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Clay Calvert

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# Legal Lessons in On-Stage Character Development: Comedians, Characters, Cable Guys & Copyright Convolutions

Clay Calvert⊗

## ABSTRACT

*This article addresses the trials and tribulations faced by stand-up comedians who seek copyright protection for on-stage characters they create, often during solo performances. The article initially explores the current, confused state of the law surrounding the copyrightability of fictional characters. The doctrinal muddle is magnified for comedians because the case law that addresses the fictional character facet of copyright jurisprudence overwhelmingly involves characters developed within the broader framework of plots and storylines found in traditional media artifacts such as books, comic strips, cartoons and movies. The article then deploys the 2014 federal court ruling in *Azaria v. Bierko* as a timely analytical springboard for addressing comedic-character copyright issues. Finally, the article offers multiple tips and suggestions for comedians and actors seeking copyright protection in their on-stage characters.*

## I. INTRODUCTION

*The Whacky World of Jonathan Winters* aired on television from 1972 through 1974.<sup>1</sup> The humor of its star, Jonathan Winters,<sup>2</sup> came primarily “from his construction of outrageously fantastic situations and characters.”<sup>3</sup> Those characters included the Oldest Airline Stewardess<sup>4</sup> and, perhaps most notably,

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⊗ Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks students Kevin Bruckenstein, Karilla Dyer, Alexa Jacobson, Tershone Phillips and Brock Seng of the University of Florida for their research, suggestions and editing assistance that contributed to this article.

1. Eric Schaefer & Dan Streible, *Archival News*, 40(4) *Cinema J.* 104, 104 (2001).
2. Winters died at age 87 in April 2013. William Grimes, *Jonathan Winters, Unpredictable Comic and Master of Improvisation, Dies at 87*, *N.Y. Times*, Apr. 13, 2013, at A19.
3. Gregory C. Elliott, *Self-Esteem and Self-Consistency: A Theoretical and Empirical Link Between Two Primary Motivations*, 49(3) *Soc. Psychol. Q.* 207, 210 n.3 (1986).
4. Cassandra McGovern, *Something Special in the Air*, 48(4) *Mass. Rev.* 636, 642 (2007).

Maude Frickert, “a sweet-seeming grandmother with a barbed tongue and a roving eye.”<sup>5</sup> Among other characters created by Winters were an overgrown child named Chester Honeyhugger,<sup>6</sup> “B. B. Bindlestiff, a small-town tycoon, and Piggy Bladder, football coach for the State Teachers’ Animal Husbandry Institute for the Blind.”<sup>7</sup>

A 1981 *New York Times* article labeled and lauded Winters as “probably the most wildly inventive comedian working today.”<sup>8</sup> In 1999, he garnered the Kennedy Center Mark Twain Prize, with the *Washington Post* noting then that his “free-form characters, like the acerbic, disheveled Maude Frickert, became artistic benchmarks for a generation of comics.”<sup>9</sup> Winters was the idol, hero and mentor of the late comedian and actor Robin Williams, who died in August 2014.<sup>10</sup> Indeed, as the *Los Angeles Times* recently observed, “like Winters, Williams was known for his tack-sharp comedy, chameleon-like personas and facility with voices.”<sup>11</sup>

Today, of course, many comedians create on-stage characters and perform routines under those personas. Daniel Lawrence Whitney, for example, may come to mind for some readers. He “has built a career on an alter-ego, a good ol’ redneck boy who favors plaid shirts with the sleeves cut out, always wears a gimme cap and likes to shout, ‘Git-r-done!’”<sup>12</sup> Whitney’s character is Larry the Cable Guy.<sup>13</sup> Larry is Whitney’s imaginative invention, brought to life by the Nebraska native when he developed “the Southern accent for his stand-up act after moving to Georgia for college.”<sup>14</sup> And Larry the Cable Guy is clearly an act. As one reporter remarked, “Larry is the stage creation of a gifted comedian. Out of the spotlight, the Nebraska-born Whitney is a low-key,

5. Grimes, *supra* note 2, at A19.

6. Robin Williams, *A Madman, But Angelic*, N.Y. Times, Apr. 15, 2013, at C1.

7. Grimes, *supra* note 2, at A19.

8. John C. O’Connor, *TV Weekend; Jonathan Winters, Derby and a Texas Murder*, N.Y. Times, May 1, 1981, at C31.

9. Jacqueline Trescott, *Prized Funnyman; Kennedy Center to Honor Jonathan Winters*, Wash. Post, Apr. 30, 1999, at C1.

10. See Maria Puente, ‘Tortured Genius’ Mystery Takes Yet Another Sad Turn, USA TODAY, Aug. 14, 2014, at 1D (noting that Winters “was known to be Robin Williams’ hero and mentor”); David Wiegand, *How Robin Williams Changed TV Forever*, S.F. CHRON., Aug. 12, 2014, at A7 (observing that Williams worked “with his idol, Jonathan Winters,” on the television series *Mork & Mindy*); David Zurawik, *Williams’ Talent Soared on Wild Improvisation*, BALTIMORE SUN, Aug. 12, 2014, at 8A (contending that Williams “transformed the silliest of sitcoms into a dazzling weekly showcase of jaw-dropping improvisation and lightning-quick verbal dexterity worthy of his idol, Jonathan Winters”).

11. Steven Zeitchik, *The Emmys, ‘BAD’ DONE GOOD; Crystal recalls his lost friend*, L.A. TIMES, Aug. 26, 2014, at D1.

12. Gail Pennington, *GIT-R-DONE: St. Louis is Fodder for ‘Only in America with Larry the Cable Guy,’* ST. LOUIS POST-DISPATCH, June 14, 2013, at G31.

13. *Id.* See also Gloria Goodale & Daniel B. Wood, *The Jay Leno Show and the Rise of Political Humor*, CHRISTIAN SCI. MONITOR, Sept. 13, 2009, at 99 (observing “that Larry the Cable Guy, the stage name of stand-up comic Daniel Lawrence Whitney, whose redneck character has a huge following online, made \$21 million in 2006”).

14. Rob Lowman, *All Revved Up*, DAILY NEWS (Los Angeles), June 24, 2011, at L1.

articulate guy who spouts off words such as ‘differentiate.’ He channels his inner Goober for yuks, but he’s a seasoned, calculated performer.”<sup>15</sup>

Are stand-alone comedic characters—like those for which

Winters was famous and Whitney now handsomely profits<sup>16</sup>—copyrightable? The rub is that these characters are *not* formed as elements or components of larger copyrightable works such as movies, plays or books,<sup>17</sup> but rather are invented, developed and performed as free-standing, on-stage personas that exist independent of larger “original works of authorship.”<sup>18</sup> If they are copyrightable, and assuming that audio-visual recordings of comedians performing them are made such that they become fixed in a tangible medium of expression,<sup>19</sup> then how finely tuned and nuanced—how developed and detailed—must those characters be to secure copyright protection and, in turn, to stop other performers from essentially doing their own versions? These questions are at the heart of this article.

As an analytical starting point, one must recognize that character, as Professor Rebecca Tushnet points out, “is not a type of work listed in the Copyright Act.”<sup>20</sup> Despite this statutory omission, courts hold that intellectual property rights—namely, copyright protection—may exist in fictional characters, particularly those that “are especially distinctive”<sup>21</sup> and where “the character was distinctively delineated by the author.”<sup>22</sup>

Not all fictional characters, however, are protected. As famed federal judge Learned Hand<sup>23</sup> wrote more than eighty years ago in a seminal case regarding characters in a theatre play, “the less developed the characters, the less they can be copyrighted.”<sup>24</sup> Under this maxim, as one federal court recently reiterated,<sup>25</sup> so-called stock characters are not copyrightable.<sup>26</sup> But

15. Mark De la Vina, *Larry the Cable Guy Gets It Done*, *San Jose Mercury News* (Cal.), May 14, 2005, at 1E.

16. See John J. Moser, *Larry the Cable Guy is Still ‘Gittin’ R Done*, *PITT. POST-GAZETTE*, Jan. 9, 2014, at W7 (noting that Larry the Cable Guy is “a lucrative franchise” for Whitney, and adding that “seven of his nine comedy albums have hit No. 1 on Billboard’s Comedy chart, and three have gone gold”).

17. See 17 U.S.C. § 102 (2014) (identifying motion pictures, dramatic works and literary works as among the types of authorship to which copyright protection can adhere).

18. 17 U.S.C. § 102(a) (2014).

19. See 17 U.S.C. § 102(a) (2014) (providing that copyright protection requires original works of authorship to be “fixed in any tangible medium of expression”).

20. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 *Harv. L. Rev.* 683, 750 (2012).

21. *Olson v. Nat’l Broad. Corp.*, 855 F.2d 1446, 1452 (9th Cir. 1988) (citing *Warner Bros., Inc. v. American Broadcasting Co., Inc.*, 720 F.2d 231 (2d Cir. 1983) in finding that copyright protection was available for the character of Superman although defendant’s parody did not infringe copyright).

22. *Warner Bros., Inc. v. Film Ventures Int’l*, 403 F. Supp. 522, 525 (C.D. Cal. 1975) (citing *Nimmer on Copyright* § 30).

23. See generally *GERALD GUNTHER*, *Learned Hand: The Man and the Judge* (1994) (providing an excellent biography of Learned Hand).

