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# Scènes à Faire as Identity Trait Stereotyping

Jasmine Abdel-khalik\*

## ABSTRACT

There is at least one place where the law not only recognizes but expects and encourages stereotyping based on race, ethnicity, gender, sexual orientation, gender expression, nationality, and the like (“identity traits”)—stock characters. A stock character is the archetype of a story’s character and, as such, is excluded from copyright protection, making the stock freely available for other authors to use. However, harm arises when courts agree that a stock character is comprised of an identity trait and any other characteristic, indicating that what flows naturally from that identity trait is something more than just that identity—a stereotype. In fact, identity trait stereotyping appears in the seminal stock characters case, *Nichols v. Universal Pictures*, involving the “low comedy Jew and Irishman.”

There are three steps courts can take to minimize identity trait stereotyping while continuing to permit the use of stock characters. First, courts should recognize three categories of characters in creative works: stock, indefinite, and distinctly delineated. While only distinctly delineated characters would have copyright protection, the intermediate category allows courts to find that a character has multiple characteristics without implying that the characteristics are standard for specific identity traits. Second, courts must separate the determination of a character’s scope and copyrightability from the substantial similarity analysis to avoid conflating similarity with stock. Third, when possible, courts should also take the opportunity to correct the errors of the past.

While no copyright doctrine alone is to blame for society’s stereotyping and stereotypes, scènes à faire grants judicial approval for continuing stereotyping. Without more care, the consequences could not only further entrench negative stereotypes in the creative mind, but also in the minds of those who consume their creative product.

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## I. INTRODUCTION

A casting call for the *Straight Outta Compton* movie:

SAG OR NON UNION CASTING NOTICE FOR FEMALES-ALL ETHNICITIES from the late 80's. Shoots on "Straight Outta Compton." Shoot date TBD. We are pulling photos for the director of featured extras. VERY IMPORTANT—You MUST live in the Los Angeles area (Orange County is fine too) to work on this show. DO NOT SUBMIT if you live out of the area. Nobody is going to be flying into LA to do extra work on this show—and don't tell me you are willing to fly in.

SAG OR NON UNION FEMALES—PLEASE SEE BELOW FOR SPECIFIC BREAKDOWN. DO NOT EMAIL IN FOR MORE THAN ONE CATEGORY:

A GIRLS: These are the hottest of the hottest. Models. MUST have real hair – no extensions, very classy looking, great bodies. You can be black, white, Asian, Hispanic, mid eastern, or mixed race too. Age 18-30. Please email a current color photo, your name, Union status, height/weight, age, city in which you live and phone number to: SandeAlessiCasting@gmail.com subject line should read: A GIRLS

B GIRLS: These are fine girls, long natural hair, really nice bodies. Small waists, nice hips. You should be light-skinned. Beyoncé is a prototype here. Age 18-30. Please email a current color photo, your name, Union status, height/weight, age, city in which you live and phone number to: SandeAlessiCasting@gmail.com subject line should read: B GIRLS

C GIRLS: These are African American girls, medium to light skinned with a weave. Age 18-30. Please email a current color photo, your name, Union status, height/weight, age, city in which you live and phone number to: SandeAlessiCasting@gmail.com subject line should read: C GIRLS

D GIRLS: These are African American girls. Poor, not in good shape. Medium to dark skin tone. Character types. Age 18-30. Please email a current color photo, your name, Union status, height/weight, age, city in which you live and phone number to: SandeAlessiCasting@gmail.com subject line should read: D GIRLS<sup>1</sup>

It is not a controversial or bold statement to say that, in a variety of areas of law, the use of stereotypes on the basis of race, gender, nationality, or the like is

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1. Hamilton Nolan, *Straight Outta Compton Casting Call is Racist as Hell*, GAWKER (July 17, 2014, 9:25 AM), <http://gawker.com/straight-outta-compton-casting-call-is-racist-as-hell-1606524197>.

generally disfavored.<sup>2</sup> Yet, in the context of the creative process, there remains at least one place in the law where stereotyping is not only recognized but perhaps even expected as the basic frame into which a creative mind will expand: the scènes à faire doctrine in copyright law. Scènes à faire are defined as “situations and incidents that flow necessarily or naturally from a basic plot premise.”<sup>3</sup> As such, scènes à faire lack the requisite creativity to warrant copyright protection and instead are available for all creative minds to use as a foundation to be explored and developed in new ways for new works.<sup>4</sup> A subcategory of scènes à faire is stock characters, which are defined as “characters who display generic traits.”<sup>5</sup> For example, a magician in a standard magician’s costume has been labeled a stock character.<sup>6</sup> A stock character is often called some variation of a stereotypical archetype.<sup>7</sup>

The danger arises when a stock character is described as comprising an identity trait—such as race, ethnicity, gender, sexual orientation, gender expression, nationality, and the like—and an additional characteristic, which then propagates an identity trait stereotype. In fact, from its inception in *Nichols v. Universal Pictures*, the very notion of stock characters is presented as infusing identity traits with some sort of stereotype when the court recognized “the low comedy Jew and Irishman” as stock characters.<sup>8</sup> While not clearly defined by the court, these stock characters may be stereotypes pulled from the then existing creative industries and given power by the court’s recognition.<sup>9</sup>

Stereotypical assumptions about characters based on identity traits are not just a function of the past. Casting calls, which describe the expected, yet general, characteristics for specific roles, indicate current use of identity trait stereotypes by at least some in the creative industries. Consider the controversy surrounding the recent N.W.A. biopic. N.W.A. is widely considered one of the most influential rap groups that “brought gangsta rap into the mainstream.”<sup>10</sup> In its highly acclaimed *Straight Outta Compton* album, N.W.A. “offered an uncompromising view of life as young black men on the streets of LA, delivered with unswerving aggression, braggadocio[,] and dark humour [sic].”<sup>11</sup> In 2015, an N.W.A. biopic was filmed and

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2. See, e.g., Wyatt Foret, *Transforming Healthcare Law: Litigating Antidiscrimination Under the Affordable Care Act*, 28 YALE J.L. & FEMINISM 243 (2017); Margaret Moore Jackson, *Confronting “Unwelcomeness” from the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 CARDOZO J.L. & GENDER 61 (2007); Arusha Gordon & Ezra D. Rosenberg, *Barriers to the Ballot Box: Implicit Bias and Voting Rights in the 21st Century*, 21 MICH. J. RACE & L. 23 (2015); Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293 (2003).

3. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002).

4. See, e.g., *Randolph v. Dimension Films*, 634 F. Supp. 2d 779, 789 (S.D. Tex. 2009); *Scott-Blanton v. Universal City Studios Prods. LLLP*, 539 F. Supp. 2d 191, 201–202 (D.D.C. 2008).

5. *Tanksley v. Daniels*, 259 F. Supp. 3d 271, 290 (E.D. Pa. 2017).

6. See *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004) (citing *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175–76 (9th Cir. 2003) (giving further detail regarding the scope of the stock character)).

7. *DaVinci Editrice S.R.L. v. ZiKo Games, LLC*, No. H–13–3415, 2014 WL 3900139, at \*8 (S.D. Tex. Aug. 8, 2014).

8. 45 F.2d 119, 122 (2d Cir. 1930).

9. See *infra* Part III.

10. *N.W.A. Bio*, ROLLING STONE, <https://web.archive.org/web/20180614015809/https://www.rollingstone.com/music/artists/n-w-a/biography> (last visited Dec. 15, 2018).

11. Rebecca Laurence, *NWA: ‘The World’s Most Dangerous Group’?*, BBC (Aug. 13, 2015), <http://www.bbc.com/culture/story/20150813-nwa-the-worlds-most-dangerous-group>.

released, *Straight Outta Compton*.<sup>12</sup> At the time of its release, it was the “highest grossing movie from an African-American director.”<sup>13</sup>

Among its controversies and tragedies,<sup>14</sup> one of the *Straight Outta Compton* casting calls, reproduced above, generated a great deal of heat. Searching for extras for one scene, the casting call placed women (“girls”) into categories that sounded like grades—“A Girls” through “D Girls.” Even more problematic was that the darker the skin and, for African Americans, the more natural the hair, the lower the grade. “B Girls” have “long natural hair . . . [and] should be light-skinned. Beyoncé is a prototype here.”<sup>15</sup> “C Girls” are “medium to light skinned with a weave.”<sup>16</sup> “D Girls” are not only poor and overweight, but also have “medium to dark skin tone.”<sup>17</sup> As the casting call spread through the media, the reaction was quick and ferocious.<sup>18</sup>

The casting company that released the casting call said the notice was “just an unfortunate mistake in the lettering that has caused us backlash. . . .”<sup>19</sup> It claimed the letters, which it had used in previous casting calls, are to sort responses and not to rank women.<sup>20</sup> Even if this claim is true, nothing in the casting company’s response addressed the substance in the category descriptions themselves, specifically the offensive assumptions in identifying and grouping particular characteristics. Universal Pictures distanced itself, stating “the filmmakers . . . did not approve and do not condone the information in this casting notice.”<sup>21</sup>

Despite Universal Pictures’s protestations, someone associated with the film, or perhaps multiple people, provided the information for the casting call and chose the casting company. Intuitively, only those associated with the film or with access to the *Straight Outta Compton* script would know what kind of extras would be needed for particular scenes. In fact, this intuition has some support.<sup>22</sup> Brian Herrera, a Princeton professor who researches the history of casting, notes that a casting

12. *See id.*

13. *See* Mia Galuppo, ‘*Straight Outta Compton*’ Becomes the Highest-Grossing Movie from African-American Director, BILLBOARD (Nov. 3, 2015), <https://www.billboard.com/articles/news/6752823/straight-outta-compton-box-office-worldwide>.

14. *See, e.g.*, Ben Westhoff, *The Truth Outta Compton: Why did Suge Knight Run Over his Friend with a Truck?*, GUARDIAN (Feb. 2, 2015, 3:26 PM), <https://www.theguardian.com/music/2015/feb/02/suge-knight-murder-accident-straight-outta-compton>.

15. *See* Nolan, *supra* note 1; Travis Lyles, *Here’s the ‘Straight Outta Compton’ Casting Call that Everybody Thought was Racist*, BUS. INSIDER (Aug. 13, 2015, 7:53 PM), <http://www.businessinsider.com/racist-straight-outta-compton-casting-call-2015-8>.

16. *See* Nolan, *supra* note 1.

17. *See id.*

18. *See, e.g., id.*; Colin Stutz, *N.W.A. Movie Casting Call Conflates Black Skin with Unattractiveness*, SPIN (July 17, 2014), <https://www.spin.com/2014/07/nwa-biopic-straight-outta-compton-racist-casting-call-skin/>.

19. Najja Parker, *JET Talks to Agency Under Fire for Casting Call*, JET (July 17, 2014), <https://www.jetmag.com/entertainment/agency-fire-offensive-casting-call/>.

20. *See id.*

21. Sean Michaels, *NWA Biopic Makers Apologise Following Accusations of Racist Casting Call*, GUARDIAN (July 18, 2014, 5:59 AM), <https://www.theguardian.com/music/2014/jul/18/nwa-biopic-film-makers-apologise-following-accusations-of-racist-casting-call>.

22. *See, e.g.*, Ken Lazer, *An Inside Look at the Casting Process*, BACKSTAGE (June 29, 2018, 2:00 PM), <https://www.backstage.com/advice-for-actors/backstage-experts/how-does-casting-process-work/> (noting that the casting process involves getting specs from the client); *How to Write a Casting Notice*, LIGHTS FILM SCH., <https://www.lightsfilmschool.com/blog/how-to-write-a-casting-call/481> (last visited Dec. 15, 2018) (noting that a strong casting call is the first point of contact between the production and the potential actors). *But see* Alan Duke, *Acura Apologizes for Seeking ‘Not Too Dark’ Actor*, CNN,

call, or breakdown, reflects “the filmmakers’ and producers’ initial wishes for the role.”<sup>23</sup> One company, Breakdown Services, distributes most casting calls for films and television and drafts approximately half of the notices.<sup>24</sup> Otherwise, for major projects, casting directors are likely the ones who create the casting calls by referencing the associated screenplays or consulting with the screenwriter.<sup>25</sup> Even when Breakdown Services prepares a casting call, the descriptions “are either taken directly from the script or requested specifically by the creative team” and are approved by the casting director before posting.<sup>26</sup>

Regardless of which process is used to draft the casting call, Universal Studios, and others similarly positioned, cannot avoid responsibility for the use of stereotypes in casting calls. If the casting calls are approved without review by the project’s creative team (beyond perhaps the casting director), it is a choice the creative team made. Given that the *Straight Outta Compton* racist casting call (or perhaps a casting call that reflects colorism or both)<sup>27</sup> is not a singular event, this choice is an abrogation of responsibility or perhaps even approval of the current standards used to draft casting calls because many casting calls contain similar problems. For example, a 2010 casting call for hobbit extras for *The Hobbit* movie required “light skin tones, a requirement reinforced when the casting agent reportedly rejected a woman of Pakistani descent because of her skin color.”<sup>28</sup> *The Hobbit*’s author had provided some guidance that recognized some variety in hobbit skin-tones, but the casting did not.<sup>29</sup>

Outside the realm of film, the casting call for an Acura 2012 Super Bowl ad “called for an African-American actor [to play the car dealer] who was ‘not too

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<https://www.cnn.com/2012/04/18/showbiz/acura-ad-controversy/index.html> (last updated Apr. 19, 2012, 9:43 AM).

