ways she sees fit.\(^{284}\) However, upon publication of the character, the creator opens up the possibility for others to own that fictional character too.\(^{285}\) In the case of a written story, a reader gains ownership of a fictional character once she understands the creator’s concept of the fictional character in his or her own mind. Consequentially, readers will be free to exploit their shared ownership of the character. The possible caveat to readers exercising their shared right would be a situation where the law restricted such individuals’ rights temporarily in order to fairly compensate creators.\(^{286}\)

Under a Fichtean framework of thinking, creators of fictional characters may not be able to exert completely exclusive ownership over fictional characters. However, creators will always be able to exert a completely exclusive ownership over the ways in which they have expressed their characters. Each person effectively has their own unique way of expressing a fictional character. If a literary form is utilized, this would be the particular combination of words a person uses to describe a character; if a graphical form is utilized, this would be a particular combination of colors and lines.

Applying Fichte’s philosophy to the ownership of fictional characters helps us understand the very nuanced relationship between a creator and his or her character. A character, as an idea, has an independent existence from its creator and can potentially be owned by all the world. This explains why one intuitively distinguishes a physical book about, for example, Sherlock Holmes, from the character himself.\(^{287}\) One does not hold up a physical copy of *A Study in Scarlet*\(^{288}\)

\(^{283}\) See supra Section III.C.1.

\(^{284}\) See supra Section III.C.1.

\(^{285}\) See supra Section III.C.1.

\(^{286}\) See supra Section III.C.1.

\(^{287}\) For the curious, it is worth noting that the Seventh Circuit has held that Sherlock Holmes was a copyrightable character from the time of the first Sherlock Holmes novel in 1887. Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496, 503 (7th Cir. 2014). However, note that the court also held that Sherlock Holmes is now in the public domain. *Id.*

\(^{288}\) See generally ARTHUR CONAN DOYLE, A STUDY IN SCARLET (1887).
and call it Sherlock Holmes. Rather, *A Study in Scarlet* is a book about Sherlock Holmes.

Moreover, a character is neither completely independent of its creator nor independent to how that character has been expressed. Under a Fichtean perspective, the link between an author and the text that expresses the character is so close, that Fichte says the expression is essentially part of the author’s person. A character only really develops through a creator expressing her or his ideas of that character. Sherlock Holmes effectively only walks because Sir Arthur Conan Doyle has written that Sherlock Holmes walks. Sherlock Holmes is not Sir Arthur Conan Doyle, but he is dependent on Doyle’s actions to exist. Hence, a creator owns his or her expressed story or interpretation of the character. This supports Professor Said’s research, wherein she first observed that US courts found it hard to disentangle literary fictional characters from a source text to find them copyrightable. Professor Said then argued that this difficulty occurred because the link between the text that expressed the character and the character itself was very close. Applying Fichte’s philosophy also helps us understand why a text and a character in that text might have such a close relationship—the text is part of the character.

A Fichtean perspective can balance the variety of attitudes towards character appropriation that can be found in today’s writing community. Often the discourse has been centered around the topic of whether writing fan fiction is acceptable. Fan fiction largely refers to stories published online whereby a reader has appropriated the characters created by a commercially published author. Some authors have expressed beliefs in a wholly totalitarian ownership of

289. *See supra* Section III.C.2.
290. *See, e.g.*, [*DOYLE*, *supra* note 288, at 8.]
292. *Id.* at 787–805.
294. *But see* Karen Hellekson & Kristina Busse, *Introduction to THE FAN FICTION STUDIES READER* 1, 7 (Karen Hellekson & Kristina Busse eds., 2014) (“We look here at fan fiction as historically situated in the last forty years, tending to respond to a specific form of media texts, and encompassing a specific amateur infrastructure for its creation, distribution, and reception.”); *SCHWABACH, supra* note 27, at 8 (“Fanfic, at least for the purposes of this book, refers to works derived from other works currently protected as intellectual property, but not explicitly authorized and not commercially published.”).
their created characters, and thus oppose fan fiction. For example, George R.R. Martin, author of *The Game of Thrones*, has empathetically stated online, “My characters are my children, I have been heard to say. I don’t want people making off with them, thank you . . . No one gets to abuse the people of Westeros but me.”

