

ONCE UPON A TIME....
A HAPPY ENDING FOR THE UNAUTHORISED SEQUEL?

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ABSTRACT: The sequel is an economically valuable property, the creation of which is consumer driven. This paper explores the relationship between the unauthorised sequel and the law of copyright. Issues examined include the extent to which copyright owners should have the right to control sequelisation of the original work and the impact the form or intended audience of the sequel has upon copyright provisions. The approaches adopted by several jurisdictions are commented upon, noting in particular the development in American law, which provides copyright protection for the fictional character as an independent entity. The paper will conclude that intellectual property protection must be carefully balanced against the need to ensure a bountiful public domain from which all creators may draw.

I INTRODUCTION

Once upon a time...there was a story, and the story was so good that it demanded a sequel.

It is a truism that everyone enjoys a good story; it is equally true that a particularly good story engenders the desire in the reader for a further instalment, for a sequel in some form. The sequel provides a continuation of the original story featuring original characters and other constituent parts, and may take literary, dramatic or cinematographic form. The sequel counterpart is the prequel; in similar fashion a prequel is a story based on the original work, which takes up the storyline at a point earlier in time than the original. For the purposes of this paper, the term sequel denotes both types of works.

The sequel is not a modern phenomenon. Virgil in writing *The Aeneid* was presenting the epic saga of the Trojan wars and legendary heroes from a different perspective to that of Homer in *The Iliad*. *Morte D'Arthur*,¹ a retelling of the Arthurian legend, was itself a compilation of twenty-one French and English stories, and in turn has spawned numerous other works in both literary and cinematographic formats. One example, *The Mists of Avalon*,² was so popular that the author has produced nine sequels to date.

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¹ Sir Thomas Mallory, *Morte D'Arthur* (1485) the first such book published by William Caxton in 1485.

² Marion Zimmer Bradley, *The Mists of Avalon* (1983).

Contemporary examples of the sequel include the play *Rosencrantz and Guildenstern Are Dead*³ by Tom Stoppard, which features two minor characters from Shakespeare's *Hamlet*;⁴ and the novel *Pemberley*⁵ by Emma Tennant, which is a continuation of Jane Austen's *Pride and Prejudice*.⁶

In one sense both the Stoppard play and the Tennant novel were unauthorized sequels, the authors of the original play and novel upon which the later works were based did not give permission for their characters to be used, but as the works of Shakespeare and Jane Austen were both in the public domain there were no copyright infringement implications.

The importation of copyright in the sequel arena highlights another truism: sequels are economically valuable property, especially when viewed in cinematographic terms. Chris Isidore⁷ reported that in 2003 the film studios released 25 sequels, including *X2: X-Men United*, which “took in US\$155.2 Million in 93 countries last weekend – a record opening world wide, with about US\$ 86 Million in ticket sales in the United States alone.”⁸

The explanation for the popularity of the film sequel according to Paul Dergarabedian, president of Exhibitor Relations, a leading box office tracking firm,⁹ is that the financial risk is not as great as it is with a completely new film production: “The studios are hedging bets. They have a known commodity”.¹⁰ Matthew Kaplan observes:¹¹

Because a studio does not have to invest as much money in developing new characters, they can invest their efforts more in merchandising to bring greater returns. This created a market for authors who want to write sequels based on pre existing ideas.

This philosophy can be transposed into the literary world; a sequel has an immediate market created by the popularity of the original work. In essence the sequel exists due to consumer demand. These sequels are derivatives, defined as: “(thing, word, chemical substance) derived from a source, not primitive or original,”¹² and reutilise not just the characters but other elements of the original work. This paper seeks to explore the various

³ Tom Stoppard, *Rosencrantz and Guildenstern Are Dead* (1967).

⁴ William Shakespeare, *Hamlet*. The date when Shakespeare wrote *Hamlet* is uncertain but the modern Shakespearean scholar Dr John Dover opines: “It looks therefore, as if Shakespeare may first have handled the play sometime after Lodges references of 1596 and then revised it in 1601.” Preface to the New Shakespeare edition of *Hamlet*, Cambridge University Press London England 1969. Dr Wilson also states in his preface that “the origin of the story of *Hamlet* is lost in the mists of antiquity”; Shakespeare himself plundered the works of others in his search for a ‘good story’.

⁵ Emma Tennant, *Pemberley* (1993).

⁶ Jane Austen, *Pride and Prejudice* (1813). Penguin Books England (2006)

⁷ Chris Isidore, Senior writer CNN/MONEY; “Attack of the Movie Sequels II” (2003) CNN/MONEY <<http://www.money.cnn.com/2003/05/06/news/companies/sequels>> (at 29 March 2003).

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Matthew A Kaplan, “*Rosencrantz and Guildenstern Are Dead*, but are they Copyrightable? Protection of Literary Characters with respect to Works” (1999) 30 Rutgers LJ 817 at 820. (Kaplan).

¹² The Concise Oxford English Dictionary, seventh edition, Clarendon Press, Oxford, England (1988).

issues surrounding the unauthorized sequel and copyright; in particular, copyright law in several jurisdictions, the potential consequences of copyright owner control of sequelisation, the impact of form and audience, the ambit of protection and the fictional character, and jurisdictional resolution of the issues.

II COPYRIGHT LAW AND THE UNAUTHORISED SEQUEL

The jurisdictions to be examined in this paper are New Zealand, The United Kingdom, The United States, France and Germany. All are signatories to the Berne Convention for the Protection of Literary and Artistic Works (1836) as revised in Paris in 1971.¹³ However each country implements its own individual statutes. I shall examine that of New Zealand in detail, but comment more briefly on the legislative provisions of the other jurisdictions, making reference to different provisions as appropriate.

NEW ZEALAND

Frankel and McLay¹⁴ point out that “The owner of copyright in a work has a bundle of economic rights, which are exclusive to that copyright owner.”¹⁵ The New Zealand Copyright Act¹⁶ sets out the rights of the copyright owner:¹⁷

- S16 (1) The owner of the copyright in a work has the exclusive right to do, in accordance with sections 30 to 34, the following acts in New Zealand
- (a)... to copy the work and
 - (g)...the right to make an adaptation of the work.

To prove that there is copyright in a work¹⁸ the author must first establish that the work falls within the works outlined in s.14 (1) of the Act.¹⁹

Copyright is a property right that exists, in accordance with this act, in original works of the following descriptions: [included in this section are] literary dramatic, musical, artistic works; sound recordings; films; broadcasts and cable programmes.