23. See Nina Shen Rastogi, *Please Submit All Ethnicities*, SLATE (July 30, 2012, 6:34 AM), [http://www.slate.com/articles/arts/culturebox/2012/07/casting\\_and\\_race\\_the\\_tricky\\_business\\_of\\_writing\\_casting\\_notices.html](http://www.slate.com/articles/arts/culturebox/2012/07/casting_and_race_the_tricky_business_of_writing_casting_notices.html).

24. See *id.*; Nellie Andreeva, *TV & Film Casting Biz Disrupted: Fox’s Decision to Drop Breakdown Services for Casting Networks & Its Fallout*, DEADLINE (Nov. 20, 2017, 2:02 PM), <https://deadline.com/2017/11/hollywood-casting-business-disrupted-breakdown-services-casting-networks-fox-1202211710/>. But see Lyles, *supra* note 15 (showing the offensive *Straight Outta Compton* casting call was posted on several social media sites). There are similar services for voice over and commercial work. See Kate McClanaghan, *What Does a Casting Director Do?*, HUFFINGTON POST, [https://www.huffingtonpost.com/kate-mcclanaghan/what-does-a-casting-direc\\_b\\_9799558.html](https://www.huffingtonpost.com/kate-mcclanaghan/what-does-a-casting-direc_b_9799558.html) (last updated Dec. 6, 2017) (author is a casting director, producer, and author).

25. See Lazer, *supra* note 22; Rastogi, *supra* note 23; see also Zeke, *Casting Director’s Checklist*, N.Y. FILM ACAD.: STUDENT RESOURCES (Feb. 10, 2015), <https://www.nyfa.edu/student-resources/casting-directors-checklist/>. For lower budget projects, the production may prepare the casting call itself. See Jenny Jaffe, *The Terrible World of Casting Notices*, VULTURE (Sept. 13, 2015), <http://www.vulture.com/2015/09/casting-notices-are-so-terrible.html>.

26. See Rastogi, *supra* note 23.

27. See Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1489 n.5 (2000) (citing Alice Walker to define colorism as “prejudicial or preferential treatment of same-race people based solely on their color”); see also Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L.REV. 1705, 1709 (2000) (citing Nightline to define colorism as “discrimination based on skin tone”).

28. See Lyles, *supra* note 15; Ben Child, *Extra Claims She was Rejected for Hobbit Role for Looking ‘Too Brown’*, GUARDIAN (Nov. 29, 2010), <https://www.theguardian.com/film/2010/nov/29/extra-too-brown-the-hobbit>.

29. See Child, *supra* note 28. Tolkien provided some guidance that some hobbits were “browner” than others.

dark.”<sup>30</sup> Acura claimed that the casting agency provided the “creative directions.”<sup>31</sup> For Nick Jonas’s summer tour around 2016, the casting call “requested ‘stunning female models,’ ‘the kind of girls Nick Jonas would have a crush on,’ as in, ‘mainly Caucasian,’ with possible, ‘ethnic flare, like Indian or South American.’”<sup>32</sup> The production claimed that the casting director, posting without the production company’s approval, “realized the wording was inappropriate and pulled it from the site within 30 minutes of its being published.”<sup>33</sup> The following offensive breakdown for an Asian woman helped to inspire a Tumblr account and a show about casting call breakdowns: “20’s/30’s—an Asian woman who doesn’t have the hard features of most other Asian females—she is more elegant and sophisticated and knows it.”<sup>34</sup> In a related field, fashion model castings allegedly often exclude certain races.<sup>35</sup>

In addition to identity trait stereotyping based on race, casting calls based on gender stereotyping have also raised ire. Many calls focus on the attractiveness of the female and how one’s attractiveness is expected to affect the character’s behavior, beliefs, or intellect. Some examples of female roles calling for attractive women include the following: “[s]he loves being a woman so she probably wears a push-up bra”;<sup>36</sup> a woman who “should be wearing an apron with maybe a floral pattern on it to underline femininity”;<sup>37</sup> “[t]he dream of any teenage boy, sexy yet wholesome, perfect physique, and always eager to please her man”;<sup>38</sup> and, “Female. Cute. Naïve [*sic*]. Not an independent thinker.”<sup>39</sup> In contrast, another project “prefer[red] an actor who is not thin. This is a great role for a feminist.”<sup>40</sup> Because there are so many sexist casting calls, at least two Tumblr pages were created to reproduce and discuss them: Sexist Casting Calls<sup>41</sup> and Lady Parts, the latter prompted by a casting call seeking “Beautiful Girl (non-speaking).”<sup>42</sup>

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30. See Duke, *supra* note 22.

31. See *id.*

32. Hannah Gold, *Here’s What Happened When an Actor Tried to Publicize a Racist Casting Call*, JEZEBEL (Nov. 3, 2016, 1:20 PM), <https://jezebel.com/heres-what-happened-when-an-actor-tried-to-publicize-a-1787814769>.

33. *Id.*

34. Alex Chester, *How Cast and Loose is Sparking a Revolution*, ONSTAGE BLOG: THE ACTING LIFE (July 11, 2017), <http://www.onstageblog.com/columns/2017/7/11/how-cast-and-loose-is-sparking-a-revolution> (interview of Lynne Marie Rosenberg).

35. Lisa Ryan, *Casting Director James Scully Calls for Reform of the Fashion Industry’s Overt Racism and Discrimination*, CUT (Dec. 6, 2016), <https://www.thecut.com/2016/12/fashion-casting-director-calls-out-industrys-racism.html> (“Casting directors are now being told not to cast black or Asian models.”).

36. Taylor Pittman, *19 (Totally Real) Cringeworthy Casting Calls, Read by Women*, HUFFINGTON POST (Mar. 7, 2016, 1:22 PM), [https://www.huffingtonpost.com/entry/totally-real-cringeworthy-casting-calls-read-by-women\\_us\\_56dd9333e4b0000de4051e77](https://www.huffingtonpost.com/entry/totally-real-cringeworthy-casting-calls-read-by-women_us_56dd9333e4b0000de4051e77).

37. Laura Bray, *Casting Call | The Project*, YOUTUBE (Mar. 8, 2016), [https://www.youtube.com/watch?v=KQNLs94\\_grk](https://www.youtube.com/watch?v=KQNLs94_grk). In the posted video, actors read real casting calls from real casting websites.

38. Tasneem Nashrulla, *This Actor’s Tumblr Exposes Just How Sexist Casting Calls are for Women*, BUZZFEED NEWS (Nov. 11, 2014, 5:05 PM), [https://www.buzzfeed.com/tasneemnashrulla/this-actors-tumblr-exposes-how-sexist-casting-calls-are-for?utm\\_term=.juMdXANexd#.qpPEDmQ2WE](https://www.buzzfeed.com/tasneemnashrulla/this-actors-tumblr-exposes-how-sexist-casting-calls-are-for?utm_term=.juMdXANexd#.qpPEDmQ2WE).

39. *Id.*

40. See Bray, *supra* note 37 (quoting the posted video *Casting Call | The Project* where actors read real casting calls from real casting websites).

41. Daisy Murray, *These Horrendously Sexist Casting Calls Show What Actresses Deal with Everyday*, ELLE (Aug. 24, 2017), <https://www.elle.com/uk/life-and-culture/culture/news/a38041/sexist-casting-calls-female-actress-despair-at-the-world/>.

42. Nashrulla, *supra* note 38.

The casting calls themselves are someone's synthesis of the underlying creative material—the expectation of who various characters should be. In distilling the characters to the casting call posting, by reaching down to the general emphases of each character rather than specific nuances, the casting calls may reflect perceptions of the stock from which the author developed the specific character and, therefore, can reflect the infection of stereotyping. This is an even greater problem when the creative material has lightly sketched the characters, which may occur with extras in a scene, and yet the associated casting call utilizes stereotypical assumptions to fill those roles.

While identity trait stereotypes appear in many casting calls, the casting calls may also reflect stereotyping within the underlying content, which then influences the audience's perception of that identity trait. Consider the 2018 report by the Annenberg Foundation and the USC Annenberg School for Communication and Journalism that evaluated the portrayal of characters in popular, fictional films.<sup>43</sup> Assessing the top 100 popular movies of 2017 based on domestic gross receipts,<sup>44</sup> two stereotypical characteristics appear more often for women than men. First, women were more likely than men to be shown in sexy attire, have some nudity, or to have their beauty referenced.<sup>45</sup> Female characters were also more likely to be portrayed as parents or caregivers.<sup>46</sup> These two portrayals may reinforce long-standing stereotypes that women are either young and sexy or older and motherly.<sup>47</sup> Pair that with the low percentage of female roles; in 2017, only 31.8% of speaking characters were female, a percentage that is “not meaningfully different from prior years” studied.<sup>48</sup> There is simply less female representation, and at least some seem to reflect stereotypes. Further, the study noted that in the context of gender, “exposure to traditional depictions in the media may teach and/or reinforce stereotypical attitudes, beliefs[,] and behaviors among some viewers.”<sup>49</sup> In other words, stereotypical representations can have a powerful effect in reinforcing the validity of the stereotype.

Courts have a role in addressing character stereotyping in creative works through their assessment of copyright protection for characters; courts adjudicate what is stock and what is not. Without care, judicial decisions assessing stock characters can not only legitimize the existing stereotypes but may further engrain them. To explore this topic, Part II introduces the scope and goals of copyright law and

43. See Stacy L. Smith, Marc Choueiti, Katherine Pieper, Ariana Case & Angel Choi, *Inequality in 1,100 Popular Films: Examining Portrayals of Gender, Race/Ethnicity, LGBT and Disability from 2007 – 2017*, USC ANNENBERG (July 2018), <http://assets.uscannenberg.org/docs/inequality-in-1100-popular-films.pdf>.

44. *See id.* at 28.

45. *See id.* at 8–12.

46. *See id.* at 8. Additionally, “the portrayal of underrepresented female characters, particularly females from [m]ixed [r]ace backgrounds, is still typified by sexualization. . . . [C]ontent creators . . . continue to portray underrepresented women in line with historical – and historically criticized – notions.” *See id.* at 19.

47. *See id.* at 12.

48. *See id.* at 4, 26. The report also noted that less than 30% of characters with an identifiable race/ethnicity were not white, less than one percent were LGB (none were transgendered), and only 2.5% of film characters had a disability (not including addiction). *See id.* at 14–15, 21, 23. Of course, that is assuming that diverse characters are visible at all. Of the top 100 movies in 2017, 20 had no African American characters, 43 had no Latinx characters, 37 had no Asian characters, 81 had no LGBT characters, and 41 films had no characters with disabilities. *See id.* at 26.

49. *Id.* at 8. Additionally, “studies and theory show that exposure to objectifying content can contribute to and/or reinforce body shame, appearance anxiety, and self objectification among some females.” *See id.*

how that shapes the scènes à faire doctrine. Part III explores the application of the scènes à faire doctrine and the fact that, in some cases, the application is done in a manner that reflects identity trait stereotyping. Finally, Part IV suggests that courts would be better able to avoid identity trait stereotyping in stock characters if they took three steps: (1) utilize more character categories to avoid grouping general characteristics into one stock; (2) segregate the analysis of a character from the analysis of copyright infringement to avoid implying that all similarities between two works' characters are stock; and (3) where feasible, take the opportunity to correct identity trait stereotyping in past decisions.

Addressing the legal reinforcement of stereotyping in stock characters will not solve the offensive use of stereotyping in the creative industries or society writ large and may not immediately affect the language used in casting calls. However, it will better clarify the scope and use of stock characters in copyright law. More importantly, it will prevent the impression that the legal system recognizes and approves of specific identity trait stereotypes, and it may also prevent the impression that the judicial system expects creative individuals to depend upon these stereotypes. Perhaps, by bringing the issue to the fore and strongly rejecting it, courts can remind creative minds that they too should avoid identity trait stereotyping.

## II. WHEREFORE ART THOU ROMEO:<sup>50</sup> COPYRIGHT AND THE SCÈNES À FAIRE DOCTRINE

Copyright law is structured to encourage creative works.<sup>51</sup> While this ultimately benefits the general public by encouraging the generation of more creative works for the public to enjoy,<sup>52</sup> it does so by granting certain exclusive rights to the author.<sup>53</sup> These exclusive rights allow the author to monetize creative works, thereby allowing the artist to focus on creating more works without the distraction of needing employment elsewhere to pay the bills.<sup>54</sup>

Because the goal is to encourage more creative works for the general public good, “[t]he sine qua non of copyright [protection] is originality.”<sup>55</sup> Originality requires independent creation and only a modicum of creativity, recognizing that most, if not all, creative works build on ideas and other components that are in the public domain—freely available for all to take as raw material for new creative works.<sup>56</sup> For example, as wonderfully inspired as Shakespeare’s plays are, he did not create them out of whole cloth. Of course, Shakespeare depicted historical people and events in several of his plays and therefore utilized historical facts.<sup>57</sup> However, using a computer program to compare Shakespeare plays with various documents, two researchers recently postulated that an unpublished manuscript, “A Brief

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50. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.

51. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984).

52. See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

53. See, e.g., *id.* at 155.

54. See, e.g., *Golan v. Holder*, 565 U.S. 302, 360 (2012) (Breyer, J., dissenting).

55. *Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991).

56. See *id.*

57. See Dan Jones, *Shakespeare: Did He Get His History Right?*, TELEGRAPH (June 25, 2013, 12:30 PM), <https://www.telegraph.co.uk/culture/theatre/william-shakespeare/10106855/Shakespeare-did-he-get-his-history-right.html>.