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

25. See *DaVinci Editrice S.R.L. v. Ziko Games LLC*, 2014 U.S. Dist. LEXIS 110139, \*24

drawing bright legal lines here is not easy. As Professor Tushnet writes, “the nature of copyright in characters has puzzled courts and commentators for so long.”<sup>27</sup> Professor Sonia Kaytal echoes this sentiment, asserting that there is “a host of confusion, particularly where the protection of literary characters is concerned.”<sup>28</sup>

The doctrinal muddle is magnified for comedians. That’s because the case law addressing the fictional character facet of copyright jurisprudence overwhelmingly involves characters created and developed within the broader framework of plots and storylines found in traditional media artifacts such as books, comic strips, cartoons and movies.<sup>29</sup> For instance, the copyrighted character E.T. was developed within the larger context of the movie *E.T. The Extra-Terrestrial*.<sup>30</sup> What, then, does it take today for stand-up comedians and actors to successfully assert copyright protection in non-literary characters they create during and in preparation for, live, on-stage performances?

The issue, although rarely litigated or considered in law journals,<sup>31</sup> is no laughing matter. The 2014 ruling by a federal court in *Azaria v. Bierko*<sup>32</sup>

(S.D. Tex. Aug. 8, 2014) (observing that “stock characters (stereotypical archetypes that audiences may readily recognize) are not entitled to protection”).

26. See *infra* notes 55–66 and accompanying text (addressing stock characters in greater detail).

27. Tushnet, *supra* note 20, at 750.

28. Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 *Am. U.J. Gender Soc. Pol’y & L.* 461, 499 (2006).

29. See *Warner Bros. Entm’t, Inc. v. X One X Prods.*, 644 F.3d 584, 597 (8th Cir. 2011) (asserting that “[i]t is clear that when cartoons or movies are copyrighted, a component of that copyright protection extends to the characters themselves, to the extent that such characters are sufficiently distinctive”); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754 (9th Cir. 1978) (describing “a series of cases dating back to 1914 that have held comic strip characters protectable”).

30. *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 1982 U.S. Dist. LEXIS 15942 (C.D. Cal. Sept. 20, 1982) (noting that, Steven Spielberg, who directed and is responsible for the success of the film “E.T. The Extra Terrestrial,” retains control over the quality of “E.T.” items in order to maintain a consistent image and appeal for the “E.T.” character).

31. The author located one law journal article, now more than a dozen years old, that addresses “human performance characters” and which notes, in passing, that “[h]uman characters are often created and presented by stand-up comedians or stage performers.” Mark Bartholomew, *Protecting the Performers: Setting a New Standard for Character Copyrightability*, 41 *SANTA CLARA L. REV.* 341, 343 (2001). Note that this article does not analyze comedic characters in any detail—it focuses on wrestling characters and ultimately concludes that “the current law of copyright is very unsettled and vague, thus making it difficult to know when a character has been sufficiently developed so as to be copyrightable.” *Id.* at 377. The author also located one student-authored note regarding a related but different topic, namely copyrighting improvisational performances and the problems of fixation related thereto. See also Gregory S. Donat, Note, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 *COLUM. L. REV.* 1363 (1997).

32. Judgment, *Azaria v. Bierko*, No. 12-cv-09732-GAF-(RZx) (C.D. Cal. Mar. 14, 2014) (hereinafter *Azaria Judgment*), available at <http://docs.justia.com/cases/federal/district-courts/california/cacdce/2:2012cv09732/547712/63/0.pdf?1394865396>; Order Re: Motion for Summary Judgment, *Azaria v. Bierko*, No. 12-cv-09732-GAF-RZ (C.D. Cal. Feb. 21, 2014) (hereinafter *Order*), available at <http://www.scribd.com/doc/208917098/Azaria-Granting-Msj-21-2014>.

illustrates this point. The case pivoted on control of a fictional baseball announcer character, with both parties—actors Hank Azaria<sup>33</sup> and Craig Bierko<sup>34</sup>—allegedly creating and performing their own versions of the voice of the character over the course of many years.<sup>35</sup> The case is unique because, as *Hollywood Reporter* put it shortly after the lawsuit was filed, “[w]hen most people think about what copyright protects, it’s things like movies, TV shows, music or books—not character voices. But *Azaria v. Bierko* sets up an interesting showdown.”<sup>36</sup>

Importantly, this type of comedic character battle is different from the copyright issues lurking in joke-stealing disputes between comedians.<sup>37</sup> Joke-stealing squabbles, which might arise when a stand-up comedian like Carlos Mencia<sup>38</sup> is accused of using other comedians’ jokes without attribution, are already addressed in an excellent article.<sup>39</sup> There is a lacuna in the legal literature, however, when it comes to copyright law and stand-alone characters created by comedians and actors.

Part I of this article provides an overview of current copyright jurisprudence surrounding the creation and development of fictional characters in all forms of media.<sup>40</sup> Next, Part II uses *Azaria v. Bierko* as an analytical springboard to examine the copyright issues facing comedians and actors who create characters outside the usual storytelling venues of movies, plays, comic strips and television programs.<sup>41</sup> Part III then proposes more than a half-dozen techniques and tactics through which comedians who specialize in fictional characters can use to better protect their intellectual property interests under

33. See *infra* notes 98-105 and accompanying text (providing biographical background on Azaria).

34. See *infra* notes 106-113 and accompanying text (providing biographical background on Bierko).

35. Order, *supra* note 32, at 2-3.

36. Eriq Gardner, *Hank Azaria Sues Craig Bierko to Keep Ownership of Baseball Announcer Character*, HOLLYWOOD REP., Nov. 16, 2012, available at <http://www.hollywoodreporter.com/thr-esq/hank-azaria-sues-craig-bierko-391350>.

37. Jokes are copyrightable. See Carolyn E. Miller, Case Note and Comment, *Suing the Osbournes: Intellectual Property Protection for Creative Merchandise*, 13 DEPAUL-LCA J. ART & ENT. L. 123, 137-138 (2003) (observing that “[j]okes are an example of short phrases that have been held copyrightable. Like all copyrightable works, the joke must be original and protection is limited to the joke’s expression as opposed to its mere idea”).

38. As a 2011 newspaper article describes it, Mencia was for years: “dogged by accusations of joke-stealing that became public in 2007 when the comedian Joe Rogan confronted Mr. Mencia during a set at the Comedy Store in Los Angeles. The video went viral, and soon side-by-side comparisons were all over the Internet, comparing Mr. Mencia’s jokes to those of performers as big as Bill Cosby and as small as Ari Shaffir. (“South Park” even addressed the episode.) In the stand-up world, joke-stealing was the worst of several offenses Mr. Mencia was accused of, including bumping comics from club slots and monopolizing the stage.” Joel Keller, *A Comedian’s Act is Leaner But Not Meaner*, N.Y. Times, Nov. 27, 2011, at AR27.

39. See Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 Va. L. Rev. 1787, 1796-97 (2008) (describing the Carlos Mencia controversy).

40. *Infra* notes 44-97 and accompanying text.

41. *Infra* notes 98-150 and accompanying text.

copyright law.<sup>42</sup> Finally, Part IV concludes by emphasizing that, until at least several courts clearly address the copyrightability of stand-alone comedic characters that are performed on stage, the confusion that pervades and permeates much of the general area of character copyrightability will similarly cloud this unique facet.<sup>43</sup>

## II. COPYRIGHT AND FICTIONAL CHARACTERS: A PRIMER ON THE CHAOTIC STATE OF THE LAW

Although initially there was some judicial hesitation in the early twentieth century, today “literary characters are routinely held by courts to be copyright protected.”<sup>44</sup> This includes both animate and inanimate characters.<sup>45</sup> Generally, however, literary characters derived from books are somewhat more difficult to copyright than cartoon characters because they lack the “added visual imagery.”<sup>46</sup> As one court recently noted, “[b]ecause a cartoon character has physical as well as conceptual qualities, it is more readily suitable than literary characters for copyright.”<sup>47</sup>

Characters result from “a combination of simpler ideas, just like any other complex mental construct.”<sup>48</sup> As the U.S. Court of Appeals for the Second Circuit wrote more than thirty years ago, “[a] character is an aggregation of the particular talents and traits his creator selected for him. That each one may be an idea does not diminish the expressive aspect of the combination.”<sup>49</sup> Thus, as remarked by another court in 2007, it “is the unique combination of elements that makes up a protected character.”<sup>50</sup> Those elements ripe for combination may include “name, physical appearance, attributes, mannerisms, speech and expression, habits, attire, setting and locale.”<sup>51</sup>

As a threshold matter, for a character to be copyrighted it initially must be original.<sup>52</sup> This means that the character must be “independently created by the author (as opposed to copied from other works), and [possess] at least some

42. *Infra* notes 151–226 and accompanying text.

43. *Infra* notes 227–231 and accompanying text.

44. Dennis S. Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17, 25 (2006).

45. A very recent example of an inanimate character in a media artifact receiving copyright protection is the Batmobile. *DC Comics v. Towle*, 989 F. Supp. 2d 948, 966–967 (C.D. Cal. 2013).

46. *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 72 F. Supp. 2d 1135, 1144 (C.D. Cal. 2008).

47. *Id.*

48. Todd Marabella, *Elemental Copyright: The Complexity of Ideas and the Alchemy of Mind-Share*, 90 B.U. L. REV. 2149, 2166 (2010).

49. *Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 243 (2d Cir. 1983).

50. *Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1127, 1134 (W.D. Wash. 2007).

51. Dean D. Niro, *Protecting Characters Through Copyright Law: Paving a New Road Upon Which Literarcy, Graphic, and Motion Pictures Characters Can All Travel*, 41 DEPAUL L. REV. 359, 360 (1991).

52. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991) (observing that “[t]he sine qua non of copyright is originality”).

minimal degree of creativity.”<sup>53</sup> Therefore, according to one court’s recent opinion, “[t]he ‘basic human traits that certain characters share, including age, sex, and occupation, are too general or too common to deserve copyright protection.”<sup>54</sup>

In a similar vein, no copyright protection exists for stock characters.<sup>55</sup> Such characters amount to recognizable stereotypes and generic figures, “such as a blond, blue-eyed hero or doctors in ‘hot and cold’ romances.”<sup>56</sup> For example, in the context of storylines regarding the trials and tribulations of teaching in vocational schools, a federal court determined that stock characters include “idealistic teachers, cynical teachers, stupid students, intelligent students and unruly students.”<sup>57</sup> These characters “are inherent in [use of] the school as a background and are not copyrightable.”<sup>58</sup>

In crime storylines, a stock character might take the form of a “hardscrabble detective.”<sup>59</sup> Other examples of stock characters included “strong, attractive women who think for themselves,”<sup>60</sup> “a drunken old bum,”<sup>61</sup> “the Latin Lover,”<sup>62</sup> “[a]n adult male character who acts in childish ways”<sup>63</sup> and “the scheming political strategist.”<sup>64</sup> In many ways, stock characters are akin to uncopyrightable scènes à faire.<sup>65</sup> One court recently noted that, “[s]tock characters, like stock scènes à faire, are not subject to copyright protection.”<sup>66</sup> Under the scènes à faire doctrine, Michael D. Murray explains that:

certain subject matter—stock images, tried and true story lines, fables and folklore, scenes of nature, common visual and cultural references, all of which fall under the title of “scenes that must be done”—are not able to be copyrighted because they are part of the public domain and no one can obtain a monopoly on such images by putting them into a fixed and tangible medium of expression.<sup>67</sup>

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53. *Id.*

54. *Moore v. Lightstorm Entm’t*, 992 F. Supp. 2d 543, 557 (D. Md. 2014) (quoting *Eaton v. Nat’l Broad. Co.*, 972 F. Supp. 1019, 1029 (E.D. Va. 1997)).

55. *Feldman v. Twentieth Century Fox Film Corp.*, 723 F. Supp. 2d 357, 367 (D. Mass. 2010).

56. *Id.*

57. *Burnett v. Lambino*, 204 F. Supp. 327, 331 (S.D.N.Y. 1962).

58. *Id.*

59. *Mena v. Fox Entm’t Grp.*, 2012 U.S. Dist. LEXIS 143964, \*37 (S.D.N.Y. Sept. 27, 2012).

60. *Doody v. Penguin Grp. Inc.*, 673 F. Supp. 2d 1144, 1158 n.6 (D. Haw. 2009).

61. *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004).

62. Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 68 (1992).

63. *Alexander v. Murdoch*, 2011 U.S. Dist. LEXIS 79543, \*27 (S.D.N.Y. May 27, 2011).

64. *Blakeman v. Walt Disney Co.*, 613 F. Supp. 2d 288, 308 (E.D.N.Y. 2009).

65. *See Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996) (providing examples of “unprotectable scenes a faire”).

66. *TMTV, Corp. v. Mass Prods., Inc.*, 645 F.3d 464, 469 (1st Cir. 2011).

67. Michael D. Murray, *Copyright, Originality, and the End of the Scenes a Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779, 782 (2006).

For example, in a 1996 dispute involving the novel and movie *Jurassic Park* and a series of *Dinosaur World* children's books, the U.S. Court of Appeals for the Second Circuit held that “electrified fences, automated tours, dinosaur nurseries, and uniformed workers”<sup>68</sup> constitute “classic scènes à faire that flow from the uncopyrightable concept of a dinosaur zoo.”<sup>69</sup> Thus, in brief, scènes à faire are “expressions that are standard, stock, or common to a particular topic or that necessarily follow from a common theme or setting.”<sup>70</sup>

On the other hand, Tarzan, James Bond and Godzilla are all copyrighted characters.<sup>71</sup> What does it take, then, for a character to be copyrightable? Unfortunately, the answer is far from clear. As Professor Zahr K. Said recently wrote in a comprehensive article that, unfortunately, does not address stand-alone character creation by comedians:

Courts have been vague or mistaken in their decisions to adopt certain thresholds for character protect-ability, and conclusory in their determinations that characters are—or are not—copyrightable. Judgments often seem to reflect real-world factors or legal areas other than copyright, yet legal reasoning takes place on the terrain of copyright as though faithful to the law, thus entrenching the doctrinal confusion.<sup>72</sup>

Furthermore, Professor Leslie Kurtz writes that some courts apply a development test under which the fact-finder must decide “whether a character is sufficiently distinctive or well-developed to command protection.”<sup>73</sup> It stems from Judge Hand's opinion, noted above,<sup>74</sup> in *Nichols v. Universal Pictures Corp.*<sup>75</sup> and is sometimes referred to as “the delineation test”<sup>76</sup> or “the ‘distinctly delineated’ test.”<sup>77</sup> Under the *Nichols* test, “[o]nly those characters that are highly delineated with constant traits qualify for protection separate from the works in which they appear.”<sup>78</sup>

68. *Williams*, 84 F.3d at 589.

69. *Id.*

70. *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 838 (10th Cir. 1993).

71. *See Baco v. TMTV Corp.*, 436 F. Supp. 2d 311, 314 (D.P.R. 2006) (identifying these characters as ones that courts have held receive copyright protection).

72. Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 *CARDOZO L. REV.* 769, 772–73 (2013).

73. Leslie A. Kurtz, *Fictional Characters and Real People*, 51 *U. LOUISVILLE L. REV.* 435, 442 (2013).

74. *Supra* note 24 and accompanying text.

75. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930); *See Anthony Cheng, Lex Luthor Wins: How the Termination Right Threatens to Tear the Man of Steel in Two*, 34 *COLUM. J.L. & ARTS* 261, 266 (2011) (asserting that “the ‘distinctively delineated’ standard [was] formulated by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*”).

76. Mark Bartholomew, *Protecting the Performers: Setting a New Standard for Character Copyrightability*, 41 *SANTA CLARA L. REV.* 341, 345 (2001).

77. Jasmina Zecevic, *Distinctly Delineated Fictional Characters that Constitute the Story Being Told: Who Are They and Do They Deserve Independent Copyright Protection?*, 8 *VAND. J. ENT. & TECH. L.* 365, 369 (2006).

78. *Toho Co., Ltd. v. William Morrow & Co., Inc.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998). (citing *Nichols* for this proposition). *Id.*

For example, the comic book character Superman is protected under this test because “the pictorial representations and verbal descriptions of ‘Superman’ are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author.”<sup>79</sup> One federal court observed that the problem with this test is that it is “simple in theory but elusive in application.”<sup>80</sup> Further, Professor Kurtz observes that, “it seems probable that the more idiosyncratic a character is, the more likely it is to be considered distinctive.”<sup>81</sup>

One apparent factor for a character to receive copyright protection—at least when visual images such as cartoon or movie characters are involved—is that there be “a consistent visual appearance”<sup>82</sup> of “widely identifiable”<sup>83</sup> characteristics and “consistent physical traits.”<sup>84</sup> Beyond consistency of widely identifiable characteristics, a second factor is that the characteristics be “especially distinctive,”<sup>85</sup> such that they are not stereotypical or common to the individual or object being portrayed.<sup>86</sup> For instance, “standard magician garb—black tuxedo with tails, a white tuxedo shirt, a black bow tie, and a black cape with red lining”<sup>87</sup>—is not distinctive enough to copyright a magician character.

When it comes to film characters, the legal search may thus be for “distinctive mannerisms, facial expressions, voice, or speech patterns.”<sup>88</sup> More generally speaking, as one federal district court wrote in 2007, “[c]ourts look at the many elements of the character—visual depictions, name, dialogue, relationships with other characters, their actions and conduct, personality traits, and written descriptions—to determine whether it is sufficiently delineated such that it is a unique expression.”<sup>89</sup>

Under the delineation test, the feathered title character of the book *Jonathan Livingston Seagull* was held to be copyrightable, with a federal court reasoning:

Like other highly delineated literary and film characters, the Jonathan Livingston Seagull character is protected under copyright. Jonathan Livingston Seagull is a well-defined character—an ordinary seagull named Jonathan Livingston Seagull who is determined to fly higher and faster, who transcends

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79. *Detective Comics v. Bruns Publ'ns*, 111 F.2d 432, 433 (2d Cir. 1940).

80. *Anderson v. Stallone*, No. 87-0592, 1989 U.S. Dist. LEXIS 11109, at \*16 (C.D. Cal. Apr. 26, 1989).

81. Kurtz, *supra* note 73, at 443.

82. *Warner Bros. Entm't, Inc. v. X One X Prods.*, 644 F.3d 584, 599 (8th Cir. 2011).

83. *Id.* (quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003)).

84. *DC Comics v. Towle*, 989 F. Supp. 2d 948, 967 (C.D. Cal. 2013).

85. *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008).

86. *See DC Comics*, 989 F. Supp. 2d at 967 (observing that the legal focus is on “whether the character conveys a set of *distinct characteristics*”) (emphasis added).

87. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003).

88. *Warner Bros. Entm't, Inc.*, 644 F.3d at 598.