It should be noted that the first proviso sets out that the work must be original; and it must be established that the work is within the period pertinent to copyright protection. For the categories outlined above, the duration is from the moment of creation and expires at the end of the period of 50 years from the end of the calendar year in which the author dies.²⁰

¹³ Berne Convention for the Protection of literary and Artistic Works 1886 (Paris revision 1971) <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html> (at 10 March 2006).

¹⁴ Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (1st Edition, Lexis Nexis, New Zealand, 2002) (Frankel).

¹⁵ Ibid 5.4.

¹⁶ Copyright Act 1994.

¹⁷ Ibid s.16 (1), (a) (g).

¹⁸ It is pertinent to note here the observation of Professor Ian Eagles (Professor of Law, Auckland University) given at a lecture in Auckland on the 6th April 2006, that ‘work’ is not defined in any jurisdiction.

¹⁹ See above n 16, s.14 (1).

To be protected the work must be original. However, determining whether or not a work is original may pose difficulties, as exemplified by a profusion of legal cases worldwide. As no work is completely original, it is axiomatic that all authors use ideas freely available in the public domain. Protection of a work will vary depending upon the level of originality contained therein.

To that extent a work composed of original and unoriginal parts may be classified as original, and Frankel and Mclay point out:²¹

S 15(1) If a person other than the owner of that work uses the unoriginal parts of the work, that person will not have infringed the original work.

The corollary of this is that use of the original parts of the work will be an infringement. The level of originality required for literary works in New Zealand is low;²² all that is necessary is that the author had expended skill, judgement or labour in producing the work.²³ Dramatic works are tested by the same criteria. The work must be fixed in a material form.²⁴

Copyright does not exist in a literary or dramatic or musical work unless and until the work is recorded in writing or otherwise.

Having ascertained that a work has copyright protection, copying the original parts of that work will be infringement. The leading case in New Zealand, *Wham-O MFG Co v Lincoln Industries*,²⁵ sets out the test requirements for establishing infringement by copying. There are three requirements as outlined by Frankel and McLay:²⁶

To amount to infringement by reproduction:

- (a) The reproduction must be either of the entire work or a substantial part.
- (b) There must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof.²⁷
- (c) There must be some causal connection between the copyright work and the infringing work. The copyright work must be the source from which the infringing work is derived.²⁸

²⁰ Copyright Act 1994, s. 22.

²¹ Frankel, above n 14, at 5.6.

²² In *Glogan v Land Transport Safety Authority of New Zealand* (1997) 3 NZLR 353, a taxi logbook was held to be an original literary work.

²³ Frankel, above n 14, at 5.7.1.

²⁴ Copyright Act 1994, s.15 (1).

²⁵ *Wham-O MFG Co v Lincoln Industries* [1984] 1NZLR 641 (CA). (*Wham-O*).

²⁶ Frankel, above n 14, 5.11.2 (a).

²⁷ *Wham-O*, above n 25, at 666; "It is sufficient for the plaintiff to establish some chain of causation linking the plaintiff copyright work with the defendant's alleged infringing copy;"

²⁸ *Wham-O*, above n 25, at 668.

A sequel may thus be found to have infringed the protected elements of a copyrighted work when it is proven that it copies a substantial part of the original. The word “substantial” in the context of copyright refers to quality rather than quantity²⁹ in New Zealand and The United Kingdom. As a sequel by definition draws from the works of the original, a causal connection is easily demonstrable. A film which uses a literary source as its basis, for example the film *Monty Python and the Holy Grail*,³⁰ may qualify as an unauthorised adaptation, adaptation being defined in relation to literary or dramatic works as conversion from one to the other.³¹

Moral rights originated in the Civil Law system. The original French expression referred to ‘Droit Morale’ and was used in connection with those rights which attach to the author whose creative work is held to be an extension of their person. The New Zealand Copyright Act (1994) provides moral rights of which the following are of relevance to sequels: firstly, the right to be identified as the author or director of the relevant work;³² secondly the right to object to derogatory treatment of the work;³³ and thirdly the right against false attribution.³⁴ The moral rights of identification and objection to derogatory treatment expire when the copyright in the work expires,³⁵ and the right against false attribution expires 20 years after the rights owner’s death.³⁶ The right to be identified as the author or director of a work must be asserted in writing to be effective.³⁷ The moral rights may be waived in writing³⁸ but the Act makes no provision for assignment.

The New Zealand Copyright Act (1994) also makes provision for fair dealing in respect of research and private study, news reporting and criticism. Of these the latter is most relevant to sequels. The Act provides that:³⁹

S42 (1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe copyright in the work if such fair dealing is accompanied by sufficient acknowledgment.

Parody may be deemed to fall within this section but it does present some problems. The first relates to the amount of the work taken, as parody frequently involves taking a substantial part of another author’s work. The second is the commercial motivation often found in parody. Third is that instead of fulfilling its cultural appropriateness as a means to

²⁹ Lord Evershed: “It will, therefore, depend not merely on the physical amount of the production but on the substantial significance of that which is taken.”; *Ladbroke (Football) Ltd v William Hill (Football) Ltd* (1964) 1 All ER 465 (HL). (*Ladbroke*).

³⁰ Released 1974.

³¹ Copyright Act 1994; s.2 (1) (a) (ii).

³² *Ibid* s.94 (1) (a) and (b).

³³ *Ibid* s.98.

³⁴ *Ibid* s.102 (2).

³⁵ *Ibid* s.106(1) (a) (b)

³⁶ *Ibid* s.106 (2) (a).

³⁷ *Ibid* s.96 (2).

³⁸ *Ibid* s.107 (2).

³⁹ *Ibid* s.42 (1).

criticise the value of the work or the philosophy behind that work (and by inference society itself) it may in fact be a criticism of the work itself.

THE UNITED KINGDOM

The Copyright, Designs and Patents Act 1988 formed the basis of the New Zealand Copyright Act 1994 and therefore there are marked similarities. Unlike the New Zealand Act, which requires originality for all categories of work,⁴⁰ the United Kingdom Act requires originality for literary, dramatic, musical or artistic works only.⁴¹ Again the copyright owner has the exclusive rights to copy the work⁴² or to make an adaptation thereof.⁴³ As in New Zealand, the threshold for originality is low⁴⁴ and there is the requirement of “substantial similarity” in the copying, as noted by Lord Evershed in *Ladbroke*.⁴⁵ As in New Zealand, duration of copyright is 50 years from the death of the author,⁴⁶ although it is probable that this will move to 70 years in order for the Act to be in conformance with European time limits.

