

Protecting Heroes and Superheroes in the Digital Age—The Battle Between Copyright “Superpowers” and New Media



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“It is the special genius of a common law system, as ours is, that the law adjusts to the technologies of the time. And as it adjusts, it changes. Ideas that were as solid as rock in one age crumble in another.”¹

INTRODUCTION

SUPERMAN! SPIDERMAN! JAMES BOND! These iconic heroes remain among the best-known fictional characters of our time, and, as characters, are now generally afforded copyright protection, independent of the works in which they appear.² Will their superpowers prevail in an unprecedented global battle between copyright owners fighting to protect the content they own and new digital technologies that permit characters to be copied, modified, deconstructed,

and disseminated on a scale previously unimaginable? Or will the users of digital media successfully convince the courts that their unlicensed copies and derivative creations should proceed unabated and without restriction under the doctrine of “fair use”³ and other limitations on copyright law? Should public policy support the rights of intellectual property owners in the new digital age or should it favor the free use of content created and copyrighted by others?

There are no easy answers to any of these questions. This article does not attempt to answer them all, but addresses these questions by reviewing the law of character protection as it has developed with respect to more traditional media. It examines disputes that are presented by new technologies and the few cases that have been brought in this area; it evalu-

ates some recent cases that suggest the way courts may rule, should these issues proceed to litigation; and it suggests ways in which the interests of copyright owners may be balanced with those of consumers, as more and more new technologies shift control over content and the ability to interact and create in the hands of consumers.

THE DEVELOPING LAW OF CHARACTER PROTECTION IN TRADITIONAL MEDIA

Character is the essence of any story, whether fact-based or fiction. Characters are the bridge between audience and author, and the means by which the audience is captured—or repelled—by a given work. Although courts today generally afford characters copyright protection, whether they are literary creations or visual depictions, the issue has been intensely litigated and will undoubtedly continue to be contested. Courts continue to struggle to determine whether a character has been sufficiently developed and is unique enough to warrant copyright protection, or whether her traits are mere “*scenes-a-faire*,” that is to say, stock situations or traits that naturally flow from a common theme or basic premise.⁴

The Second Circuit has consistently followed a “character delineation” test to ascertain whether dramatic characters are protectable under copyright law. In so doing, it has blended two fundamental principles of copyright law; the distinction between general ideas, which are not protected,⁵ and more fully realized

expression, which is,⁶ and the principle that generic stock character elements (e.g., a drunken Santa Claus) are mere *scenes-a-faire* and are therefore not protectable.⁷ In *Nichols v. Universal Pictures*, the Court (Judge Learned Hand) held that a literary character is indeed subject to copyright protection but only if the character is developed with sufficient specificity to constitute protectable expression. On the other hand, a mere “riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress...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.”⁸ Since Judge Hand penned those words over seventy years ago, courts have wrestled with the question of precisely what level of precision is required for a character to be adequately developed,⁹ or when the character is merely a generic type used over and over and incapable of being

to evolve. In a seminal case involving author Dashiell Hammett’s subsequent use in a television series of the “Sam Spade” characters he had created (and that Humphrey Bogart made famous in *The Maltese Falcon*), Warner Bros. claimed to have a copyright in the characters themselves when Mr. Hammett used his own characters in a television series.¹² The Court rejected this theory, perhaps influenced by the fact that the author was asserting a right to use his own creations in a subsequent work as against a movie studio, a “sophisticated plaintiff.” It opined that “[I]f Congress had intended that the sale of the right to publish a copyrighted story would foreclose the author’s use of its characters in subsequent works for the life of the copyright, it would seem Congress would have made specific provisions therefor.”¹³ It continued:

It is conceivable that the character really constitutes the story being told, but if the character is only the chess-