89. *Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1127, 1134 (W.D. Wash. 2007).

his beginnings, and who teaches others to do the same. He is not a stock character and the fact that his character has not been delineated over time is inconsequential.<sup>90</sup>

An alternative test was developed by the U.S. Court of Appeals for the Ninth Circuit sixty years ago in *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*<sup>91</sup> Under the so-called “story being told” standard “[a] character in a work in which the character is central to the story is [a] copyrightable [character].”<sup>92</sup> Specifically, in addressing whether the Sam Spade character in *The Maltese Falcon* was copyrightable, the Ninth Circuit opined that “[i]t is conceivable that the character really constitutes *the story being told*, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.”<sup>93</sup> However, this test has been critiqued as “a very exacting standard, as the vast majority of characters are mere vessels to move a plot along.”<sup>94</sup> Indeed, as the Ninth Circuit recently observed, “[s]ubsequent cases appeared to cast doubt on this test.”<sup>95</sup>

In summary, as the Ninth Circuit encapsulated both tests, “characters that are ‘especially distinctive’ or the ‘story being told’ receive protection apart from the copyrighted work.”<sup>96</sup> Conversely, as another court noted, “where the characters are *not* sufficiently delineated or are *not* the central focus of the work, courts decline to give the characters copyright protection.”<sup>97</sup> With this in mind, the article next turns to the dispute in *Azaria v. Bierko*.

### III. A TALE OF TWO VOICES AND THE DELINEATION OF JIM BROCKMIRE: A COLORFUL CHARACTER UNDER CONTENTION

This part has three sections. Initially, Section A describes the parties in *Azaria v. Bierko*, while Section B then details the factual underpinnings of their legal battle. Finally, Section C analyzes U.S. District Judge Gary A. Feess’ February 2014 ruling in the case.

#### A. The Parties

Hank Azaria is a man of many voices. As the *Washington Post* wrote in 2011, “Azaria is one of the most prolific voice talents working today. He

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90. *Id.* at 1135–36.

91. 216 F.2d 945 (9th Cir. 1954).

92. *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 1982 U.S. Dist. LEXIS 15942, at \*11 (S.D. Tex. Sept. 20, 1982).

93. *Warner Bros. Pictures, Inc.*, 216 F.2d at 950 (emphasis added).

94. Nick Gladden, *When California Dreamin’ Becomes a Hollywood Nightmare; Copyright Infringement and the Motion Picture Screenplay: Toward an Improved Framework*, 10 J. INTELL. PROP. L. 359, 370 (2003).

95. *DC Comics v. Towle*, 989 F. Supp. 2d 948, 966 (C.D. Cal. 2013).

96. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003).

97. *Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1127, 1133 (W.D. Wash. 2007) (emphasis added).

supplies voices for more than 20 characters on ‘The Simpsons,’ ranging from Moe the Bartender to Professor Frink.”<sup>98</sup> He won an Emmy Award in 1998 for outstanding voice-over performance based on his work on *The Simpsons*.<sup>99</sup> In 2013, the *St. Louis Post-Dispatch* was effusive about his voice work in the movie *Smurfs 2*, opining that “[a]s the nutty prestidigitator called Gargamel, Azaria not only steals the movie from the blue Belgian elves, he makes human co-star Neil Patrick Harris practically disappear.”<sup>100</sup> Fittingly, he was recently dubbed an “animation all-star.”<sup>101</sup>

Beyond dubbing voices, Azaria has appeared in movies ranging from the porn-centric *Lovelace*<sup>102</sup> to the journalism-focused *Shattered Glass*.<sup>103</sup> He won an Emmy for the television movie *Tuesdays with Morrie*.<sup>104</sup> On the small screen, he currently portrays an F.B.I. agent in Showtime’s *Ray Donovan*.<sup>105</sup>

Craig Bierko is an actor who has starred on Broadway in revivals of the musicals *Guys and Dolls*<sup>106</sup> and *The Music Man*.<sup>107</sup> He has appeared in movies such as *The Three Stooges*,<sup>108</sup> *Cinderella Man*<sup>109</sup> and *Scary Movie 4*.<sup>110</sup> On television, Bierko has played roles in shows such as *Unhitched*,<sup>111</sup> *Boston Legal*<sup>112</sup> and *Necessary Roughness*.<sup>113</sup> Despite their collective fame, Bierko and Azaria would square off in a legal battle culminating in 2014 over a lesser-known fictional character that neither of them ever played in a Broadway play, television series or Hollywood movie. This dispute is described in the next section.

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98. Rick Bentley, *Hank Azaria is Very Vocal About His Line of Work*, *Wash. Post*, Nov. 20, 2011, at T14.

99. *Azaria Wins Emmy for ‘The Simpsons,’ Daily Variety*, Aug. 6, 1998, at News 3.

100. Joe Williams, *Paris and Azaria Shine in Punny ‘Smurfs 2,’ ST. LOUIS POST-DISPATCH*, July 31, 2013, at A19.

101. Brandy McDonnell, *Remember Robin Williams with 6 Favorite Films*, *DAILY OKLAHOMAN (OKLA. CITY)*, Aug. 15, 2014, at Features 7.

102. Rob Nelson, *Lovelace*, *DAILY VARIETY*, Jan. 25, 2013, at 4.

103. Peter M. Nichols, *Body Parts is the Business, Immigration the Message*, *N.Y. Times*, Mar. 23, 2004, at E6.

104. Michael E. Hill, *Tuesdays with Hank*, *Wash. Post*, Jan. 6, 2002, at TV Week Y7.

105. Bill Keveney, *On ‘Ray Donovan,’ Foes are Allies of Convenience*, *USA Today*, Aug. 15, 2014, at 6D.

106. Ben Brantley, *It’s a Cinch That the Bum is Under the Thumb of Some Little Broad*, *N.Y. TIMES*, Mar. 2, 2009, at C1.

107. Allan Kozinn, *Bierko Cancels Return to ‘Matilda the Musical,’ N.Y. Times*, Nov. 20, 2013, at C3.

108. Manohla Dargis, *Wry and Subtle Jestings? Not Here, Knucklehead*, *N.Y. TIMES*, Apr. 13, 2012, at C6.

109. Sachi Fujimori, *Craig Bierko in Fine Company*, *HERALD NEWS (Passaic Cnty., N.J.)*, Apr. 5, 2011, at D1.

110. *Id.*

111. Robert Bianco, *‘Unhitched’ is Just Unfunny; and That’s Just One of Its Flaws*, *USA TODAY*, Feb. 29, 2008, at 13D.

112. Kathryn Shattuck, *What’s on Tonight*, *N.Y. TIMES*, Sept. 26, 2006, at E10.

113. Emily Yahr, *‘Necessary Roughness’: No Surprises*, *WASH. POST*, Jun. 29, 2011, at C6.

### B. The Dispute

According to the complaint for declaratory relief filed in November 2012 by Hank Azaria and his corporate business entity, How to Pictures, Inc., against Craig Bierko,<sup>114</sup> the two actors initially met around 1990. Around the same time, Azaria claims to have shared with Bierko what the complaint calls “Azaria’s voice” featuring “a colorful baseball announcer who speaks with peculiar speech inflections.”<sup>115</sup> Azaria asserts that he created this voice “in or around 1983”<sup>116</sup> and often performed it on his college campus.<sup>117</sup>

According to the complaint, Bierko also did his own sports announcer’s voice (Bierko’s Voice), and around 1990 Azaria and Bierko were introduced to each other “by a person who suggested that Bierko do the Bierko Voice for Azaria and that Azaria do the Azaria Voice for Bierko.”<sup>118</sup> At about that time, Azaria and Bierko allegedly began “fooling around with the Azaria Voice and the Bierko Voice. Azaria and Bierko used to put the Azaria Voice and the Bierko Voice together respectively on voice messages for each other for a period of about 3–5 years.”<sup>119</sup>

In his *pro per* answer, Bierko denies that Azaria “performed a so-called ‘Azaria Voice’ for him.”<sup>120</sup> In fact, Bierko “denies any awareness of an alleged ‘Azaria Voice’ in either name or substance until the term was introduced to [him] through his contractual attorney Craig Jacobson while describing Plaintiff’s position at the start of negotiations.”<sup>121</sup>

The trouble apparently began around 2010 when Azaria “developed and produced a short video for the website ‘Funny or Die.’”<sup>122</sup> Funny or Die describes itself as:

a comedy video website that combines user-generated content with original, exclusive content. The site is a place where celebrities, established and up-and-coming comedians and regular users can all put up stuff they think is funny. At the same time, the site hopes to eliminate all the junk that people have to pick through to find videos.<sup>123</sup>

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114. Complaint for Declaratory Relief at 1, *Azaria v. Bierko*, No. CV12-9732 (C.D. Cal. Nov. 14, 2012) (hereinafter Complaint), available at <http://docs.justia.com/cases/federal/district-courts/california/cacdce/2:2012cv09732/547712/1>.

115. *Id.* at 1.

116. *Id.* at 3.

117. *Id.*

118. *Id.* The person who introduced them, according to U.S. District Judge Gary Allen Feess’s February 2014 ruling, was actor Matthew Perry. Order, *supra* note 32, at 2.

119. Complaint, *supra* note 114, at 3.

120. Answer to Complaint at 1, *Azaria v. Bierko*, No. CV-09732-GAF-RZ (C.D. Cal. Mar. 28, 2013) (hereinafter Answer).

121. *Id.* at 3–4.

122. Complaint, *supra* note 114, at 3.

123. *About Funny or Die*, FUNNY OR DIE, <http://www.funnyordie.com/about> (last visited Sept. 24, 2014).