The United Kingdom moral rights and fair use provisions are compatible with those in the New Zealand legislation.⁴⁷ A significant difference is how the New Zealand legislation approaches parody. The approach entails regarding parody not as taking a substantial part, but as merely raising the idea behind a particular dramatic, literary or musical work.⁴⁸ To be effective a parody must make the audience ‘bring to mind’ or recall the original work (unless it does so, the parody will fail). Despite this, the UK courts have regarded parodies benignly and have not held all parodies to be infringements; therefore the mere fact that one work recalls another has not been considered sufficient to establish that a ‘substantial part’ has been taken.

THE UNITED STATES

Copyright Law is set out in 17 U.S.C. §§ 101-1332, sometimes referred to as the Copyright Act, the basis of which is to be found in the United States Constitution which states:⁴⁹

Congress shall have power...To promote the progress of science⁵⁰ and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

⁴⁰ Ibid s.14.

⁴¹ The Copyright, Designs and Patents Act 1988 (UK); s.1 (1).

⁴² Ibid s.16 (a).

⁴³ Ibid s.16 (e).

⁴⁴ In *University of London Press Limited v University Tutorial Papers Limited* [1916] 2 CH 601; it was held that copyright subsisted in examination papers as original literary works.

⁴⁵ *Ladbroke*, above n 29.

⁴⁶ The Copyright, Designs and Patents Act 1988 (UK); s.12 (1).

⁴⁷ Copyright Act 1994 ss. 29-75 and ss. 77-85.

⁴⁸ Hugh Laddie, Peter Prescott, Mary Vitoria, Adrian Speck and Lindsay Lane *The Modern Law of Copyright and Designs* (3rd ed Butterworths London 2000) para 3.142-3.143.

⁴⁹ United States Constitution: Article 1 Section 8, Clause 8.

⁵⁰ Kaplan, above n 11, points out that “at the time the constitution was drafted ‘science’ referred to the work of authors.”

The work must be original and fixed in any tangible form.⁵¹ The copyright owner has the right to prepare derivative works.⁵² The duration of copyright⁵³ lasts 70 years from the death of the author.

The author's moral rights are not specifically covered by the Copyright Act,⁵⁴ with the exception of a visual work of art⁵⁵ (which excludes among other items motion pictures and books).⁵⁶ The US Copyright Office and the courts consider that adequate protection is provided by various United States statutes, including the Lanham Act,⁵⁷ which addresses issues of trademarks and unfair competition together with judicial interpretation of these statutes.

Fair use of a protected work is set out in the §107.⁵⁸ In determining whether or not a copied work is fair use the courts include consideration of four factors:⁵⁹

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyright work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

FRANCE

French copyright law, the Copyright Code [*Code de la Propriete Intellectuelle*]⁶⁰ implements European Directives. There are two distinct rights in France. These are *Droits Patrimonioux* or Proprietary Rights,⁶¹ which provide for the author to exploit her works for

⁵¹ 17 USC §102 (a).

⁵² 17 USC §106 “subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorise any of the following: ... (2) to prepare derivative works based upon the copyright work.”

⁵³ Copyright Term Extension Act, Title1, Section 102(b) (1), (2), §302(a), (b), 112 Stat. 2827 (1998).

⁵⁴ Betsy Rosenblatt, “Moral Rights Basics” Harvard Law School (1998). <<http://www.cyber.law.harvard.edu/property/library/moralprimer.html>> (at 27 May 2006);

⁵⁵ 17 USC §106A.

⁵⁶ See circular 92 §101 “Copyright Laws of the United States America”. <<http://www.copyright.gov/title17/92chap1.html#101>> (at 29 May 2006).

⁵⁷ AOL Legal Resources: “The Lanham Act defines the statutory and common law boundaries to trademarks and service marks.” See Title 15 of the US Code. <<http://legal.web.aol.com/resources/legislation/tradeact.html>> (at 29 May 2006).

⁵⁸ 17 USC §107.

⁵⁹ Ibid.

⁶⁰ Copyright (Part 1), Code (Consolidation), 01/07/1992 (27/03/1997), No. 92-597; <http://www.wipo.int/clea/docs_new/en/fr/fr062en.html> (at 16 May 2006). (French Code).

⁶¹ Ibid; Title 1, Chapter 1 Article L111.1-Chapter 111 Art.L 113-9.

financial reward including reproduction of the works,⁶² and *Droits Moraux* or Moral Rights,⁶³ which are treated by the French as an extension of the author's personality.⁶⁴

To be protected under French copyright law a work must be an *Oeuvre d'esprit*, 'a work of the mind'⁶⁵ or an intellectual contribution.

The duration of the proprietary rights is for a period of 70 years after the author's death.⁶⁶ However moral rights are perpetual and pass on after the author's death to his or her rightful heirs.⁶⁷

An author shall enjoy the right to respect for his name, his authorship and his work.
This right shall attach to his person. It shall be perpetual, inalienable and imprescriptible.
It may be transmitted *Mortis Causa* to the heirs of the author.

In terms of moral rights, the protected work is regarded under French copyright law as an extension of the author's personality. Such rights include:⁶⁸ *Droit de Paternite* or the right of attribution, and *Droit au respect de l'integrite de l'oeuvre* or the right to respect his name and the right to respect his work.

GERMANY

The German Copyright Law⁶⁹ provides both economic and moral protection for the author.⁷⁰

Copyright shall protect the author with respect to his intellectual and personal relationship with his work, and also with respect to the utilisation of his work.

The author has the right of publication,⁷¹ the right to recognition of authorship,⁷² the right to prohibit distortion of his work⁷³ and the exclusive right to exploit his work in material form.⁷⁴

Of most interest in the copyright law is the distinction made between adaptation of a work and free use of the work. Francisco Blazquez⁷⁵ comments:⁷⁶

⁶² French Copyright Law; Encyclopaedia Definitions.
<http://www.en.wikipedia.org/wiki/french_copyright-law> (at 13 May 2006).

⁶³ French Copyright Law, above n 60, Title I Chapter III

⁶⁴ French copyright law, above n 62, Title I Chapter III

⁶⁵ French Code, above n 60, Title I Chapter 1 Article L 111-1.