Air Pirates,¹⁶ the Ninth Circuit attempted to draw a distinction between literary characters, whose traits and attributes are expressed exclusively through the written word, and characters portrayed through visual images such as those depicted in comic books or cartoons. The case arose when Walt Disney Productions took umbrage with an “adult underground comic book” that portrayed over twenty Disney characters (including favorites Mickey and Minnie Mouse, Donald Duck, and Goofy) as “active members of a free thinking, promiscuous, drug ingesting counterculture.”¹⁷ Clearly, Walt Disney Productions did not like seeing famed characters such as Goofy—who are normally portrayed with “innocent delightfulness”—depicted in such a bohemian light. First, the court noted that comic strip characters had been protected as long ago as 1914.¹⁸ Second, it distinguished *Sam Spade* on the grounds that it only involved literary characters,¹⁹ in contrast to *Air Pirates*:

[W]hile many literary characters may embody little more than an unprotected idea (citation omitted), a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression. Because comic book characters therefore are distinguishable from literary characters, the Warner Brothers language does not preclude protection of Disney’s characters.²⁰

Air Pirates attempts to shortcut the relative difficulty a court faces in identifying exactly how many character traits a character must possess—and how unique they must be to be sufficiently delineated to merit copyright protection—by distinguishing all graphically depicted characters which have tangible physical characteristics from literary characters.²¹ In contrast to literary characters, a visually depicted character contains its author’s “unique elements of expression” through

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protected.¹⁰ That issue continues to be litigated on a case by case basis,¹¹ and, as we discuss below, the issue of whether a delineation is sufficiently precise to be copyrightable, or to be deemed infringed, becomes particularly important in the digital media context in which characters may appear only briefly in video clips, or a single trait of an animated superhero may be borrowed for use in an online multiplayer game.

The Ninth Circuit has articulated a somewhat different test that continues

man in the game of telling the story he is not within the area of protection afforded by the copyright.¹⁴

Finally, it added that characters are not copyrightable because they are “always limited and always fall into limited patterns.”¹⁵ In sum, the *Sam Spade* court fashioned a “bright line” rule, flatly excluding literary characters from the protection of copyright law.

In an effort to move beyond *Sam Spade*, in *Walt Disney Productions v. The*

the addition of a “visual image” and visually depicted “conceptual qualities.”²² Indeed, courts have routinely recognized the copyrightability of visually depicted characters by granting copyright protection to a wide range of comic book and cartoon characters: Wonderman,²³ Betty Boop,²⁴ Barney Google and Spark Plug,²⁵ Godzilla,²⁶ as well as Mickey Mouse and Donald Duck.²⁷ However, whether *Air Pirates* modifies *Sam Spade* or accepts its ruling as to literary characters is debatable, and how the *Sam Spade* and *Air Pirates* rules apply to literary property whose lead character becomes an iconic cinematic hero was left unclear in *Air Pirates*.

It took a *literary* creation, visually depicted in almost twenty films—James Bond—for a court to have the opportunity to conclude that such characters are protectable and that even stock characteristics can be conjoined to create a copyrightable character. The *Bond* case²⁸ involved a commercial for a car with a detachable roof and featured a glamorous couple and villain with metal-encased arms who jumps onto the car’s roof. Elegantly, and “with a flirtatious turn to his companion, the male driver deftly releases the Honda’s detachable roof... sending the villain into space...”²⁹ The studio moved to enjoin the commercial. Accusing the studio of trying to gain a monopoly over the “action/spy/police hero” genre, Honda argued that Bond, as a dramatic character, was not protectable, and that the woman and villain were mere stock characters. The Court, however, concluded that under either the *Sam Spade* test or the Ninth Circuit *Air Pirates* “character delineation” test, Bond was indeed a copyrightable character: “A James Bond film without James Bond is *not* a James Bond film.”³⁰

Significantly, the court came to its conclusion after experts for both sides dissected both the classic James Bond adventure (“a high-thrill chase of the ultra-cool British charmer and his beautiful and alarming sidekick by a grotesque

villain in which the hero escapes by wit aided by high-tech gadgetry”)³¹ and the character of Bond.³² Bond’s characteristics—“his cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his marksmanship; his ‘license to kill’ and use of guns; his physical strength”³³—not to mention his penchant for fast cars, vintage wines, evening jackets, and beautiful women companions—are hardly unique, and taken one by one, might be deemed “stock elements.” But in combination, in a series of novels and films, they create a unique and unforgettable character who is both “the story being told” and the fully delineated character that Judge Hand ruled would be protectable in *Nichols*.

