Can Stephen Colbert Bring Back Stephen Colbert? Alternate, Fictional Personas in Copyright

*Kourosh Shaffy**

* J.D. Candidate, Columbia Law School, Class of 2018. I would like to thank Pippa Leongard for her advice and input.

INTRODUCTION

Stephen Colbert: ultraconservative political talking head with a show on cable television providing a voice for the far right. Stephen Colbert: parody of a very conservative cable television personality, such as a Bill O'Reilly. Stephen Colbert: actor with a cable television show that he uses to mock and lampoon conservatives and right-wing politics. Stephen Colbert: new host (as David Letterman's replacement) on CBS's "Late Show."

When Comedy Central's "The Colbert Report*"* premiered in October 2005, most of the network's intended audience recognized Colbert from his years-long stint on "The Daily Show with Jon Stewart."[1] But here Colbert, given his own platform, was taking his act to the next level. Whereas Colbert had previously satirized the news in his sarcastic, observational manner as a comedian first and a character (in the "Daily Show's" running gags and sketches) second, given his own late night cable platform, Colbert embodied his character. Gone was any trace of the actor, a largely unknown face who had been in the casts of ensemble shows like "The Dana Carvey Show*"* and "Strangers with Candy."[2] Colbert took those aspects of his satirical brand of humor and greatly extended them, creating a wholly new and original voice that, for ten years, lambasted Republicans and conservative viewpoints like nothing else on American television.

The Stephen Colbert on "The Colbert Report*"* was a character of its own, an intricately thought out, highly novel alternate persona embodied by an actor who was so committed to his vision that over the entirety of the show's run he rarely, if ever, broke character—not only on the show itself, but in public too. If Colbert gave another network or media outlet an interview, he did so as his "The Colbert Report*"* persona. Even when he hosted the White House Correspondents' Dinner in 2006, Colbert remained in character in front of George Bush and the media, providing biting commentary on the Bush Administration while professing to be a very conservative Bush supporter himself.[3]

When Colbert ended his series in December 2014 in order to begin his current run on CBS hosting "The Late Show with Stephen Colbert," it was thought that his "The Colbert Report*"* persona had been permanently put to rest.[4] Colbert, both on his new show and in all public appearances since 2015, has only been himself, a comedian who gravitates toward political commentary but who no longer does so as a fictional character. That is, until July 2016, when Colbert brought back his "The Colbert Report" persona on his new CBS show for a single segment.[5] Though met with much buzz and enthusiasm by audiences, Colbert's fictional persona would not make a

1. *The Colbert Report–Episode Guide*, COMEDY CENT., https://perma.cc/V3UN-R2GK (last visited Dec. 19, 2016).

2. *Stephen Colbert*, IMDB, https://perma.cc/G9WQ-7TD4 (last visited Dec. 22, 2016).

3. Blathnaid Healy, *2006 Annual White House Correspondents' Dinner*, WHCA, https://perma.cc/4ZSK-2UXS (last visited Dec 26, 2016).

4. *The Late Show with Stephen Colbert*, IMDB, https://perma.cc/8FGR-BK3A (last visited Oct. 19, 2017).

5. David Sims, *Stephen Colbert's Alter Ego Is Back*, ATLANTIC (July 19, 2016), https://perma.cc/2LCM-66GT.

return appearance, as Comedy Central lawyers contacted CBS and claimed that any use by Colbert of his "Report*"* persona would constitute a violation of Comedy Central's exclusive rights in its own intellectual property.[6]

This Note argues that Stephen Colbert should have the right to use his former Comedy Central persona on his new CBS show. Creator-performers of characters that are fictionalized versions of their own, real personas should not lose their rights to these characters because of copyright law. Traditional concerns associated with a need for copyright (for example, the danger of unapproved copying) are not present where the author's presence is essential to performance of the character, as is certainly the case here. Nobody can play the fictional Stephen Colbert character but the real Colbert. An artist like Colbert must be free to use his character.

Part I examines current case law. Part II argues that this is not the ordinary case of a performer's use of intellectual property where he or she is but an actor playing a typical fictional character; instead, this is a case of an actor whose fictional persona is so intertwined with his own persona that many audiences have not even been able to discern that the actor was playing a character at all. Part III concludes that because the Comedy Central persona is Colbert's own creation—a fictionalized alternate persona of his own, bearing the actor's real name and likeness, which he used and fleshed out not only on his Comedy Central series but also created prior to that series' debut and then used in many other public arenas—it should be copyrightable by Colbert independent of Comedy Central's copyright in "The Colbert Report." In order for Colbert and similar creator-performers of such detailed alternate personas to be able to use their characters freely, these very specific types of character-personas should be protected by a specific, enumerated category of copyrightable works of their own under the Copyright Act.

I. BACKGROUND ON CHARACTER COPYRIGHTS AND CLAIMS

Before engaging in a discussion of what Colbert might be able to do to get around Comedy Central's claim to his former persona, what the law forbids him from doing, and what it should allow him to do, it is important to review the bases in existing copyright law for the rights in Colbert's fictional persona.

A. COPYRIGHTABLE SUBJECT MATTER

1. Authorship

Article I, Section 8, Clause 8 of the U.S. Constitution, known as the Copyright and Patent Clause, states that "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[7] This clause is the basis of federal authority to provide for the issuance of copyrights to

6. Tony Maglio, *Stephen Colbert Can't Use 'Colbert Report' Character on CBS, Lawyers Say*, THEWRAP (July 28, 2016, 7:41 AM), https://perma.cc/HMZ2-WZ6S.

7. U.S. CONST. art. I, § 8, cl. 8.

authors of intellectual works and to provide protection to copyright holders from infringements of their works.

What the Copyright Clause makes clear is: copyright protection is limited to works that "promote the Progress of Science and useful Arts," with "Science" coming to mean "Knowledge"; a work which gets copyright protection only keeps it "for limited Times," meaning some definite duration; and such protection and rights are only allotted to the "Writings" of "Authors." In *Burrow-Giles Lithographic v. Sarony*, the Supreme Court established how courts should define these latter two words.[8] The Court interpreted "Writings" broadly, establishing that all courts must consider the "Author" to be a work's originator, and "Writing" the physical rendering of the originator's thought. Under this framework, the key to copyright protection is that there is some artistic input.[9] The Court held that the plaintiff's photographs of Oscar Wilde were works of authorship because they involved creative choices made by the plaintiff.[10] Accordingly, courts have continued to protect an author's deliberate, authorial choices.[11]

2. Originality

The current American copyright framework is the Copyright Act of 1976, which limits copyrightable subject matter to only "original works of authorship fixed in any tangible medium of expression."[12] This means that, for a work to be copyrightable, it must be a work of authorship, contain originality, and demonstrate fixation. *Burrow-Giles* showed that, for a work to satisfy the requirement of originality, its author must express his ideas with choices.[13]

Just as the Court in *Burrow-Giles* limited the judicial role in assessing copyrightability and broadly interpreted what is copyrightable, so the Court in *Bleistein v. Donaldson Lithographing* further limited judicial power and adopted a broad definition of originality.[14] The Court found that a work's commercial purpose does not detract from its originality, and that a work need not be "fine art" to be copyrightable—courts should not judge artistic quality when determining copyrightability.[15]

8. Burrow-Giles Lithographic v. Sarony, 111 U.S. 53 (1884).

9. *Id.* at 57–58 ("An author in that sense is 'he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.'").

10. *Id.* at 60.

11. David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 22 (2001) ("Copyright protection requires the subjective choice of an author in order for protection to lie.").

12. 17 U.S.C. § 102(a).

13. *Burrow-Giles*, 111 U.S. 53 at 55.

14. Bleistein v. Donaldson Lithographing, 188 U.S. 239, 250 (1903) ("The least pretentious picture has more originality in it than directories and the like, which may be copyrighted.").

15. *Id.* at 251 ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations."); *see also* Nimmer, *supra* note 11, at 201 ("Judges simply have traditionally eschewed esthetic judgments in copyright cases.").

3. Fixation

For a work to be copyrightable, it must not only be an original work of authorship, but must also be fixed in tangible form. The Copyright Act requires that a work have a tangible embodiment that lasts for more than a transitory duration.[16] Significant to the notion of fixation and copyrightable subject matter is the idea-expression dichotomy: the Copyright Act provides no copyright protection for ideas, procedures, processes, systems, methods, or operations.[17] This restriction is meant to prevent the monopolization of ideas and ensure public access to knowledge and the potential building blocks of other works.[18] In *Morrissey v. Procter & Gamble Co.*, the First Circuit detailed another facet of this dichotomy, the merger doctrine, dictating that if there are but a few ways to express an idea, those expressions cannot be copyrighted.[19] In *Hoehling v. Universal City Studios*, the Second Circuit deployed still another aspect of fixation: the *scènes à faire* doctrine, which says events, settings, characters, and common phrases indispensable to the treatment of a subject cannot be copyrighted.[20] These doctrines function to prevent bootstrapping of idea protection through the monopolization of every expression of the idea.

B. CHARACTERS

The Register of Copyrights has traditionally considered fictional characters uncopyrightable separate from the copyrightable works that they appear in.[21] However, "in light of the profusion of sequels that appear in all media—novels, motion pictures, and television especially—wherein characters from a prior work appear in an otherwise completely new work," this is no longer the case in practice.[22] Instead, "the prevailing view has become that characters per se are entitled to copyright protection."[23] But while the trend in courts today is toward granting greater copyright protections to authors of fictional characters, in determining whether and to what extent characters are copyrightable in the first place, courts draw a distinction between visually depicted ones and those that are verbally depicted: the former have long been protected, while the latter have posed more of a challenge for courts attempting to identify applicable copyright principles.[24] The controlling

16. 17 U.S.C. § 101.

17. 17 U.S.C. § 102(b); *see also* Baker v. Selden, 101 U.S. 99, 103 (1879) (holding that plaintiff had copyright in the book describing his bookkeeping system, but not use of that system).

18. *See also* Feist Publ'ns. v. Rural Tel. Serv., 499 U.S. 340, 347 (1991).

19. Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967).