⁶⁶ French Code, above n 60, Title 11 Chapter III Article L 123-1.

⁶⁷ French Code, above n 60, Title 11 Chapter 1 Article L 121-1.

⁶⁸ French Code, above n 60, Title 11 Chapter 1 Article L 121-1.

⁶⁹ Gesetz über urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz-UrhG) of 9 September 1965 amended (10/09/2003).

<<http://www.gema.de/urheberrecht/urhg/index.shtml>>(at 29 may 2006).

⁷⁰ Ibid Chapter 1V.1.

⁷¹ Ibid Chapter 1V. (12)1.

⁷² Ibid Chapter 1V.13.

⁷³ Ibid Chapter 1V.14.

⁷⁴ Ibid Chapter 1V.15. (1).

The German *Urheberrechtsgesetz* (Author's Rights Act-Urh G) makes explicit the distinction between the adaptation of a work (*Bearbeitungsrecht*, §23 UrhG) and the free use of a work⁷⁷ (*Freie Benutzung*, §24 UrhG) thereof: "an independent work created in the free use of another author's work can be published and used for commercial purposes without the permission of the author of the original work" (§24 UrhG). The borrower must use the earlier work only as a suggestion for his/her own creative work.

The duration of copyright is for 70 years after the death of the author.⁷⁸

III POTENTIAL CONSEQUENCES OF COPYRIGHT OWNER CONTROL OVER SEQUELISATION.

A fundamental concept to be grasped in the context of copyright protection of sequels is that the current copyright owner is not necessarily the author of the work in issue. In respect of the film industry this will virtually always be the case as identified by Therese Catanzariti.⁷⁹

In Australia film financing, the investors usually require the producer to assign the investors the ancillary rights in the film...the ancillary are defined to include the right to produce or authorise the production of sequels, prequels, spin offs and remakes.

In order to examine the probable consequences if copyright owners are allowed to control sequelisation, several scenarios present themselves. The first of these can be illustrated by the Sir Arthur Conan Doyle-Sherlock Holmes situation. Sir Arthur Conan Doyle made the fictional character Sherlock Holmes a phenomenon in his day. In 1893, Conan Doyle decided to 'kill off' Sherlock Holmes in order to concentrate on his non-fictional writings. Holmes apparently died in the novel *The Final Problem*, the last story in the *Memoirs of Sherlock Holmes* series. Such was public outcry that Conan Doyle had to revive Holmes, who re-appeared in *The Hound of the Baskervilles* in 1901, and subsequent stories.⁸⁰

In this case it can be clearly seen that sequelisation was consumer driven. If Conan Doyle as a writer had not responded to public pressure and also refused to authorise a sequel by another writer then the reading public for the duration of the copyright would have been deprived of considerable enjoyment. In addition, the avenues of cinematographic works, adaptations for stage and television would have been dramatically curtailed.

⁷⁵ Francisco Javier Cabrera Blazquez, LLM, is an analyst of The Department of Legal Information, European Audiovisual Observatory.

⁷⁶ Francisco Blazquez "Plagiarism: An Original Sin?" Caslon Analytics; Intellectual Property Guide (2004).

<<http://www.caslon.com.au/ipguide16.htm>> (at 10 May 2006). (Blazquez).

⁷⁷ See above n 76, fn 16 "not to be confused with the American 'fair use' doctrine, which applies only to the use of a work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."

⁷⁸ See above n 69, Chapter V11.64.

⁷⁹ Theresa Catanzariti, "The Plot Thickens: formats, sequels and spin offs after Goggomobil" (2004), Ent LR, 15 (3) (85-93): ibid 857. (Catanzariti).

⁸⁰ Sherlockian Net; Arthur Conan Doyle <<http://www.Sherlockian.net/acd/index.html>> (at 28 May 2006).

An alternative scenario is one where the author who has assigned his or her copyright to a publisher or a film producer and such is the acclaim with which the original work has been awarded that a sequel would be assured of commercial and literary success. The author of the original work would be the appropriate person to produce the sequel but either the copyright owner is not prepared to authorise a sequel by the original owner, preferring to commission another writer, or the publisher may prefer to suppress a sequel completely in order to avoid it competing with alternative works. In the former case the public may be presented with an alternative work vastly inferior to the sequel desired. Whereas in the latter situation the reading or viewing public is deprived of the pleasure to be incurred in the enjoyment of a sequel by the author whose primary work they deemed to merit one. In both cases the author is deprived of the 'tools of his trade.'⁸¹

A third consequence if copyright owners are allowed to control sequelisation is that the unauthorised sequel may result in unjust enrichment to the copyright owner. Matthew Kaplan comments.⁸²

By precluding sequel authors from receiving any protection in their work, the original copyright holder can use a sequel author's treatment or ideas without worrying about trampling the rights of that author. Therefore, the original author can be unjustly enriched because anything the secondary author creates will be considered an unauthorised derivative work and infringing.

A further scenario takes into consideration the fact that copyright creates a monopoly.⁸³ The copyright owner who exercises such monopoly to control sequelisation is able to financially exploit that monopoly, such that works merchandised at a monopoly rate could make those works inaccessible to a certain strata of the public.

Thus far the effect of the copyright owner controlling sequelisation has been viewed from the aspect of deprivation to either the author or the public. An alternative view is that of benefit to the author, who is allowed to control sequelisation. The author could therefore prevent the situation whereby the potential market for his or her sequels is destroyed due to a glut in the market caused by unrestrained sequels. Judge Kozinski⁸⁴ is unconvinced that this last scenario is a viable one:⁸⁵

⁸¹ An interesting sidelight on this issue is provided by the case of *Warner Bros Pictures Inc v Columbia Broadcasting System* 216.F.2d 945. The author Dashiell Hammett wrote the novel *The Maltese Falcon*, and sold Warner Brothers the exclusive rights to use these writings. Hammett subsequently wrote new novels featuring the Sam Spade and other characters that he had used in the original novel. Warner Brothers claimed copyright infringement in their characters.

The court observed, *Ibid* 950: "Authors work for the love of their art no more than other professional people in other lines of work for the love of it. There is the financial motive as well." and concluded; *Ibid* 950 "The characters were vehicles for the story told and the vehicles did not go with the sale of the story". The author was not to be deprived of the tools of his trade.

⁸² Kaplan, above n 11, 830-831.