Azaria's video, still online at the Funny or Die website,<sup>124</sup> features a Jim Brockmire character played by Azaria that utilizes his sports announcer voice.<sup>125</sup> According to the complaint, the video features Azaria portraying:

the Jim Brockmire Character, who uses the Azaria Voice, and who has a characteristic attire (plaid jacket with a fresh rose on his lapel), a host of famous admirers (real life sportscasters such as Dan Patrick, Rich Eisen, and Joe Buck who appear in the video short), the penchant for making obscure and off-the-wall cultural references when commenting on a baseball game, and a backstory regarding how he caught his wife cheating on him, had a breakdown on air, and was consequently fired. The development of the Jim Brockmire Character into a full-fledged persona was created by Azaria and writers hired by How to Pictures without any input from Bierko.<sup>126</sup>

Azaria's complaint goes on to assert that, after the release of the "Funny or Die" video, Bierko demanded that Azaria "cease and desist from exploiting the Azaria Voice and, by implication, the Jim Brockmire character."<sup>127</sup> Specifically, Azaria sought declaratory relief, contending that he "independently created the Azaria Voice which he then incorporated into the Jim Brockmire Character. Azaria transferred all ownership in the Jim Brockmire Character to How to Pictures. The Jim Brockmire character is distinctly delineated such that it is copyrightable subject matter which can acquire independent copyright protection."<sup>128</sup>

Bierko, in stark contrast, asserts in his answer "[t]hat the alleged 'Azaria Voice' is Plaintiff's interpretation of a characterization originated, performed and introduced to him by the Defendant [Bierko] and therefore is not subject to Plaintiff's copyright, ownership, title or interest in any form."<sup>129</sup>

### *C. The Decision*

On February 21, 2014, U.S. District Judge Gary Allen Feess<sup>130</sup> granted Hank Azaria's motion for summary judgment.<sup>131</sup> Not only did Feess find that

124. *Gamechangers EP 3: A Legend in the Booth with Hank Azaria*, FUNNY OR DIE, <http://www.funnyordie.com/videos/7d1f3b33e7/gamechangers-ep-3-a-legend-in-the-booth-with-hank-azaria> (last visited Sept. 24, 2014).

125. Complaint, *supra* note 114, at 4.

126. *Id.* at 4.

127. *Id.*

128. *Id.* at 5.

129. Answer, *supra* note 120, at 4.

130. Judge Feess assumed Senior U.S. District Judge status on March 13, 2014, less than one month after issuing his ruling in *Azaria*. See *Biographical Directory of Federal Judges: Gary Allen Feess*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=2823&cid=999&ctype=na&instate=na> (last visited Sept. 24, 2014).

131. Order, *supra* note 32, at 1.

Azaria’s Jim Brockmire was “sufficiently distinct to warrant copyright protection,”<sup>132</sup> but he also ruled that Bierko’s unnamed “Sports Announcer Character” was not copyrightable.<sup>133</sup>

Feess’s reasoning in reaching opposite conclusions on the two issues—recognizing Azaria’s character as copyrightable, but not Bierko’s—may prove instructive for stand-up comics who develop their own on-stage characters. Rather than applying one of the two key legal standards for copyrighting characters as were described above,<sup>134</sup> Feess expanded the analysis, suggesting both were applicable. In disjunctive fashion, he found that “[a] character may be protected if it constitutes the story being told *or* if the character has ‘displayed consistent, widely identifiable traits’ that make it particularly distinctive.”<sup>135</sup> Further, in describing which characters were not copyrightable Judge Feess reaffirmed the notion of unprotected stock characters,<sup>136</sup> adding that, “[c]haracters that have only ‘generic and common’ attributes are not copyrightable.”<sup>137</sup>

Applying these principles to the Funny or Die video featuring Azaria’s Jim Brockmire character, Feess began by noting that the video is “expressly designed to distinguish his [Azaria’s] character from all the types and tropes of a generalized sports broadcaster.”<sup>138</sup> In other words, the video was *intended* to push the Brockmire persona out of the stock character category and into the protected world of distinctively delineated characters by featuring his “qualities, characteristics, [and] quirks.”<sup>139</sup> Feess found that the video did precisely that, not only by illustrating a distinctive visual appearance for Brockmire, but, most importantly, by providing a personal backstory of supposed facts regarding him. Specifically, Judge Feess opined that Brockmire’s:

personal history and physical appearance—down to his marital relationship, lucky pen, career arc, volatile temper, affinity for specific cultural trivia, plaid jacket, red tie, the rose on his lapel, and the classic sign off to his wife—are at least as individualized as several characters whose copyrights have been recognized in this District.<sup>140</sup>

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132. *Id.* at 7.

133. *Id.* at 8.

134. *Supra* Part I (describing the different tests deployed by courts for determining whether fictional characters are protected by copyright law).

135. Order, *supra* note 32, at 6 (quoting *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1225 (9th Cir. 2008)).

136. *See supra* notes 55–66 and accompanying text (describing the concept of stock characters and providing examples of them).

137. Order, *supra* note 32, at 6 (quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1176 (9th Cir. 2003)).

138. *Id.* at 7.

139. *Id.* at 3.

140. *Id.* at 7.

In addition, Feess noted that the video involved other people—namely, real-life sports broadcasters, such as Joe Buck—to further define the Jim Brockmire character by describing his relationship to other broadcasting giants in baseball broadcasting history.<sup>141</sup> In other words, Brockmire’s backstory was fleshed out with narration provided by others, not simply his own. With this in mind, Feess found “that Jim Brockmire is sufficiently distinct to warrant copyright protection.”<sup>142</sup>

In direct contrast, Feess found Bierko’s unnamed sports announcer to be “extremely vague.”<sup>143</sup> The court pointed out that Bierko’s only description of the character was that of “‘a white, male baseball announcer,’ who expresses himself in a ‘uniquely American and arguably musical’ fashion”<sup>144</sup> and who “is ‘between the ages [sic] 45 and 60, professional, well-trained, and shows a tendency towards being psychologically imbalanced.’”<sup>145</sup>

What other details might Bierko have supplied to better delineate his character? By specifically noting that Bierko “did not know whether [his] character was married, had friends, had children, drank alcohol, or used drugs,”<sup>146</sup> Judge Feess seems to imply that these facts would help to define Bierko’s character.

For Judge Feess, Bierko’s announcer amounted to little more than a stock character. As he opined, none of Bierko’s character’s features would distinguish it “from any actual baseball announcer sitting in the booth on a given game-day.”<sup>147</sup> With the visual and personality aspects of Bierko’s character rendered ineffective in the quest for copyrightability, the only remaining characteristics of Bierko’s character related to his “vocal patterns and intonations.”<sup>148</sup> But a voice, standing alone, is not copyrightable<sup>149</sup> and thus such vocal characteristics did not help Bierko. Ultimately, Feess concluded Bierko’s sports announcer character was not copyrightable.<sup>150</sup>

With the *Azaria* dispute and decision in mind, the following discussion attempts to distill key principles that actors and comedians creating on-stage characters might be wise to follow in seeking copyright protection.

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 3.

147. *Id.* at 7.

148. *Id.* at 8.

149. *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

150. Order, *supra* note 32, at 8.

#### IV. NO LAUGHING MATTER: ADVICE FOR COMEDIANS SEEKING TO COPYRIGHT CHARACTERS

This article illustrated in Part I the convoluted state of the law surrounding the copyrightability of characters.<sup>151</sup> The muddle is partly due to the fact that “the tests for determining protection of literary characters under copyright law are confusing, difficult to apply, and often yield unpredictable results.”<sup>152</sup>

These problems are arguably exacerbated when on-stage comedic characters are the personas in question. That is because of the absence of case law, the paucity of legal scholarship directly on point<sup>153</sup> and the fact that the characters are fashioned in an environment lacking the greater contextual variables of a movie, cartoon or book. Even *Azaria* did not directly involve an on-stage performance, but rather featured what Judge Feess aptly called “a mock-biopic,” which featured “interviews of individuals who describe the fictional Jim Brockmire, his qualities, characteristics, quirks, and various anecdotes about his life and career.”<sup>154</sup>

But in light of decisions like *Azaria*, as well as prior case law on character formation in other contexts, what qualities and characteristics might a comedian deploy to better garner copyright protection? What follows are some suggestions and advice for comedians and actors based on both Parts I and II, as well as the author’s own opinions derived there from.

##### A. *Make It as Multifaceted and Idiosyncratic as Possible*

This initial point should be considered an overarching or big-picture principle, with all of the ones that follow flowing from it. The key here is to imbue a character with as many non-generic variables and unique facets as possible to help steer it out of the unprotected waters of stock characters<sup>155</sup> and into the protected dock of distinctive delineation.<sup>156</sup> And given that a character is ultimately the totality of multiple variables,<sup>157</sup> a more-the-merrier maxim seems appropriate when it comes to adding dimensions to a character. While it may never be clear which specific facet or aspect of a character ultimately tips the balance in favor of copyrightability, adding more to the mix seemingly cannot hurt, as long as those facets are consistently portrayed.<sup>158</sup>

Of course, the ultimate product—the final character produced from a multitude of dimensions—must be an original comedic invention in order for it

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151. *Supra* notes 44–97 and accompanying text.

152. Zecevic, *supra* note 77, at 377.

153. *Supra* note 31 and accompanying text.

154. Order, *supra* note 32, at 3.

155. *See supra* notes 55–66 and accompanying text (describing stock characters).

156. *Supra* note 81 and accompanying text.

157. *See supra* notes 48–50 and accompanying text (addressing how a character results from a combination of attributes).