Discourse of Rebellion and Rebels,” inspired or influenced 11 of Shakespeare’s plays, including King Lear and Macbeth.<sup>58</sup>

Recognizing that creative works are often built on the shoulders of giants, several principles describe material not eligible for copyright protection. Some excluded content is logical, such as facts. While the expression, selection, and arrangement of facts can display originality, facts themselves are not creative and should be available for all to use.<sup>59</sup>

Another principle specifically excludes copyright protection for ideas.<sup>60</sup> An idea extracted from any specific expression can be used to create numerous new works, and each of these works would add to the public benefit as each would be distinct in their expression.<sup>61</sup> For example, Shakespeare’s *Romeo and Juliet* is one of the most famous explorations of star-crossed lovers kept apart by external forces.<sup>62</sup> However, a number of other books, plays, and movies explore the same idea, including *West Side Story*, which uses race as the motivating dynamic for the external forces, and the recent zombie movie *Warm Bodies*, where a zombie falls in love with a non-zombie human even as her father is a noted leader in the war against zombies.<sup>63</sup> Each of these may have started with the same idea, but each explored that idea in different ways, with different expression.<sup>64</sup> And each inure to the benefit of the general public because the benefit comes in the specific, unique expression of the idea. Therefore, the expression is protected by copyright law, but not the idea.<sup>65</sup>

In addition, there are some elements of expression that “naturally follow from the idea . . . .”<sup>66</sup> These elements, termed scènes à faire, are described as “certain commonplace expressions [that] are indispensable and naturally associated with the treatment of a given idea.”<sup>67</sup> These elements can be incidents, settings, or characters.<sup>68</sup> For example, “a daytime talk show will contain such stock elements as a host, interviews of guest celebrities, and cooking segments, and these standard elements are not protected by copyright.”<sup>69</sup> The key is to avoid copyright protection for elements that are “so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another.”<sup>70</sup> Because scènes à faire are aspects that flow directly from the idea, extending copyright

58. See Michael Blanding, *Plagiarism Software Unveils a New Source for 11 of Shakespeare’s Plays*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/books/plagiarism-software-unveils-a-new-source-for-11-of-shakespeares-plays.html>.

59. *Feist*, 499 U.S. at 347–48 (noting that facts are discovered not created, are therefore not original to the author, and are part of the public domain).

60. See 17 U.S.C. §102(b) (2018).

61. See, e.g., *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003) (“[N]o copyright protection may be afforded to the idea of producing a glass-in-glass jellyfish sculpture.”).

62. See Laura Barnett, *Happy Ending for Romeo and Juliet*, GUARDIAN (Apr. 23, 2008, 5:05 PM), <https://www.theguardian.com/stage/2008/apr/23/theatre4>.

63. See Mary Sollosi, *12 Romeo and Juliet Movies, Ranked*, ENT. WEEKLY (Nov. 4, 2016, 5:58 AM), <http://ew.com/gallery/romeo-and-juliet-adaptations/>.

64. But see *infra* note 208 (suggesting that there could be substantial similarity in the plot between *Romeo and Juliet* and *West Side Story*).

65. *Feist Publ’n Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349–50 (1991).

66. *Satava*, 323 F.3d at 810.

67. *Evox Prod. LLC v. Kayak Software Corp.*, No. CV15–5053 PSG (AGRx), 2017 WL 5634856, at \*9 (C.D. Cal. Jan. 20, 2017).

68. See *Horizon Comics Prod., Inc. v. Marvel Entm’t, LLC*, 246 F.Supp.3d 937, 941 (S.D.N.Y. 2017).

69. *Erickson v. Blake*, 839 F.Supp.2d 1132, 1138 (D. Or. 2012).

70. *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923, 929 (7th Cir. 2003).

protection to scènes à faire would effectively grant monopolistic rights on the underlying idea.<sup>71</sup>

It is the notion of scènes à faire characters, often termed stock characters, that increases the potential for stereotyping. The essence of a stock character is to identify the prototype or stereotype of a character.<sup>72</sup> Stock characters must have a set of consistent and expected characteristics. For example, in comparing two commercials that include butchers, the Northern District of Illinois noted that “the butchers function as stock characters—both don a white butcher coat and, unsurprisingly, work in a butcher shop.”<sup>73</sup> Likewise, the Central District of California found that where two works’ characters merely shared the characteristic of employment in the medical field, although not the specific profession, that similarity alone was too general to deserve copyright protection.<sup>74</sup> The danger arises when ascribing characters certain characteristics solely because of their identity traits.

### III. “THERE IS NO DARKNESS BUT IGNORANCE”:<sup>75</sup> THE DISTORTED USE OF STOCK CHARACTERS

The earliest, seminal case identifying stock characters is Judge Learned Hand’s 1930 opinion in *Nichols v. Universal Pictures* regarding the play *Abie’s Irish Rose*.<sup>76</sup> Starting in 1922, *Abie’s Irish Rose* ran on Broadway for 2,327 performances spanning more than five years.<sup>77</sup> An estimated 11 million people saw the play.<sup>78</sup> The play also ran in other cities, was turned into two movies and a weekly radio show, and was revived on Broadway twice.<sup>79</sup>

In this important case, *Abie’s Irish Rose’s* playwright sued Universal Studios for allegedly infringing the play’s copyright with the movie *The Cohens and The Kellys*.<sup>80</sup> Finding no copyright infringement, Judge Hand articulated his test for comparing works, which sifts out unprotectable subject matter in a particular work and leaves the nuggets of protectable matter for comparison.<sup>81</sup> Judge Hand also recognized, likely for the first time in United States copyright law, that a character

71. See *GoPro, Inc. v. 360Heros, Inc.*, 291 F. Supp. 3d 1060, 1073 (N.D. Cal. 2017) (citing *Ets-Hokin v. Skyey Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000)).

72. See, e.g., *Tanksley v. Daniels*, 259 F. Supp. 3d 271, 290 (E.D. Pa. 2017) (citing *Tanikumi v. Walt Disney Co.*, 616 F. App’x 515, 519 (3d Cir. 2015)); *DaVinci Editrice S.R.L. v. ZiKo Games, LLC*, No. H-13-3415, 2014 WL 3900139, at \*8 (S.D. Tex. Aug. 8, 2014) (citing *Gaiman v. McFarlane*, 360 F.3d 644, 659-60 (7th Cir. 2004)).

73. *Culver Franchising Sys., Inc. v. Steak N Shake Inc.*, No. 16 C 72, 2016 WL 4158957, at \*7 (N.D. Ill. Aug. 5, 2016).

74. *Id.*

75. *Marcus v. ABC Signature Studios, Inc.*, 279 F. Supp. 3d 1056, 1069 (C.D. Cal. 2017).

76. WILLIAM SHAKESPEARE, TWELFTH NIGHT act 4, sc. 2.

77. 45 F.2d 119, 120 (2d Cir. 1930).

78. Ted Merwin, *The Performance of Jewish Ethnicity in Anne Nichols’ Abie’s Irish Rose*, 20 J. AM. ETHNIC HIST. 3 (2001).

79. *Id.*

80. *Id.*

81. *Nichols*, 45 F.2d at 120.

82. *Id.* at 121.

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since

could be so general as to be a stock character or so specific as to be potentially protectable under copyright.<sup>82</sup>

It is the specifics of the character discussion that demonstrate the stereotyping danger. Plaintiff's play and Defendant's movie both involved star-crossed lovers, and in both, one is from a Jewish family and the other from an Irish family.<sup>83</sup> In the context of assessing the characters, the court stated the following:

Nor does [the playwright] fare better as to her characters. It is indeed scarcely credible that she should not have been aware of *those stock figures, the low comedy Jew and Irishman. The defendant has not taken from her more than their prototypes have contained for many decades.* If so, obviously so to generalize her copyright, would allow her to cover what was not original with her. But we need not hold this as matter of fact, much as we might be justified. Even though we take it that she devised her figures out of her brain de novo, still the defendant was within its rights.<sup>84</sup>

The court's holding ultimately rested on the fact that the characters are so different as to avoid copyright infringement. However, the court's statements above suggest that the similarities between the play and the movie characters could be described as solely deriving from the stock figures—the low comedy Jew and Irishman. The question immediately arises: what *is* a low comedy Jew and Irishman? What does Judge Hand *mean*?

From Judge Hand's decision, there is little clarification in the context of assessing the characters' similarities and differences. Still, the holding sheds light on the court's perception of the characters' scope. With respect to the Irish fathers, the court noted that the differences are significant—one is a religious zealot with patriarchal pride and the other is merely obstinate.<sup>85</sup> But a second reference to low comedy noted that “for the rest[, the defendant's Irish father] is only a grotesque hobledehoy, used for low comedy of the most conventional sort, which any one might borrow, if he chanced not to know the exemplar.”<sup>86</sup> When comparing the two Jewish patriarchs, the court noted that they are quite different except that “both are grotesque, extravagant[, and] quarrelsome; both are fond of display; but these common qualities make up only a small part of their simple pictures, no more than any one might lift if he chose.”<sup>87</sup> It is unclear, but one could argue that the court believed these common qualities could be lifted because they comprise the stock.

These brief case references are inconclusive as to what the court meant by “the low comedy Jew and Irishman.” For both identity traits, it is possible and even likely that Judge Hand was referencing common stereotypes utilized in low comedy stage productions during this era. Low comedy is “a dramatic or literary form of entertainment with no primary purpose but to create laughter by boasting, boisterous

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otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.

82. *Id.*

83. *Id.* at 120.

84. *Id.* at 122 (emphasis added).

85. *Id.*

86. *Id.*

87. *Id.*

jokes, drunkenness, scolding, fighting, buffoonery[,] and other riotous activity.”<sup>88</sup> Vaudeville, a form of light entertainment that featured a variety of acts,<sup>89</sup> commonly utilized low comedy.<sup>90</sup> Given that vaudeville’s heyday was 1890-1910, and it extended through the early 1930s,<sup>91</sup> it is entirely possible that low-comedy vaudevillian character types informed Judge Hand’s description of the Irish and Jewish characters, especially as he suggests that these prototypes existed for many decades before his decision.<sup>92</sup> Moreover, commentators describe *Abie’s Irish Rose* itself as drawn from, among other things, recorded vaudeville monologues and containing elements recognizable as deriving from vaudeville.<sup>93</sup> The play also drew from comic strips, which often lacked the ability to have the more layered portrayals that could appear in theater.<sup>94</sup> Based on some academic explorations of low comedy productions in vaudeville or other theater, and at least early comic strips, they often included negative, ugly stereotypes.<sup>95</sup>

“Ethnic humor” mocking Irish people was plentiful. One description at the turn of the century depicted Irish characters as laborers who spoke quickly and whose humor was rooted in “misunderstanding and violent argument.”<sup>96</sup> Another description framed the Irish as “embod[y]ing propensities for brawling, drinking to excess, contradicting themselves unwittingly, and making incongruous statements—brutal or foolish behavior, in other words”; “a figure in a derby hat and dudgeon pipe, a melodic if not sentimental songster having a belligerent attitude, a love for the bottle, a penchant for politics, . . . a quizzical look.”<sup>97</sup> Generally, Irish characters were described as “drunk, belligerent, and dumb,” the latter meaning either stupid or naïve.<sup>98</sup>

At least one of the Jewish vaudevillian stereotypes portrayed Jewish folks as book smart, dishonest, potential “suckers,” and lacking “street smarts.”<sup>99</sup> The Jewish immigrant stereotype was also described as “vulgar, pushy, penny-pinching.”<sup>100</sup> One of the earlier Jewish comics “depicted Jewish characters in grotesque make-

88. Justin Cash, *Low Comedy*, THEATRE LINKS, <http://www.theatrelinks.com/low-comedy/> (last visited Dec. 15, 2018).

89. See *Vaudeville*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/art/vaudeville> (last visited Aug. 11, 2018).

90. See, e.g., Celia Wren, *Virtually Vaudeville*, BOS. GLOBE (June 20, 2004), [http://archive.boston.com/ae/theater\\_arts/articles/2004/06/20/virtually\\_vaudeville?pg=full](http://archive.boston.com/ae/theater_arts/articles/2004/06/20/virtually_vaudeville?pg=full).

91. Lawrence E. Mintz, *Humor and Ethnic Stereotypes in Vaudeville and Burlesque*, 21 MELUS 19 (1996); ENCYCLOPAEDIA BRITANNICA, *supra* note 89.

92. It is important to note there were different characters in the vaudevillian tradition associated with different ethnicities. See M. Alison Kibler, *Rank Ladies, Ladies of Rank: The Elinore Sisters in Vaudeville*, 38 AM. STUD. 97, 97–98 (1997) (noting the distinction between the two sisters’ characters).

93. See Merwin, *supra* note 77, at 3, 7, 12.

94. See *id.* at 7; Kerry Soper, *Performing ‘Jiggs’: Irish Caricature and Comedic Ambivalence Toward Assimilation and the American Dream in George McManus’s Bringing Up Father*, 4 J. GILDED AGE & PROGRESSIVE ERA 173, 176–81 (2005).

95. See Soper, *supra* note 94, at 191–93, 195–201; Carl Wittke, *The Immigrant Theme on the American Stage*, 39 MISS. VALLEY HIST. REV. 211, 211–12 (1952).