20. Hoehling v. Universal City Studios, 618 F.2d 972, 979 (2d Cir. 1980) ("Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain 'stock' or standard literary devices, we have held that scenes a faire are not copyrightable as a matter of law.").

21. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12[A][1] (rev. ed. 2015) [hereinafter NIMMER ON COPYRIGHT].

22. *Id.*

23. *Id.*

24. Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 444 (1986) [hereinafter, Kurtz (1986)]; Leslie A. Kurtz, *Fictional Characters and Real People*, 51 U. LOUISVILLE L. REV. 435, 442 (2013) [hereinafter, Kurtz (2013)] ("Literary characters—those depicted by

principle today for all character copyright cases is a two-pronged approach, pursuant to which characters are given independent copyright protection if: (1) they are sufficiently delineated in a plaintiff's work; and (2) if a defendant's work copies that delineation.[25]

II. A GAP IN THE LAW

A. THE ISSUE

Stephen Colbert began "The Colbert Report" in October 2005, but he created and began developing his fictional persona well before his time on "The Daily Show." It took Colbert years to continuously craft his fictional persona and hone his performance.

Colbert's character was first conceived at Chicago's Second City, not as a parody of any specific political pundit, but as a deadpan news anchor delivering fictional news.[26] When he got his television start as a cast member on the short-lived 1990s sketch comedy series "The Dana Carvey Show," Colbert further developed his character, this time on screen, starring in unaired sketches as a deadpan anchor delivering fake news directly to the camera, as he would on "The Colbert Report."[27] After "The Dana Carvey Show" was canceled, Colbert began his eight-year stint on "The Daily Show" in 1997, where he was hired as a "correspondent," a role that initially entailed numerous character-driven field pieces. Over time, Colbert transformed his role from one revolving around field pieces to one built around news-driven pieces, at Jon Stewart's desk, that heavily involved comedic editorializing.[28] This transformation proved a success that Colbert parlayed into his own series, "The Colbert Report."

Colbert sold "The Colbert Report" to Comedy Central as a general, broad parody of a news show, akin to what "The Daily Show" had become, and not as one starring the fictional character at dispute here. Colbert's character was initially given just a stock description: that of a fake, idiotic news anchor. It was not until after Comedy

portraits drawn in words—have presented more difficulties and complications. They exist as abstract mental images, seen not by the eyes but with the mind. The author's words convey different images to different minds. The character may be created initially by the author, but the character may come to life in your mind in a different way than it comes to life in mine. It cannot be directly perceived. It is far easier to compare visual images than abstractions. As a result, courts have struggled to determine when a literary character has those qualities that entitle it to copyright protection.").

25. NIMMER ON COPYRIGHT, *supra* note 21, at § 2.12[A][2] (citing Nichols v. Universal Pictures, 45 F.2d 119, 121 (2d Cir. 1930)).

26. Howard Kurtz, *TV's Newest Anchor: A Smirk in Progress*, WASH. POST (Oct. 10, 2005), https://perma.cc/D6TP-FPT7.

27. Steve Heisler, *Dana Carvey and Robert Smigel*, A.V. CLUB (June 15, 2009, 12:00 AM), https://perma.cc/9JJ6-N9PU.

28. Ken P., *An Interview with Stephen Colbert*, IGN (Aug. 11, 2003), https://perma.cc/7APS-MYN2 (Colbert began mixing more and more of his own humor and personality into his onscreen persona, stating, "I play a high status character in my own life, so that's a quality. I like the revelation in weakness in the high status package . . . . On *The Daily Show*, I'm essentially a very high status character, but my weakness is that I'm stupid. Like, that's my character's weakness . . . . I don't mind seeming like a fool. I truly don't mind seeming like a fool.").

Central had bought the series that Colbert developed it into a direct parody of "The O'Reilly Factor."[29]

For the first several years of "The Colbert Report," Colbert was so committed to his perpetual public performance as his conservative talk show host persona that for many in the general public who were exposed to the character but were not familiar with the series—perhaps coming across clips of it online or seeing Colbert perform as the character outside of Comedy Central (hosting the White House Correspondents' Dinner, for example)—this persona came across as genuine and not an act.[30] Colbert had a segment on his show called "Better Know a District," in which he would interview various congressmen, asking them questions about their political positions as well as about their districts.[31] At first, congressmen on both sides of the aisle readily appeared on the segment, expecting Colbert to be a real-life Bill O'Reilly type, not realizing that the left-leaning actor was actually portraying a character intended to parody the likes of O'Reilly and others (including some liberals) who advocated political views and policies with which the actor strongly disagreed or found comically ridiculous.[32] Colbert intentionally used the segment to show those congressmen and public figures who appeared on it in a humorous and very unflattering light.[33] For most of the show's early run, few congressmen ever appeared to be in on the joke, and most became upset when they found out.[34]

Even as "The Colbert Report" started gaining popularity, with audiences and congressmen alike becoming increasingly aware that the series was a parody of a news show like O'Reilly's and not a real one, Colbert still rarely if ever broke character.[35] For ten seasons, Colbert remained faithful to his performance as his fictional persona, responding to all of the critical acclaim and increased viewership he received by ever-further delineating the complexities of his character. Eventually, Colbert himself commanded significant cultural influence for his portrayal, making

29. *Colbert Builds 'Report' with Viewers, Readers*, FRESH AIR (Oct. 9, 2007), https://perma.cc/XF3P-RY47.

30. Jason Linkins, *Colbert Study: Conservatives Don't Know He's Joking*, HUFFINGTON POST (Jan. 29, 2011, 11:05 PM), https://perma.cc/F4ZQ-EJ76.

31. *Politicians Relish Comic's Needling*, WASH. TIMES (July 3, 2006), https://perma.cc/2EC6-DNZ4.

32. *'Colbert Report' is Lawmakers' Siren*, WEBINDIA123 (Mar. 15, 2007, 12:01 AM), https://perma.cc/TFL3-RYAW.

33. *Id.*

34. Erika Lovley & Marin Cogan, *Congress Cools on Colbert*, POLITICO (Sept. 30, 2010, 4:33 AM), https://perma.cc/GC8Y-2TMS; *see also* Lynn Westmoreland, *Better Know a District – Georgia's 8th – Lynn Westmoreland*, COMEDY CENT. (Jun. 14, 2006), https://perma.cc/VF7R-W2DH (describing one infamous instance of congressman's appearance on "Better Know A District," when Georgia Republican Lynn Westmoreland, who advocated for displaying Ten Commandments in U.S. Capital, appeared on segment and was challenged by Colbert during it to name the Commandments and could only come up with three).

35. David Sims, *Why Stephen Colbert Isn't Connecting*, ATLANTIC (Oct. 18, 2016), https://perma.cc/H7U9-PEG3 (for example, "The Colbert Report" directly parodied elements of "The O'Reilly Factor," but when O'Reilly guest starred on his show, Colbert did not break character to acknowledge the irony of the situation, even after O'Reilly himself tried brought it up).

Time's "100 Most Influential People" list in 2006 and 2012.[36] Colbert also started writing satirical books as his character, including *I Am America (And So Can You!)*, which topped the *New York Times*' Hardcover Nonfiction Bestsellers List for fourteen weeks.[37] This book was a further extension of the parody Colbert had created and continuously crafted in public, as he himself stated in an interview that he was parodying books by pundits like O'Reilly and Sean Hannity.[38] Colbert coined a word as his character, "truthiness," which became the Merriam-Webster's 2006 "Word of the Year."[39] He famously went so far in parodying conservative politicians and American political elections that he, in character, twice ran for President, co-hosted a significant political rally at the National Mall, and started his own super PAC, known as "Americans for a Better Tomorrow, Tomorrow," which raised over a million dollars for his mock-conservative persona's candidacy.[40] Colbert's parodic reporting on his own campaign increased national awareness of super PACs and earned him a Peabody Award.[41]

Although the "sweat of the brow" theory is no longer a basis or justification for copyright protection, it is important to consider that, as "The Colbert Report" took off, Colbert worked tirelessly to expand his increasingly-elaborate parody.[42] Soon, the books he wrote in character, the elections he ran in character, and all the years he spent staying in character both on- and off-screen, elevated the character from a self-important, deadpan parody of news anchors, to a highly delineated fictional persona with its own detailed backstory—a character inseparable from the actor who embodied it.[43] The persona was no longer simply a parody of conservative news anchors, but a heightened, fictional version of the real Colbert. It became a very delineated, human, alternate persona Colbert could embody to bring attention to political causes and issues he felt mattered.[44] As such, the fictional persona only

36. Brian Williams, *The 2006 TIME 100: Stephen Colbert*, TIME (May 8, 2006), http://content.time.com/time/specials/packages/article/0,28804,1975813_1975838_1976306,00.html; Garry Trudeau, *The World's 100 Most Influential People 2012: Stephen Colbert*, TIME (Apr. 18, 2012), http://content.time.com/time/specials/packages/article/0,28804,2111975_2111976_2111953,00.html.

37. THE EDITORS OF ENTERTAINMENT WEEKLY, THE MUST LIST: RANKING THE BEST IN 25 YEARS OF POP CULTURE (2015), *available at* https://perma.cc/E7Q4-HMYR.

38. *Meet the Author: Stephen Colbert*, BOOKS (Oct. 16, 2007) (download using iTunes).

39. Associated Press, *'Truthiness' Pronounced 2006 Word of the Year*, FOX NEWS (Dec. 8, 2006), http://www.foxnews.com/story/2006/12/08/truthiness-pronounced-2006-word-year.html.

40. Colbert I. King, *Stephen Colbert's Unfunny Run for President*, WASH. POST, Jan. 20, 2012, https://perma.cc/D33D-X6KQ; Brian Montopoli, *Jon Stewart Rally Attracts Estimated 215,000*, CBS NEWS (Oct. 31, 2010, 10:48 AM), https://perma.cc/Y6HL-VBSZ; Ryan J. Reilly, *Colbert's Super PAC Not Actually Called Colbert Super PAC*, TALKING POINTS MEMO (Jul. 1, 2011, 1:25 PM), https://perma.cc/2XNG-TERF; Melissa Yeager, *It's been 4 years since Stephen Colbert created a super PAC—where did all that money go?*, SUNLIGHT FOUNDATION (Sep. 30, 2015, 10:34 AM), https://perma.cc/QZ6Z-SBEL.