158. *See supra* notes 82–84 and accompanying text (addressing the need for consistency of portrayal).

to be copyrighted, not one that has been done before by someone else.<sup>159</sup> The late Johnny Carson, for instance, most likely would not have been able to copyright his Aunt Blabby character had he attempted to do so. Why? Because, as William Grimes of the *New York Times* bluntly put it,<sup>160</sup> “Carson kidnapped Maude Frickert [from Jonathan Winters]<sup>161</sup> and simply changed the name to Aunt Blabby, one of his stock characters. Mr. Winters said that the blatant theft did not bother him.”<sup>162</sup> Tom Shales of the *Washington Post*, in a slightly more subtle fashion, observed that Carson’s “Aunt Blabby” character had “more than a passing resemblance to Jonathan Winters as ‘Maude Frickert.’”<sup>163</sup>

### B. Give It a Name

One clear way to begin delineating a character is to give it a name. Jonathan Winters named his most famous character Maude Frickert,<sup>164</sup> Daniel Whitney calls his Southern-sounding character Larry the Cable Guy<sup>165</sup> and Hank Azaria dubbed his sports broadcaster Jim Brockmire.<sup>166</sup> The late comedian Chris Farley’s motivational speaker character even had a name: Matt Foley.<sup>167</sup> The decision in *Azaria* certainly suggests that giving a character a name is a good first step toward delineation, as Judge Feess specifically compared and contrasted Hank Azaria’s and Craig Bierko’s characters on this precise variable.<sup>168</sup>

Furthermore, it might also be beneficial to secure a trademark for the character’s name to limit its use by others in association with certain goods and services.<sup>169</sup> For instance, “Larry the Cable Guy” is trademarked.<sup>170</sup> Because

159. See *supra* notes 52–53 and accompanying text (addressing the need for originality under copyright character).

160. See *supra* notes 1–9 (providing background on Jonathan Winters and some of his many characters).

161. See *supra* notes 5, 9 and accompanying text (describing the Winters’ Maude Frickert character).

162. Grimes, *supra* note 2.

163. Tom Shales, *Tonight and Forever: Johnny Carson, the Late-Night Host Whose Best Act Was Himself*, WASH. POST, Jan. 24, 2005, at C1.

164. *Supra* note 5 and accompanying text.

165. *Supra* notes 13–14 and accompanying text.

166. *Supra* note 125 and accompanying text.

167. See generally ‘Saturday Night Live’ Comedian Chris Farley Dies at 33, WASH. POST, Dec. 19, 1997, at C6 (describing “Matt Foley, a bespectacled motivational speaker who struggled to keep his pants up and ended his speeches by smashing the furniture in a froth, his blond hair mussed,” as one of “Farley’s best-known TV characters”).

168. *Supra* Part II, Section C and accompanying text.

169. See generally Benjamin A. Goldberger, *How the “Summer of the Spinoff” Came to be: The Branding of Characters in American Mass Media*, 23 Loy. L.A. Ent. L. Rev. 301, 382 (2003) (noting that “characters whose names or likenesses indicate a source of a product—be it a movie, book, or stuffed doll—are protectable and registerable as trademarks under the Lanham Act”); Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA Ent. L. Rev. 97, 123 (2003) (noting that “[a]s a general matter, trademark law only prohibits certain commercial uses of another’s mark, that is,

“trademarks function as a designation of source or origin”<sup>171</sup> and “characters can be protected under the law of trademarks,”<sup>172</sup> claiming ownership rights to a character’s name might help to better associate that character with a comedian if a copyright dispute arose.

*C. Provide Both Visual and Auditory Details: From Clothes and Accessories to Accents and Catchphrases*

Professor Zahr K. Said asserts that the inquiry for most courts into character copyrightability “would consider the characters’ physical descriptions, linguistic tendencies or catchphrases, relationships with other characters, and emotional traits.”<sup>173</sup> As to the first two items in this series, both the outward appearance (the physical description) and the auditory attributes (how the character speaks and/or what he or she says) of comedic characters are important. In a nutshell, character copyrightability can be, in large part, a matter of sight and sound.

When it comes to visual appearance in delineating a character, Judge Feess remarked on Jim Brockmire’s “plaid jacket, red tie, [and] the rose on his lapel.”<sup>174</sup> The combination of this trio of items, in turn, helps to give Brockmire a distinctive appearance or, in the words of Judge Feess, helps to make him “individualized.”<sup>175</sup> Furthermore, the character is accessorized with a “lucky pen.”<sup>176</sup> Had Brockmire been bedecked in a plain blue blazer, a non-descript tie yet lacked the lapel rose, the outcome arguably might have been different, with the character perhaps shading more into the stock category. *Saturday Night Live* fans of the late Chris Farley’s Matt Foley character will recall that his visual appearance, like that of Jim Brockmire, was punctuated with an attention-calling “garish plaid sports jacket.”<sup>177</sup> Although clearly not a legal principle, common sense tells us that a more unusual clothing pattern (for example, plaid) is more likely to make a character distinctive than one that is not.

Similarly, Daniel Whitney’s Larry the Cable Guy has a distinctive visual

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uses in connection with the sale of goods or services”).

170. The trademarks for “Larry the Cable Guy” can be found by searching for that phrase via Trademark Electronic Search Service, at the U.S. Patent and Trademark Office’s website at <http://tmsearch.uspto.gov/bin/gate.exe?f=tess&state=4803:whv5a4.1.1>; see *Larry the Cable Guy – Trademark Details*, JUSTICIA TRADEMARKS, <http://trademarks.justia.com/856/58/larry-the-cable-guy-85658830.html> (last visited Sept. 24, 2014).

171. *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 925 F. Supp. 2d 1067, 1072 (C.D. Cal. 2012).

172. Leslie A. Kurtz, *The Methuselah Factor: When Characters Outlive Their Copyrights*, 11 U. MIAMI ENT. & SPORTS L. REV. 437, 443 (1994).

173. Said, *supra* note 72, at 779.

174. Order, *supra* note 32, at 7.

175. *Id.*

176. *Id.*

177. *Manic Comic Chris Farley Found Dead*, ST. PETERSBURG TIMES (Fla.), Dec. 19, 1997, at 2B.

appearance’, as he typically dresses in sleeveless flannel shirts, wears a baseball cap and dons blue jeans.<sup>178</sup> As one reporter waggishly wrote, Whitney has “managed to achieve a \$20 million a year income by wearing trucker caps, flannel shirts with the sleeves cut off and sounding like he’s just shoveled every animal dropping in the state of Georgia.”<sup>179</sup> The last part of this observation, of course, taps into another way comedians can attempt to delineate a more distinctive character—namely, by the way the character speaks or sounds.

Indeed, the voice of a character—the “manner of speech,”<sup>180</sup> as one court put it—can be important in determining if the character is sufficiently delineated to warrant copyright protection. For example, in holding that the boxer character Rocky Balboa from a series of Sylvester Stallone movies was copyrightable, a federal district court emphasized that the “character has become identified with specific character traits ranging from his *speaking mannerisms* to his physical characteristics.”<sup>181</sup> In this same light, when examining the copyrightability of film characters, the U.S. Court of Appeals for the Eighth Circuit has searched for “the distinctive mannerisms, facial expressions, *voice*, or *speech patterns* of a film character.”<sup>182</sup>

For instance, the Larry the Cable Guy character features a “thick drawl”<sup>183</sup>—“an exaggerated Southern drawl”<sup>184</sup> that has been described as a “painfully thick Southern accent,”<sup>185</sup> to be more precise<sup>186</sup>—and a “signature

178. See De la Vina, *supra* note 15, at 1E (observing that “Larry the Cable Guy (a.k.a. Dan Whitney) is a burly country bumpkin, a good ol’ boy jokester who is more Bible Belt than Borscht Belt in *his sleeveless shirt and battered baseball cap*”) (emphasis added); Gavin Edwards, *Incoming: The New King of Comedy?*, ROLLING STONE, May 5, 2005, at 35 (describing the character as wearing a “sleeveless flannel shirt and a crappy baseball cap”); Neely Tucker, *Potbelly Laughs For the Cable Guy; Blue-Collar Comic Smacks Suburbia on the Funny Bone*, WASH. POST, Mar. 17, 2006, at C1 (noting that during a performance as Larry the Cable Guy, Whitney was “wearing about \$23.17 of clothes—old jeans, flannel shirt with the sleeves cut out, camouflage baseball cap”); Jason T. Eastman & Douglas P. Schrock, *Southern Rock Musicians’ Construction of White Trash*, 15 RACE, CLASS & GENDER 205, 210 (2008) (noting that Larry the Cable Guy “often wears a baseball cap displaying a rebel flag”).

179. Jeff Simon, *Black Ready to Rant at Shea’s*, BUFFALO NEWS (N.Y.), Mar. 22, 2009, at F1.

180. See *Gaiman v. McFarlane*, 360 F.3d 644, 661 (4th Cir. 2004) (opining, with regard to the “Medieval Spawn” character, that “[o]nly his costume and *manner of speech*, together with the medieval background, distinguish him in Spawn No. 9 from other Hellspawn. But that is enough expressive content for copyrightability”) (emphasis added).

181. *Anderson v. Stallone*, 1989 U.S. Dist. LEXIS 11109, \*21 (C.D. Cal. Apr. 26, 1989) (emphasis added).

182. *Warner Bros. Entm’t, Inc. v. X One X Prods.*, 644 F.3d 584, 598 (8th Cir. 2011) (emphasis added).