96. Wittke, *supra* note 95, at 221 (discussing various other stereotypes including a Jewish one that rose in popularity around the turn of the 20th century).

97. Joseph Boskin & Joseph Dorinson, *Ethnic Humor: Subversion and Survival*, 37 AM. QUARTERLY 81, 83–84 (1985).

98. Mintz, *supra* note 91, at 20.

99. *Id.* at 21.

100. See Merwin, *supra* note 77, at 22.

up, with derbies or plug hats pulled far down over their ears, long black coats, long tapering beards, large spectacles, and hands crossed in an obsequious gesture.”<sup>101</sup>

Irish and Jewish people were not the only ethnicities to suffer from negative stereotypes in vaudeville. For example, one American Studies professor summarized additional stereotypes of the era as follows:

The Italians are happy rascals, promiscuous, prolific, and irresponsible, comically hyperemotional—and dumb; the Germans . . . are lazy, stodgily conservative, and of course, also dumb. Blacks are lazy, dishonest, promiscuous, prolific, irresponsible and—guess what—dumb. . . . [B]lacks are associated with an insatiable desire for watermelon, chicken, or pork chops; Italian immigrants are associated with crime and huge families, [Germans] with sauerkraut and beer, and so forth.<sup>102</sup>

Vaudeville alone exposed a significant number of people to low comedy characters. Some suggest that vaudevillian stereotypes extended into the radio and early TV eras as well.<sup>103</sup> Were these the specific characters referenced in the *Abie's Irish Rose* decision? One can never be certain, but it seems likely, at a minimum, that the reference to the low comedy Jew and Irishman was intended to encompass a recognized constellation of characteristics, likely quite negative, to each identity trait—stereotypes as to what it meant to be Jewish and Irish.

Moreover, the court's decision makes clear that these stereotypes did not deserve copyright protection because these “prototypes” need to be available for any other author to use, just as the author of *Abie's Irish Rose* used them to create her characters. What is less clear is where to undertake this analysis in a copyright infringement matter. Can these stereotypes be used without fear of infringement because, as stock characters, they are not copyrightable subject matter? Or, is it because the similar aspects are too small or indistinct a part of the specific character to create substantial similarity?

Regardless, Judge Hand's reasoning serves as the foundation for assessing copyright in a character. Courts must evaluate what components are uncopyrightable as well as provide a reason why the unprotected material is uncopyrightable. But most importantly, courts must consider when a constellation of characteristics is a prototype—a stereotype that should be available for others to use.

There are some subsequent decisions that suggest certain characteristics are associated with an identity trait. In some decisions, as with Judge Hand's opinion, the references are short and unclear. For example, in *Walker v. Time Life Films, Inc.*, the Second Circuit compared a book and movie set in a Bronx police department.<sup>104</sup> In assessing substantial similarities for copyright infringement, the court reiterated its refusal to protect stock themes and referred to “the familiar figure of the Irish cop” as a “venerable and often-recurring theme[] of police fiction”<sup>105</sup> without further explaining what the associated supposed characteristics (other than occupation and ethnicity) may be. Perhaps the Second Circuit is simply indicating that

101. Wittke, *supra* note 95, at 227; see also Susan Murray, *Ethnic Masculinity and Early Television's Vaudeo Star*, 42 CINEMA J. 97, 102 (2002).

102. Mintz, *supra* note 91, at 20–21.

103. See Murray, *supra* note 101, at 97–98, 101–02.

104. 784 F.2d 44, 46–47 (2d Cir. 1986).

105. *Id.* at 50.

all cops in New York City are Irish; that generalization does not even correspond with the police officers in the accused infringing work.<sup>106</sup> It is more likely that there is either some general stereotype associated with cops that are Irish or merely an assumption that a significant portion of the New York City police force is Irish. But, as with the *Abie's Irish Rose* decision, the court does not explain the contours and assumes that the audience knows.

Likewise, other courts identify short references that more explicitly link identity traits to specific characteristics. Two examples involve race. One court found that “tall athletic African-Americans who know how to handle weapons[,] . . . exude confidence[,] and have a cool head when surrounded by the imminent [] danger” is stock.<sup>107</sup> Additionally, the Ninth Circuit, when comparing two Tarzan toys, noted that the “Mattel TARZAN has distinctly almond-shaped eyes while AFR TARZAN’s eyes are *more ordinary* round ones.”<sup>108</sup> Perhaps the court means to indicate that, in the toy industry, round eyes are common. But, an equally plausible reading is that the court assumes that, for humans, round eyes are ordinary, common, and basic. The distinction may be one without a difference. Regardless of whether the court is indicating that round eyes are “ordinary” for the toy industry or for humans, races commonly possessing almond-shaped eyes are deemed not ordinary. By including this language in its decision, the Ninth Circuit is placing its imprimatur on the notion that round eyes are normal; all other shapes are “otherized.” And, unlike the *Abie's Irish Rose* decision, both of these decisions were issued in this century.

A 2011 decision demonstrated gender and sexual orientation stereotypes. In *DiTocco v. Riordan*, the plaintiff alleged that the Percy Jackson novels and films infringed plaintiff’s copyright.<sup>109</sup> In comparing the stock love interests of the young, male protagonists, the court noted that “teenage boys frequently pursue girls of the blond, popular, and athletic variety.”<sup>110</sup> Frequently is not always, but, because it is deemed a stock character, this sentence implies that this type of love interest is standard; it naturally follows that teenage boys would pursue this type of character, implying that they would not be interested in dating any other types of girls or boys.

Sexual orientation, gender, and gender expression also played a part in a case comparing *Loony Ben*, a proposed television comedy, and the *Modern Family* television show.<sup>111</sup> First, in assessing the two male leads, the magistrate judge found that a character with gender non-conforming behavior is not copyrightable but did not state whether that is because it is stock or for some other reason.<sup>112</sup> The magistrate judge also addressed the plaintiff’s specific claims of “opposite gender” stereotypical characteristics and found that the male characters share only one—they

106. See Vincent Canby, ‘Fort Apache, the Bronx,’ with Paul Newman, N.Y. TIMES (Feb. 6, 1981), <https://www.nytimes.com/1981/02/06/movies/fort-apache-the-bronx-with-paul-newman.html> (noting the, albeit fleetingly included, African American police officers and, if one were to use stereotypes, the likely Italian-American partner to the lead).

107. Capcom Co. v. MKR Grp., Inc., No. C 08-0904 RS, 2008 WL 4661479, at \*8 (N.D. Cal. Oct. 20, 2008).

108. Mattel, Inc. v. Am. First Run Studios, 79 F. App’x 955, 956 (9th Cir. 2003) (emphasis added).

109. 815 F. Supp. 2d 655, 658 (S.D.N.Y. 2011).

110. *Id.* at 668.

111. Alexander v. Murdoch, No. 10 Civ. 5613(PAC)(JCF), 2011 WL 2802899, at \*1–2 (S.D.N.Y. May 27, 2011). Adopted in No. 10 Civ. 5613(PAC)(JCF), 2011 WL 2802923, at \*1 (S.D.N.Y. July 14, 2011). The magistrate judge’s report and recommendation was later adopted by the court albeit in a much more compact form that lacks some of the same language.

112. *Id.* at \*9. Adopted in 2011 WL 2902923, at \*5.

both like to cook.<sup>113</sup> The magistrate judge failed to challenge the stereotype that cooking is gendered (presumably female) behavior and, in fact, provided the appearance of approval with that stereotype. Likewise, the magistrate judge seemed to adopt the plaintiff's stereotypical assumptions about masculine and feminine roles in the context of comparing two gay couples. Specifically, the magistrate judge stated that the "more masculine" figure does not quite fit that role because even though he "likes sports and is the more physically imposing of the pair, he is also more openly emotional, dresses more flamboyantly, and prefers being a stay-at-home dad to working."<sup>114</sup> While the magistrate judge does not frame this as a stock character, the report still indicates that men, in stereotypical form, must like sports and prefer to work outside of the home. Women, in stereotypical form, are more emotional, dress a certain way, and prefer to stay at home. To a certain degree, the analysis likely reflects how the plaintiff framed the characters' similarities. Perhaps unintentionally, the magistrate judge's analysis simply reinforced antiquated, stereotypical expectations of gender, gender expression, and even sexual orientation.<sup>115</sup>

The Central District of California in *Shame on You Productions v. Banks* not only made a similar, quick, gendered stock character statement, but then compounded it with a string of citations to other cases, some with similar, stereotypical summaries.<sup>116</sup> The plaintiff argued that the main lead in both works were strikingly similar because they both were "pretty blonde but prudent wom[en](. . . 'good girls') in [their] thirties who [] wear[] inappropriate brightly-colored dress[es]. . . ." <sup>117</sup> First, the court noted that "an attractive, blond 'good girl'" is unprotectable,<sup>118</sup> presumably because it is an unprotected idea and/or stock character. Is the implication that non-blond women cannot be good girls—or perhaps even attractive? The court subsequently stated the following:

*A 32-year-old female who is pretty and likeable is a stock character that lacks the distinctiveness required to invoke copyright protection. See Benjamin, 2007 WL 1655783, at \*6 ("Melanie is the main character in Sweet Home and Maddie is the main character in Rescue Me. While Plaintiff contends both are attractive, likable, 30-year-old females that have escaped their humble past to pursue their dreams of working and living in the big city, these similarities are immaterial because they describe the female lead in almost every romantic comedy. Such stock characters are not protected by copyright law"); Dunn v. Brown, No. CIV.A. 10 11383 FDS, 2011 WL 4499007, \*4 (D.Mass. Aug. 16, 2011) ("Plaintiff proffers as evidence only that Langdon has the physical descriptions of Hathaway because both characters wear jeans and are attractive, with blue eyes and nice smiles.*

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113. *Id.*

114. *Id.* at \*12. Adopted in 2011 WL 2902923, at \*6. Although the conclusion is adopted by the court, some of the specifics were not reproduced in the court's order.

115. *Id.* at \*14. Adopted in 2011 WL 2902923, at \*7. The court further reinforces gender and sexual orientation stereotypes in a later discussion of what plaintiff termed "sexually ambiguous," small character roles by assessing sexual orientation and whether the character displays non-gender conforming behavior, such as a male character displaying interest in clothing and men's hairstyles.

116. 120 F. Supp. 3d 1123 (C.D. Cal. 2015).

117. *Id.* at 1163–64.

118. *Id.* at 1164.

These type of generic physical descriptions, however, do not have copyright protections”); *Alexander v. Murdoch*, No. CV 10–5613 PAC JCF, 2011 WL 2802899, \*10 (S.D.N.Y. May 27, 2011) (“The plaintiff also claims that Rosa and Gloria are substantially similar because each is ‘a stunningly beautiful, fiery, temperamental, Latina mother, with a thick accent, who’s in love with her Caucasian [ex-husband/husband] and always makes him do the right thing, especially where her son is concerned.’ The flaw in this comparison is that Rosa is a *stock character* and therefore not copyrightable”); *id.* (“attraction to blonde women cannot be said to be a rare or unique character trait; it is a basic character type and is not copyrightable”); *Feldman v. Twentieth Century Fox Film Corp.*, 723 F.Supp.2d 357, 367 (D.Mass.2010) (“Similarly, copyright protection does not extend to stock characters, such as a *blond, blue-eyed hero* or doctors in ‘hot and cold’ romances”). . . .<sup>119</sup>

The court adopts much of the plaintiff’s list of similarities as stock; in so doing, it indicates “good girls” as a stock character are blond and attractive. Numerous references in other cases can, likewise, be stereotypical or exclusionary.<sup>120</sup>

Alternatively, some courts may describe a character as comprising an idea.<sup>121</sup> While lacking the “standard” or “indispensable” nature of *scènes à faire*, the potential for reinforcing stereotypes is still present depending on how the “idea” is presented. For example, describing the idea of a “horny, sex-seeking, over-the-top, gay character” or “a young incarcerated African-American male,” both descriptions drawn from cases, may reinforce negative stereotypes associated with the respective identity traits in the same manner as if these descriptions were used to define stock characters.<sup>122</sup> Of course, any such harm is significantly elevated when a decision frames certain characteristics as indispensable or flowing naturally from a specific identity trait, which is what *scènes à faire* (or stock characters) means.

119. *Id.* at 1164–65 (emphasis added).

120. *See, e.g.*, *Silas v. Home Box Office, Inc.*, 201 F. Supp. 3d 1158, 1179–80 (C.D. Cal. 2016) (suggesting, without explicitly stating, that fashionably-dressed, Latin American women with cheating football-player lovers are stock); *Rucker v. Harlequin Entm’t, Ltd.*, No. H–12–1135, 2013 WL 707922, at \*8 (S.D. Tex. Feb. 26, 2013) (finding that both male lead characters were “black-haired, blue-eyed, ‘tall, dark, and handsome,’” wealthy and powerful, and swept women off their feet and the women were beautiful with “red hair and green eyes . . . [were] slender, curvaceous, and young . . . [and were] strong-willed and passionate,” which the court found to be generic characters in romance novels); *White v. Twentieth Century Fox Corp.*, No. CV 11–01987SJO (SHx), 2012 WL 13008330, at \*4, \*10, \*13–14 (C.D. Cal. Apr. 11, 2012) (noting most movies with a romantic plot will have a successful, beautiful, and desirable female character); *Alexander v. Murdoch*, No. 10 Civ. 5613(PAC)(JCF), 2011 WL 2802899, at \*8, \*10, \*13 (S.D.N.Y. May 27, 2011). Adopted in 2011 WL 2802923 (S.D.N.Y. July 14, 2011) (in addition to the Latina stereotype, the court also said that “an adult male character who acts in childish ways [aka “Peterpanism”] is a basic character type” and that “attraction to blonde women . . . is a basic character type” as well as made several other assertions about stock characters such as the “funny, quirky Jewish Grandmother[;]” in contrast, the court in another location found that a character was insufficiently developed to be copyrightable); *Sinicola v. Warner Bros., Inc.*, 948 F. Supp. 1176, 1186–87 (E.D.N.Y. 1996) (no copyright protection for Italian-American gangsters and Irish cops in New York City and stereotypical Godfather figures and renegade mobsters in Italian-American organized crime); *Franklin v. Ciroli*, 865 F. Supp. 947, 949–50 (D. Mass. 1994) (no copyright protection for a stereotyped character of an Italian “Godfather figure who presents the newlyweds with a large cash gift”).