41. Rachel Leven, *Super-PAC craze sweeps the nation*, THE HILL (Feb. 16, 2012, 10:15 AM), https://perma.cc/U73T-KTK2; Courtney Subramanian, *Stephen Colbert's Super PAC Satire Lands Him a Peabody*, TIME (Apr. 5, 2012), http://perma.cc/SYW6-827K.

42. Feist Publ'ns, Inc. v. Rural Tel. Serv., 499 U.S. 340, 362–63 (1991).

43. Mike Sacks, *An Extended Interview with Former 'Colbert Report' Head Writer Allison Silverman*, SPLIT SIDER (Jan. 25, 2011), https://perma.cc/F77Z-MK54.

44. Dave Itzkoff, *Stephen Colbert, the Late Night Hope*, N.Y. TIMES, Sept. 6, 2015, at AR1, *available at* https://nyti.ms/2jBFrIQ ("If you have been watching closely, they say, the 'Stephen Colbert'

became more intertwined with Colbert's real persona, further closing the gap between the performer and the character.

No contracts between Colbert and Comedy Central are publicly available, and it will be assumed for the purposes of this Note that Colbert did not have a work-for-hire agreement with Comedy Central as to his character. Regardless, Colbert, not Comedy Central, created an extremely elaborate parody: a character that shares his name, physical appearance, and personality, in the sense that the character's is an extension of Colbert's comedy—he took the people and subjects of his jokes and made a character that gave himself a new medium for expressing his same comedy, now through the form of parody.[45] Nobody can portray "Stephen Colbert" other than Stephen Colbert. The character is exclusively his, because Colbert crafted it as an alternate persona for himself and as an expression of his views and comedy. Comedy Central should not legally be able to prevent Colbert's use of his fictional version of himself. Copyright law should provide Colbert exclusive rights to the character. More broadly, the law should provide the same protection for any individual who makes, and performs as, a fictional version of themselves. If such a creator-performer does not intentionally contract away rights, then his or her possessing anything less than the exclusive rights to his or her work would be inequitable.

B. HUMAN CHARACTER PORTRAYALS

1. The Current Structure

Under copyright law, a fictional character comprises three identifiable legal components: (1) name; (2) physical appearance; and (3) characterization (personality traits).[46] However, this becomes complicated when that fictional character is a human character portrayal, wherein an individual portrays a fictional character that is a fictionalized version of themselves—an alternate persona.[47] It is frequently the case that such individuals create and perform their characters before ever fixing them in copyrightable works.[48] While the Copyright Act does recognize fictional characters as copyrightable independent of the works in which they appear, the Act does not explicitly make fictional characters their own category of copyrightable subject matter, thus narrowing the types of fictional characters that are afforded copyright protection. This means that for these creator-performers to gain copyright in their own fictional personas, they must also create copyrightable works of authorship—to which they hold copyright—and incorporate their characters into

character who illuminated hypocrisy with a wink and a smirk is not too far removed from the man who will soon appear nightly outside of those quotation marks.").

45. Charles McGrath, *How Many Stephen Colberts Are There?*, N.Y. TIMES (Jan. 4, 2012), https://nyti.ms/2ojIV5Y.

46. David B. Feldman, *Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 CAL. L. REV 687, 690 (1990) (citing Michael V.P. Marks, *The Legal Rights of Fictional Characters*, 25 COPYRIGHT L. SYMP. (ASCAP) 35, 37–38 (1980)); D. Kerson, Comment, *Sequel Rights in the Law of Literary Property*, 48 CAL. L. REV. 685 (1960).

47. *Id.* at 701.

48. *Id.*

those works.[49] Courts today lean toward giving authors copyright protection in their characters separate from the works that they appear in, as long as they appear in a copyrightable work. But myriad creator-performers, ignorant of the copyright law, lose the opportunity to fully benefit from their own creations.[50] Given that federal copyright protection automatically subsists in original works of authorship that are fixed in any tangible medium of expression—a low bar—upon their creation, if Congress made a separate category of copyrightable subject matter for fictional characters, creator-performers would be better protected from unwittingly signing away their character copyrights.[51]

2. "Larry (Bud) Melman"

Colbert is certainly not the only late-night television talk show host who has sparred with his previous network over intellectual property rights after switching to a new network. One such instance also includes a "Daily Show" alum (Craig Kilborn), Comedy Central, and the replacement of a CBS late night talk show host.[52] Likewise, Conan O'Brien recently lost rights to his NBC characters, although in that instance he had contracted away his rights.[53] Here, it is assumed Colbert did not contract away his rights. Further, Kilborn and O'Brien were both hired to host preexisting talk shows and did not have carefully crafted fictional personas. Colbert obviously did, and he created a talk show specifically for his persona, the series itself deviating far from the norms of any established television format.

A more apt comparison to draw here is to David Letterman, who hosted NBC's "Late Night" from 1982 until 1993, when he left NBC in favor of hosting CBS's

49. 17 U.S.C. § 102(a).

50. Feldman, *supra* note 46, at 701 ("Under current law, character artists risk being robbed of their creations as well as their livelihoods. For instance, a producer may claim rights to another's 'pure' character by including it in a film or television program. The injustice in demanding that actor Paul Rubens incorporate his Pee Wee Herman character into a film or television show before he can establish any rights in the character is readily apparent.").

51. 17 U.S.C. § 104(a)–(b); *see supra* notes 7–22 and accompanying text.

52. Craig Kilborn, the original host of *The Daily Show*, left the series in 1998 to succeed Tom Snyder as host of CBS's *The Late Late Show*, and after much dispute with Comedy Central, was allowed by that network to bring one of the sketches he had created for *The Daily Show*, "Five Questions," with him to CBS, in exactly the same format and style; *see* Eriq Gardner, *Can Viacom Really Stop Stephen Colbert from Playing Stephen Colbert*, HOLLYWOOD REP. (July 28, 2016), https://perma.cc/2F9X-T6XS; *see also The Late Late Show with Craig Kilborn* (CBS television broadcast Nov. 16, 2000), *available at* https://www.youtube.com/watch?v=2uVunmprTrM (showing Kilborn's "5 Questions" segment on CBS, clearly in the same style and form as it was on Comedy Central).

53. O'Brien took over NBC's *The Tonight Show* in June 2009, after hosting the network's *Late Night* for sixteen years, only to be infamously fired in January 2010. Before his final show on NBC aired, O'Brien agreed to terms in the network's buyout of the remainder of his contract, specifically granting NBC the copyrights in the characters and sketches he had created on his two series on the network. *See* Bill Carter, *Fingers Still Pointing, NBC and O'Brien Reach a Deal*, N.Y. TIMES (Jan. 21, 2010), https://nyti.ms/2BBh3jV; *see also* Matthew Belloni & Nellie Andreeva, *O'Brien's NBC Departure Leaves Bits Behind*, HOLLYWOOD REP. (Jan. 16, 2010, 9:16 AM), https://perma.cc/G73L-SBPZ.

"Late Show."[54] When "Late Show with David Letterman" premiered, it was immediately clear his new series bore remarkable similarities to his old one. In one review of the premiere episode, the reviewer even noted, "[b]esides the comedy and laughter and familiar attitude of David Letterman's premiere 'Late Show' for CBS last night, there was an unmistakable message to NBC: If you want to make an issue over 'intellectual property', come and get us."[55] Letterman's CBS series featured many of the same sketches he made for NBC, unaltered, like "The Top 10." Letterman went so far as to make an on-air promise that his new series would hew closely to the old one.[56] This was despite NBC's many public warnings to Letterman the summer before his CBS series debuted that, should he reuse any of the same elements from his time at NBC, the network would pursue legal action.[57]

The recurring elements Letterman brought back from his NBC series onto CBS included not just bits and sketches, but one fictional character which he and one of his writers had specifically created and written for his NBC series: actor Calvert G. DeForest's popular "Larry (Bud) Melman."[58] As with Colbert, most viewers could not discern that Melman was a fictional character, believing he was a real person who Letterman found funny enough to feature on his series. In reality, DeForest was embodying a character he had conceived of with Letterman before NBC's "Late Night" premiered. Initially, DeForest and Letterman had a nondescript, stock description of the character, who was only meant to appear in a single 1982 sketch, as a kind of "man off the street." DeForest instead fleshed that character out, making it unique and memorable, and continued to develop distinct characteristics over the course of his many appearances on NBC.[59] Like Colbert's character, DeForest's became his own, very delineated fictional persona—a character that audiences, even as they came to realize that it was fictional, could not disassociate with DeForest.[60]

Lawyers for NBC informed DeForest that he could not use his same fictional persona on CBS, claiming copyright ownership in the character. Letterman paid NBC no heed. With NBC not backing down from its threats of legal action, CBS negotiated terms with NBC such that Letterman could use many of his previous segments, but with some alterations. The sketches would have to be renamed,[61] and

54. Bill Carter, *Letterman's 'Late Show' Scheduled to End in May*, N.Y. TIMES (Dec. 10, 2014), https://nyti.ms/2BwbOSJ; *see also* Mark Hariss, *David Letterman's Contract,* ENT. WEEKLY (Jan. 29, 1993, 5:00 AM), https://perma.cc/5X5T-LH2E.

55. Eric Mink, *Late Show with David Letterman Airs First Show in 1993*, N.Y. YORK DAILY NEWS (Aug. 31, 1993), http://www.nydailynews.com/entertainment/david-letterman-late-show-airs-cbs-1993-article-1.2214417.

56. *Id.*

57. *Id.*

58. Jennifer 8. Lee, *Calvert DeForest, 85, Larry (Bud) Melman on 'Letterman,' Dies*, N.Y. TIMES (Mar. 22, 2007), https://nyti.ms/2vxHQts.

59. *Id.*

60. *Id.*

61. Janet Maslin, *Review/Television; New Time, New Place, Same Humor*, N.Y. TIMES (Aug. 31, 199)3, *available at* http://www.nytimes.com/1993/08/31/arts/review-television-new-time-new-place-same-humor.html.