⁸³ *Tate v Fuller* (1908) [1KB 821,832-833].

⁸⁴ The Honourable Alex Kozinski: Judge Ninth Circuit Court of Appeals. Pasadena, California.

⁸⁵ Alex Kozinski, "What's So Fair About Fair Use?" (1991) *Journal of the Copyright Society of the USA* 46 (4).

Such an outcome could harm the progress of the arts, by preventing the creation of authentic works that would have been of higher quality. Such a scenario is conceivable, but in my view it is unlikely. Cervantes had no power to enjoin unauthorised sequels to his immensely popular *Don Quixote*. He did, however have the power to provide the real thing - and the world could tell the difference.

IV IMPACT OF FORM AND AUDIENCE ON THE SEQUEL AND COPYRIGHT PROVISIONS

There are two distinct areas, parody and fan-fic, where the form and intended audience of a sequel impact upon the application of the copyright provisions of the jurisdictions examined. The first of these, parody, has been described by Professor Voorhoof⁸⁶ as:⁸⁷

[It is] in essence...a ridiculing dialogue with an existing, mostly famous or a well known trademark...a creation of a new work that makes ridiculous, or creates at least an antagonistic, critical, humoristic tension with the style, content or form of the original work.

Parody is regarded in most jurisdictions as an exception with regard to copyright in that the parodist may utilise substantial parts of the original author's work without the parodied author's permission.

In New Zealand and the United Kingdom⁸⁸ parody may be deemed to fall within the fair dealing provisions of the relevant Copyright Acts and will not infringe copyright, providing "such fair dealing is accompanied by sufficient acknowledgement."⁸⁹

Under United States Copyright Law parody falls again into the fair use exception of §107. In the case of *Campbell v Acuff-Rose Music*,⁹⁰ which concerned parody, the Supreme Court included consideration of the four factors set out in the Copyright Act⁹¹ [repeated here for the reader's ease of reference]:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

⁸⁶ Dirk Voorhoof is Professor Faculty of Social and Political Sciences, Ghent University, Belgium.

⁸⁷ Dirk Voorhoof "Freedom of Expression, Parody, Copyright and Trademarks" A conference paper delivered in New York 16 June 2001. <http://www.elai-usa.org2001_conference/press_voorhoof.doc> (at 29 May 2006)(Voorhoof).

⁸⁸ Copyright Act 1994 (NZ) s.42; The Copyright, Designs and Patents Act 1988 s.30 (UK).

⁸⁹ Ibid.

⁹⁰ *Luther R Campbell aka Luke Skywalker v Acuff-Rose Music inc* 510 US 569, 579, 114 S.ct 1164, 127 L ED 2d 500 (1994) (Campbell).

⁹¹ 17 USC §107.

and determined how they should be applied.⁹² The Supreme Court considered that the four statutory factors should not be treated in isolation. Rather they should all be explained with the results being weighed together taking into consideration the purposes of the copyright.

In France, parody is explicitly recognised as an exception to copyright⁹³ provided that it operates “observing the rules of the genre.”⁹⁴ Francisco Blazquez comments:⁹⁵

These ‘laws of the genre’ which leave the courts room for interpretation, could be described as follows: parody must be humorous and there must not be confusion with the parodied work...parody can be used to support a serious idea if the treatment is humorous, but can never be used to obtain a commercial benefit through unfair competition.

Although in German copyright law there is no explicit exception for parody, parodies may be regarded as “free use of the original work”,⁹⁶ and it would be a matter for judicial decision whether or not the parody fell within an acceptable level of fair use.

Whilst accepting that there are difficulties in all jurisdictions in identifying the demarcation point between copyright infringement and the acceptable use of parody,⁹⁷ the courts have been proved capable of ascertaining that point, as demonstrated in *Campbell v Acuff Rose Music*.⁹⁸

Parody takes on a fundamentally different form to that of the original work and the intention is different. The original work may be serious, humorous or even educational in some manner, but that of the parody is to entertain and often to make social comment or criticism. The audience for the two formats may radically differ; and in financial terms the true parody is not intended to compete commercially with the original parodied work.

The law of copyright has recognised the special place parody occupies, and where a sequel takes the form of parody ‘observing the rules of the genre’ it should not be held to infringe the copyright to the original work.

The second area I consider to be that known as ‘fanfic’. Fan Fiction takes place in cyber space, being the genre of writings written in homage to the works of favourite authors, and

⁹² *Campbell*, above n 90, 1171.

⁹³ Copyright Code (Consolidation), 01/07/1992 (27/03/1997), No. 92-597, Art L 122-5.

⁹⁴ *Ibid.*

⁹⁵ Blazquez, above n 76.

⁹⁶ Copyright. Law (Consolidation) 09/09/1965 (16/07/1998 § 24UrhG)

⁹⁷ Voorhoof, above n 87. Voorhoof ascribes the difficulties to the inherent paradoxes of parody, these being:

“reproduction is necessary, but not too much (substantial taking);

There must be resemblance but, no confusion;

Additional elements are needed, but not too many (the public must be able to recognise the original);

The parody must be critical-offensive, but not defamatory (antithesis, no *animus iniurandi*)”.

⁹⁸ *Campbell*, above n 90.

which are posted on the Internet. Natasha Walters writing in the Guardian newspaper reports:⁹⁹

Unsurprisingly, Peter Pan is a popular boy among the kids who post their tales on the fan fiction websites-on one...you can find more than 800 Peter Pan sequels and or prequels...the same website holds more than 34,000 Lord of the Rings offerings, and more than 150,000 Harry Potter spin offs.

These are derivative works taking not just the characters but frequently the whole fictional world of the original work. The Fan Fiction works operate within shared worlds which develop and complement the world in the original work. Fan Fiction writers have a devout admiration for the original text and there is no intention to produce a competitive work which would exploit the commercial success of the original.

Julie Harris-Hulcher observes that "...this literary anarchy is a form of intellectual freedom that could easily be overruled by zealous application of intellectual property laws."¹⁰⁰

There has been no case law to date involving fan fiction and the application of intellectual property laws, whether zealous or otherwise.¹⁰¹ Natasha Walters points out that there have been threatening letters from the lawyers of copyright holders whose works have been the subject of fan fiction: but these have not so far burgeoned into a legal case. This is probably for two reasons: firstly the non commercial nature of the genre, the works being accessible freely on the internet; and secondly the fact that fan fiction is not intended to, and indeed does not compete with the original novels. The copyright owners therefore suffer no commercial loss.