This is in tension with an increasingly vocal generation of fan fiction writers who understandably feel that their writing practices are not so morally reprehensible. As Grace Epstein writes, explicitly referring to authors such as George R.R. Martin: “They like their current position in the world, and the idea that anyone below them could do new and inventive things with their worlds and characters sets their nerves a-jangling. But . . . it’s not their decision . . . ” One commentator echoed Epstein’s sentiments, defending Fredik Colting’s unauthorized sequel to J.D. Salinger’s classic novel *Catcher in the Rye*. Although the Second Circuit found that Colting had likely infringed Salinger’s copyright in both the novel and the character Holden Caulfield, the journalist Brigid Delaney wrote that it was time Salinger “let [his] baby go.”

Seeing fictional characters from a Fichtean way of thinking is a way of affirming different parts of the above views. The sentiments of authors like George R.R. Martin are recognized to some extent—creators do have totalitarian ownerships over certain aspects of their created characters, namely how that character has been expressed. This means that no one would be allowed to use any of Martin’s words without his express or implied permission. However, as this Article demonstrates, a fictional character is not so much an “expression,” but an “idea.” Secondly, creators, upon publication, open up their fictional


296. *Martin, supra note 295.*


300. *Delaney, supra note 299.* Delaney continued, writing “[s]o good was he at creating a fully formed, truthful, distinct character that just walked off the page and into readers’ lives, he can no longer be said to own Holden. Rather it is a character owned by readers.” *Id.*
characters to be shared with readers—this recognizes Delaney’s sentiments.\textsuperscript{301} Hence, under a Fichtean framework of thinking, fictional characters can be seen as ideas that are ultimately ownable by all the world—or in other words, “beyond copyright.” What is not beyond copyright is each person’s expression of a fictional character. To Fichte, a person owns this expression perpetually and absolutely.\textsuperscript{302}

\textit{C. Two Systems of Fictional Character Ownership}

Adopting a Fichtean perspective on fictional character ownership would enable the United States to avoid much of the uncertainty and incoherence plaguing today’s law of fictional character ownership.\textsuperscript{303} Two points are worth emphasizing. Firstly, adopting Fichte’s manner of thinking would give the law, in some ways, a simpler test to follow when trying to discern to what extent a fictional character is protected by copyright. Under present copyright law, a fictional character can be owned as an independent copyrighted work—provided it passes a copyrightability test—which differs depending on the nature of the fictional character.\textsuperscript{304} However, if courts follow Fichte’s way of thinking, fictional characters—whether literary, artistic, or audiovisual—will not be proper subjects of “exclusive property” or copyright, likely falling into the category of ideas.\textsuperscript{305} The sufficiently delineated, story being told, and three-part tests would all be redundant under a Fichtean framework. There would be no conception of a bias against literary characters. Instead, the analysis would likely start with the physical work and then draw out intangible aspects closer to the meaning of a literary work or artistic work.\textsuperscript{306} Both descriptions and depictions of fictional characters would be protected as part of the author’s form in such works.\textsuperscript{307}

The history of US case law suggests that courts have viewed characters as existing on a spectrum between the extremes of ideas and expression.\textsuperscript{308} The more detailed a character becomes, the closer it comes to becoming a copyrightable expression.\textsuperscript{309} For example, in \textit{Gaiman v. McFarlane}, the court found that “[a]ll though Gaiman’s verbal description of Cogliostro may well have been of a stock character, once

\begin{itemize}
\item[301.] \textit{Id.}
\item[302.] \textit{See supra} Section III.C.2
\item[303.] \textit{See supra} Part I.
\item[304.] \textit{See supra} Section II.A.
\item[305.] \textit{See supra} Section IV.A.
\item[306.] \textit{See supra} Section IV.A.
\item[307.] \textit{See supra} Section IV.B.
\item[308.] \textit{See supra} Section II.A.
\item[309.] Nichols v. Universal Pictures Corp., 45 F.2d. 119, 121 (2d Cir. 1930).
\end{itemize}
he was drawn and named and given speech he became sufficiently distinctive to be copyrightable." In contrast, applying a Fichtean conceptual framework suggests that a character is a set of ideas, and the more detailed the character becomes, the more complex the set of ideas it becomes. Making a character more detailed does not transform it from an idea into an expression—it merely makes the character a more detailed idea. Gaiman’s drawings and words describing Cogliostro constitute expressions of the idea of Cogliostro, and it is these precise expressions that are copyrightable.