DeForest would have to make similar changes to his character, including giving the character a different name and identity.[62]

3. Infringement of Television Talk Show Copyrights in General

Had CBS failed to negotiate a deal with NBC, and had Letterman used sketches and characters from "Late Night" regardless, then NBC would have been in a good position to win a suit for copyright infringement against Letterman or CBS. Should Colbert ignore Comedy Central's warnings and continue to use his fictional character from "The Colbert Report" on CBS, Comedy Central could be in the same position as NBC was in 1993, with Letterman, in its ability to make its case. Just as NBC owned the copyright to Letterman's previous television series, so too does Comedy Central own the copyright to "The Colbert Report."[63]

Comedy Central has certain exclusive rights in its copyrighted series, including the right to reproduce and distribute, or to authorize the reproduction or distribution of, copies of "The Colbert Report."[64] These network rights might be limited by the format of the genre, in that television talk shows like NBC's "Late Night" and CBS's "The Late Show" largely involve the same elements of monologue, sketch, interview, and so on. Therefore, a network's claims to the copyrights in those elements could be rejected as an attempt to lay claim to *scènes à faire*. This is unlikely to be the case with Comedy Central, however, given how original "The Colbert Report" was in its selection and presentation of these elements; the series was arranged not as a traditional talk show, but as a parody of other series.[65] And yet, while Colbert's character, which he copied from Comedy Central's series, was clearly not talk show *scènes à faire*, neither were the elements Letterman copied from his former NBC talk show. Neither Colbert nor Letterman copied any elements common to the general television talk show format, and so neither could argue that their former networks were attempting to own noncopyrightable bits. Letterman clearly copied specific, original sketches and the fictional persona of Melman without NBC's consent, meaning NBC could have had a strong case against Letterman and DeForest had it

62. *Id.*

63. Under the Copyright Act, television series are audiovisual works, and for purposes of copyright law, television talk shows are also considered motion pictures, which are any audiovisual works (not only traditional films) that, upon viewing, leave on the viewer an impression of motion, and which are fixed in tangible form, which television talk-shows are because they are not broadcast live, but recorded on tape and then distributed over national broadcasts. 17 U.S.C. § 102(a). *See also* NIMMER ON COPYRIGHT, *supra* note 21, at § 2.09[A]-[D] (motion pictures are "series of related images, [which] when shown in succession, 'impart an impression of motion' . . . . A live television broadcast also cannot qualify as a motion picture—although it does impart an impression of motion, it is not 'fixed in any tangible medium of expression' . . . . Note that embodiment of the images in motion picture *film* is not necessary.").

64. 17 U.S.C. §§ 101, 106(1), (3).

65. NIMMER ON COPYRIGHT, *supra* note 21, at § 2.09 [A] (citing Baris/Fraser Enters. v. Goodson-Todman Enters. Ltd., 5 U.S.P.Q.2d 1887 (S.D.N.Y. 1988)) ("For even given a television game show composed entirely of stock devices, it is still possible that 'an original selection, organization, and presentation of such devices' could win copyright protection."); *see also* Itzkoff, *supra* note 44; Maslin, *supra* note 61.

not come to an agreement with CBS.[66] In much the same way, if Colbert continues using his fictional persona, Comedy Central could have a strong case against both him and CBS.

4. Possible Infringement of "Stephen Colbert" by Stephen Colbert

If Colbert chooses to ignore Comedy Central's warning, the network will likely sue him for copyright infringement—and win.[67] Comedy Central's claim would be that Colbert infringed its exclusive rights in its copyrighted "The Colbert Report." Specifically, Comedy Central would allege Colbert infringed its rights of reproduction (by copying his fictional persona), and public performance (by nationally transmitting his performance of that character).[68] Comedy Central would not struggle to prove that the fictional Colbert was a copyrightable character either because, in contrast to literary characters, courts have long protected visual characters like Colbert's.[69]

Even if Comedy Central structured its case around copyright protection of the Colbert character and not the series as a whole, it would still prevail. In applying the two-pronged approach to character copyright disputes, courts have used two different tests for the first prong, evaluating whether a specific character should be given copyright protection in the first place.[70]

Judge Hand laid down the majority rule in *Nichols v. Universal Pictures*, a Second Circuit case holding that only the copying of protected elements is relevant in a copyright dispute. Hand introduced his "delineation" test, finding that the more specifically delineated a character is and the more detailed the character's features, the more likely that character is to be suitable for copyright protection.[71] A second test was established in the Ninth Circuit with *Warner Bros. v. CBS*: characters in a copyrighted work were found to be vehicles for the story being told, not the story itself, and therefore not copyrightable.[72] No other courts adopted this test, and the

66. Mink, *supra* note 55.

67. Feldman, *supra* note 46, at 690–91 (citing Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946)) ("In determining whether a copyrighted work has been infringed, courts generally undertake a two-step inquiry: First, was the copyrighted work copied? Second, was the copying significant enough to constitute an 'improper appropriation of the copyrighted work?' A court will find improper appropriation when the copy is substantially similar to the original.").

68. 17 U.S.C. § 106.

69. *See* NIMMER ON COPYRIGHT, *supra* note 21, at § 2.12[A][3][b].

70. *See supra* note 21 and accompanying text; Kurtz (2013), *supra* note 24, at 442.

71. Nichols v. Universal Pictures, 45 F.2d 119, 121 (2d Cir. 1930) (although Hand posits that a character may be copyrighted independently of the plot of the work in which it appears, he warns, "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 . . . . It follows that the less developed the characters, the less they can be copyrighted."); *see also* NIMMER ON COPYRIGHT, *supra* note 21, at § 2.12[A][2].

72. Warner Bros. v. CBS, 216 F.2d 945, 950 (9th Cir. 1954) ("[E]ven if the Owners assigned their complete rights in the copyright to [the work], such assignment did not prevent the author from using the

Ninth Circuit has largely phased it out.[73] The Ninth Circuit has recently stated that, although characters "are ordinarily not afforded copyright protection . . . characters that are 'especially distinctive' or the 'story being told' receive protection apart from the copyrighted work."[74] According to Leslie Kurtz, "this liberates lower courts from a need to use or twist the 'story being told' test, as they can ignore that part of the newly articulated test and look to whether characters are especially distinctive."[75] The modern trend is toward greater protection. The delineation test clearly favors authors, whereas the "story being told" test has a higher standard, under which courts deny even unique characters copyright protection if they themselves are not "the story."[76] Although both tests have been criticized, and Congress has provided no bright-line rule on the matter, the predominant test today is clearly that of Hand.[77]

In our hypothetical fact scenario, the Ninth Circuit's "story being told" test would presumably not be applied, because "Late Night," where the infringing action by Colbert originates, and "The Colbert Report," the work at issue, were both filmed only in New York.[78] Moreover, while the alleged infringement is technically happening in the Ninth Circuit as elsewhere, both of the networks that own "Late Night" and "The Colbert Report," CBS and Comedy Central, respectively, are headquartered in New York, meaning there would be no necessary basis for this case to be heard in the Ninth Circuit.[79] Since only the Ninth Circuit has ever applied, and

characters used therein, in other stories. The characters were vehicles for the story told, and the vehicles did not go with the sale of the story.").

73. *See* Kurtz (2013), *supra* note 24, at 444 ("Outside the Ninth Circuit, the case has not been followed.").

74. Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003) (citing *Warner Bros. v. Columbia*, 216 F.2d 945).

75. *See* Kurtz (2013), *supra* note 24, at 447 (citing Bach v. Forever Living Prods. U.S., Inc., 473 F. Supp. 2d 1127, 1139 (W.D. Wash. 2007); JB Oxford & Co. v. First Tenn. Bank Nat'l Ass'n, 427 F. Supp. 2d 784, 800–04 (M.D. Tenn. 2006)).

76. *See* NIMMER ON COPYRIGHT, *supra* note 21, at § 2.12[A][3][a] ("'[T]he *Sam Spade* case' seems to envisage a 'story' devoid of plot, wherein character study constitutes all, or substantially all, of the work. There may be rare examples of such works but, for most practical purposes, that rule would effectively exclude characters from the orbit of copyright protection.").

77. In the Seventh Circuit, Judge Posner has criticized the "story being told test" as leading to incorrect decisions and instead favors a "distinctiveness test." Gaiman v. McFarlane, 360 F.3d 644, 661 (7th Cir. 2004) ("Although Gaiman's verbal description of Cogliostro may well have been of a stock character, once he was drawn and named and given speech he became sufficiently distinctive to be copyrightable. Gaiman's contribution may not have been copyrightable by itself, but his contribution had expressive content without which Cogliostro wouldn't have been a character at all, but merely a drawing."); *see also* Jenna Skoller, *Sherlock Holmes and Newt Scamander: Incorporating Protected Nonlinear Character Delineation into Derivative Works*, 38 COLUM. J.L. & ARTS 577, 581 n.25 (2015) (citing 1 MICHAEL D. SCOTT, SCOTT ON MULTIMEDIA LAW § 6.04 (rev. ed. 2014) ("The 'story being told' inquiry has been criticized as being too difficult to achieve, and the sufficient delineation test has been criticized as being too unclear.")).

78. Seth Mnookin, *The Man in the Irony Mask*, VANITY FAIR (Sep. 24, 2007, 12:00 AM), https://perma.cc/ZD4J-CT5W; *see* IMDB, *supra* note 2.

79. NIMMER ON COPYRIGHT, *supra* note 21, at § 12.01[A][1][a] ("The prototypical case invoking federal jurisdiction is an action for infringement of a statutory copyright. In such instances, federal jurisdiction is exclusive."); *see also* Arthur Young & Co. v. Richmond, 895 F.2d 967, 970 (4th Cir. 1990) (citing T.B. Harms Co. v. Eliscu, 339 F.2d 823, 828 (2d Cir. 1964) for the proposition that, "'An action 'arises under' the Copyright Act if and only if the complaint is for a remedy expressly granted by the Act,

no longer relies on, the "story being told" test, only the majority "delineation" test would be used. The court deciding this case, in applying the majority "delineation" test, would almost certainly find the character more than sufficiently delineated for copyright protection, and in turn, would find Colbert to be infringing Comedy Central's copyright in it.