After *Bond*, it can be concluded with some certainty that distinctive characters are protectable in the context of traditional media, even if their individual characteristics, taken one by one, might not be because they are deemed “stock elements.”³⁴ Whether use of individual elements to evoke James Bond or other heroes in interactive digital video clips or online interactive games may claim similar protection is far less certain.

THE IMPACT OF DIGITAL MEDIA ON COPYRIGHT PROTECTION FOR CHARACTERS

Since the early 1990s, rapidly evolving digital technologies and devices have diminished the exclusive control media companies once enjoyed over dissemination and distribution of content and have shifted much of that control to the consumer. Social networking sites (of which MySpace is among the most popular); online services for hosting user-generated video content (such as YouTube and Google Video); mobile television via cell phones and other handheld devices; online role-playing games; mobile game units with WiFi and other interactive capability; interactive television—these and a plethora of other interactive tech-

nologies all invite the consumer to use and transmit “bites” of copyrighted content and to create her own content based upon it, or otherwise to modify it. Can the same principles that protect characters from infringement in more traditional media be effectively enforced in this fast-paced digital environment? Will principles of fair use immunize from infringement user-generated and transmitted video content that copies or modifies copyrighted characters? What about similar acts in social networking sites, or the creation of interactive gaming content that uses famous heroes, superheroes and animated characters? Finally, is the copying of evocative attributes of protected characters in games or video clips infringement or mere use of unprotected ideas? To date, most of these issues have not yet been decided by any court, but as content creators try to satisfy consumers by providing ever more content directly to the new devices technology has created, allowing the consumer to space shift as well as to time shift, they certainly will arise.

The Doctrine of Fair Use

Much of what is permitted or forbidden in the digital context turns on the doctrine of “fair use,” which limits the application of copyright.³⁵ Section 107 of the Copyright Act codifies the doctrine and provides, in pertinent part, that four non-exclusive factors are to be considered. The four “fair use” factors identified by Congress as particularly relevant are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used; and (4) the effect on the market for the copyrighted work.³⁶

The fair use defense follows the fundamental principle that ideas and expression are to be treated differently, “permitting free communication of facts while still protecting an author’s expression.”³⁷ If a court concludes that what is being copied or manipulated falls into the “idea” or

“fact” category or constitutes *scenes-a-faire*, it will not be deemed protected.

Of the four statutory fair use factors, which are closely interrelated, courts have generally considered the third and fourth—amount used and market impact—to be of greatest significance. Thus, in the instance of, for example, a consumer’s creation of her own short video content for Google Video incorporating pre-existing copyrighted material (such as clips from a well-known movie, television program or commercial), a court would likely consider the markets in which the copyrighted work is or may be exploited as well as the extent of the

new media technologies are touted as giving users control over content, consumers are not as original as one might think. Users often post pictures of their favorite characters (like Superman or one of the “South Park” kids) on their home pages of social networking sites like MySpace. Online game players often choose to imitate their favorite superheroes when creating their “own” characters in online role-playing games. Indeed, imitation is the sincerest form of flattery, and it is human nature to emulate well-loved characters. What child or inner child doesn’t want to live a “virtual” life as Superman, Barney the purple dinosaur,

Conversely, it might well conclude that a game player’s copying of two characteristics that identify Wonder Woman—her golden lasso and bullet-proof bracelets in an interactive game—does not rise to the level of infringement of a protected fully delineated character. Or it could rule the other way. Given these uncertainties, it is not surprising that intellectual property holders are considering a variety of preemptive actions and digital rights management techniques to protect their own present and anticipated exploitation of “their” intellectual property.