183. Kalefa Sanneh, *A Hick and Bumbler Walk into a Comedy Club*, N.Y. TIMES, Apr. 28, 2005, at E3.

184. Edwards, *supra* note 178, at 35.

185. Williesha C. Lakin, LARRY THE CABLE GUY JUST WANTS TO MAKE YOU LAUGH, HERALD NEWS (PASSAIC CO., N.J.), July 3, 2005, at D10.

186. According to a *New Yorker* article, “Whitney, who grew up in Nebraska, acknowledges that he’s always surprised at just how Southern his Larry voice gets to sounding.” Tad Friend, *Letter From California: Blue-Collar Gold*, NEW YORKER, July 10, 2006, at 74.

guttural style.”<sup>187</sup> This character, however, is delineated not only by how he sounds, but also by what he says. Specifically, Larry the Cable Guy repeatedly utters an “all-purpose slogan”<sup>188</sup> in the catchphrase “Git-R-Done.” In fact, at a May 2005 performance in Jacksonville, Florida, Whitney’s character reportedly exclaimed the catchphrase “Git-R-Done” a whopping twenty times.<sup>189</sup> Thus, while the Larry the Cable Guy “persona depends on obvious stereotypes”<sup>190</sup> that initially might seem to make him a stock character—a fat Southern redneck who engages in “juvenile humor”<sup>191</sup>—Whitney delineates—and in turn distinguishes—the character in multiple visual and audio ways.

Just as “Git-R-Done” constitutes a catchphrase inextricably intertwined with Larry the Cable Guy, Judge Feess observed that Jim Brockmire is associated with a “classic sign off to his wife.”<sup>192</sup> Beyond that specific rhetorical device, the Brockmire character is also known for generally making cultural references and engaging in cultural trivia when he speaks.<sup>193</sup> Similarly, Jonathan Winters’ Maude Frickert character was generally known for “her acerbic comments”<sup>194</sup> and “a barbed tongue,”<sup>195</sup> which, in turn, helped to bring out her personality as a “devilish old reprobate”<sup>196</sup> and a “swinging granny.”<sup>197</sup> Basically, in addition to uttering a specific phrase repeatedly, the constant use of a genre of retort or exclamation might help to delineate a character.

In this light, Chris Farley’s motivational speaker character, Matt Foley, can be seen as brandishing a famous catchphrase as well—namely, his use of the line about himself living in a van down by the river.<sup>198</sup> Catchphrases, in brief, can make a character memorable and create a more distinctive personality. And memorability—when conceptualized as the kind of “high degree of recognition and identification”<sup>199</sup> that helps a character receive protection—is something that, almost by definition, a stock character is not.

In summary, visual appearances, accents and catchphrases all play

187. Jason Zinoman, *Less Politics, More Everyman: The Remade Rustics*, N.Y. TIMES, May 18, 2013, at C1.

188. *Id.*

189. Tom Szaroleta, *Larry the Cable Guy Gets Laughs*, FLA. TIMES-UNION (JACKSONVILLE), May 2, 2005, at B8.

190. Zinoman, *supra* note 187, at C1.

191. *Id.*

192. Order, *supra* note 32, at 7.

193. *Id.*

194. David Hinckley, *Last Laugh; Improv Comedy Legend Winters Dies*, DAILY NEWS (N.Y.), Apr. 13, 2013, at A12.

195. Grimes, *supra* note 2, at A19.

196. Charles Strum, *Multitudes Wink from One-of-a-Kind Mind*, N.Y. TIMES, Jan. 9, 2000, at §13 59.

197. Frank Ahrens, *Hats Off to the Father, and Granny, of Improv; Jonathan Winters Tickled by Mark Twain Comedy Prize*, WASH. POST, Oct. 21, 1999, C1.

198. Michael Colton, *A Comic Who Earned the Biggest Laughs*, WASH. POST, Dec. 19, 1997, at D1.

199. Warner Bros., Inc. v. Film Ventures Int’l, 403 F. Supp. 522, 525 (C.D. Cal. 1975) (quoting Walt Disney Prods. v. Air Pirates, 345 F.Supp 108 (N.D. Cal. 1972)).

important roles in delineating a character, especially when those three elements are combined. As the items below indicate, however, there are more ways to delineate a character than just by mere sight and sound.

*D. Provide a Factual Backstory for the Character that Demonstrates a Distinctive Personality*

In concluding that Jim Brockmire was copyrightable, Judge Feess reasoned that the character features a “personal history.”<sup>200</sup> Specifically, part of that history relates to his marriage, career arc and “his relationship to other broadcasting giants in baseball broadcasting history.”<sup>201</sup> These facts about who Brockmire is as a person—his backstory, as it were—go beyond the character’s mere visual appearance and auditory sound to vest him with a narrative history that brings out his personality and individuality. In other words, he becomes more than just someone who announces sporting events and calls games; he is imbued with personality traits, which courts will consider in determining copyrightability.<sup>202</sup>

The Funny or Die video also includes comments and reflections from real-life sports broadcasters.<sup>203</sup> Their words help to flesh out Brockmire’s backstory. As Judge Feess wrote, “the video cleverly uses identifiable, highly successful sports announcers to further define the Jim Brockmire character.”<sup>204</sup>

In contrast, a comedian on stage performing a solo act, of course, will not possess the added luxury of having other real-life figures provide factual details about the comedian’s character. A comedian thus might be wise, while acting and speaking in the character’s persona, to describe some of the character’s biographical details. Those details—where the character lives, as well as information about his education, temper, marital status, sex life, jobs, family, political and moral values, for instance—could perhaps be revealed in building up to the punch line of a joke. In other words, self-revelation—or story telling in the process of joke telling—provides a prime mechanism for furnishing a factual history, beyond simply using the words of other characters.

*E. Interaction*

Another way a character might be delineated is through his or her interactions with others. A character’s movements, personality and manner of speaking are allowed to come out when he or she interacts with others. For a

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200. Order, *supra* note 32, at 7.

201. *Id.*

202. See *Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1127, 1134 (W.D. Wash. 2007) (observing that “[i]n determining whether a character deserves copyright protection, courts look at the many elements of the character—visual depictions, name, dialogue, relationships with other characters, their actions and conduct, *personality traits*, and written descriptions”) (emphasis added).

203. Order, *supra* note 32, at 7, n.4.

204. *Id.*

stand-up comedian working a solo act, the obvious place for interaction is with members of the audience. Shyness, brashness, rudeness, quietness, wittiness and seriousness, among other personality traits, might be facets revealed during audience interactions.

Additionally, physical quirks, such as how a character stands, walks, slouches or points, might be revealed when speaking with audience members. For example, Chris Farley's Matt Foley "would spread his legs wide and put his arms between his legs as he's making his point."<sup>205</sup> Beyond audience interaction providing an *entrée* for illustrating such character qualities, other comedians who already appeared on the same bill as the character in question might return to the stage to interact with the character as well.

#### F. Repetition of Performance and Recordation

It is a fundamental tenet of U.S. copyright law that intellectual property rights exist only where an original work of authorship is "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>206</sup> Thus, once a comedian has perfected a character, he or she must record its performance by both audio and visual means. In fact, to capture all of a character's nuances and movements that might be overlooked by a single camera, it likely would help to have multiple cameras simultaneously record a performance then later edit them into a single video that captures different angles at different times. Multiple cameras can thus add depth and dimension to a character that a single camera cannot capture.

Inadequate recordation, in fact, was a problem for Craig Bierko in his legal tussle with Hank Azaria. As Judge Feess wrote:

None of these characteristics would serve to distinguish Sports Announcer Character from any actual baseball announcer sitting in the booth on a given game-day. Moreover, even these limited personal details have never been fixed in a tangible medium. The only two potential instances of fixation—the 1990 message left for Azaria's friend, and the later audio recording—featured Bierko speaking in the Sports Announcer Character's voice. But they did not reveal any of the character's ostensible attributes. For instance, the fixations are audio only, and that audio does not speak about his age or ethnicity.<sup>207</sup>

Repetition of a performance is also important. Specifically, additional performances may be deployed to "further define, update, and develop the character."<sup>208</sup> Of course, subsequent performances should also be recorded to demonstrate development and fine-tuning.

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205. Mekado Murphy, *How Pixar Developed 'Art' for 'Monsters University'*, N.Y. TIMES, June 16, 2013, at A16 (quoting Ricky Nierva).

206. 17 U.S.C. § 102 (2014).

207. Order, *supra* note 32, at 7–8.

208. *Siegel v. Warner Bros. Entm't Inc.*, 542 F. Supp. 2d 1098, 1110 (C.D. Cal. 2008).

Repetition of the performance of characters is especially important because, as one court noted, it demonstrates that the characters are “larger than a single production or visual representation, and in essence transcend the boundaries of any one copyrighted work.”<sup>209</sup> In other words, while the audio-video tape of a comedian’s single performance as a character may be copyrighted, the key is for the comedian to make the character ultimately transcend any one single recording. As one federal district court observed, there are certain characters “to which copyright protection may attach quite apart from the copyrighted work in which that character appears or is depicted. The kinds of characters to which this kind of protection is extended are those of the stature of Godzilla, James Bond, Superman, Rocky Balboa, and/or well-known Disney comic book characters such as Mickey and Minnie Mouse, Donald Duck, and Goofy.”<sup>210</sup>

Thus it is the case that, “though perhaps not an explicit requirement, cases finding copyrightable characters have typically seemed to implicitly require that the characters appear several times, in different books, movies, or other presentations, and that their attributes have been *consistently* portrayed in those various appearances.”<sup>211</sup> This unspoken mandate of repetition “is consistent with the requirement that a protectable character comprise ‘the story being told,’ and/or be so highly ‘delineated,’ in that the crucial question is whether what is important is the character itself, or the story in which it appears.”<sup>212</sup> In other words, regardless which of the two character copyright standards a judge chooses to apply—repetition is important.