5. Change is Necessary

Colbert created and performed his fictional persona prior to its appearance on television and has since fleshed the character out far past its stock description and the confines of television. Today, his character is an extension of his own personality. Nevertheless, Colbert can no longer legally play the part.[80] Had Colbert—or any artists in a similar position—known to author a separate, copyrightable work incorporating his character *prior* to signing a contract with Comedy Central, then Colbert would have kept the exclusive rights to his character, and the network would have no claim to his use of it outside "The Colbert Report." The law fails to protect detailed human character portrayals, leading performers like DeForest to unknowingly give up their rights to those characters.

III. THE SOLUTION

In an increasingly digitized world, more individuals have the chance to create, write, and star as their own fictional characters on their own series. Audiences will struggle to disassociate many of these characters with the actor playing them or might not even realize they are fictional, such as: (1) Colleen Ballinger's Youtube character ("Miranda Sings"); (2) the Netflix series *Haters Back Off!*, a docu-comedy about how that character (not Ballinger) first gained Youtube fame; and (3) Comedy Central's own *Nathan For You*, in which comedian Nathan Fielder plays a comedic version of himself, offering real businesses and people (intentionally poor) business tips and playing out the real interactions to parody business advisors and news shows.[81] Such series are the latest in a growing trend of programs featuring actors portraying heightened, fictionalized versions of themselves, with many often closely parodying their own real lives and relationships (the classic example being comedian and "Seinfeld" creator Larry David's HBO series "Curb Your Enthusiasm").[82] As these sorts of parodies become increasingly prevalent and lucrative—performers otherwise unknown to audiences gaining attention almost solely because of their self-

e.g. a suit for infringement or for the statutory royalties for record reproduction, . . . or asserts a claim requiring construction of the Act.'")).

80. The author continues to assume both that Colbert did not contract away the rights to his character, and that he did not recognize that Comedy Central's ownership of his series would necessarily include the ownership rights to his character.

81. Jasef Wisener, *Haters Back Off! Season 1 Review: Ready or Not, Miranda Is Here*, TVOM (Oct. 12, 2016), https://perma.cc/7B6U-QG5A; Alex Wong, *Nathan For You Season 3*, GQ (Oct. 14, 2015), https://perma.cc/Y79R-F69R.

82. *Curb Your Enthusiasm*, IMDB, https://perma.cc/8NX2-TN9Z (last visited Jan. 2, 2017).

parodies—the issue of Colbert's being able to own the copyright in his own fictional persona becomes ever more pressing.

The current alternate protections available to these performers—trademark, right of publicity, and fair use—do not suffice. The Copyright Act should be amended to include protection for this specific form of fictional character: a highly delineated, close-to-reality fictional persona that is, inherently, performable only by the individual who conceives it because the performer and character share a name, physical appearance, personality, or biographical information. This addition to the Act would not run the risk of establishing that other characters, ones which raise traditional copyright concerns like that of unauthorized use, would gain protection. Under an expressio unius interpretation, other types of characters would not be automatically copyrightable, only the aforementioned type of alternate authorial personal, which cannot be performed by anybody other than their authors.

A. FEDERAL TRADEMARK PROTECTION

1. The Law

Although Colbert may try to use federal trademark law to claw back the right to use his fictional persona, such efforts will likely be unsuccessful. Federal trademark protection can apply to any "word, name, symbol or device . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others."[83] The key issue in dealing with a contested use of a trademarked fictional character is whether that contested use is likely to cause consumers confusion as to the "origin, sponsorship, or approval of . . . goods, services, or commercial activities . . . ."[84] The likelihood of confusion, however, is not required for a finding of trademark infringement where the trademarked fictional character at issue is "famous," as the Colbert character certainly is.[85] Federal trademark protection does not automatically attach when a character is created, but rather depends upon a registrant's use, or good faith intention to use, that character in commerce.[86]

While the likelihood of confusion and commercial use requirements would not be an issue for Colbert if he had trademarked his persona and subsequently tried to show any infringement of it by others, it is an issue for unknown creator-performers. Those are the types, like DeForest, who might not have ever expected fame or broad recognition for their characters. They would not be able to protect their rights to their personas through trademark because "[t]rademark provides a legal home only for those well-known fictional characters whose names or visual images readily identify a single source of authorship and who have had significant continued exposure to the general public."[87] As the public is unlikely to associate a particular character with a

83. 15 U.S.C. § 1127.
84. 15 U.S.C. § 1125(a)(1)(A).
85. 15 U.S.C. § 1125(c)(1).
86. 15 U.S.C. §§ 1051(a)(1); 1051(b)(1).
87. Feldman, *supra* note 46, at 705 n.111 ("[T]rademark law does not provide adequate protection for characters").

particular author immediately, with any such association taking time and continued performances to create, until a creator-performer establishes such association with his fictional persona, "a court may deny trademark protection if the plaintiff cannot demonstrate a likelihood of consumer confusion."[88] Again, while this is not a concern for well-known characters' names and appearances, it is for unknown creator-performers who may lose rights to their personas after appearing on copyrighted series they do not own. Although courts have sometimes extended trademark protection to character appearances without consideration of whether the public would associate that character with its creator-performer, nevertheless, "the Lanham Act offers uncertain protections. Each claim is subject to the vagaries of the character's use, the rise and fall of the character's popularity, and the public's awareness of the character's creator."[89]

In *CBS v. DeCosta*, a plaintiff who created a fictional cowboy persona, Paladin, as whom he made public appearances at rodeos and parades, brought action against the defendant for trademark infringement, claiming CBS misappropriated his character and idea.[90] The plaintiff, who had given a substantial amount of details and personality to his fictional persona, had not previously sought any copyright protection in his character, and at the time, the Copyright Act had not yet been amended to make copyright ownership in a work of authorship automatic upon a work's creation. This meant the plaintiff could not sue for copyright infringement. The plaintiff had also become well known for handing out photos of himself, along with business cards with the image of a chess knight and featuring the words "Have Gun Will Travel."[91] Ten years after the plaintiff retired, the defendant began broadcasting a television series, "Have Gun Will Travel," starring a character named Paladin who wore a similar costume as the plaintiff and also handed out business cards "virtually—if not absolutely—identical with the plaintiff's."[92] The First Circuit recognized that the substantial similarity in the characters was too great for it to dispute the jury's finding that the defendant had clearly stolen the plaintiff's character.[93] However, the First Circuit would deny the plaintiff relief under trademark law, emphasizing that the plaintiff's limited use of the character now that he had retired, and the difference in the audience for the plaintiff's performances and the audience for the defendant's series, left little likelihood of confusion as to the source or sponsorship of the defendant's series.[94] In reality, trademark law is often insufficient for creator-performers to protect their fictional personas, as "this same fate is often suffered by trademark holders where the alleged infringer's use of a character involves less than a complete replica of the original character."[95] Another

88. *Id.* at 706.
89. *Id.* at 707.
90. CBS. v. DeCosta, 377 F.2d 315, 316 (1st Cir. 1967).
91. *Id.*
92. *Id.* at 316–17.
93. *Id.* at 317.
94. DeCosta v. CBS, 520 F.2d 499, 514 (1st Cir, 1975).
95. Kathryn M. Foley, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide*, 41 CONN. L. REV. 921, 948 n.205 (citing Universal City Studios v. Nintendo Co., 746

indication of trademark law's porous protection for these sorts of fictional personas is that courts often decline to protect such characters where "the alleged infringement involves less tangible qualities, such as physical characteristics and personality," and the exact types of personal qualities, like their own real names, that creator performers give to their fictional personas.[96]

The First Circuit also held in *CBS* that the character was copyrightable, and so because the plaintiff had failed to get such protection for it, he was not entitled to recover damages. The First Circuit likewise found that the plaintiff's act of distributing business cards and photos publicly, while in character, constituted a publication of his "writing," such that the 1909 Copyright Act's publication requirement for federal copyright protection had been satisfied.[97] Similarly though, since the plaintiff had not copyrighted the business cards or photos either, the publication triggered his character's lapse into the public domain under the 1909 Act, therefore making it lawfully available for the defendant to use.[98] While today it is no longer the case that authors must go through the formalities of a copyright publication and registration process in order to receive copyright protection in their works,[99] authors of fictional characters intended for human character portrayals, like Colbert, do not see copyright protections automatically vest in their works, and instead must take unnecessary additional steps of placing their creations within separate, fixed copyrightable works in order to protect them—steps that most would not be aware of in the first place.[100] The First Circuit viewed the plaintiff's Paladin persona as what he had reproduced, and "all of his appearances after he handed out his photos were arguably copies."[101] That the plaintiff might have protected his persona by copyrighting his photographs only further shows the need for statutory recognition of this specific character category.

2. Colbert's Trademark Argument

In order to qualify as a trademark under the Lanham Act, a character has to acquire distinctiveness, which can be either inherent or earned through use.[102] In other words, "[t]rademark can protect a fictional character only when the public identifies the character, or one of its elements, with one particular source."[103] While no court has yet expressly denied fictional characters the possibility of inherent

F.2d 112, 117 (2d Cir. 1984), which held "use of the Donkey Kong character was not likely to cause confusion with King Kong and Universal Studios.").

96. *Id.* at 948.

97. CBS v. DeCosta, 377 F.2d 315, 320 (1st Cir. 1967).

98. *Id.*; *see also* Feldman, *supra* note 46, at 702 n.94 ("Under the 1909 Act, copyrights did not vest upon creation of a work, but only upon its publication. Until publication, artistic creations were protected by state common law copyright. One of the major effects of the 1976 Act was to grant federal copyright protection upon creation, and not publication, of a work.").

99. Feldman, *supra* note 46, at 703.

100. *Id.* ("[B]oth the 1909 and 1976 Acts support the court's conclusion that DeCosta's character lacked copyright protection").

101. *Id.*

102. 15 U.S.C. § 1052(f).