Online Interactive Games

The world of online interactive games is one of the fastest-growing and most lucrative areas to exploit media technologies. Because digital games rely so heavily on characters, they are ripe for creating copyright issues for content owners. In the antiquated days when Atari ruled the video game world, players were forced to play only those characters given to them by the game architecture; there was no way to make Pac-man look different or to create your own “Pac-character.” But online interactive game technology has changed that, allowing players to now create literally create their own character “avatars.” That of course, opens the door wide open for infringement of copyrighted superheroes and other characters.

To date, only one case—which settled before these important issues could be judicially determined—has been brought alleging character infringement in the online gaming context. In 2004, Marvel Enterprises, Inc.; filed a copyright and trademark lawsuit in Los Angeles against the distributor and creator of an online multiplayer role-playing game which allows players to create their own superheroes—superheroes which, Marvel alleged, too closely resembled its own superheroes.⁴⁰ The dispute squarely presented the issue of what intellectual protection is available for characters in an interactive online game. As online

As online games and entertainment media generally become even more interactive, battles over whether mere “stock elements” have been appropriated or whether there has been infringement of a copyrighted character will almost certainly become commonplace.

use made.³⁸ The first factor, purpose of the use, is also important—if the copy is transmitted for commercial purposes, that tends to weigh *against* a finding of fair use. As to the nature of the copyrighted work, creative works, such as film or fiction are normally given the greatest deference.³⁹ Each such determination must, of course, be made on a case-by-case basis. Some user-generated video content may be more expressive—created for parody or social commentary (for example, one video clip uploaded to Google Video depicts a student dressed in a “Pac-Man” costume running through a school library); others video files on such services are more overtly commercial in nature (posted to advertise businesses). Of course, in between is a considerable grey area.

User behavior in the new media world is affected by two factors. First, while

or their favorite character from Saturday morning cartoons?

Second, new media technologies encourage smaller bits of information to be exchanged. Perhaps only one or two characteristics of a character are borrowed, inviting a *scenes-a-faire* defense (for example, in an online sole-playing game, a caped superhero encased in a body suit with a chest initial is a recurring character). As a result, copyright owners will likely be contesting numerous efforts to expand the scope of the fair use doctrine and apply it to the new media. A court could certainly determine that interactive use of a copyrighted film clip is not “fair” because it contains a critical scene involving a key character, even if it is insubstantial in the time used (an example might be Rhett Butler’s “Frankly my dear I don’t give a damn” farewell from *Gone With The Wind*).

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City of Heroes is a “massively multi-player online game,” boasting an Internet user subscription base of some 180,000 players. Players can design the appearance and abilities of their own superhero character, and then fight crime alongside thousands of other players simultaneously in virtual Paragon City. Using

physical areas: Head, Upper Body, and Lower Body. Within each section, players choose among a wide array of different features—such as different faces or masks for Head, and different clothing styles for Upper Body and Lower Body. Players also choose specific colors, textures, patterns and details for their hero’s costume. In fact, the game states that there are over 2.24×10^{24} distinct costume combinations, ensuring a designer’s “creativity” and that no two players’ characters are identical.

Marvel’s pleading alleged that the structure and flow of the game’s Creation

verse? Superheroes are often best known by a single trait or attribute. Thus, what constitutes “idea” and what is “expression” of a superhero character is more subtle than in other contexts. The Webslinger is a normal teenager except for his special spider-like powers. Is it an infringing act to give spider-like powers to a character created by a user for purposes of playing a game? It is well-established that copyright law does not protect ideas; it only protects the “expression of an idea.”⁴¹ The concept of a mild-mannered scientist who, when angered, transforms into a violent, powerful being was the subject of *The Strange Case of Dr. Jekyll and Mr. Hyde* and was not unique to Marvel’s *Incredible Hulk*. However, Marvel’s *expression* of this idea as a green, muscular giant with torn, purple shorts can be and is in fact protected by copyright. Thus, the question is not easy to answer, particularly in the digital environment, which so easily uses identifying features and bits of a character.