Adopting Fichte’s manner of thinking would also allow us to avoid the difficult reasoning exhibited in cases like Burroughs v. MGM, Inc., where the judge struggled to articulate who the Tarzan character was, independent from the works in which Tarzan had appeared. The court necessarily had to draw on what Fichte would consider ideas—features like Tarzan being raised in the jungle by apes, in tune with nature, and so on. As Burroughs shows, the problems with this approach is that the bounds of property become very unclear and, perhaps, even almost impossible to define. To Fichte, it would only be the precise components of a character, as expressed by an author, that would be owned by that author. In relation to Tarzan, this would be the actual words pertaining to Tarzan from the Tarzan novels.

The second point worth emphasizing is that Fichte’s bright-line test for copyright infringement would provide greater clarity in cases of character appropriation. For example, the type of copying done in MGM v. American Honda Motor Co. would clearly be noninfringing. This is because Honda only made use of MGM’s ideas—a blonde male character, quirky villain, and other characteristics. To Fichte, nonliteral copying was not so much property infringement as it was property creation. Honda, by expressing MGM’s ideas in its own way, created a form that it owned exclusively. Fichte’s bright-line test avoids the difficulties that come with trying to compare two abstract characters in an abstract fashion.

The two points above can also be illustrated by applying Fichte’s philosophy to DC Comics v. Towle. If Fichte’s philosophy had been

310. Gaiman v. McFarlane, 360 F.3d 644, 661 (7th Cir. 2004).
311. Burroughs v. MGM, Inc., 519 F. Supp. 388 (2d Cir. 1981); see also supra Section II.C.
312. See supra Section II.C.
313. See supra Section II.C.
314. See supra Section IV.B.
315. See generally MGM, Inc. v. Am. Honda Motor Co., 900 F. Supp. 1287 (C.D. Cal. 1995); see also supra Section II.C.
316. See supra Section II.C.
317. See discussion supra Section III.D.
318. DC Comics v. Towle, 802 F.3d 1012 (9th Cir. 2015); see supra Part 0.
the law, the Batmobile could not have been a copyrightable character.\textsuperscript{319} Furthermore, even though DC Comics may have owned copyright in the comic strips, television series, and films depicting the Batmobile,\textsuperscript{320} Mark Towle did not make a comic strip, television series, or film—he made cars.\textsuperscript{321} He only, according to Fichte, appropriated the “ideas” of DC Comics. Fichte’s concerns about using ideas unfairly may well have been triggered here, given that Towle had associated his cars with the Batman brand to gain a commercial benefit.\textsuperscript{322} Fichte might have thought that DC Comics ought to have been granted temporary exclusive rights—rights that would prevent Towle from making Batmobile replicas. This would have allowed DC Comics to be fairly compensated for their labor in devising the Batmobile idea.\textsuperscript{323} Hence, although a similar outcome may have arisen in Towle, the legal path to get to that outcome would have been markedly different under Fichte’s bright-line test.

So far, there have been many cases whereby copyright has been used as a means of regulating fictional character ownership. However, considering a Fichetean perspective of fictional character ownership points towards regulating fictional character appropriation through means outside copyright law. The next part of this Article discusses a case involving such extracopyright regulation.