121. *See, e.g.*, *Hudson v. Universal Studios, Inc.*, No. 04 Civ. 6997(GEL), 2008 WL 4701488, at \*6 (S.D.N.Y. Oct. 23, 2008); *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 312 (S.D.N.Y. 1999).

122. *See Hudson*, 2008 WL 4701488, at \*6.

Interestingly, there is one decision where a court vehemently rejected associating a stereotype with a specific trait—the socioeconomic trait of being poor. In *JCW Investments v. Novelty*, the plaintiff created the “Pull my Finger Fred” doll, “a plush toy figure of a smiling, black-haired, balding, Caucasian man in a white tank top, blue pants, and brown shoes” sitting in a green chair.<sup>123</sup> It sued the makers of the “Fartman” doll (and “Fartboy”),

a plush doll of a smiling, black-haired, balding Caucasian man, wearing a white tank top with ‘Fartman’ emblazoned across the front in red capital letters, a red baseball cap with a large ‘F’ on the front (worn backwards), blue pants, and white tennis shoes . . . sitting in a brown vinyl chair.<sup>124</sup>

Both dolls reacted when someone pressed a specific finger by making flatulence-like sounds while the dolls’ chairs vibrated and then followed up with flatulence jokes.<sup>125</sup>

Among its various arguments against substantial similarity, the defendant argued the following:

[I]t is standard to stereotype an adult [who] finds humor in farting and joking about it as having a low socioeconomic status [and] [p]ortraying a character as overweight, balding and wearing blue jeans and a white undershirt with no overshirt is a stereotypical way of depicting adult characters of low-socioeconomic status. . . .<sup>126</sup>

The court strongly rejected the defendant’s argument.<sup>127</sup> Not only did it find this connection to be mere conjecture, but the court also noted that it is “more than a bit insulting and condescending.”<sup>128</sup> Most importantly, however, the court rejected the idea that scènes à faire for someone who enjoys farting and farting jokes, what would flow naturally or is standard for that character, is low socioeconomic status (and presumably vice-versa), nor is it standard to depict a person with low socioeconomic status as having the physical characteristics shared by the two plush dolls.<sup>129</sup> The court ultimately granted the plaintiff’s motion for summary judgment on the copyright claim.<sup>130</sup>

The court’s strong rejection may be because of the defendant’s boldness in explicitly drawing the connection between poor people and flatulence jokes or a certain style of clothing. Charitably, perhaps some of the other courts with identity trait stereotyping language do not strongly reject the stereotypes because other defendants may not tie identity traits as explicitly to specific characteristics. On the other hand, these courts have not been as careful in avoiding or explicitly rejecting identity trait stereotypes, such as fiery, temperamental Latinas; attractive, blond good girls; or round eyes as more ordinary than almond-shaped eyes.

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123. 289 F. Supp. 2d 1023, 1028 (N.D. Ill. 2003).

124. *Id.* at 1029.

125. *Id.* at 1028–29.

126. *Id.* at 1036.

127. *Id.*

128. *Id.* at 1038.

129. *Id.*

130. *Id.* at 1040.

Moreover, these identity trait stereotypes may not trigger the same concerns as expressed by the *JCW Investments* court because they encompass long standing and oft repeated stereotypes—and again, one hopes that the court simply missed them because they were argued more subtly. For example, some of the same stereotypes that informed turn-of-the-20<sup>th</sup>-century humor continued explicitly into at least the 1950s, “affect[ing] the thinking of many Americans about their fellow countrymen from other lands.”<sup>131</sup> And, certainly some or all may extend much later. One commentator stated that these stereotypes become so “deeply embedded in our individual memory and so fairly anchored in our collective folklore, . . . [that] they tend to be extremely difficult to dislodge.”<sup>132</sup> Repeated exposure to stereotypes has consequences.

The problem is that *scènes à faire*, specifically stock characters, are often called prototypical,<sup>133</sup> caricatures,<sup>134</sup> and stereotypical archetypes.<sup>135</sup> This type of language demonstrates that courts are directed to look for stereotypes of all sorts. Courts—as exposed to the stereotypes in the culture as anyone else is—may feel it appropriate to recognize identity trait stereotypes. In so doing, however, it provides judicial imprimatur for stereotypes associating specific characteristics with specific identity traits. Courts cannot remove stereotypes from all of society, but it can take steps to avoid reinforcing these stereotypes in its evaluation of copyrightable characters.

#### IV. “SCREW YOUR COURAGE TO THE STICKING-PLACE”:<sup>136</sup>

##### UNTANGLING THE STEREOTYPE FROM THE STOCK CHARACTER

In the context of an occupation, identifying a set of expected characteristics is not necessarily negative.<sup>137</sup> The stock stereotype for a doctor may include possessing a proficiency in science, wearing a white coat and stethoscope, and diagnosing medical issues. However, there is greater concern when such exploration includes “the basic human traits” of age, sex, or race.<sup>138</sup> For example, what if the stock stereotype for a doctor included being male? Likewise, what is stock for someone who is identified as African American? In answering the latter question, courts would ideally point to nothing more than an American who traces his or her (rather recent) ancestry to Africa.<sup>139</sup>

131. Wittke, *supra* note 95, at 211.

132. Boskin & Dorinson, *supra* note 97, at 83; *see also* Wittke, *supra* note 95, at 211.

133. Tanksley v. Daniels, 259 F. Supp. 3d 271, 290 (E.D. Pa. 2017).

134. Moore v. Lightstorm Entm’t, 992 F. Supp. 2d 543, 557 (D. Md. 2014), *aff’d sub nom.* Moore v. Lightstorm Entm’t, Inc., 586 F. App’x 143 (4th Cir. 2014) (mem.).

135. DaVinci Editrice S.R.L v. Ziko Games, LLC, No. H-13-3415, 2014 WL 3900139, at \*8 (S.D. Tex. Aug. 8, 2014). *See* Funkhouser v. Lowe’s, Inc., 208 F.2d 185, 189 (8th Cir. 1953) (“Almost every story and motion picture about the old west contains some stereotyped roles of hero, heroine, and villain. Necessarily, character traits of individuals portraying these roles will exhibit similarities.”).

136. WILLIAM SHAKESPEARE, *MACBETH*, act 1, sc.7.

137. *See* Moore, 992 F. Supp. 2d at 557.

138. *See* Levi v. Twentieth Century Fox Film Corp., No. 3:16cv129, 2018 WL 1542239, at \*7 (E.D. Va. Mar. 29, 2018); Moore, 992 F. Supp. 2d at 557.

139. I say rather recent because, even with recent discoveries complicating the story, all modern humans probably evolved from distant African ancestors. *See, e.g.*, John Hawks, *Three New Discoveries in a Month Rock Our African Origins*, MEDIUM (June 7, 2017), <https://medium.com/@johnhawks/the-story-of-modern-human-origins-just-got-more-complicated-9e435bea24f6>. Dr. John Hawks is a Professor of Anthropology at the University of Wisconsin – Madison and runs a paleoanthropology blog. *See* his curriculum vitae at <http://johnhawks.net/images/hawkscv.pdf>.

Intentionally or not, courts can reinforce stereotypes about specific identity traits as well as assumptions about what constitutes “normal” in an exclusionary way. However, such blending between societal, identity trait stereotypes and stock characters is not necessary. Instead, it may stem from how the court assesses the copyrightability of characters. There are two changes to copyright assessment that can aid in preventing future issues; furthermore, courts should take opportunities to correct the past.

### *A. What is a Protectable Character: Changing Future Categories for Characters*

Unlike other aspects of creative expression, characters have a high threshold before they are eligible for copyright protection. Once again, Judge Hand in the *Nichols* case first explained the reasoning as follows:

Nor need we hold that [the accused infringer is never liable for stealing] as to the characters, quite independently of the ‘plot’ proper, though, as far as we know such a case has never arisen. If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare’s ‘ideas’ in the play, as little capable of monopoly as Einstein’s Doctrine of Relativity, or Darwin’s theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.<sup>140</sup>

From this predicate, courts have held that characters generally do not qualify for copyright protection independent of the underlying work.<sup>141</sup> But to determine whether a character has reached the high threshold of warranting independent copyright protection, courts have developed at least two different standards. First, nearly 25 years after *Nichols*, the Ninth Circuit articulated the “story being told” standard to evaluate the character Sam Spade in *The Maltese Falcon*.<sup>142</sup> Because all the characters in the mystery-detective story were “vehicles for the story told” rather than the story itself, the detective Sam Spade was not copyright protected.<sup>143</sup> The *Nimmer* treatise notes the nearly impossible threshold this standard requires because the “story being told” standard seems to provide for copyright protection only when a character forms the basis of a character study, and the story is devoid of any other plot.<sup>144</sup> Very few characters would qualify under this standard.

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

141. *Gallagher v. Lions Gate Entm’t Inc.*, No. 2:15-cv-02739-ODW(Ex), 2015 WL 12481504, at \*7 (C.D. Cal. Sept. 11, 2015) (citing *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954)).

142. *Warner Bros. Pictures*, 216 F.2d at 950.

143. *Id.* at 946, 950.

144. See MELVILLE B. & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12[A][3][a] (Matthew Bender, rev. ed.) (2018). The Ninth Circuit apparently uses a different test for graphic characters. “[A] visual

An alternate approach, more in line with the *Nichols* reasoning, is to evaluate whether the character is sufficiently developed or delineated to warrant copyright protection, which is the “especially distinctive” standard.<sup>145</sup> Like many standards, the “especially distinctive” standard has few definite parameters, but some courts have required characters to “display[] consistent, widely identifiable traits.”<sup>146</sup> Over time, the Ninth Circuit has started referencing both standards as alternatives.<sup>147</sup>

Some literary characters are sufficiently specific and delineated to warrant copyright protection; Sherlock Holmes is an example.<sup>148</sup> However, literary characters, as compared to visually depicted characters, can have a more difficult time reaching the requisite high threshold because they often lack sufficient content.<sup>149</sup> In contrast, the very nature of visual depiction can provide more individualized details. The recent *DC Comics v. Towle* decision articulated a test for determining when a visually depicted character in a comic book, television program, or motion picture meets the threshold: (1) “the character must generally have physical as well as conceptual qualities,” (2) “the character must be sufficiently delineated to be recognizable as the same character whenever it appears . . . . Considering the character as it has appeared in different productions, it must display consistent, identifiable character traits and attributes, although the character need not have a consistent appearance,” and (3) “the character must be especially distinctive and contain some unique elements of expression.”<sup>150</sup> Using this standard, the court found that the Batmobile is sufficiently delineated even though its bat-like appearance varied over the years.<sup>151</sup>

Regardless of the test used, most courts seem to require that a character must be highly delineated to qualify for copyright protection.<sup>152</sup> A striking example of a sufficiently delineated character is Rocky Balboa, considered by the Central District of California to be one of the most highly delineated characters in modern American

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similarity (even if not completely identical in appearance) plus a similarity in character traits may prove sufficient to infringe . . . .” *Id.* § 2.12[A][3][b].

145. *Tanksley v. Daniels*, 259 F. Supp. 3d 271, 290 (E.D. Pa. 2017); *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 310 (S.D.N.Y. 1999); *Anderson v. Stallone*, No. 87–0592 WDKGX, 1989 WL 206431, at \*6 (C.D. Cal. Apr. 25, 1989).

146. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (citing *Toho Co., Ltd. v. William Morrow & Co., Inc.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998) (*Godzilla*)); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., Inc.*, 900 F. Supp. 1287, 1297 (C.D. Cal. 1995) (*James Bond*); *Anderson*, 1989 WL 206431, at \*7 (*Rocky Balboa*).

147. *Rice*, 330 F.3d at 1175; *Olson v. Nat’l Broad. Co., Inc.*, 855 F.2d 1446, 1452 (9th Cir. 1988) (considering without deciding if this is the right test in the context of assessing visually depicted characters); *Marcus v. ABC Signature Studios, Inc.*, 279 F. Supp. 3d 1056, 1069 (C.D. Cal. 2017).

148. *See Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 501–03 (7th Cir. 2014).

149. *JB Oxford & Co. v. First Tennessee Bank Nat. Ass’n*, 427 F. Supp. 2d 784, 798 (M.D. Tenn. 2006).

150. 802 F.3d 1012, 1021 (9th Cir. 2015) (internal quotation marks and citations omitted).

151. *Id.* at 1021–1023; *see also Halicki Films, LLC v. Sanderson Sales and Mktg.*, 547 F.3d 1213, 1225 (9th Cir. 2008) (suggesting that the car Eleanor, who consistently foiled heists, likely would qualify for copyright protection but remanding for determination).