Indeed, that is why the online gaming context presents unique issues. Most difficult is the fact that many alleged “clones” appropriate certain attributes—but not all attributes—of famed superheroes. But copyright protection for a compilation of superhero *attributes* is not the same as copyright protection for a *character*, and inevitably will lead to a debate about whether a plaintiff seeking to protect the integrity of its characters is only seeking protection for individual “stock” elements which cannot be protected. For example, can DC Comics claim ownership of a character’s inability to use X-ray vision through lead or his vulnerability to Kryptonite? Content owners will defend their rights to such famed attributes, which are valuable in large part due to many years of investment in the character. The producers of role-playing games will likely argue against such copyright protection. The legality of such defenses, and where a court will come out on these issues remains uncertain.⁴² Defendants will assert the *scenes-a-faire* doctrine as

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the game’s character Creation Engine, a player selects from a large menu of different abilities, attributes, and physical characteristics to create a superhero.

There is a three-stage process to create a character. A player must choose the hero’s: (1) **Origin**, such as “Mutant” (like Marvel’s X-Men characters), “Science”, or “Magic;” (2) **Archetype**, such as “Blaster,” “Tank” (like The Hulk), “Defender”—which is an overarching category for the hero’s abilities or fighting style; and (3) particular **attributes and appearance**. Marvel alleged that the Creation Engine does not allow a player to “start from scratch” but instead limits the player’s options through a series of choices at each stage; defendants, by contrast, emphasized that players can build “your own costume from scratch.” Costumes are broken down into three

Engine *led* and *encouraged* players to create characters that are nearly identical to Marvel superheroes. The key example in the complaint was Wolverine—an X-Men character who is a mutant and scrappy fighter, with unbreakable metal claws protruding from each hand and who possesses incredible regenerative powers. With the right choices on *City of Heroes*—“Mutant” Origin; “Scrapper” Archetype; “Claws” as the primary power set; “Regeneration” as the secondary power set—Marvel claimed that a player could create a clone of Wolverine in less than one minute, and sought to have the court hold the game designer and distributor responsible.

The structure of this “character creation” system raises a critical question: what elements of a character are entitled to copyright protection in the digital uni-

a defense to such claims, arguing that copyright law is designed not just to encourage and incentivize authors to create works by financial reward, but also to foster creativity by others, while content owners seek to prevent any copying at all to stem an anticipated flood of unauthorized exploitation, which, they believe, may impede future exploitation of valuable resources in new markets.

Other New Technologies

Online games are the most visible example of how user-controlled, interactive digital technologies will create copyright challenges for character owners. But other new media technologies trigger similar issues. Marshall McLuhan's famous maxim that "the medium is the message" and is affected by "the new scale that is introduced into our affairs by each such extension of ourselves, or by any new technology,"⁴³ aptly describes the impact of new delivery devices on media and the law.

MTV Networks has been at the forefront of the new media revolution. For example, it has introduced "virtual snacking" as part of its charge into the mobile content delivery market. Mobile phones and devices invite shorter content because users have shorter attention spans for viewing video clips on these platforms. Shorter content length means that using identifiable characters is even more important; thus, in the burgeoning market for mobile television and video content, characters will be critical. Shorter length also means that animated characters have premium value, because animation translates so well into the small screens of mobile devices. Given the nature of its programming (heavy on music, celebrities and animation), MTV Networks sat primed to tackle the new market for delivering content via mobile, wireless and other devices. In 2005, certain MTV Networks channels began offering short video clips of content from well-known television programs (such

as MTV's "Laguna Beach"), specifically designed for mobile phones; these "virtual snacks" offer viewers more insight into some of their favorite television characters and facilitates community sharing as users send the clips "virally" to their friends. This strategy allows the company to virally market their television program—and often the lead characters—to the mobile phone audience. But it also means that the copyright owner may lose control over the content (for example, users may manipulate images of characters or copy them for unauthorized purposes), or perhaps must be prepared to impliedly license it to all users and their friends.