V. THE CASE OF GOETHE AND NICOLAI

A. The Subversion of an Instant Classic

In 1774, the German author Johann Wolfgang von Goethe published the book \textit{The Sorrows of Young Werther}.\textsuperscript{324} The book was a literary sensation. Within ten years of its release, the book had been translated into four languages and inspired a generation of European youth to adopt the novel’s protagonist Werther as its hero.\textsuperscript{325} The book recounted Werther’s unrequited love for a young woman named Charlotte.\textsuperscript{326} Unfortunately, because Charlotte married another man,
Albert,327 Werther was driven to his wits end.328 Deciding that the most noble thing to do in the situation was to die, Werther shot himself in the head.329

Goethe’s novel enjoyed such scintillating success that it was soon blamed for a subsequent epidemic of perceived copycat suicides throughout Europe, and the book was banned in the German city of Leipzig.330 In the wake of this, a book publisher, Friedrich Nicolai, wrote, and in 1775 published, The Joys of Young Werther.331 Nicolai’s book parodied Goethe’s book and constituted a polemic against following Werther’s suicide in any way. Nicolai conceived an alternative ending to The Sorrows of Young Werther. In The Joys of Young Werther, Albert and Charlotte were changed to be only engaged when Werther decided to kill himself.332 Albert thwarted Werther’s suicide and persuaded Werther and “Lotte” (as Charlotte was so called in Nicolai’s parody) to marry instead.333 Through the trials and tribulations of married life, Werther learned to give up his extreme romanticism for a more steady, rational way of living.334

Examining Nicolai’s appropriation of Goethe’s characters and Goethe’s response is illuminating. This case study provides an example of a writing community regulating the use of fictional characters without recourse from lawsuits or proprietorial notions. It also suggests that a moral conception of copyright can complement a utilitarian conception.

B. The Nature of Nicolai’s Appropriation

Nicolai employed many of Goethe’s precise words when writing his parody; on each and every page of Nicolai’s parody, the reproduction of Goethe’s form occurred, ranging from short words and phrases to entire sentences.335 However, in nearly all the cases where Nicolai reproduced Goethe’s phrasing or referred to Goethe’s writing, Nicolai prodigiously included a footnote directing the reader to a page from The Sorrows of Young Werther. All in all, Nicolai explicitly referenced

328. Id. at 209–13.
329. Id. at 222.
330. Furedi, supra note 325.
331. See generally Nicolai, supra note 56.
332. Id. at 17–18.
333. Id. at 30–31.
334. Id. at 53–55.
335. See, e.g., infra notes 339–342 and accompanying text.
Goethe’s work sixty-one times—a sizeable number, given that *The Joys of Young Werther* was only fifty-six pages long.\(^{336}\)

Two of Nicolai’s citations consisted of quotations. They occurred in the context of two characters discussing *The Sorrows of Young Werther* in “real life.”\(^{337}\) The majority of Nicolai’s remaining citations involved more sophisticated uses of Goethe’s words. Often, Nicolai would not only express Goethe’s original idea, but also expressed another idea that subverted Goethe’s idea. For example, in Nicolai’s parody, Albert’s explicit diagnosis of Werther and Lotte’s marital problems was their romanticism.\(^{338}\) Nicolai made Albert give an exhortation, and bookended the exhortation with a reference to *The Sorrows of Young Werther*: “Fine young sir! Love is possible, but you must love with a human love . . . ”\(^{339}\) This exact same line occurred in Goethe’s work but in a very different context. Werther, prior to meeting Charlotte, had been trying to explain to a friend why the bounds set by society destroyed passionate love.\(^{340}\) Werther told the story of a man who was wholly in love with a girl, but then was confronted by a “Philistine”\(^{341}\) who rebuked the man: “My good young friend, love is natural; but you must love within bounds.”\(^{342}\)

In *The Sorrows of Young Werther*, Goethe emphasized the negative consequence of such advice, having Werther remark disdainfully that “he may become a useful member of society . . . but it is all up with his love . . . ”\(^{343}\) In *The Joys of Young Werther*, Werther essentially followed the Philistine’s advice, as embodied by Albert in the

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336. *See generally Nicolai, supra note 56.*

337. *See id. at 8 (“Ich las, wie er neben Alberten ging, . . . pflücke Blumen am Wege . . . .” translated to “I read how he walked side by side with Albert ‘. . . plucked flowers by the way . . . .’”) (quoting GOETHE (1774), supra note 55, at 78 (Werther recounting in a letter “Ich gehe so neben ihm hin, und pflükhe Blumen am Wege . . . .”))).

338. *Nicolai, supra note 56, at 44–45.