V AMBIT OF COPYRIGHT PROTECTION IN THE UNITED STATES: FOCUS ON THE FICTIONAL CHARACTER

Using the United Kingdom as a model for the issue of 'character protection' it can be seen that characters have no protection per se:¹⁰²

There is no authority however, which expressly or impliedly recognise copyright in a fictional character when that character is created within the context of a literary work.

The copyright protecting the expression of the idea through the words and form of the piece are held to protect the characters contained therein.

The other jurisdictions examined are in accord, with the exception of the United States. American law has seen an assertively obfuscatory development on the issue recognizing characters as independent copyrightable entities prompted, no doubt, by their economic significance to the copyright holder. The fact that the vast majority of cinematic sequels

⁹⁹ Natasha Walter "Works in Progress" (27 October 2004), The Guardian Newspaper. <<http://www.technology.guardian.co.uk/online/comment/story/0,12449,1336907,00.html>. >(at 16 May 2006).

¹⁰⁰ Julie Harris-Hulcher "Letting The Monsters out." see the chapter 'Long Tentacles of the Law' <<http://www.Epberglund.com/RGttCM/nightsapes/NS15/ns15nf01.htm>> (at 16 May 2006)

¹⁰¹ Ibid

¹⁰² Professor A McGee and G Scanlon "Copyright in Character" (2003) Bus Law 470.

originate in the United States supports this view. The crux of this issue is encapsulated in the words of Professor Kurtz:¹⁰³

Despite their elusiveness, fictional characters do have independent lives of their own. Characters such as Sherlock Holmes, Tarzan, Falstaff, Superman, James Bond, Pogo, Peter Rabbit, the Bobbsey Twins, Nancy Drew, Travis McGee and Mickey Mouse may be better known and *more valuable than any particular work in which they appear*. (The emphasis is mine)

I have previously proffered the view that sequelisation is predominately consumer driven, so too in my opinion is character protection in the United States, as supported by the above observations of Professor Kurtz. It is of value to trace the stages of development of character protection in the United States prior to evaluating the value it may add to the debate.

As a starting point it is important to consider the nature of a fictional character. Within the literary work they inhabit they have an elusiveness born of the perception of the individual reader. The depiction of a literary character in a film can be completely awry to the visualisation of the same character within the mind of the individual reader while the visual depiction, especially of a cartoon character, does not present the same conceptual difficulties.¹⁰⁴

Courts have been far more willing to protect characters that have a visual component than to protect literary characters, which exist as more abstract mental images.

The Disney cartoon creations are readily accessible as demonstrating the economic value of the independent character and have been the subject of litigation in which they were accorded copyright protection as separate entities to the cartoons in which they appeared.

In the case of *Walt Disney Productions v Air Pirates*,¹⁰⁵ the court found that copying a graphic character could be found to infringe copyright on the basis that¹⁰⁶

a comic book character...has physical as well as conceptual qualities (that are) more than likely to contain some unique elements of expression.

Thus 'Minnie, Mickey and others' were held to be more than flat graphic figures, they were deemed to have character traits, even personality, as such there needs to be something more than a substantial similarity in graphic representation to establish a prerequisite for copyright protection being awarded.

¹⁰³ Leslie Kurtz, "The Independent legal Lives of Fictional Characters" (1986) Wisconsin Law Review 429-525.

¹⁰⁴ Ibid 444.

¹⁰⁵ *Walt Disney Productions v Air Pirates* 581 F2d 751,753 (9th Cir 1978) cert denied 439 US 1132 91979.

¹⁰⁶ Ibid 755.

The later case of *Warner Bros Inc v American Broadcasting Co*¹⁰⁷ extended consideration of character protection to the situation where a cartoon character was the subject of a visual depiction in a television programme 'The Great American Hero.' The court held that the main character of the programme, Ralph Hinkley, did not exhibit substantial similarity to the hero, Superman, of the comic books and films.

Yet the case was not argued on the basis of dissimilarity of appearance only,¹⁰⁸ the character Hinkley being "...of medium height with a slight build and curly, somewhat unkempt blond hair," unlike the suave Superman described by the court as "a tall, well built, dark haired and strikingly handsome young man,"¹⁰⁹ but also on the overall evidence of the character's qualities and distinguishing features. The court would examine both of these aspects in a determination of infringement.

Indeed it has been held in *United Features Syndicate v Sunrise Mold Co*¹¹⁰ that even where the characters exhibit no personality traits as such, infringement could be found where the copied character is virtually identical to the original. Professor Kurtz identifies the reason for this to be that:¹¹¹

Its visual element makes it one of the least abstract of abstractions, and provides something concrete and delineated which can be the subject of objective comparisons.

Thus it can be seen that a cartoon character can be copied and have a separate existence outside the work in which it originally appeared, such that the copying could constitute infringement.

Literary characters have presented a more complex problem for the legislature, and the United States judiciary uses two tests to try to ascertain protectability of such creations. The first is the 'Delineation' test emanating from the proposition of Judge Learned Hand in *Nichols v Universal Pictures Corp*,¹¹² in which he said:¹¹³

...the less developed the characters, the less they can be copyrighted, that is the penalty an author must bear for marking them too 'indistinctly'.

In this case the author of the play *Abies Irish Rose* claimed that the Universal Pictures film *The Cohens and the Kellys* infringed the copyright in her play by using similar characters and plot.

Judge Hand, in examining the issue of character protectability, gave birth to the idea that the character that is well developed and not a stock character may attract protection.¹¹⁴

¹⁰⁷ *Warner Bros Inc v American Broadcasting Co Inc* 720 F 2d 231 (2d cir 1983).

¹⁰⁸ *Ibid* 236.

¹⁰⁹ *Ibid* 235.

¹¹⁰ *United Features Syndicate v Sunrise Mold Co*, 569F Supp 1475 (SD Fla 1983); in which the cartoon character Peanuts had been copied.

¹¹¹ See Kurtz, above n 103, 450.

¹¹² *Nichols v Universal Pictures Corp* 45 F 2d 119 (1930).

¹¹³ *Ibid* 121.

¹¹⁴ *Ibid* 121.

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.

The ‘Delineation’ test’ has a two stage process. First to ascertain if the character is sufficiently well developed to merit copyright protection; and second, if it is found that the character merits protection, to ascertain if the alleged infringing character is closely similar in terms of personality and physical traits to the original, or merely exists in the abstract.