#### *G. Consistency of Performance and Compensation for Character*

A lack of consistent depiction can defeat a claim for copyright protection of a character.<sup>213</sup> Thus, when assembling and putting together any and all of the above-mentioned qualities and variables, it is key that a comedian consistently repeats them during his or her performances. More than that, consistency of the brand or niche of a character’s humor, as well as consistency of that character’s pace of delivery of material, should not be ignored.

More specifically, a comedian might demonstrate character consistency by maintaining the same variety or genre of jokes told while in character. For instance, Larry the Cable Guy’s brand of humor has been characterized as

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209. *Rice v. Fox Broad. Co.*, 148 F. Supp. 2d 1029, 1055 (C.D. Cal. 2001), *aff’d in part, rev’d in part on other grounds*, 330 F.3d 1170 (9th Cir. 2003).

210. *Id.*

211. *Id.* at 1056.

212. *Id.*

213. *Walker v. Viacom Int’l, Inc.*, 2008 U.S. Dist. LEXIS 38882, \*15–16 (N.D. Cal. May 13, 2008) (rejecting a claim for copyright in the character Mr. Bob SpongEE where the character was “not consistently depicted,” and holding that “[t]his lack of consistency defeats plaintiff’s claim that the stand-alone character of ‘BOB SPONGEE’ is protected”). *See supra* notes 208-212 and accompanying legal test (describing the requirement of consistency in portrayal).

“strong on bodily functions”<sup>214</sup> and “obsessed with bathroom humor.”<sup>215</sup> Whitney bluntly calls it “[s]eventh-grade juvenile stupid”<sup>216</sup> humor, stating that, “[f]arts are funny.”<sup>217</sup> A reviewer for one Florida newspaper seemingly concurs, asserting that the Larry character is “dirty in a seventh-grade boy kind of way, with lots of jokes about bodily functions and breasts and inappropriate things to do with a toilet brush.”<sup>218</sup> Others dub it “redneck humor”<sup>219</sup> and politically incorrect in terms of the people at whom it pokes fun.<sup>220</sup> Specifically, Whitney’s Larry the Cable Guy act has been criticized as “racist, homophobic and ignorant”<sup>221</sup> because he “takes aw-shucks shots at gays, blacks, Muslims and other groups.”<sup>222</sup>

Another tactic a comedian might employ to demonstrate a character’s consistency relates to the timing and pacing at which his or her jokes are conveyed to the audience. For example, the speed and rate of jokes told by Daniel Whitney as Larry the Cable Guy is fast and steady.<sup>223</sup> Whitney once told the *Washington Post* that he delivers material at a pace of “[e]ight seconds per joke. Jokes on the way to telling the joke.”<sup>224</sup> One reviewer similarly observed that Whitney’s jokes are conveyed as “short, snappy one-liners.”<sup>225</sup> Additionally, when telling such jokes, Whitney’s character doesn’t use the

214. Kevin Thomas, *Comedy That’s Redneck, White and Blue-Collar*, L.A. TIMES, Mar. 28, 2003, at E8.

215. William Booth, *Guffaw Guys; The Kings of Redneck Comedy, Proudly Showing Their True Colors*, WASH. POST, Sept. 5, 2004, at N1.

216. Jeff Korbelik, *It’s Official: Cable Guy to Do Show at Stadium*, LINCOLN J. STAR (NEB.), Apr. 7, 2009, at A1.

217. Thom Smith, *How the Funniest Bell Hop in West Palm Beach Became Larry the Cable Guy*, PALM BEACH POST (FLA.), July 27, 2005, at 1E.

218. Szaroleta, *supra* note 189, at B8.

219. See Tom D’Angelo, *‘Cable Guy’ Says He’s a Husker at Heart*, PALM BEACH POST (Fla.), Sept. 6, 2009, at 6C (asserting that Whitney is “known for redneck humor”); Lakin, *supra* note 185, at D10 (describing Whitney’s character as being famous for “redneck humor”); George O’Brien, *Performance Driven*, BUSINESSWEST, Mar. 6, 2006, at 26 (stating that Whitney’s character “offers what is called ‘redneck humor’”).

220. See Phil Kloer, *Grits ‘n Grins*, ATLANTA J. CONST., May 12, 2005, at 1E (noting that Whitney “is the only one of the country-fried comics who’s been criticized for stepping over the line of political correctness” and adding that his Larry the Cable Guy character “makes passing references to blacks, Hispanics and gays in ways that some might find offensive. His riffs against political correctness, though, make the jokes seem like part of a political philosophy.”); *Rapid Rise from Rube to Riches; Larry Might not Appeal to All Tastes, But He’s a Multimedia Maverick*, Daily Variety, June 24, 2011, at A1 (asserting that “the college-educated revile him” and that the “mainstream media have no use for the politically incorrect good ol’ boy who rattles off 10 jokes a minute and even stands behind the groaners”).

221. Timothy McNulty, *How Un-PC Can You Be?*, Pitt. Post-Gazette (Pa.), Apr. 16, 2006, at E1.

222. *Id.*

223. See Mary Nevans Pederson, *Redneck Humor Hits Dubuque; Larry the Cable Guy Entertains 3,300 at Five Flags Center*, Telegraph Herald (Dubuque, Iowa), Mar. 11, 2005, at A1 (describing the comedian’s delivery as “rapid-fire”).

224. Booth, *supra* note 215, at N1.

225. Dan LeRoy, *Other Man’s Failure Was Just What He Needed*, CHARLESTON DAILY MAIL (W. VA.), Nov. 17, 2005, at 7D.

word ‘fuck’ or take the Lord’s name in vain,<sup>226</sup> unlike many comedians. The absence of quality thus might help to delineate a character.

Finally, although never judicially articulated—of course, a court has never squarely addressed the copyrightability of a comedian’s stand-alone, on-stage character at all—it might help a comedian to demonstrate that he or she is specifically compensated for performing their character. This would evidence the public’s recognition of a character as distinctive. For example, if Daniel Whitney advertises his comedic performances not under his real name, but under that of Larry the Cable Guy, it illustrates that the character itself is what/who people recognize and pay to experience.

In summary, there are multiple ways for a comedian to attempt to increase copyrightability and ultimately obtain copyright protection for a character. Among other things, the sight, sound, slogans, motion, personality, and interaction of a character can help to make it copyrightable. No single variable, however, will likely accomplish full copyrightability for a comedian’s character. It is the distinctive product from a totality-of-the-elements approach that ultimately is the key.

## V. CONCLUSION

If it is true that “literary characters created in copyrighted works present a difficult challenge to copyright law,”<sup>227</sup> then non-literary characters created outside this framework pose even greater challenges. Comedians who perform alone on a stage, without the trappings of a plot or storyline and without interacting with other characters, face a difficult task in developing original, creative characters suitable for copyright protection.

As attorneys Allison Brehm and Eric May of Kelley Drye assert, *Azaria* demonstrates that “the level of development of fictional character traits and their prominence in the work in which the character appears influence whether the character merits copyright protection.”<sup>228</sup> Intellectual property law attorney Paul Thomas of Fredrikson & Byron adds that *Azaria* illustrates “two fundamental principles of copyright protection: the requirement of detailed creativity in expression and the requirement of fixing the expression in a tangible medium.”<sup>229</sup>

This article has gone beyond such minimal, albeit clearly fundamental, advice to provide further guidance to comedians and actors who seek copyright

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226. See Edwards, *supra* note 178, at 35 (quoting Whitney in making the proposition that “I don’t say the f word, and I don’t take the Lord’s name in vain”).

227. Matthew A. Kaplan, Note, *Rosencrantz and Guildenstern are Dead, But are They Copyrightable?: Protection of Literary Characters With Respect to Secondary Works*, 30 RUTGERS L.J. 817, 819 (1999).

228. Allison Brehm & Eric May, *Character Rights, Not So Elementary*, DAILY J., June 25, 2014, available at <http://www.kelleydrye.com/publications/articles/1857>.

229. Paul E. Thomas, *Character Building Experiences*, Fredrikson & Byron, P.A., Mar. 7, 2014, [http://www.fredlaw.com/news\\_\\_media/2014/03/07/565/character\\_building\\_experiences](http://www.fredlaw.com/news__media/2014/03/07/565/character_building_experiences) (last visited Sept. 24, 2014).

protection for their on-stage characters. An ownership interest in a comedic character is of significant fiscal importance in this area, especially given that “[e]arning a livable salary through comedy is not easy.”<sup>230</sup> Indeed, *Forbes* notes that “[m]ost aspiring comics start out in the local club scene, where gigs can pay as little as \$20 for a weekday spot and \$75 on a weekend.”<sup>231</sup>

Ultimately, however, the law in this area will not be clarified until several courts are able to address the issue as well as agree on criteria. Until that time, comedians are largely left laughless in the legal lurch.

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230. Jason Zinoman & Megan Angelo, *Clever, How They Earn That*, N.Y. TIMES, Nov. 2, 2012, at A12, available at <http://www.nytimes.com/2012/11/04/arts/stand-ups-and-their-salaries.html>.

231. Vanna Le, *Jerry Seinfeld Tops Highest-Earning Comedians List of 2013*, FORBES, July 11, 2013, available at <http://www.forbes.com/sites/vannale/2013/07/11/jerry-seinfeld-tops-list-of-the-highest-earning-comedians>.