339. *Id. at 45 (citing GOETHE (1774), supra note 55, at 22).*


341. *Id. (the author’s translation of the word “Philister”). For another source that translates “Philister” and “Philistine”, and also discusses Goethe’s uses of the word, see Estle McIvenna, *The “Philistine” in “Sturm Und Drang”,* 33 MODERN LANGUAGE REV. 31, 33 (1938) (“We are indebted to Goethe’s *Werther* (1774) for the first important use of the term in its moral and intellectual sense. . . . [T]he novel suggests throughout the misery Werther suffers from the Philistinism of society.”).*

342. *Nicolai replicates the words of Goethe’s 1774 work. Nicolai, supra note 56, at 45. (“Feiner junger Herr! Lieben ist menschlich, nur müßt ihr menschlich lieben . . . ” referencing Goethe’s 1774 work); GOETHE (1774), supra note 55, at 22 (“Feiner junger Herr, lieben ist menschlich, nur müßt ihr menschlich lieben!”).*

343. *GOETHE (1774), supra note 55, at 23. Note that this is the Author’s translation of the original 1774 work, which was compared with Boylan’s translation of Goethe’s similarly worded 1787 work. See GOETHE, supra note 55, at 7.*
text, resulting in marital bliss with Lotte. Nicolai thus suggested, contradicting Goethe’s portrayal of Werther, that restraining passionate love does not kill it, but merely transforms it into a more sustainable love, vibrant in its own way.

When considering the acceptability of Friedrich Nicolai’s actions, intriguingly, a Fichtean framework of thinking would predict the same result as current US law might—that Nicolai’s appropriation was acceptable. However, the way in which Fichte would arrive at this result differs from how US law would arrive at that same result. First, under either framework, Nicolai would have likely infringed Goethe’s copyright because he reproduced the exact words of Goethe’s work. The degree of infringement would have been lessened if Fichte’s views are applied to the transformative work that Nicolai created—having Albert give the exhortation instead of a Philistine would be labeled as the mere reproduction of ideas. In contrast, given modern copyright’s broader definition of “expression,” a large amount of Nicolai’s transformative work would still be labeled as reproducing expression.

Today’s law would likely have excused Nicolai’s copying on the basis that the nature of his parody constituted fair use of Goethe’s work. In contrast, although Fichte would have thought Nicolai would have been at the mercies of Goethe, the philosopher would have also predicted that Goethe would excuse Nicolai on the account that his copying constituted citations. In his article, Proof of the Unlawfulness of Reprinting, Fichte observed that there seemed to be “an unspoken agreement among writers to cite each other by direct quotation of their own words.” This Fichtean prediction proved true; although Goethe complained about Nicolai’s actions, the nature of Goethe’s complaint was not one of theft, but artistic misinterpretation.

C. The Nature of Goethe’s Response

It seems likely that Goethe adopted a perspective somewhat akin to a Fichtean perspective on fictional character ownership in relation to Nicolai’s appropriation. In his memoirs, Goethe wrote that

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344. NICOLAI, supra note 56, at 53–55.
345. Id. at 47 (“[T]heir lives flowed on like a calm stream – not as poetic a symbol as a raging torrent, but for this very reason no less suited to those who are happy.”).
346. See 17 U.S.C. § 107 (fair use); see, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (holding that a parody may constitute fair use); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276 (11th Cir. 2001) (holding that based on the evidence before the court, Randall’s parody THE WIND DONE GONE of Mitchell’s book GONE WITH THE WIND appeared to lend itself to a “viable fair use defense”); see also supra Section II.A.
347. See supra Section III.C.2.
348. Fichte, supra note 46, at 455.
the parody gave him and his friends “occasion for many a jest.” To Goethe, Nicolai was an “otherwise excellent” man who let himself down by having to “deprecate and oppose everything that did not accord with his own way of thinking.” Goethe ultimately condemned Nicolai for “interfering unasked in other people’s affairs” and for meddling “with things beyond his compass.”

The wrong done to Goethe seemed to be less about Nicolai’s appropriation of Goethe’s characters, and more about Nicolai’s manner of appropriation, which Goethe found offensive. Mere character appropriation did not seem to be a problem to Goethe. In the same passage from his memoirs, Goethe references a “vignette” drawing done by Daniel Chodowiecki that illustrated Nicolai’s parody. It featured Werther hugging Charlotte with Albert standing nearby. Goethe condoned this character appropriation, saying that it gave him “much delight; as at that time I admired this artist extravagantly.”