The second approach is the ‘Story Being Told’ test, which emanates from the case of *Warner Bros Pictures Inc v Columbia Broadcasting System*.¹¹⁵ This case concerned the determination of whether Dashiell Hammett’s characters Sam Spade and others from his novel *The Maltese Falcon* could be used by Hammett in later novels after Hammett had granted Warner Bros the rights to transform the book into a film. The question before the court was whether characters could be protected under copyright law.¹¹⁶

It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of protection afforded by copyright.

The court concluded in this case that the characters were merely “Vehicles for the story being told and the vehicle did not go with the sale of the story.”¹¹⁷

The effect of this ruling using the ‘Story Being Told’ test was to narrow the protection afforded literary characters which might be ascertained using the Delineation test. The trend however moved towards a greater willingness by the courts to accede copyright protection to literary characters. In *Burroughs v Metro Goldwyn Mayer Inc*¹¹⁸ the court held that the copyright in the Edgar Rice Burroughs novel *Tarzan of the Apes* extended to the character of Tarzan, which they found to be distinctly delineated, albeit on what appears to be minimal grounds.¹¹⁹

Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet experience human emotions. He is athletic, innocent, youthful, gentle and strong. He is Tarzan.

This description could be applied to other literary characters, for example the character Mowgli featured in Rudyard Kipling’s *The Jungle Book*, and there would appear to be even less justification for holding that the character Hopalong Cassidy was distinctly delineated in *Filmvideo Releasing Corp v Hastings*.¹²⁰ The character Hopalong Cassidy was created

¹¹⁵ *Warner Bros Pictures Inc v Columbia Broadcasting System* 215 Frd 946.

¹¹⁶ *Ibid* 950.

¹¹⁷ *Ibid* 950.

¹¹⁸ *Burroughs v Metro Goldwyn Mayer Inc* 519 F Supp 388(SDNY1981).

¹¹⁹ *Ibid* 391.

¹²⁰ *Filmvideo Releasing Corp v Hastings* 509F Supp 60 (SDNY) aff’d, 668 F 2d 91 (2nd cir 1981).

by Clarence E Mulford and featured in twenty-three novels. The personality the book portrayed of the character Hopalong Cassidy was diametrically opposed to that of the character featured in the film, the former being tough and prone to swearing, the latter being gentle and non swearing.

Character protection prevents another author creating a new work which might feature the original characters in a new adventure. This was demonstrated in *Anderson v Stallone*,¹²¹ in which case the court used both tests to determine whether the characters who had appeared in the first 3 'Rocky' films were protected and whether Anderson in writing a treatment for *Rocky 4* was infringing their copyright protection. The Rocky series of films centred around the character Rocky Balboa, played by Sylvester Stallone, a working class good natured Italian who achieved fame and fortune as the heavy weight boxing champion of the world. Rocky is supported in his quest by a close group of friends. The court held that the characters were protected under either the 'Delineation' or 'The Story Being Told' test, holding that: "The Rocky characters are one of the most highly delineated groups of characters in modern American cinema."¹²²

The danger inherent in this approach is emphasised by Michael Todd Helford:¹²³

This approach, if left unchecked will ultimately dilute the significance of a limited copyright term and hence make fewer characters available for unauthorised expressive uses.

I would maintain that the American focus on the character obfuscates the debate surrounding the unauthorised sequel. This is so especially given the courts' openness to the introduction of the law of trademarks and protection into the determination of character protection. For example in *Edgar Rice Burroughs Inc v Mann*¹²⁴ it was held that public confusion might result from the defendants using the title *Tarz & Jane & Boy & Cheetah* in a film with explicit adult themes, such being the public recognition of the name Tarzan, either individually or aligned with that of Jane. This importation is not helpful.

Furthermore, the emphasis on characters is too narrow. A more equitable approach to balancing the protection an author requires in his creation against the access to primary works required by the secondary writer is provided by character protection within the original work and the 'substantial similarity' test.

Characters do not exist in a vacuum, they inhabit a whole fictional world and it is difficult to remove the characters without also taking some other elements which they bring with them; "trailing elements of plot that cannot be totally severed".¹²⁵ In the *Lara's Child*

¹²¹ *Anderson v Stallone* 11 USPQ 2d 1161 (CD Cal 1989).

¹²² *Ibid* 1166.

¹²³ Michael Todd Helford, "When Mickey Mouse is as strong as Superman: the Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters" (1992) *Stanford Law Review* 44 (3) 623-674.

¹²⁴ *Edgar Rice Burroughs Inc v Mann* 195 USPQ (BNA) 159 (CD Cal 1976).

¹²⁵ Kurtz, above n 103, 431.

(*Laras Tochter*) case¹²⁶ the court had to consider whether an unauthorised sequel of the novel *Doctor Zhivago* by Boris Pasternak had been created in free use (freiebenutzung, §24 urhG) of Pasternak's novel or whether it was an adaptation (bearbeitungsrecht, §23 urhG).

Pertinent to the question was the examination of the distance the unauthorised sequel had moved away from the premise of the original work. Professor Eagles¹²⁷ explained the court's approach thus:¹²⁸

Because it approached the problem by the adaptation route rather than treating it as a subsistence or direct copying issue, the Bundesgerichtshof was able to focus not just on the characters but also their environment and the network of relationships between them and ask itself whether the sequel was truly independent of the original.

In this case the unauthorised sequel was found to have incurred liability not on the basis that the characters came 'trailing elements of plot' but on the basis that the characters came trailing not just elements of plot but scenes from the original work and fully developed characters in addition to plot and context.

Lara's Child was not considered to be an original work created in free use of *Dr Zhivago*. However the inference is that an unauthorised sequel may be deemed to be a free use work which does not infringe copyright protection in the original work provided the author of the sequel does not use too much of the original.

This approach would allow new works based on copyrighted works whilst providing protection for the original author against writers who seek to use not merely their characters but their entire fictional worlds. This surely is a more just outcome, as exemplified by Professor Eagles:¹²⁹

This careful balancing of competing interests, while sometimes difficult to apply in individual cases, is likely to prove a more fruitful solution to the sequel problem in copyright than the North American inspired quest for the crunch character.

VI JURISDICTIONAL RESOLUTION OF THE ISSUES

As previously examined, copyright law in each jurisdiction has a shared set of principles but is applied in individual jurisdictions with a national particularity.