But it is interactivity that creates the greatest potential for infringement of copyright or rights of publicity. Courts will have to decide whether, if users transmit back or create content, that use is fair. For example, interactive television (ITV) is becoming more widely-used. ITV describes any number of efforts to allow viewers to interact with television content as they view. The viewer must be able to alter the viewing experience (such as choosing which angle to watch a football match), or return information to the broadcaster. In its deepest sense, the

play a game. This is a relatively simple use of ITV technology, but in the future, could leave to advanced capabilities such as allowing viewers to change the appearance of a character, deciding what lines the characters will say, or determining what plot events happen to a character. As ITV becomes more advanced, copyright owners will be challenged to effectively police what feedback and impact users will have on characters, without compromise users' enjoyment at shaping their favorite characters.

Another interactive technology which raises issues for character protection are social networking sites like MySpace and Friendster. When users design their home pages on these services, they often post images of their favorite characters—presumably without authorization from the content owner. Content owners must determine when and how to police such use, or whether to chalk it up to fair use. This may seem innocuous until there are instances of well-loved characters being depicted or manipulated in ways which arguably tarnish the character's image (raising trademark dilution issues, as well as copyright questions). Rightholders for children's characters like the Peanuts and

Even if a plaintiff can invoke protection for visual depictions of specific characters, if the copyright registrations are for entire comic book issues featuring those characters, ... a plaintiff must prove that an individual game-created character infringes the comic book issue (which includes multiple characters, dialogue and other drawings).

program, itself, might change based on viewer input. The Nickelodeon channel uses ITV technology on certain children's shows, like "Dora the Explorer"—which allows children to play along with certain episodes by using the remote control to

the Walt Disney icons will be especially worried; while some fun-loving users might like it, the Charles Schulz estate would probably frown on seeing Snoopy in a compromising position. As a result, some content owners contemplate licens-

ing their characters for use on these social networking sites, so they at least have some control the images made available and how they can be copied and manipulated (or not). Copyright owners may need to choose whether to license these uses now across the board, or contest their unlicensed use in court, relying on judges to treat new technology uses like “old media.”

As new media platforms proliferate, so too do the potential hurdles for copyright owners. A user-generated content service like YouTube, for example, raises a number of unresolved issues. Users may share video clips of their own, or content from other web sites—including web pages and content featuring character images. Who is responsible if there is an infringing use of a character? Blogs by readers—and who owns them?—may contain infringing material. Responsibility to police sharing of video content must be allocated. Indeed, another peer-to-peer sharing experience is not unimaginable. Whether these sites become another contested online video store and contribute to or facilitate copyright infringement remains to be determined.

WHERE WILL THE COURTS GO?

To date, in cases involving online transmission, the judiciary (the Supreme Court and the Second and Ninth Circuits) have generally sided with intellectual property owners against proponents of the “free internet.”⁴⁴ While none of these cases involve the precise issues presented by the ever-increasing availability of digital media and the consumer’s growing ability to obtain, control, manipulate, and transmit content, they demonstrate a judicial philosophy that supports intellectual property rights, and conclude that, where possible, intellectual property rights should be enforced. They may well suggest that if copyright owners and service providers go to war, courts will likely attempt to apply traditional principles to the interactive digital media and side with the copyright owners.

On the other hand, the limited and brief nature of consumer-created video clips or networking site displays featuring characters, and the fact that in interactive games, single character traits rather than the entire character may be copied and incorporated in a new work, may lead courts to deem such uses immaterial under the doctrine of fair use. However, as technology changes continue to accelerate, what today may represent only a minimal “slice” of a copyright-protected character and may appear to be *de minimis* use under fair use principles, not impacting the copyright owner’s markets, may tomorrow represent a valuable source of revenue for the content creator which invested resources in the characters and creative works which consumers are now altering, transmitting, and copying.

The critical question is where is society’s interest located? Simply stated, one might argue that the real battle is between the innovator and the creator of the characters, *i.e.*, creation which in the end serves the public and is worth protection, as opposed to the exploiter who seeks to profit by dissecting just enough of the characters to slide under the fair use fence. The constitutional purpose of copyright law is to serve the public interest by promoting innovation. The new media revolution has blown open the doors to previously unheralded levels of innovation for technology providers and consumers; copyright owners will need to embrace those innovations to protect their core character assets. And courts will need to balance the interests of all the players—copyright owners, technology providers, and the consuming public—to figure out how much protection characters deserve in the new digital frontier.