In contrast, Edward T. Potter suggests that Goethe was offended by what he felt was Nicolai’s “reductive misreading of the novel.” This is reflected in Goethe citing an “old rhyme” to summarize his feelings towards Nicolai, the poem ending with the lines “And those who understand me not / Should better learn to read.” Both authors perceived Werther’s suicide as being brought about by the effects of hypochondria. Nicolai’s cure for Werther’s hypochondria was in Potter’s words, Werther’s “integration into society.” However, to Goethe, Werther’s hypochondria was complex and not easily solved. Hence, in his memoirs, Goethe remarked that Nicolai’s parody seemed to step over the fact that “Werther’s youthful bloom, from the very first, appears gnawed by a deadly worm,” the “deadly worm” of hypochondria.

350. Id.
351. Id. at 513–14.
352. Id. at 513.
354. GOETHE, supra note 349, at 513.
356. GOETHE, supra note 349, at 514–15.
357. Potter, supra note 355, at 122.
358. Id.
359. Id. at 123.
360. GOETHE, supra note 349, at 513–14.
In relation to both Nicolai and Chodowiecki, Goethe made no mention of his “property” being at issue. In contrast, Goethe did use the phrasing of “property” when reflecting on the publisher Christian Friedrich Himburg, who had produced unauthorized collections of Goethe’s works.\textsuperscript{361} In his memoirs, Goethe recounted his feelings of “contempt” and “indignation” at the “robbery.”\textsuperscript{362} He labeled Himburg as one who was “making himself very comfortable with my property.”\textsuperscript{363} Piracy was a major problem that Goethe continually had to confront. By 1787—only thirteen years after \textit{The Sorrows of Young Werther} was first published—twenty pirated versions of the book existed.\textsuperscript{364} Piracy of Goethe’s later works also occurred.\textsuperscript{365} As Goethe became a more established writer, he started taking action against his unauthorized publishers and managed to procure a privilege that prohibited unauthorized reprinting of his works.\textsuperscript{366}

Goethe never suggested in his memoirs that he thought law needed to be involved or that Nicolai had done something “illegal,” as opposed to something that was done in aesthetic bad taste. Instead, Goethe did two things, both of a literary nature. First, he wrote a poem, which he phrased as being a “way of quiet, innocent revenge.”\textsuperscript{367} The poem was incisively satirical of Nicolai. Goethe represented Nicolai as defecating on Werther’s grave and then exclaiming, “The good man, how he ruined himself / If he had only shat like me / He wouldn’t have died!”\textsuperscript{368} Second, Goethe wrote some prose that played off Nicolai’s parody consisted of a dialogue between Charlotte and Werther after his failed suicide attempt.\textsuperscript{369} The fascinating outcome was essentially the creation of more literature.

\textbf{D. Where Utilitarianism and Natural Law Theory Can Coincide}

Nicolai’s appropriation and Goethe’s response fascinatingly display a situation where the writing community resolved its own issues, and in a way that is consistent with a Fichtean perspective of

\begin{itemize}
\item \textsuperscript{361} \textsc{Siegfried UnselD, Goethe and His Publishers} 30 (Kenneth J. Northeott trans., 1996).
\item \textsuperscript{362} \textit{Id.} at 31.
\item \textsuperscript{363} \textit{Id.}
\item \textsuperscript{364} \textit{Id.} at 24.
\item \textsuperscript{365} \textit{Id.} at 35.
\item \textsuperscript{366} \textit{Id.} at 32.
\item \textsuperscript{367} \textsc{Goethe, supra} note 349, at 514.
\item \textsuperscript{368} \textsc{Paul Fleming, Exemplarity and Mediocrity: The Art of the Average from Bourgeois Tragedy to Realism} 178 (2008) (quoting Goethe’s poem and briefly discussing it).
\item \textsuperscript{369} \textsc{Goethe, supra} note 349, at 514 (referencing this prose piece, though it is lost by the time Goethe wrote his memoirs).
\end{itemize}
fictional character ownership. The result of Nicolai and Goethe’s short literary spat was essentially, the production of more creative goods, and yet, copyright was nowhere to be found.