152. *See, e.g., Penguin Random House LLC v. Colting*, 270 F.Supp.3d 736, 746 (S.D.N.Y. 2017) (noting that copyright law “does protect characters who are sufficiently delineated to be original.”) (emphasis in original); *JB Oxford & Co.*, 427 F. Supp. 2d at 798–99 (citing *Toho Co., Ltd. v. William Morrow & Co., Inc.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998)) (“While *Godzilla* may have shifted from evil to good, there remains an underlying set of attributes that remain in every film. *Godzilla* is always a prehistoric, fire-breathing, gigantic dinosaur alive and well in the modern world. This Court finds that *Godzilla* is a well-defined character with highly delineated consistent traits.”); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., Inc.*, 900 F. Supp. 1287, 1295–96 (C.D. Cal. 1995) (finding *James Bond* character was copyrightable because it had an identifiable set of traits); *Anderson v. Stallone*, No. 87–0592 WDKGX, 1989 WL 206431, at \*7 (C.D. Cal. Apr. 25, 1989) (“The *Rocky* characters are one of the most highly delineated group of characters in the modern American cinema.”).

cinema.<sup>153</sup> The Rocky movies, named after the character, depicted “the physical and emotional characteristics of Rocky . . . [including] specific character traits ranging from his speaking mannerisms to his physical characteristics.”<sup>154</sup> Similarly, other examples demonstrate when a character has met the high threshold required for copyright protection. In one decision, a character’s “age, obviously phony title, . . . what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character.”<sup>155</sup> A more recent case, applying the *Towle* standard, found Garth of Izar from the Star Trek universe sufficiently delineated even though he only appeared in one television episode and one novel.<sup>156</sup> He not only had physical and conceptual qualities but also a detailed Starfleet captain history that distinguished Garth of Izar from a stock spaceship officer.<sup>157</sup> The same court also found that the Vulcan and Klingon species, with specific features and history, “may be entitled to copyright protection.”<sup>158</sup>

On the other hand, a character is insufficient when: it is only described in short summaries and via screenplay dialogue and action;<sup>159</sup> it entails a magician dressed as a standard magician in a “black tuxedo with tails, a white tuxedo shirt, a black bow tie, and a black cape with red lining—and his role is limited to performing and revealing the magic tricks”;<sup>160</sup> or it is “a drunken old bum, . . . a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing dragon, a talking cat, [or] a Prussian officer who wears a monocle and clicks his heels. . . .”<sup>161</sup>

This high threshold for finding that a character is copyrightable is at least part of the reason why courts blend specific traits with identity trait stock characters. A stock character, as a form of scènes à faire, should only be comprised of characteristics that are *indispensable or standard*.<sup>162</sup> On the other hand, a sufficiently delineated character must be very specific. Courts are often labeling characters as “stock” or “types” when the level of specificity is a bit more than the “standard” but insufficiently delineated for protectability. For example, one court found that “[a]n adult male character who acts in childish ways is a basic character type that is not in itself copyrightable.”<sup>163</sup> However, it is certainly not indispensable to the notion of an adult male to have the characteristic of acting childishly.

Likewise, in comparing two reality television shows focused on weight loss, the court described as stock “a young man who cannot be a firefighter because he is overweight, and a scorned wife who, after gaining weight, lost her husband to a

153. See *Anderson*, 1989 WL 206431, at \*7.

154. *Id.* (finding also that the same features would warrant copyright protection under the “story being told” standard).

155. *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004) (stating that Sam Spade should have been a copyrightable character). The character was much more likely to be sufficiently distinctive because it was drawn rather than merely consisting of a verbal description. *Id.* at 661.

156. *Paramount Pictures Corp. v. Axanar Productions, Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at \*1, \*4 (C.D. Cal. Jan. 3, 2017).

157. *Id.* at \*4.

158. *Id.*

159. See *Olson v. Nat’l Broad. Co., Inc.*, 855 F.2d 1446, 1452–53 (9th Cir. 1988).

160. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (finding also that the magician is not the “story being told” but rather a facilitator to reveal the secrets of various magic tricks).

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

162. See, e.g., *Sinicola v. Warner Bros., Inc.*, 948 F. Supp. 1176, 1185 (E.D.N.Y. 1996) (citing *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 436 (S.D.N.Y. 1985)).

163. *Alexander v. Murdoch*, No. 10 Civ. 5613(PAC)(JCF), 2011 WL 2802899, at \*8 (S.D.N.Y. May 27, 2011).

younger, slimmer woman.”<sup>164</sup> The court rightly notes that the identified characters would be developed through their later interactions with other contestants, which would reveal traits such as strength, laziness, honesty, lacking in integrity, and the like; at that point, the characters would be sufficiently delineated.<sup>165</sup> But, that does not mean that the extant description is, itself, the stock. Firefighter is stock. Male is stock. A male who cannot be a firefighter due to weight is more specific than a stock character while still not specific enough to be a fully developed character.

Consider the characters Sixty Nine in the play *Bronx House* and Biscuit in the movie *Life*.<sup>166</sup> In arguing copyright infringement, the plaintiff alleged that both are substantially similar as they are incarcerated, “horny, sex[-]seeking, over[-]the[-]top, gay characters.”<sup>167</sup> Given this argument, one wonders about the content for these characters’ casting calls. This description sounds as shallow as the ones found to be insufficiently delineated. On the other hand, imagine if the court were to call this a stock character—indicating that to be a gay man means having these specific characteristics. The court avoided the worst of the offensive notion, but perhaps not all of it, by not calling this description stock, but rather saying that this character is an idea and thus still unprotectable.<sup>168</sup> Another court used the language of generalities for a similarly insufficient character, holding that the category of “African-American men who rise from poverty and lives of crime to become successful” is too general to be copyrightable; it remains too general even when adding that the characters run record labels, “have straightened hair[,] or dress in button-down shirts without a tie and occasionally wear a blazer.”<sup>169</sup>

These decisions point to the need for an intermediate level between stock and sufficiently delineated characters—an indefinite character. This indefinite character would not ascribe all identified characteristics as naturally flowing from the identity trait, as is the implication of stock characters. Rather, it would simply recognize that the author combined the identified characteristics and that the character is still too insufficiently described to warrant copyright protection. This has the additional benefit of forcing the authors and the authors’ advocates to consider what is really claimed as the character. Perhaps seeing the confluence of characteristics, starkly written, may force at least some authors to be more mindful of stereotyping in his or her next project.

Although not clearly articulated, one can read the *Denker v. Uhry* decision as, perhaps, employing a similar category for characters. The plaintiff, author of *Horowitz and Ms. Washington*, sued the author of the play and screenplay *Driving Miss Daisy*.<sup>170</sup> The court noted that the female leads were both “elderly, Jewish, and strong-willed.”<sup>171</sup> Without suggesting that this was a stock character, the court subsequently determined that the works expressed these shared traits differently, thus

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164. *Milano v. NBC Universal, Inc.*, 584 F. Supp. 2d 1288, 1296 (C.D. Cal. 2008).

165. *See id.* at 1297.

166. *See Hudson v. Universal Studios, Inc.*, No. 04 Civ. 6997(GEL), 2008 WL 4701488, at \*6 (S.D.N.Y. Oct. 23, 2008), *aff’d*, 369 F.App’x 291 (2d Cir. 2010).

167. *Id.*

168. *See id.*; *see also Mallery v. NBC Universal, Inc.*, No. 07 Civ. 2250(DLC), 2007 WL 4258196, at \*6 (S.D.N.Y. Dec. 3, 2007) (considering a “minority artist” with the ability to paint the future” an unprotectable idea).

169. *Tanksley, v. Daniels*, 259 F. Supp. 3d 271, 291 (E.D. Pa. 2017).

170. *Denker v. Uhry*, 820 F. Supp. 722, 723 (S.D.N.Y. 1992).

171. *Id.* at 735.

refuting substantial similarity.<sup>172</sup> With respect to the male leads, the plaintiff's identified similarities ("black, [] hired to render assistance to an elderly Jewish person, develop[ed] a friendship with their employer," and had some kind of relationship with children and grandchildren) were "broad, unprotectible [*sic*] character outlines; they mark where the similarities end."<sup>173</sup> Thus, the character similarities were too indistinct to be copyrightable material, but that does not mean that they are stock characters. Even so, by blending these characteristics without noting what is stock and what is not, the court can still imply stereotypes.

To avoid reinforcing stereotypes by blending characteristics with identity traits, courts should explicitly recognize three types of characters—stock, indefinite, and distinctively delineated. Only distinctively delineated characters would receive copyright protection. However, if the stock is separated explicitly from the indefinite, then courts would avoid the implication of associating characteristics with identity traits. For example, in *Denker*, the female leads are comprised of three separate stock characteristics: gender, age, and religion. These stock characteristics are combined with another characteristic—strong-willed. However, the combination of all four traits is still too indistinct to meet the high threshold required for characters. This portion of the analysis identifies whether there is enough specificity to warrant copyright protection. Therefore, it should carve out the components that are simply generalizations and include a discussion of when, if ever, these generalizations are substantial enough in quantity to draw a specific character.

As the *Denker* example further demonstrates, however, there is a risk to this approach. By dissecting the plaintiff's character to evaluate what components are unprotectable, it "risks elimination of any copyright protection for a character, unless the allegedly infringing character looks and behaves exactly like the original . . ." <sup>174</sup> Copyright protection can extend to the selection and arrangement of unprotectable elements. While unlikely given the high standard, it is possible that a copyrightable character is comprised solely of individual components that would, standing on their own, be too general or indistinct for copyright protection.

However, two considerations related to copyright infringement should minimize this concern. With respect to the first concern, it is true that "[n]o character infringement claim can succeed unless [the] plaintiff's original conception sufficiently developed the character, and [the] defendants have copied this development and not merely the broader outlines."<sup>175</sup> For example, "there is no substantial similarity to be found between two characters who share only their sex and hair color."<sup>176</sup> However, when the plaintiff's and the defendant's characters are compared, the substantial similarity analysis is not a one-for-one character comparison alone. Rather, it includes assessing if the defendant character infringes the plaintiff character's "total concept and feel."<sup>177</sup> Thus, a jury found similarity between the film lead in *Lone Wolf McQuade* and the television lead in *Walker, Texas Ranger* because of "approaches to law enforcement, style, fighting technique, characteristic

172. *See id.*

173. *Id.*

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

175. *Alexander v. Murdoch*, No. 10 Civ. 5613(PAC)(JCF), 2011 WL 2802899, at \*7 (S.D.N.Y. May 27, 2011) (quoting *Smith v. Weinstein*, 578 F. Supp. 1297, 1303 (S.D.N.Y.), *aff'd*, 738 F.2d 419 (2d Cir. 1984)).

176. *Id.* at \*8.

177. *Warner Bros., Inc.*, 720 F.2d at 241; *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1226 (C.D. Cal. 1997) (the intrinsic test assesses "total concept and feel").

behavior, and methods of operation as modern-day Texas Rangers, their portrayal by Chuck Norris, their attitudes toward authority and rules, and their style of attire and choice of vehicle.”<sup>178</sup> Even when plaintiff’s character is dissected to determine if copyright protection is warranted, the fact that the allegedly infringing character does not look and behave exactly like the original should not foreclose a finding of substantial similarity.

This leads to the second point. These concerns can be ameliorated by properly considering the scope and copyrightability of the character separately from the copyright infringement analysis. A character’s copyright protection is often assessed in two ways. First, courts may assess whether the plaintiff has any copyrightable protectable material at all. For example, one court held that characters briefly described in short summaries in a movie treatment, with some additional information derived from a screenplay’s dialogue and action, may be insufficiently delineated to receive copyright protection.<sup>179</sup> Second, and more commonly, evaluating whether a character is sufficiently delineated for copyright protection is blended into the substantial similarity comparison for copyright infringement. In other words, courts are often confronting the issue of copyrightability as they assess similarity between the original author’s work and the accused infringer’s work. Blending these processes can lead to courts ascribing too much to the stock. They must be separated analytically.

### *B. When Characters are Similar: Adding to the Assessment Method*

In considering how courts assess copyright infringement of characters, it would be helpful if courts used a consistent approach to test for copyright infringement. Unfortunately, courts do not. The Second and Ninth Circuits apply the two more common approaches. The Second Circuit has a two-step infringement approach: (1) actual copying and (2) legal/misappropriated copying, which evaluates substantial similarity.<sup>180</sup> A character can infringe without being a literal, plagiarized copy; courts will assess “whether the similarities are due to protected aesthetic expressions original to the allegedly infringed work[] or whether the similarity is to something in the original that is free for the taking.”<sup>181</sup> Thus, for substantial similarity, the test is “whether ‘an average lay observer would [] recognize the alleged copy as having been appropriated from the copyrighted work.’”<sup>182</sup> The average, lay observer should only focus on the copyrighted work’s protectable elements.<sup>183</sup> Of course, what may be protectable can be the selection and arrangement of otherwise unprotectable elements.<sup>184</sup> Therefore, the decisionmaker will also assess “the total concept and feel” to ensure that it captures the totality of the original author’s creative input.<sup>185</sup>

178. *Lone Wolf McQuade Associates v. CBS Inc.*, 961 F. Supp. 587, 594 (S.D.N.Y. 1997).

179. *See Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1452–53 (9th Cir. 1988).