103. Feldman, *supra* note 46, at 707.

distinctiveness, neither has a court found any character inherently distinctive. Instead, "courts have routinely required a showing of secondary meaning, limiting trademark protection to those fictional characters that have undergone a reasonable degree of circulation and established some level of public recognition."[104] In evaluating whether Colbert's character has the secondary meaning necessary for trademark protection, a court would evaluate its distinctiveness under a standard similar to that discussed in *Fisher v. Star Co.*, in which the New York Court of Appeals, finding that the cartoon characters at issue were entitled to protection, noted, "[t]he figures and names have been so connected with the respondent as their originator or author that the use by another of new cartoons exploiting the characters . . . would be unfair to the public and to the plaintiff."[105] Any court would certainly see that Colbert's character is unmistakably connected to the actor, and Colbert would have no issue satisfying the distinctiveness requirement.[106]

To receive trademark protection in his fictional persona, however, Colbert would also have to satisfy another statutory requirement, one that he likely would not be able to: his persona must "indicate the source of the goods."[107] The issue for Colbert here would be that "[c]ourts have interpreted this language to require that a trademark indicate only a *single* source of the good. This presents particular difficulty for fictional characters, as they are often simultaneously associated with a number of different sources, including authors, producers, sponsors and even themselves."[108] Colbert's persona became known to audiences through its use on "The Daily Show" and "The Colbert Report," series made by myriad writers, producers, directors, and other crew, as well as Comedy Central executives. If Colbert cannot prove that his persona identifies only himself, and not Comedy Central or anybody else working for Comedy Central, then he will not be able to receive trademark protections in it. Given that a "fictional character's ability to indicate a single source is often no more than a convenient fiction," should Colbert seek trademark protection in his persona, Comedy Central is likely to raise this concern that Colbert's persona does not identify only himself.[109]

104. Foley, *supra* note 95, at 941 (citing Christine Nickels, *The Conflicts Between Intellectual Property Protections When a Character Enters the Public Domain*, 7 UCLA ENT. L. REV. 133, 161–63 (1999)).

105. Fisher v. Star Co., 231 N.Y. 414, 433 (1921).

106. Foley, *supra* note 95, at 942 ("[T]he proponent of a trademark must satisfy the heavy evidentiary burden of acquired distinctiveness through widespread use and recognition.").

107. 15 U.S.C. § 1127.

108. Foley, *supra* note 95, at 942–43 (citing Gruelle v. Molly-'Es Doll Outfitters, 94 F.2d 172, 174 (3d Cir. 1937) ("finding that the Raggedy Ann doll was associated with the author, John B. Gruelle"); Patten v. Superior Talking Pictures, 8 F. Supp. 196, 197 (S.D.N.Y. 1934) ("finding that Frank Merriwell's character was associated with the author, Burt L. Standish"); Processed Plastic v. Warner Commc'ns, 675 F.2d 852, 856 (7th Cir. 1982) ("finding an association with the producers and the television show"); Wyatt Earp Enters. v. Sackman Inc., 157 F. Supp. 621, 624–25 (S.D.N.Y. 1958) ("finding an association with the producer and the television series"); Premier-Pabst v. Elm City Brewing, 9 F. Supp. 754, 760–61 (D. Conn. 1935) ("holding that the Old Maestro character is associated in the public mind with Pabst Blue Ribbon, the sponsor of the Old Maestro radio program"); DC Comics v. Unlimited Monkey Bus., 598 F. Supp. 110, 112, 115 (N.D. Ga. 1984) ("finding Clark Kent to be associated with Superman")).

109. Kurtz (1986), *supra* note 24, at 485.

In *Frederick Warne Co. v. Book Sales*, the Southern District Court of New York found that the plaintiff publisher could not earn trademark protection for characters illustrated in a widely esteemed book with which it was associated. Trademark protection was not available to the plaintiff absent proof that the public exclusively identified the illustrations with the plaintiff.[110] Similarly, in *Universal City Studios v. Nintendo Co.*, the same court held that the public did not identify the character of King Kong with any single source, as the character appeared in a multitude of different media, including in films and books owned by many different copyright holders.[111] The District Court there noted that, even if the public did not know the source of the King Kong character, it had to know that the character originated from only a single source, which it did not know, and therefore, the character could not be protected by trademark law.[112]

Given that Colbert's fictional persona earned recognition through "The Colbert Report," the public might not identify Colbert himself as the single source of that character. It seems fair to assume most do not know the history of Colbert's developing his persona, and likewise, even if the public identifies the character with Colbert as its performer, Comedy Central could raise legitimate doubts that the public identifies Colbert as its sole creator and source as well. One individual does not make a television series, and the public, even if it does not know the names of any of the writers or crew Colbert worked with on his Comedy Central series, very likely will recognize that they exist. Each episode of "The Colbert Report" lists many writers and crew in its credits, which might well have led the public to assume Colbert did not originate his character alone. Additionally, it is likely that much of the "The Colbert Report"-viewing public knows that: (1) Jon Stewart was heavily involved in the production of "The Colbert Report," as an executive producer; (2) Colbert first gained fame on Stewart's "The Daily Show"; (3) Colbert's series was clearly a clear spin-off of Stewart's; and (4) each episode of "The Daily Show" ended with Colbert making a brief appearance, in character, to speak with Stewart prior to "The Colbert Report" starting. It is conceivable that the public could identify Stewart as another source of Colbert's character. Thus, it is likely Colbert would not be able to fulfill trademark law's single source requirement.

A search of the USPTO registry of trademarks shows that nobody—neither Comedy Central nor Colbert—has registered "Colbert," "Stephen Colbert," or "The Colbert Report" for federal trademark protection. It might be that, in a contract between Colbert and Comedy Central, the actor assigned all of the trademark rights in his character to the network. Even assuming this is not the case, though, Colbert, as shown above, would likely not be able to successfully claim trademark ownership in his character if he attempted to do so.

The deficiency in trademark law's ability to protect fictional characters matters especially for creator-performers, like De Costa, who are not famous, or whose characters are not famous. In these instances, trademark law may actually harm the

110. Frederick Warne & Co. v. Book Sales, 481 F. Supp. 1191, 1195–98 (S.D.N.Y. 1979).
111. Universal City Studios v. Nintendo Co., 578 F. Supp. 911, 913–14, 923–24 (S.D.N.Y. 1983).
112. *Id.* at 925.

unknown creator-performers because, "[i]n cases where characters are less well known, courts are hesitant to restrict their use in new works of fiction."[113] When these unknown creator-performers have not fixed their personas into separate copyrighted works that they own, they often have no recourse, despite their creations sharing their own personal features and qualities, as courts "decline to extend protection in many cases where the alleged infringement involves less tangible qualities, such as physical characteristics and personality."[114] At the same time, should a network make use of these unknown creator-performers' characters, and should this use become widespread such that the network's version of the character is famous, then not only will the creator performers have no claim to the networks' characters, but due to trademark law, they may not even be allowed to continue using their original creations themselves. That is because, today, courts typically will enjoin unauthorized uses of famous fictional characters in new works, since "[t]rademark protection is extended to such well-known characters on the assumption that consumers are likely to believe that the creators of the first work created, or at the very least, authorized the second work."[115] The networks, if they have registered the characters for some trademark protections, will prevail.[116]

B. STATE LAW RIGHT OF PUBLICITY

Of course, real people cannot be protected by copyright, which is why there might be issues with these types of close-to-reality fictional personas. After all, humans cannot be the authors of themselves, as they are not works of authorship. But fictional characters like Colbert's, though they consist of elements of their creator-performers' real lives and identities, should, ultimately, be copyrightable fictional characters, owned by their authors, and not the networks that make them famous. And in many states, Colbert and those in similar disputes "do have the right to prevent the use of elements of their identity under the right of publicity."[117] This right, usually invoked by celebrities, is a protection against the use of one's name or likeness without their permission, and is used to prevent the appropriation of the commercial value of an individual's identity, including their name and likeness.[118] However, this right would likely not give Colbert and others any better claim to the use of their personas. First, the right varies greatly from state to state, with New York choosing not to protect personas under its relevant statute.[119] Second, these

113. Foley, *supra* note 95, at 947.

114. *Id.* at 948 (*citing* Smith v. Weinstein, 578 F. Supp. 1297, 1307 (2d Cir. 1984) ("declining to extend protection to a comedy writer who asserted that his name had acquired secondary meaning as the originator of a prison rodeo movie concept")).

115. *Id.* at 947 (*citing* Prouty v. NBC, 26 F. Supp. 265, 265–66 (D. Mass. 1939) ("enjoining the use of the character Stella Dallas in skits created by NBC")).

116. Feldman, *supra* note 46, at 708 ("[Trademark law] may legitimately protect only a very narrow range of characters . . . Because these causes of action place increased burdens of proof on the plaintiff, they are of little use in the vast majority of cases.").

117. Kurtz (2013), *supra* note 24, at 437 (citing J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2010)).

118. *Id.*

119. N.Y. Civ. Rights L. § 50.

sorts of fictional characters, because they look, sound, even embody the creator-performers portraying them, when they appear as part of a work copyrighted by another, like a network series, often create a "conflict between the rights of the copyright owner and the rights of the performer," as in Colbert's case.[120] With famous characters, like Colbert's, that tension and conflict is "magnified exponentially by the increasing use of *character merchandising* . . . . Because of the enormous economic potential of a fictional character, anyone who is in a position to profit from its exploitation is eager to assert control over its commercial use."[121] Colbert wanted to use his old character to help bring in more viewers to his CBS series, while Comedy Central wants full control of the market for that character.

The right of publicity enables celebrities to control the use of their identities and protect their own publicity values from overexploitation and resulting devaluation.[122] However, actors asserting rights of publicity in the personalities of their fictional personas are unlikely to find success. In *Wendt v. Host International, Inc.*, the actors from the NBC series "Cheers" sued a chain of "Cheers"-themed restaurants over the use of their characters from the series, as the chain made and used robots based on the actors' characters and portrayals.[123] The actors claimed that their likenesses were protected under California's right of publicity. These actors played characters that contained elements of some of their own human personas, in the same way that Colbert's character is a fictionalized version of his real identity and persona. The restaurant chain, defending its use, argued that it had received a license from Paramount Pictures, the producer and copyright owner of "Cheers", which had provided the chain with the exclusive right to use those characters from the series.[124] The Ninth Circuit held that the actor's suit was an attempt to "interfere with Paramount's right to exploit the *Cheers* characters. Section 301 of the Copyright Act preempts any state law 'legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright' . . . . The copyright to *Cheers* carries with it the right to make derivative works based on its characters . . . . The presentation of the robots in the *Cheers* bars is a derivative work."[125] Thus, the restaurant chain was allowed to continue using the characters.