If Goethe and Nicolai had operated in present-day United States, Goethe might have launched a lawsuit against Nicolai. Indeed, Nicolai and Goethe’s literary exchange has striking parallels to the facts of *Salinger v. Colting*, which also involved the appropriation of fictional characters from a famous novel. A Swedish book publisher, Fredrik Colting, appropriated characters from J.D. Salinger’s famous novel *Catcher in the Rye* to write his unauthorized sequel, *60 Years Later*. Salinger sued Colting and won in the sense that the Second Circuit upheld the lower court’s finding that Colting’s sequel likely infringed Salinger’s copyright in the novel *Catcher in the Rye*. Colting’s work was most likely not fair use. Ultimately, the dispute was settled out of court, and Colting agreed not to publish the work in the United States. If Salinger had taken a more Fichtean view of character appropriation, perhaps he would not have taken legal action against Colting. Salinger may have even produced more literature in response to Colting’s work. At the very least, Colting’s work would not have been suppressed, resulting in a more diverse body of literature.

A likely follow-up view of a utilitarian conception of copyright, like what exists at present in the United States, is that a natural rights theory of copyright is creator friendly and user unfriendly, whilst a utilitarian based theory of copyright is more neutral between the two parties. However, the Nicolai and Goethe case study suggests something much different. Even under a Fichtean framework, where the role of copyright is significantly diminished, a balance between authors and users can be struck to promote the production of creative goods. In other words, a moral rights basis for copyright can result in achieving the same consequences that a utilitarian basis desires—promoting the proliferation of more creative goods. Fichte’s dichotomy

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373. *Id.* at 83.
374. *Id.*
possessed an inherent balancing mechanism that carved out space for the secondary use of creative goods, although this was not his direct concern.

This is not to say that Fichte thought there should be anarchy. His conception of copyright still prohibited piracy,\(^\text{377}\) which was Goethe’s real concern.\(^\text{378}\) Although an implication of applying Fichte’s views is that character appropriation should not be regulated by copyright, it does not follow that character appropriation should not be regulated by law at all. Fichte’s discussion of providing fair compensation to the inventors of ideas suggest that the law should still step in to make sure that character appropriation is done fairly.\(^\text{379}\)

VI. TOWARDS NEW WAYS OF SEEING

It would be unrealistic to attempt to transplant a Fichtean perspective of fictional character ownership into US copyright law. Amongst many other hurdles, constitutional reform would be required to replace copyright’s current utilitarian rationale with Fichte’s natural law rationale.\(^\text{380}\) Although the Goethe-Nicolai case study suggests that applying a Fichtean perspective to issues of character appropriation may help more art to be produced, one case study is not enough to prove such a significant proposition. An extensive amount of research and analysis would need to be undertaken to weigh the benefits and costs of implementing a Fichtean system of copyright in the United States.

Furthermore, although examining a Fichtean perspective also supports arguments concluding that fictional character ownership is theoretically untenable and undesirable,\(^\text{381}\) abolition of such ownership also seems unrealistic given the Ninth Circuit’s recent affirmation of fictional character ownership in *Towle*.\(^\text{382}\) What may be more realistic is to exhort the judiciary to clarify the language used in discussing fictional character ownership. Instead of holding that characters themselves can be copyrightable, judges should more explicitly hold that only expressions of characters are copyrightable. It is easier to

\(^{377}\) See supra Section III.C.2.
\(^{378}\) See supra Section V.C.
\(^{379}\) See supra Section III.C.1.
\(^{380}\) See supra note 257 and accompanying text.
\(^{381}\) See, e.g., Francis M. Nevins, Jr., *Copyright + Character = Catastrophe*, 39 J. COPYRIGHT SOC’Y U.S.A. 303, 343 (1992) (“It is impossible to articulate a criterion for separating copyrightable from uncopyrightable characterizations that does not compel courts to operate *ultra vires* and hand down aesthetic decisions.”); see also Said, supra note 29, at 827 (“Outside the text, in the minds of their readers, characters should not be independently copyrightable because, in a very real sense, they fail to satisfy copyright’s fixation requirement once they have been removed from their texts.”).
\(^{382}\) *DC Comics v. Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015).
reconcile this language shift with existing jurisprudence, and it can also motivate a more detailed factual analysis when copyright infringement suits arise.