180. *See, e.g., DiTocco v. Riordan*, 815 F. Supp. 2d 655 (S.D.N.Y. 2011).

181. *Mallery v. NBC Universal, Inc.*, No. 07 Civ. 2250(DLC), 2007 WL 4258196, at \*2 (S.D.N.Y. Dec. 3, 2007) (citing *Tufenkian Import/Export Ventures, Inc. v. Einstein Moonjy, Inc.*, 338 F.3d 127, 134–35 (2d Cir. 2003)).

182. *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995).

183. *See id.*

184. *See Feist Publ’n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348–50 (1991).

185. *See Knitwaves, Inc.*, 71 F.3d at 1003–04.

As recognized in the Second Circuit jurisprudence, assessing copyright infringement of characters can be quite difficult. The decisionmaker “must consider the ‘totality of [the characters’] attributes and traits’ as well as the extent to which the defendants’ characters capture the ‘total concept and feel’ of figures in the book.”<sup>186</sup> The distinction between a substantially similar, but not identical, infringing character and one who may be reminiscent, but not infringing, of the plaintiff’s character can be an “elusive” one.<sup>187</sup> An interesting court suggestion is that there is a lack of substantial similarity when the characteristics identified by the plaintiff as the basis of a copyright infringement claim could be used to create diametrically opposed characters.<sup>188</sup>

The Ninth Circuit applies a two-step test: establishing substantial similarity in protected elements and showing that the infringing party had access to the plaintiff’s work.<sup>189</sup> Whether there is substantial similarity is assessed by its own two-part test—an extrinsic test and an intrinsic test.<sup>190</sup> The extrinsic test, the focus in summary judgment motions, is an objective assessment of “‘articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events’ in the two works.”<sup>191</sup> The intrinsic test “examines an ordinary person’s subjective impressions of the similarities between two works.”<sup>192</sup> The intrinsic test also assesses the “total concept and feel.”<sup>193</sup> Importantly, the Ninth Circuit’s substantial similarity part focuses on whether “the *protectable elements, standing alone*, are substantially similar.”<sup>194</sup>

Therefore, both the Second and Ninth Circuit tests compare protectable elements and exclude unprotectable elements, such as stock characters. To make this comparison, however, many courts conflate the protectable elements assessment with comparing the works for infringement purposes. The *Shame on You* case is an example.<sup>195</sup> The court evaluates the lead characters’ similarities for more than two pages before finding that the similarities are simply those of a stock character.<sup>196</sup> Another example is the decision in *DiTocco*.<sup>197</sup> The character comparison is embedded within the substantial similarity section.<sup>198</sup> After identifying some specific legal principles related to characters and discussing the lead protagonists, the court then reasons that the works contain unprotectable stock characters, such as love interests; the stock character in *DiTocco* is not copyrightable because “teenage boys frequently pursue girls of the blond, popular, and athletic variety.”<sup>199</sup> Note that this analysis jumps to the aspects of the two works’ characters that are similar and uses

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186. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (citing *Warner Bros. v. Am. Broad. Co., Inc.*, 720 F.2d 231, 240 (2d Cir. 1983) (in the context of comparing a graphic character)).

187. *See Warner Bros.*, 720 F.2d at 242.

188. *See Allen v. Scholastic Inc.*, 739 F. Supp. 2d 642, 660–61 (S.D.N.Y. 2011).

189. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003).

190. *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

191. *Id.*

192. *Id.*

193. *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1226 (C.D. Cal. 1997).

194. *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) (emphasis in original); *see also Halicki v. Carroll Shelby Int’l*, No. CV 0408813SJOPJWX, 2009 WL 10669478, at \*5 (C.D. Cal. Aug. 12, 2009) (quoting *Funky Films, Inc.*, 462 F.3d at 1077); *Rice*, 330 F.3d at 1174.

195. *Shame on You Productions, Inc. v. Banks*, 120 F. Supp. 3d 1123, 1154 (C.D. Cal. 2015).

196. *Id.* at 1162–65.

197. *DiTocco v. Riordan*, 815 F. Supp. 2d 655, 667–68 (S.D.N.Y. 2011).

198. *Id.* at 665–67.

199. *Id.* at 668.

those similarities to identify the parameters of the stock. The court then articulates the similarities alleged by the plaintiff and the differences between the two characters it has already labeled as stock.<sup>200</sup> Unfortunately, the court in *DiTocco* never explicitly suggests that the love interest characters move beyond the stock.

The court in *DiTocco* is really articulating two things. First, that love interests have stock components, and, second, that the similarities between these characters are so outweighed by the differences that the court will not find substantial similarity. By blending the analysis of these two things, the court, perhaps inadvertently, suggests that teenage love interests will frequently be blond, athletic, and popular, apparently excluding the rest of the population as unworthy of being a love interest for teenage boys. The court uses the similarities between the two works' characters to inform the parameters of the stock character. In so doing, it reinforces a stereotype.

Because the substantial similarity analysis often occurs simultaneously with assessing the character's copyrightability, the generalities of the characters influence the contours of the stock characters—or at a minimum, appear to do so in some decisions. For these decisions, the comparison is leading the frame. There are two ways that the court can address this potential for confusion.

First, if the court were to properly identify the character initially, it may avoid framing stock characters based on the similarities of the two works. In *Azaria v. Bierko*, the Central District of California granted a motion for summary judgment on a claim comparing a baseball sports announcer video character and the defendant's "Sports Announcer Character," only memorialized in an audio clip.<sup>201</sup> The court first evaluated the scope and copyrightability of both the plaintiff and the defendant's characters before considering infringement.<sup>202</sup> For the plaintiff's character, the court focused on the constellation of specific characteristics that make the character sufficiently distinct as to warrant protection.<sup>203</sup> While this approach is helpful in clarifying the scope of the copyrightable character, the court did not identify the stock. Moreover, the court adopted this approach in response to specific declaratory judgment requests by the plaintiff, including requested declarations that the plaintiff's character is copyrightable and that the defendant's character is not copyrightable.<sup>204</sup>

Some courts have undertaken this kind of two-step process in a more traditional copyright infringement suit. For example, the recent *Star Trek* decision about Garth of Izar assessed the copyright-protected elements first, including the copyrightability of characters, before evaluating the extrinsic prong of substantial similarity.<sup>205</sup> The decision did not have an explicit and complete parsing of the stock before determining the copyrightability, but it did take the important initial step of separating the determination of a character's copyrightability from the comparison of two characters to assess copyright infringement. A consistent approach of separating these analytical steps, and appropriately categorizing character elements among the three

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200. *Id.* The love interests are "two blond females who like to watch baseball and tease the protagonist."

201. No. CV 12-9732 GAF (RZx), 2014 WL 12561611, at \*1-2 (C.D. Cal. Feb. 21, 2014).

202. *Id.* at \*4-5.

203. *Id.* at \*4.

204. *Id.* at \*3-4.

205. See *Paramount Pictures Corp. v. Axanar Productions, Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at \*4-6 (C.D. Cal. Jan. 3, 2017).

proposed options, will help avoid conflating the similarities among the plaintiff's and the defendant's characters and the characteristics that are stock.

However, this step only serves to focus the court on the initial character, the literal character expressed in the plaintiff's work. In many cases, the defendant did not create a new story with the identical character of another author's work.<sup>206</sup> Instead, the plaintiff's copyright suit alleges that the defendant's character shares enough specific traits as to be an infringing copy of the plaintiff's character.<sup>207</sup> Therefore, the suit's focus is on a narrower version of the plaintiff's character, comprised of a subset of the copyrightable character traits.

Various courts' decisions to utilize the narrower version of a character may be a function of the unclear, blended analysis of character copyright infringement. In other words, because courts are often undertaking the substantial similarity test at the same time as assessing the copyrightability of the character, the court focuses on the similarities of the plaintiff's and the defendant's characters. Given the high standard required before a character will receive copyright protection, one may argue that utilizing a narrower version of a character is an improper approach to character infringement, but it may reflect the needs of assessing substantial similarity rather than mere or near identity.<sup>208</sup> Regardless, if this approach continues even after identifying the character separately, then the narrower version of the plaintiff's character should be sufficiently drawn as to warrant copyright protection.

Therefore, if the courts continue to assess the narrower version of plaintiff's character as the relevant one, the second recommendation is to separately assess if the narrower version of plaintiff's character is sufficiently drawn as to warrant protection. For example, the author of a historical novel, *Echo of Lions*, sued the filmmakers of *Amistad* for copyright infringement of two of her characters.<sup>209</sup> The plaintiff contended that both characters "link[ed] white and Black America, provid[ed] a contemporary Black voice to the Amistad story, and [were] active in supporting the Africans' cause."<sup>210</sup> The court proceeded to assess if these identified characteristics, when combined but absent other elements, were sufficiently delineated to warrant copyright protection before assessing whether the characters would have substantial similarity.<sup>211</sup> The court found that the plaintiff's character was not sufficiently delineated, and, even if it was, the characters were insufficiently substantially similar.<sup>212</sup>

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206. *But see* Anderson v. Stallone, No. 87-0592 WDKGX, 1989 WL 206431, at \*1 (Apr. 25, 1989) (accused infringer wrote a treatment for Rocky IV using several characters from the prior Rocky movies).

207. Mallery v. NBC Universal, Inc., No. 07 Civ. 2250(DLC), 2007 WL 4258196, at \*2 (S.D.N.Y. Dec. 3, 2007).

208. This approach may be an application of the pattern test, advocated by Professor Zechariah Chafee and noted by Professor Nimmer in his treatise. *See* NIMMER, *supra* note 144, at §13.03[A][1][b]. Professor Nimmer uses pattern analysis to demonstrate plot similarity between *Romeo and Juliet* and *West Side Story*, specifically 13 similarities that are a bit generalized but still more detailed than an idea and may be sufficient to demonstrate substantial similarity. Nimmer later notes that "[t]he characters are also, of necessity, comparable in those two works." *Id.* at §13.03[E][3][b][v]. The characters, of course, have some differences, which means that a narrower version of the characters have similarity.

209. Chase-Riboud v. Dreamworks, Inc., 987 F. Supp. 1222 (C.D. Cal. 1997).

210. *Id.* at 1228.

211. *Id.* at 1228-29 (comparing the Theodore Joadson and Henry Braithwaite characters). The court similarly found that the Cinque character, having a voice and remaining true to his African roots, is not "sufficiently distinctive" to be copyright protectable material. *Id.* at 1229-30.

212. *Id.* at 1228-29.

Unfortunately, many courts are not that clear in separating the narrower character and the substantial similarity assessments. Even those that explicitly undertake the separate analysis can do so in a confusing fashion. For example, in *Gadh v. Spiegel*, the court first assessed whether the lead in an unproduced television script was substantially similar to the lead in the movie *Her*.<sup>213</sup> After perfunctorily concluding that the characters were not similar, the court then determined that the general similarities between the characters, the narrower plaintiff's character and the defendant's character, were insufficiently distinct to warrant copyright protection.<sup>214</sup>

The *Gadh* court's approach is simply backwards. Ideally, the court would first identify the plaintiff's character and determine if it warrants copyright protection. Even if one were to use the narrower version of the plaintiff's character, the court should first properly identify the narrower character, which would be based on the plaintiff's *claimed* similarities with the defendant's character, but without the court actually comparing the works independently. The court would then assess if the narrower character is sufficiently delineated, and in the case of *Gadh*, it would have determined that the similarities describe a character that is insufficiently distinct to be protected. Moreover, assessing the narrower character for sufficient delineation focuses the court's attention on the characteristics being compared directly. If that process is undertaken carefully, courts can avoid defaulting to the notion that a grouping of two or three general characteristics must describe a stock character simply to avoid finding copyright infringement for an indefinite character.

Assessing the plaintiff's character standing alone and the narrower plaintiff's character requires a court to focus on the specifics of the character alleged. Both should be carefully assessed to ensure that identity traits, which are stock by themselves, are not combined with other elements to create an identity trait stereotyped character. This requires that the court undertake a careful, distinct analysis of copyrightability—a more difficult task for characters than for other copyrightable creative elements. Only then should a court consider if there is copyright infringement.

### *C. How to Correct the Past: Courts Confronting Past Decisions*

In finding that a character is a stock character, several courts have done so in a manner that is, at a minimum, unclear and, in some cases, may move beyond ambiguity to reinforce stereotypes. The consequence can be lingering confusion as to whether a certain combination of identified characteristics is, in fact, *scènes à faire* and, therefore, excluded from copyright protection. For example, because a long-standing, prior case has already identified a stock character, there could be confusion as to whether being Irish, Jewish, a woman, or gay does not just identify a specific nationality, religion, gender, or sexuality, but also triggers a cavalcade of stereotypically associated characteristics. The latter use of stock characters places judicial imprimatur on the notion that certain characteristics are fundamental to identity traits—essentially judicial approval of stereotypes.

However, even when the stereotypical delineation of a stock character is long-standing, courts can and should clarify that stereotypes based on identity traits are

213. No. CV 14–855–JFW (PJWx), 2014 WL 1778950, at \*5 (C.D. Cal. Apr. 2, 2014).

214. *Id.*

not necessary or appropriate. In other words, courts can and should clarify that to be an attractive young woman does not require that the woman is blond and that having almond eyes is not extraordinary. In fact, the Second Circuit has rectified its own past erroneous, or at least ambiguous, holding that ascribed certain characteristics as standard, an error that was perpetuated in several subsequent decisions.