Wendt shows that courts do not construe the right of publicity narrowly. If Colbert attempted to make a claim to use of his character, under the right of publicity, because they share the same name and likeness, a court would likely find for Comedy Central

120. Kurtz (2013), *supra* note 24, at 437 (citing J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2010)).

121. Peter K. Yu, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 CARDOZO L. REV. 355, 356–57 (1998).

122. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) ("The theory of the right [of publicity] is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity. . . . [A] celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used.").

123. Wendt v. Host Int'l, 197 F.3d 1284, 1285–86 (9th Cir. 1999).

124. *Id.* at 1286.

125. *Id.*

as the copyright owner in that character. The rationale behind this is that if, "by asserting their state claims, actors were able to interfere with the copyright holders' exclusive use of the copyrighted works, such interference would prevent copyright holders form obtaining monopoly profits . . . . [T]he state created right would prevent copyright holders from directing investment in areas where they could maximize their profits and would greatly reduce the incentives generated by the copyright scheme."[126] Clearly, the right of publicity is also an insufficient means of protection for Colbert.

C. FAIR USE

The Register of Copyrights has stated: "As is equally true in the case of detailed presentations of plot, setting, or dramatic action, we believe it would be unnecessary and misleading to specify fictional characters as a separate class of copyrightable works."[127] The concern identified by the Register is reflected by Judge Hand's warning in *Nichols* that if characters are their own category of copyrightable subject matter, too many characters and character descriptions will be copyrighted, such that it will be made more difficult for new authors to conceive of characters that would not be infringing on the rights of other authors in preexisting copyrighted ones.[128] The Second Circuit again expressed this concern a half-century later in *Warner Bros. v. ABC*.[129] As long as characters are not made broadly copyrightable, as they would be if they were specifically enumerated by the Copyright Act, fair use is a means of balancing the need to protect one's characters while also having them available for future authors to use equitably (meaning not substantially).[130]

With no real alternatives under copyright law, Colbert attempted to make a fair use of his Comedy Central character on his CBS show in the summer of 2016. Indeed, under current copyright law, fair use may represent his only colorable argument in favor of continuing to use his fictional persona. However, it is not an ideal solution, as Colbert is still left without a right to the actual persona that he created, delineated, was known as, and expressed himself by. And what is more, Colbert's use of the character on CBS is arguably not even a strong fair use.

126. Yu, *supra* note 121, at 385, 388.

127. *Quoted in* NIMMER ON COPYRIGHT, *supra* note 21, at § 2.12[A][1].

128. Nichols v. Universal Pictures, 45 F.2d 119, 121 (2d Cir. 1930).

129. Warner Bros. v. ABC, 720 F.2d 231, 240 (2d Cir. 1983) ("It is a fundamental objective of the copyright law to foster creativity. However, that law has the capacity both to augment and diminish the prospects for creativity. By assuring the author of an original work the exclusive benefits of whatever commercial success his or her work enjoys, the law obviously promotes creativity. At the same time, it can deter the creation of new works if authors are fearful that their creations will too readily be found to be substantially similar to preexisting works.").

130. 17 U.S.C. § 107 (fair use doctrine excludes from a copyright owner's exclusive rights the reasonable unauthorized appropriations from his or her original, copyrighted work by second author if second author uses appropriated material in way that advances benefit to public without substantially harming present or potential economic value of first work, with benefits to public including "purposes such as criticism, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.").

1. The Claim

Immediately after being warned by Comedy Central that he could no longer use his character, Colbert openly mocked their cease and desist letter on *The Late Show*, and then proceeded to bring out a new character, one created specifically for that occasion: "Stephen Colbert's identical twin cousin".[131] This new character, arguably an unauthorized derivative work, is very similar, if not identical, to his Comedy Central character.[132] Comedy Central, if it brought suit, could use the precedent from *Warner Bros.*, in which the Second Circuit heard a dispute over the defendant's television series, "The Greatest American Hero."[133] There, the plaintiff alleged that series to be a rip-off of *Superman*, to which the plaintiff owned copyright. The Second Circuit held that the defendant was not infringing the plaintiff's film and television rights to the Superman character, because "[s]tirring one's memory of a copyrighted character is not the same as appearing to be substantially similar to that character, and only the latter is infringement."[134] Comedy Central can use this case to support the claim that Colbert's new character not only stirs up memories of the old, copyrighted one, but is substantially similar to it and therefore constitutes infringement.[135]

The right to parody also falls under fair use.[136] Colbert, for his part, could use *Keeling v. Hars*, a Second Circuit case concerning the plaintiff's theatrical parody of *Point Break*, which the jury agreed was a fair use of the underlying film.[137] At issue was the defendant's unauthorized use of that parody, leading the plaintiff to use fair use not as a defense to a copyright infringement claim, but as the basis for an affirmative claim against the defendant for that unauthorized use.[138] One key to any parody is originality, which is possible even if plaintiff's contributions to the original work consisted solely of uncopyrightable elements like stage directions and theatrical devices.[139] Colbert can use this case to point to how his new character, though objectively very similar to his old one, is intended to be a parody of a parody—a

131. Tony Maglio, *Stephen Colbert Can't Use 'Colbert Report' Character on CBS, Lawyers Say*, THEWRAP (Jul. 28, 2016, 7:41 AM), https://perma.cc/ZVP7-NLJ9.

132. Feldman, *supra* note 46, at 704 ("Under the current law, the second expression of a character in the same medium as the original expression is a derivative work of that character's original expression.").

133. Warner Bros. v. ABC, 720 F.2d 231, 235 (2d Cir. 1983).

134. *Id.* at 242.

135. Nichols v. Universal Pictures, 45 F.2d 119, 121 (2d Cir. 1930).

136. Yu, *supra* note 121, at 399; *see also* Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992) ("[P]arody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law.").

137. Keeling v. Hars, 809 F.3d 43, 45 (2d Cir. 2015) (the plaintiff added "jokes, props, exaggerated staging, and humorous theatrical devices to transform the dramatic plot and dialogue of the film into an irreverent, interactive theatrical experience.").

138. *Id.*

139. *Id.* at 49–51 (citing Feist Publ'ns v. Rural Tel. Serv., 499 U.S. 340, 345 (1991) ("[C]opyright law protects . . . creative choices made in selecting and arranging even un-copyrightable elements.").

parody of Comedy Central's famous character.[140] The two characters have different backstories and act somewhat differently, with the CBS character being deliberately more conservative than the Comedy Central one, such that it is critical of the Comedy Central character, seeing it as too liberal.

2. The Fair Use Claim

If Comedy Central did bring a copyright infringement suit against Colbert, and the actor made an affirmative claim of fair use, the court hearing the case would consider the four factors in the fair use test established by the Supreme Court in *Campbell v. Acuff-Rose Music*, where a rap song parodied the plaintiff's copyrighted song, "Pretty Woman."[141] In conducting its review of the factors, the court would not treat any single factor as dispositive of a finding of fair use or a lack thereof, and all four would have to be considered and weighed against one another.[142]

The first fair use factor is the purpose and character of the derivative use, including whether it is of a commercial nature or for nonprofit educational use. The issue with this first factor is whether the challenged use of a copyrighted work is transformative or adds something new that alters or changes the meaning or message of the original work.[143] Parody has been held to always have some transformative value, and like the author of commentary or criticism, the author of a parody can claim fair use.[144] Because Colbert's CBS character shares the same physical appearance and personality as his Comedy Central character, his use of the Comedy Central character is not very transformative. However, the threshold inquiry for a court reviewing Colbert's parody of his former character for the first factor is to consider "whether a parodic character may reasonably be perceived" from it.[145] Colbert, prior to presenting this new character on CBS, prefaced its reveal with a humorous retelling of how Comedy Central contacted him to inform him he could not make use of his Comedy Central character; the purpose behind this CBS character, it was immediately clear, was to make light of the situation and of Comedy Central's demands.[146] Notwithstanding that, should Colbert bring this character

140. *See also* L.L. Bean, Inc. v. Drake Publrs., 811 F.2d 26, 34 (1st Cir. 1987) ("[D]enying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression.").

141. Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

142. *Id.* at 574–78.

143. *Id.* at 578–79 (citing Folsom v. Marsh, 9 F. Cas. 342, 348 (No. 4,901) (CCD Mass. 1841) ("The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation ('supplanting' the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'")).

144. *Id.* at 580 ("If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.").

145. *Id.* at 582.

146. McGrath, *supra* note 45.

back, if he would not be directly parodying his own, previous self-crafted persona, a fair use parody defense would not work.[147]

The second fair use factor under *Campbell* is the nature of the infringing work.[148] While this second factor calls for recognition by courts that some works are closer to the core of the intended copyright protection of the original than others—making fair use harder to show when the former works are merely precisely copied—the caveat here is that parodies, of course, almost invariably copy publicly-known expressive works.[149] Here, Colbert did not reuse any dialogue, stories, or sets from "The Colbert Report," and did not claim to be the same character, creating a new character with a novel story and new dialogue.[150] This also speaks to the third factor, which looks at the amount and importance of what has been used.[151] Colbert, in the role of his new CBS fictional persona, is playing a very similar character to that of his Comedy Central fictional persona, but he does not actually reproduce anything identifiable—name, costume design, backstory, intonations, or actual dialogue—from that Comedy Central character.[152]

For a parody to be recognizable and successful, to some extent it must aim to parody the "heart" of the original work.[153] As such, Colbert would argue to a court that by playing this new fictional persona, he is parodying his former fictional persona. He created both personas and they both blur the lines between his actual personality and identity and the characters'. The new fictional persona's purpose is transformative in that, where his first character was lampooning a large breadth of people and things, Colbert's new one only targets that first character with its ridicule. In so doing, Colbert could argue that he is getting directly at the heart of the original fictional persona without actually copying from it—dialogue, backstory, name, purpose, or otherwise.