The battle lines continue to be drawn, but at stake are the legal and business future of interactive media—and character owners. Without easy answers, this is one battle that all the combined powers of Spider-Man, Superman, and James Bond may be necessary to resolve. ©

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Endnotes

1. Larry Lessig, *Free Culture* 3 (Penguin Books 2004).
2. *See, e.g., Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F. Supp. 1287, 1295–97 (C.D. Cal. 1995) (granting preliminary injunction against unauthorized depiction of James Bond-like character).
3. 17 U.S.C. § 107 (2000 & West Supp. 2006).
4. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121–22 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); *see generally* Melville & David Nimmer, *Nimmer on Copyright* § 13.03 (discussing *Nichols* in context of substantial similarity test).
5. *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 347–48 (1991); 17 U.S.C. § 102(b) (2000 & West Supp. 2006) (“In no case does copyright protection...extend to any idea...”).
6. *See, e.g., Nichols*, 45 F.2d at 121 (“[T]he less developed the characters, the less they can be copyrights; that is the penalty an author must bear for marking them too indistinctly.”); *Smith v. Weinstein*, 578 F.Supp. 1297, 1302, 1303 (2d Cir. 1984) (“Copyrights do not protect thematic concepts or scenes which necessarily must follow from certain plot situations.” ... No character infringement claim can succeed unless plaintiff’s original conception sufficiently developed the character, and defendants have copied this development and not merely the broader outlines.”) (citation omitted); *Robinson v. Viacom International, Inc.*, 93 Civ. 2539, 1995 WL 417076, at *9 (S.D.N.Y. Jan. 4, 1995) (“‘Stock’ characters are ineligible for copyright protection.”).