It began with the 1960 dispute between Ideal Toy and Fab-lu, where Ideal Toy alleged copyright infringement of its Tammy and Pepper dolls.<sup>215</sup> Initially, the district court denied a preliminary injunction, noting that “although the accused dolls are similar to plaintiff’s dolls in size and shape, and indeed some features (such as hands and arms) are virtually identical,” the overall impression of the dolls was distinct.<sup>216</sup> On appeal, the Second Circuit upheld the district court’s rejection of a preliminary injunction, but also noted that “[a]n examination of the dolls reveals that, while similarities exist as to *standard doll features such as the full faces; pert, upturned noses; bow lips; large, widely spaced eyes; and slim figures*, distinct differences exist . . . .”<sup>217</sup> When the district court subsequently granted summary judgment to the plaintiff, it did not address the “standard doll features” because the defendant conceded that it sought to make an exact copy.<sup>218</sup>

The Second Circuit’s discussion of “standard doll features” may reflect the toy industry’s bias towards a certain appearance. Such industry-wide biases have longstanding roots. For example, a 1967 study of toy listings in catalogs found that only 1% of toys had what the study described as “Negro features.”<sup>219</sup> The toy industry’s choices may have reflected general societal stereotypes and racial preferences of the time. A 1958 study drew the sad conclusion that even African-American children had a “consistent preference for dolls resembling whites over those resembling Negroes.”<sup>220</sup> Notably, dolls can influence children’s perceptions of appropriate and approved appearances and expectations.<sup>221</sup> The preference for non-African-American dolls in the distant past not only seeps into the minds of those children, but each generation may then, subconsciously or not, perpetuate that preference for the next generation.

In light of the importance of dolls, consider the impact of the *Ideal Toys* decision. In decreeing what constitutes “standard” doll features, one can take this as a statement as to what are the idealized features of women—and too bad for those that do not fit. Moreover, the stereotyping of doll features reinforces existing racial or ethnic stereotypes and preferences for certain features. For example, the preference for a pert, upturned nose contrasts with then existing stereotypes that denied

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215. *Ideal Toy Corp. v. Fab-Lu Ltd.*, 266 F. Supp. 755, 756 (S.D.N.Y. 1964) (reaffirming its original decision on reargument).

216. *Id.*

217. *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1023 (2d Cir. 1966) (emphasis added).

218. *Ideal Toy Corp. v. Fab-Lu, Ltd.*, 261 F. Supp. 238, 242 n.14 (S.D.N.Y. 1966).

219. Donald W. Ball, *Towards a Sociology of Toys: Inanimate Objects, Socialization, and the Demography of the Doll World*, 8 SOC. QUARTERLY 447, 454 (1967). Of course, the study itself must have presumed what it means to be or look African American, a stereotype as well.

220. *Id.* at 453 n.26 (citing K. Clark & M. Clark, *Racial Identification and Deference in Negro Children*, in READINGS IN SOC. PSYCHOL. 602–11 (Eleanor Maccoby, T. Newcomb & E. Harley eds., 1958)).

221. See, e.g., Helga Dittmar, *The Costs of Consumer Culture and the “Cage Within”: The Impact of the Material “Good Life” and “Body Perfect” Ideals on Individuals’ Identity and Well-Being*, 18 PSYCHOL. INQUIRY 23–24, 28 (2007) (noting that ideals about weight are communicated to children through dolls; the study demonstrated that young girls’ satisfaction with their body size is affected by exposure to Barbie doll images after exposure to a full-figured doll); Ball, *supra* note 219, at 6.

that feature to certain peoples.<sup>222</sup> By stating that pert noses are the “standard,” and considering the existing stereotype, it excludes some from being “preferred.”

As with the Mattel Tarzan case, the question is *who* is stating that these features are standard? The language of “standard doll features” is unclear. Is it referencing the choices of the toy industry? Or, is the Second Circuit suggesting that this combination of features is stock for the very idea of a doll? If the latter, then it is essentially stating that what naturally flows from the idea of a female doll are these features. Each dollmaker would have a copyright only in the expression that is beyond these features. Further, it would be the court placing its imprimatur on that stereotype; the court would be reinforcing that dollmakers should use these characteristics as the foundation—that which flows naturally from the idea of a doll.

Subsequent cases demonstrate that these kinds of findings have lasting power and impact, even when potentially based in identity trait stereotypes. In 1980, the Second Circuit applied the *Ideal Toy* standard doll principle to assess the similarity of baby dolls and noted that “a certain degree of similarity is attributable to the ‘kewpie doll’ appearance of both . . . toys.”<sup>223</sup> The court then indicated, without using the exact term, that standard doll features are stock—by finding that the similarity between the toys “necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form . . . .”<sup>224</sup> In 1997, the Southern District of New York again referred to the standard doll features language in explaining its own analysis that compared porcelain “J,” “O,” and “Y” candleholders with an angel and holly.<sup>225</sup> This court framed the *Ideal Toys* standard doll features as an unprotectable idea.<sup>226</sup> Finally, in 2002, the Eastern District of New York compared its analysis of rag dolls to the *Ideal Toy* standard doll feature analysis.<sup>227</sup>

However, in 2004, the Second Circuit finally rejected the stereotype. Mattel claimed that a commemorative millennium Rockettes doll infringed two different Barbie dolls.<sup>228</sup> The trial court granted Radio City’s summary judgment motion, relying on the “obligation” to exclude the elements common for a “youthful, female doll,” including the *Ideal Toy* standard doll features.<sup>229</sup> On appeal, the Second Circuit took the opportunity to clarify. In a footnote, the Second Circuit recognized that “language in our own opinions may have contributed to the district court’s determination. . . .”<sup>230</sup> Additionally, the Second Circuit stated the following:

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222. See, e.g., Bernice Schrank, “Cutting Off Your Nose to Spite Your Race”: Jewish Stereotypes, Media Images, Cultural Hybridity, 25 SHOFAR 18 (2007) (discussing “Jewish noses,” the Jewish nose as a stereotype, and changing perceptions and acceptance over the past few decades); Roy Goldblatt, *As Plain as the Nose on Your Face: The Nose as the Organ of Othering*, 48 AMERIKASTUDIEN/AM. STUDIES 563 (2003) (reviewing in part Gilman’s work on the 19th and early 20th century Austro-German criticism of the Jewish nose as a mechanism for othering, Gilman’s assessment of plastic surgery as a mechanism for making “the racially visible invisible,” and then assessing the stereotype in Hollywood).

223. *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 916–17 (2d Cir. 1980).

224. *Id.* at 916 (quoting *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976)).

225. See *Great Importations, Inc. v. Caffco Int’l, Inc.*, No. 95 CIV. 0514 MBM SEG, 1997 WL 414111, at \*3, \*6, \*21 (S.D.N.Y. July 24, 1997).

226. *Id.* at \*7 (without calling it scènes à faire or stock).

227. *Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.*, 210 F. Supp. 2d 147, 172 (E.D.N.Y. 2002) (without calling it scènes à faire or stock).

228. *Mattel, Inc. v. Goldberger Doll Mfg. Co.*, 365 F.3d 133, 134 (2d Cir. 2004).

229. *Mattel, Inc. v. Radio City Entm’t*, No. 00 CIV.6272 JSR, 2002 WL 1300265, at \*1 (S.D.N.Y. June 12, 2002).

230. *Mattel*, 365 F.3d at 136 n.3.

But we did not mean to suggest in *Durham* that, because original copyrighted features are, or may be described as, standard of commonplace, they maybe [*sic*] freely copied. We see no reason to believe that Barbie's facial features are necessary to convey the idea of a young adult female fashion doll.<sup>231</sup>

The court does not explicitly reject the notion that the “standard doll features” are stock, but the last sentence does so indicate. If these features were scènes à faire, then they would be excluded from copyright protection. The features could be freely copied because they encompass the very idea of what flows naturally from a doll and would thus tell us what makes a comely female face from a potentially racialized perspective. As this court clarifies, calling a combination of features common may reflect industry practice, but industry practice does not mean that the combination is “indispensable and naturally associated with the treatment of a given idea.”<sup>232</sup>

On the other hand, the text of the decision does leave some room for confusion. “An upturned nose, bow lips, and wide eyes are the ‘idea’ of a certain type of doll face. That idea belongs not to Mattel but to the public domain.”<sup>233</sup> Now, instead of being a stereotype for all dolls, the Second Circuit is saying that the standard doll features may be an idea for *one type* of doll face. In combination with its footnote text, it appears that the court is rejecting the stereotype in general, but on the other hand, perhaps it is simply announcing that this is one of many stereotypes. This still contains some of the dangers of stereotyping—although more diffused. As with characters, it would be better to term this combination too indefinite a set of characteristics to warrant copyright protection (the intermediate level). But at a minimum, it demonstrates the court correcting some of the prior generations' errors.

This style of correction can and should take place on a broader spectrum in two ways. First, when courts rely upon precedent utilizing scènes à faire to exclude characteristics based upon identity traits, the courts should take the opportunity to clarify that these characteristics do not comprise the essence of what it means to be a person with the identified trait. As the Second Circuit said in *Mattel*, there is “no reason to believe” that a certain set of features is “necessary to convey the idea.”<sup>234</sup> Further, as argued above, appropriate assessment of indefinite characters as compared to stock or distinct characters should, in most if not all matters, resolve concerns about whether other artists have free access to general characteristics without infringing.

Second, courts should likewise be very careful in making scènes à faire determinations. Courts must choose their words carefully to avoid instituting a stereotyped version of a particular person based on his or her immutable traits. Rather, as in *JCW Investments* in the context of socioeconomic status, courts should affirmatively identify and reject arguments that would perpetuate such stereotypes.<sup>235</sup>

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231. *Id.*

232. *Evox Products, LLC v. Kayak Software Corp.*, No. CV15–5053 PSG (AGRx), 2017 WL 5634856, at \*9 (Jan. 20, 2017).

233. *Mattel*, 365 F.3d at 136.

234. *Id.* at 136 n.3.

235. *See supra* notes 121–33 and accompanying text.

## V. CONCLUSION

Certainly, no copyright doctrine alone is to blame for the societal ills of stereotyping. Additionally, there are those who have argued that there can be benefits in certain contexts. For example, one commentator argued that “ethnic humor,” based on identity trait stereotyping, has a positive side when the jokes are adopted as self-deprecating humor by those who have the relevant identity trait.<sup>236</sup> On the other hand, such humor may be used simply to shift the negativity from one group to another and may reflect the “often undignified struggle of upwardly striving Americans to achieve positive definition and respectable status.”<sup>237</sup> The purported benefits, assuming they even exist, are far outweighed by the demonstrable harms.

By recognizing identity trait stereotypes as *scènes à faire*, courts legitimize them and further entrench their use as the stock from which a specific character will develop. In so doing, not only are the courts acceding to the narrow view espoused by some in the creative industries (albeit perhaps unwittingly), but courts may also be encouraging creative minds to start a new character in a new work from the recognized, stereotyped, identity trait stock, using it as the foundation upon which the artist builds new expression. This framing invigorates the stereotype and, ironically, may be stifling creativity with respect to characters that have a particular identity trait.

Consequently, we may have more creative works that, subtly or not, reinforce identity trait stereotypes in the consuming public’s minds, just as dolls socialize children as to appearances and expectations. Perhaps that is why we see the continued use of offensive language in casting calls, which creates even more harm and exclusion when circulated amongst actors. Or perhaps the casting calls, independently drawn from the script or conversations with the creative team, simply reflect a practice that sees no harm in repeatedly utilizing offensive stereotypes. If so, the creative teams can still prevent this problem if they start to think about identity traits as nothing more, and nothing less, than that specific trait. At a minimum, courts can bring that issue to the fore with how they handle stock character arguments.

Moreover, including identity trait stereotyping in stock characters places the imprimatur of judicial approval on those stereotypes. If a lead character is Jewish or Irish, contrary to the implication of the *Abie’s Irish Rose* decision, nothing more should naturally flow from those identity traits than the character’s religion or national ancestry.

Further, identity trait stereotypes not only infect the determination of stock, but also the arguments as to what is a creative leap beyond the stock. For example, a popular HBO series was sued for copyright infringement based on claimed similarities with themes and characters in the plaintiff’s television treatment.<sup>238</sup> One of the plaintiff’s characters was an unnamed African-American attorney working at Goldman Sachs in mergers and acquisitions and was referenced as a love interest.<sup>239</sup> As the court noted in response, “one would have hoped that we were well past the day

236. See, e.g., Boskin & Dorinson, *supra* note 97, at 82.

237. *Id.* at 83, 97 (“The Polish joke cycle, as Dundes observed, transfers heat from other ethnic groups including Jews and blacks to the lower socio-economic classes in general.”).

238. *Willis v. Home Box Office*, No. 00 CIV. 2500(JSM), 2001 WL 1352916, at \*4 (S.D.N.Y. Nov. 2, 2001), *aff’d*, 57 F. App’x. 902 (2d Cir. 2003).

239. *Id.* at \*5.

when someone would urge that it should be ‘creative’ to conceive of an African-American male involved in finance.”<sup>240</sup> One would have hoped, but the “creativity” argument likely stems from a stereotype as to what it means to be African American or from what the stock African-American character entails. Perhaps this could have been avoided if plaintiff’s attorney considered whether the character fit within an indefinite character category.

To have an identity trait should mean nothing more than having that identity trait. In order to help us all move forward, courts must take steps to move past identity trait stereotypes in scènes à faire.

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240. *Id.*