Lastly, the fourth factor would require the court to analyze the effect of Colbert's new persona on the market for the original.[154] Comedy Central today can no longer generate any money from Colbert's character's traditional, original use, which was

147. Campbell v. Acuff-Rose Music, 510 U.S. 569, 597 (1994) ("The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well)."); *see also* Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992) ("By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist.").

148. *Campbell*, 510 U.S. at 586.

149. *Id.*

150. McGrath, *supra* note 45.

151. *Campbell*, 510 U.S. at 586–87.

152. McGrath, *supra* note 45.

153. *Campbell*, 510 U.S. at 586 (citing Folsom v. Marsh, 9 F.Cas. 342, 348 (No. 4,901) (CCD Mass. 1841) ("The third factor asks whether 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole' . . . are reasonable in relation to the purpose of the copying. Here, attention turns to the persuasiveness of a parodist's justification for the particular copying done")); *see also* White v. Samsung Elec. Am., 989 F.2d 1512, 1518 (9th Cir. 1993) (Kozinski, J., dissenting) ("It's impossible to parody a movie or a TV show without at the same time 'evoking' the 'identities' of the actors."); Fisher v. Dees, 794 F.2d at 434–35 n.2 (9th Cir. 1986) ("To 'conjure up' the original work in the audience's mind, the parodist must appropriate a substantial enough portion of it to evoke recognition.").

154. *Id.* at 590.

as the center of *The Colbert Report*, which has long end its run. But the derivative uses for the character still likely make Comedy Central a lot of money, from products the company manufactures, or might manufacture, bearing the Colbert character's name and likeness,[155] to revenue it generates from sales of old episodes of "The Colbert Report" through iTunes and similar platforms, including DVDs.[156] Colbert's new character, a parody of his Comedy Central one, if he were to continue to occasionally perform as it on CBS, assuming its use continued to be limited to infrequent, short segments poking fun at his old character, would likely neither affect Comedy Central's market for the original character nor its market for preexisting or potential derivative uses of that original character.[157] Colbert would likely argue that this was the case because the new character is different than the old one and is not the center of its own series, let alone one that would compete for ratings, or any sorts of sales, with "The Colbert Report," and he would not actually be reproducing his former persona or doing anything similar in terms of an ongoing public performance staying in character.

Nevertheless, copyright infringement has been found in cases involving characters with many fewer similarities between them than Colbert's CBS character and his Comedy Central one.[158] To counter Colbert's fair use defense, Comedy Central could use further case precedents that expand on Colbert's burden of proving a fair use defense, demonstrating where reasonable doubt might be raised as to Colbert's argument. For one, if Colbert brings back his character and does anything resembling the kind of fake news delivery for which his Comedy Central-owned character became known, or if he uses that character to do anything other than ridicule Comedy Central and meet its stated purpose as a parody, then Colbert's fair use defense would likely fail.[159] Thus, in considering the fourth fair use factor (the effect of Colbert's use of his new character on Comedy Central's market for the

155. *The Colbert Report–Episode Guide, supra* note 1.

156. Scott Collins, *Stewart's exist is no joke at Comedy Central*, L.A. TIMES (Feb. 11, 2015, 5:10 PM), https://perma.cc/3R2J-56GX.

157. *Campbell*, 510 U.S. at 590 (citing Harper & Row, 471 U.S. 539, 569 (1985) ("It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original . . . The enquiry 'must take account not only of harm to the original but also of harm to the market for derivative works.'").

158. Campbell v. Acuff-Rose Music, 510 U.S. 569, 587–88 (1994) (in reference to *Harper*, ("[a] work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.")); *see also* NIMMER ON COPYRIGHT, *supra* note 21, at § 2.12[3][b] ("[A] visual similarity (even if not completely identical in appearance) plus a similarity in character traits may prove sufficient to infringe, even when the names of plaintiff's characters differ from defendant's.").

159. Dr. Seuss Enters., v. Penguin Books., 109 F.3d 1394, 1401 (9th Cir. 1997) (citing *Campbell*, 510 U.S. at 580, the Ninth Circuit held plaintiff's published book, which adapted the image and verse of defendant's copyrighted *The Cat in the Hat* to recount O.J. Simpson trial for children, could not be found a fair use parody because, "[a]lthough *The Cat NOT in the Hat!* does broadly mimic Dr. Seuss' characteristic style, it does not hold his style up to ridicule. The stanzas have 'no critical bearing on the substance or style of' *The Cat in the Hat.* [The authors] merely use the Cat's stove-pipe hat, the narrator ('Dr. Juice'), and the title (*The Cat NOT in the Hat!*) 'to get attention' or maybe even 'to avoid the drudgery in working up something fresh.'")).

original character): while Colbert will likely show that the use would have no direct impact as things currently stand, if Colbert were to begin using the new character to draw audiences to his new series who want to see him portray his former character, then this too will weigh against a court's finding of fair use.[160]

Ultimately, then, Colbert playing "Stephen Colbert's Identical Twin Cousin" is not an appropriate solution to the issue of his not being able to use his former, fictional persona. The reality is that if Comedy Central wanted to bring suit against Colbert for copyright infringement in the event that he continued to use this new character, the network might very well win. And even if his use of "Stephen Colbert's Identical Twin Cousin" can lawfully be seen as a fair use parody, Colbert still will not actually be able to use the fictional persona that he so completely delineated and might have been able to protect his rights in had he known about current copyright law and its lack of any individual category for characters. Under the fair use doctrine, instead, he would be left just to play a parody of that character, no longer able to express his views and comedy in the same way, as he would always have to gear his persona to one mocking his prior persona, thereby leaving the character fundamentally different than what it was before and during Colbert's time on Comedy Central.

D. POLICY DICTATES THE CREATION OF A NEW CATEGORY OF COPYRIGHTABLE SUBJECT MATTER

While there might be a trend toward finding characters copyrightable in infringement actions, under current copyright law, Colbert and those similarly situated have no legal recourse to protect the use of their own fictional personas if they, as is often the case, unwittingly fail to secure copyrights in them. If Colbert were to ignore Comedy Central and bring back his character onto CBS, such use would clearly be copyright infringement and give Comedy Central cause to bring suit against him.[161] Other approaches to Colbert's attempt to play his own fictional persona again also prove unsuccessful or dissatisfying.

It is unlikely that, if a court reviewed Colbert's case, it would provide Colbert protection and ownership of his character alone given that Comedy Central owns the series the character was a part of.[162] Colbert could also try to argue "The Colbert Report" was not a joint work. In *Burrow-Giles*, the photographer got the copyright protection in the work despite not personally creating the subject of the disputed

160. MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981).

161. *See* Feldman, *supra* note 46, at 704 ("Under the current law, the second expression of a character in the same medium as the original expression is a derivative work of that character's original expression. If the original expression is in a copyrightable work, then copying the character may infringe that work's copyright.").

162. NIMMER ON COPYRIGHT, *supra* note 21, at § 808.3(D) (describing a motion picture under the Copyright Act as a "single, integrated work, [the] individual elements [of which], "including its production, direction, cinematography, performances, and editing . . . cannot be registered apart from the work as a whole. For example, one actor's performance in a television show may not be registered apart from the rest of the motion picture."); *see also* Feldman, *supra* note 46, at 704 ("The law, however, makes no specific provisions for the protection of fictional characters as entities apart from a copyrighted work.").

photograph.[163] Colbert can claim that, because he exercised a great deal of control over the entire Comedy Central show—and especially as to his character, from dialogue to mannerisms and characteristics—that he rightfully should own the copyright to his fake persona. But this would not likely work either, given that Colbert alone did not write, produce, direct, film and do all else necessary for every episode of "The Colbert Report" to be completed. This would be akin to the recent case of *Garica v. Google*, where the court held that the plaintiff was an employee on the 2012 film, *Innocence of Muslims*, and was not the copyright owner of her own acting performance because her performance was a contribution to an integrated work (a motion picture) and not itself a work of authorship.[164] While Colbert exhibited a lot more control over his work than could the plaintiff in *Garcia*, he was still similarly contributing to an integrated work that he did not own and that he could not exclusively make significant decisions for. Thus, Colbert would be without options if he tried to pursue ownership in his own fictional persona.

IV. CONCLUSION

Congress intends for the Copyright Act to promote creativity, and both it and the courts have felt that characters need not be given their own category of copyrightable subject matter; they are protectable from infringement, where need be, if they are delineated enough. While this may be the case for characters generally, in our changing media landscape, in the case of a character like Colbert's—a human character portrayal that is intended as exclusively his own, a fictional persona mixing fiction and reality—Congress's view is antiquated and wrong.[165] For Congress to continue without an amendment to the Copyright Act making these specific, increasingly prominent types of characters, these close-to-reality fictional personas, their own category of copyrightable subject matter, especially when the creator-performers portraying them can make many uses of their personas outside of the copyrighted formats they appear on, will only stifle creativity.[166]

163. Burrow-Giles Lithographic v. Sarony, 111 U.S. 53, 54 (1884).

164. Garcia v. Google, 766 F.3d 929, 933–34 (9th Cir. 2014); *see also* NIMMER, *supra* note 21, at § 2.12[B][3] ("[P]erformances should be considered to qualify, at most, as contributions to larger works (such as motion pictures and sound recordings) that themselves form the basis of copyright's subject matter.").

165. Feldman, *supra* note 46, at 704 ("There are many human audio/visual characters . . . created prior to any inclusion in a 'copyrightable work' . . . [and] current copyright law ignores them. . . . This void ignores the realities of the rapidly expanding world of entertainment.").

166. *Id.* at 704 ("Popular characters will often make their way into presequels, sequels, remakes, spinoffs, and merchandise. The character alone is valuable independent of any 'work' in which it appears. An original character expression should not be vulnerable to unfettered duplication merely because it has not appeared in a copyrightable 'work.'").