Hence, judges will still have to grapple with which of the three character copyrightability tests to apply in a relevant case. However, the goal of each test ought not to be about discerning whether a character is copyrightable, but whether the work or set of works that express the plaintiff’s ideas of the character amount to copyrightable expression. If the sufficiently delineated test is applied, either on its own or as a part of Towle’s three-part test, the test should not be applied to a character (i.e., is the character sufficiently delineated) but to the parts of the plaintiff’s works that express that character (i.e., whether the works in question sufficiently delineate the character). Applying this test to the facts of Towle, such works would be the parts of DC Comics’ Batman comics, television series, and films that have expressed the idea of the Batmobile in some way. This provides a more definite boundary for the scope of copyright subsisting in the expressions of the Batmobile. Instead of utilizing generalized descriptions of the Batmobile, the court is continuously motivated to refer back to the concrete conglomerate of comic book panels, television, and film shots that make up the expression of the Batmobile.

The more concrete the analysis at the character copyrightability assessment stage, the greater the clarity of the analysis for copyright infringement. Instead of comparing a generalized description of the plaintiff’s character to another generalized description of the defendant’s character, the court should be motivated to compare specific parts of the plaintiff’s works that express the allegedly infringed character to the specific parts of the defendant’s works that express the allegedly infringing character. Although adopting this language shift does not solve the great incoherence underlying the character copyrightability test, such a move motivates more thoughtful analysis in character appropriation cases.

Thoughtful analysis is one of the fruits of considering a philosophical perspective and applying it to legal problems. However, philosophical or legal thinking alone can only go so far. Cross-
disciplinary research and analysis is important. A fair amount of ink has been spilled on fictional characters from both a philosophical perspective and a legal perspective. Ironically, the philosophical discussion may have missed the legal discipline’s problem-solving focus; whereas the legal discussion may have missed the philosophical “factual” analysis that would provide greater depth to the legal discussion.

VII. CONCLUSION

Applying a Fichtean perspective to fictional characters provides a broader, more grounded outlook on the ownership of fictional characters. Such a perspective provides a more coherent framework for how to better express and navigate the nuanced relationships between authors, secondary authors, and characters. It views fictional characters as ideas, unownable by all of the world, barring their expressions, which are exclusively owned by authors. This opens up a means of safeguarding and validating each and every person’s unique interpretation of a fictional character. No single person will have a definitive interpretation of what a fictional character means. Conceiving fictional characters as ideas is crucial to this state of affairs.

Applying a Fichtean perspective also allows fictional characters a meaningful sort of independence from their creators and those who engage with them. Fascinatingly, one commentator has suggested that less explicit copyright protection for fictional characters contributes to seeing fictional characters as “second-class citizens in the world of intellectual property.” Using the term “citizen” is ironic because it suggests according a greater dignity to a fictional character the more that character is made a subject of property—property referring to a character’s vulnerability to being owned by another and being commercially exploited, much like a slave or bondservant. In contrast,


388. See, e.g., supra note 29 and accompanying text.

389. See supra Section IV.A.

390. See Wendy J. Gordon, Reality as Artifact: From Feist to Fair Use, 55 L. & CONTEMP. PROBS. 93, 101 (1992) (“Too broad a set of intellectual property rights can give one set of persons control over how that reality is viewed, perceived, interpreted—control over what the world means.”).

a Fichtean view makes characters less the subjects of property and more personas in their own “right.” They are owned by no man nor woman. They are free. In this sense, characters are beyond copyright.

392, Perhaps seeing characters in this way may make us open to even giving characters “rights.” Authors could possibly be seen as the guardians of characters, as opposed to their owners. As Patricia Williams has famously encouraged on the topic of rights-giving, “Instead, society must give [rights] away . . . Give to all of society’s objects and untouchables the rights of privacy, integrity, and self-assertion; give them distance and respect.” PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 165 (1991) (emphasis in original).