- But see Walt Disney Productions v. The Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (extending copyright protection to Walt Disney characters).
7. *Cf. Burns v. Twentieth Century-Fox Film Corp.*, 75 F.Supp. 986, 992 (D. Mass 1948) (“Santa Clauses who are benevolent, though drunk (or because they are drunk) are common characters in moving pictures dealing with retail stores. One such cinema produced about 1941 was called *Life Begins at Eight-Thirty*. And irascible executives, like irascible judges are unfortunately a familiar phenomenon belonging to the general domain of knowledge. Only sharp etchings of particular persons create the type of character than can be the subject of a successful plagiarism suit. Plaintiffs Santa Claus and plaintiffs McNabb entirely lack the necessary individualization. They remain more types so loosely sketched as not to be reduced to the possession of any author—or indeed any reader.”)
 8. *Nichols* at 121.
 9. *Weinstein*, 578 F.Supp. at 1303 (characterizing racial types, “city boys,” and prisoners as “characterizations too general to deserve protection.”)
 10. A parallel concept governs patent law; an idea must be sufficiently reduced to practice to enable the inventor to obtain a valid patent.
 11. *See, e.g., Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F. Supp. at 1294 n.5 (concluding that elements comprising James Bond character created copyrightable hero). This case is discussed in more detail below.
 12. *Warner Bros. Pictures v. Columbia Broadcasting System*, 216 F.2d 945, 950 (9th Cir. 1954), *cert. denied* 348 U.S. 971.
 13. *Id.*
 14. *Id.*
 15. *Id.* This holding has been severely criticized as being far too restrictive. *See, e.g., Goodis v. United Artists Television, Inc.*, 425 F. 2d 397, 406 (2d Cir. 1970) (criticizing on public policy grounds); *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004) (criticizing *Sam Spade* decision as “wrong”); *Olson v. National Broadcasting Co.*, 855 F.2d 1446, 1451 (9th Cir. 1988) (characterizing “story being told” holding as dicta); *accord* 1 Nimmer § 2:12 (“[S]uch a rule if followed would effectively exclude characters from the orbit of copyright protection.”).
 16. *Walt Disney Productions v. The Air Pirates*, 581 F.2d 751 (9th Cir. 1978).
 17. *Id.* at 753.
 18. *Id.* at 754. *See, e.g., Detective Comics, Inc. v. Bruns Publications Inc.*, 111 F.2d 432 (2d Cir. 1940); *Fleischer Studios v. Freundlich*, 73 F.2d 276 (2d Cir. 1934), *cert. denied*, 294 U.S. 717; *King Features Syndicate v. Fleischer*, 299 F. 533 (2d Cir. 1924); *Detective Comics, Inc. v. Fox Publications, Inc.*, 46 F.Supp. 872 (S.D.N.Y. 1942); *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914); 1 Nimmer § 30.
 19. *Id.* at 755.
 20. *Id.*
 21. *Id.* at 754–55.
 22. *Air Pirates*, 581 F.2d at 755.
 23. *Detective Comics, Inc. v. Bruns Publ’n, Inc.*, 111 F.2d 432, 432–34 (2d Cir. 1940).
 24. *Fleischer Studios v. Freundlich*, 73 F.2d 276, 276–78 (2d Cir. 1934).
 25. *King Features Syndicate v. Fleischer*, 299 F. 533, 534–38 (2d Cir. 1924).
 26. *Toho Co. v. William Morrow, Inc.*, 33 F.Supp. 2d 1206, 1215–16 (C.D. Cal. 1998).
 27. *Air Pirates*, 581 F.2d at 754–55.
 28. *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., Inc.*, 900 F.Supp. 1287 (C.D. Cal. 1995) (decided on motion for preliminary injunction).
 29. *American Honda*, 900 F.Supp. at 1291.
 30. *Id.* at 1296.
 31. *Id.*
 32. *Id.* at 1294.
 33. *Id.* at 1296.
 34. *See New Line Cinema v. Easter Unlimited, Inc.*, 17 U.S.P.Q. 2d 1631, 1632–33 (E.D.N.Y. 1989) (extending protection to unique subcharacteristic—Freddy Krueger’s hand). *But see Burns v. Twentieth Century-Fox Film Corp.*, 75 F.Supp 986 (D. Mass 1948) (“Only sharp etchings of particular persons create the type of character than can be the subject of a successful plagiarism suit. Plaintiff’s Santa Claus and plaintiff’s McNabb entirely lack the necessary individualization. They remain more types so loosely sketched as not to be reduced to the possessions of any author—or indeed any reader.”).
 35. 17 U.S.C. § 107 (2000 & West Supp. 2006).
 36. 17 U.S.C. § 107; 3 Nimmer § 13.05(A)(1); 1 Nimmer § 1.10(C).
 37. *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 560 (1985).
 38. *Id.* at 548 (less than 13% of a work is substantial if significant portions are used.)
 39. *Id.* at 563–64.
 40. *Marvel Enterprises, Inc. and Marvel Characters, Inc. v. NCSOFT Corp. and Cryptic Studios, Inc.*, No. CV 04-9253 (C.D. Cal. 2004).
 41. *Feist Publications*, 499 U.S. 347–48 (1991). The “idea” vs. “expression of idea” dichotomy is codified in 17 U.S.C. § 102(b), which states that copyright protection does not extend to ideas or concepts.
 42. *Warner Bros., Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d at 240.
 43. Lewis H. Lapham & Marshall McLuhan, *Understanding Media: The Extensions of Man* 7 (MIT 1994).
 44. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 218–19 (2003) (supporting congressional extension of the term of the copyright for existing copyrights and concluding that the proximity in time of the Copyright Clause and First Amendment to the Constitution indicates that “in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles...”); *Metro-Goldwyn Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764, 2775 (2005) (characterizing case as involving tension between artistic protection and technological innovation, and concluding that “the administration of copyright law is an exercise in managing the trade-off”); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (injunction issued under Digital Millennium Copyright Act (“DMCA”) affirmed as against First Amendment defense); *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001) (file sharing activities were not fair use).