¹²⁶ Decision of the Bundesgerichtshof (German Federal Court of 29 April 1999-1 ZR 65/96. <http://www.rws-verlag.de/bgh-free/volltex/1999/vo6_9/vo61201.htm> (at 30 May 2006).

¹²⁷ Professor Ian Eagles "Dr Zhivago's Children: Some Lessons from German Copyright's Encounter with the Sequel" (2004) 10 NZBLQ 109.

¹²⁸ Ibid 111.

¹²⁹ Ibid 113.

Consider the case of *Lara's Child*,¹³⁰ in which the German court analysed the issues on the basis of the uniquely German differentiation between adaptation and free use. If the case had been heard in the United States it would have presented character protection issues, in France moral rights issues and in New Zealand and the United Kingdom substantial similarity issues.

Two recent cases serve to illustrate this proposition, one a US case, the other a French case. First the United States case of *Suntrust Bank v Houghton Mifflin Co.*¹³¹ This case concerned an unauthorised sequel to the Margaret Mitchell novel *Gone with the Wind*, written by Alice Randall and entitled *The Wind Done Gone*. Both novels were set in the antebellum South. The sequel recounted events from the viewpoint of Cynara, the illegitimate daughter of a slave and her white master. Alice Randall borrowed extensively from *Gone with the Wind*; such borrowing included the taking of fifteen characters, several scenes, and the mirroring of the language used in the original.¹³²

The Mitchell estate, learning of the publication of the sequel, sued the book publisher Houghton Mifflin for copyright (and trademark) infringement, seeking in addition to damages an injunction to prevent publication of the book.

The defence proffered was that of 'Fair Use', that the work had a parodic intention to ridicule the portrayal of a contented and supportive population of black slaves in the white-dominated Deep South in *Gone with the Wind*.

The case acquires a distinctly American perspective with the importation into the parody investigation of the First Amendment¹³³ right to free speech. At the District Court hearing the injunction against publication was granted, having found copyright infringement existed.¹³⁴

The court found that there was actionable copying due to substantial similarity to *Gone with the Wind* both in quantity and quality.

Houghton Mifflin appealed against the decision¹³⁵ of the District Court, strongly supported by advocates of free speech. At appeal the injunction was lifted, the appeal judge finding that *The Wind Done Gone* constituted a work which should be protected under the fair use doctrine. Dr Rimmer comments:¹³⁶

¹³⁰ See above n 126.

¹³¹ *Suntrust Bank v Houghton Mifflin Co* 136 F Supp 2d 1357.

¹³² "Gone With The Wind Done gone: Re-Writing and Fair Use" (2002).
115 Harvard Law Review 1193-1216, at 1203-5.

¹³³ United States Constitution, First Amendment: "Congress shall make no law...abridging the freedom of speech..." <<http://www.law.cornell.edu/constitution/constitution.billofrights.html>> (at 24 May 2006).

¹³⁴ *Suntrust Bank v Houghton Mifflin Co* 136 F Supp 2d 1357.

¹³⁵ *Suntrust Bank v Houghton Mifflin Co* (2001) US Appeal Lexis 21690.

¹³⁶ Dr Matthew Rimmer, Lecturer, Faculty of Law Australian National University:
"Gone with the Wind: Copyright Law and Fair Use."(April 2003).
<<http://www.alia.org.au/publishing/incite/2003/04/wind.gone.html>> (at 31 May 2006).

[The Court] found that the injunction against *The Wind Done Gone* was an “extraordinary and drastic remedy” that amounts to unlawful prior restraint in violation of the First Amendment.

Dr Rimmer further quotes Wendy Strothman, executive vice-president of Houghton Mifflin as saying:

Today’s decision is an absolute victory for both the First Amendment and for the fair use doctrine of the Copyright Act, both crucial to American culture and freedom of expression.

This quotation emphasised the distinctive American approach to copyright infringement.

The second case to illustrate the influence of national particularities on the decisions of the judiciary is a French case.¹³⁷ The case concerns an unauthorised sequel to the novel *Les Misérables* by Victor Hugo, entitled *Cosette ou le Temps des Illusions* written by François Ceresa. Victor Hugo’s great great grandson, Pierre Hugo (acting on behalf of Hugo’s descendants) brought the case on the basis of a violation of moral rights. French moral rights as has been seen, are “perpetual, inalienable and imprescriptible” and may be transmitted *Mortis Causa* to the heirs of the author.¹³⁸ The descendents were not successful at this first hearing in two respects; the first being that Pierre Hugo lacked locus standi:¹³⁹

The court found that ‘the first born of the direct line of descendants’ completely failed to show that he was the heir of Victor Hugo. On the contrary, at the end of his life, the author had designated his rights to a poet friend as custodian of his rights.

The second point of most significance to the issue of moral rights, was the fact that during his lifetime Victor Hugo had been explicit that he did not want his descendants to have control over his work but rather that it should be put into the public domain. Nevertheless, at an appeal hearing in Paris¹⁴⁰ it was decided that the sequel did infringe the moral rights of Victor Hugo, determining that the author would never have allowed a third person to “write a continuation of his work.”¹⁴¹

The court imposed a symbolic fine of €1.

VII CONCLUSION

The major issue for the law of copyright and the unauthorised sequel is the need to balance the property rights of the author, necessary to promote the incentive to further create,

¹³⁷ This case is unavailable in English but is reported in BBC News Online: Entertainment:

As.<<http://newswww.bbc.net.uk/1/low/entertainment/arts/1542284.stm> (at 25 May 2006).

<<http://newswww.bbc.net.uk/1/low/entertainment/arts/1346391.stm> (at 25 May 2006).

And The Victor Hugo web page:><http://www.hugo-online.org/april04.htm>> (at 25 May 2006).

¹³⁸ French Code, above n 60, Title II Chapter I art. L.121-1.

¹³⁹ Report of Nomos Societe d’ Avocats.

<<http://www.nomosparis.com/gb/archives.php?idnews=2&mois=8&annee=2002>> (at 25 May 2006).

¹⁴⁰ *Hugo v Editions Plon*, CA Paris, 4Ch, 31 March 2004 (2004) 202 RIDA 292.

¹⁴¹ Cason Analytics: “Moral Rights Cases”

<<http://www.caslon.com.au/mrcasesnote.htm>> (at 26 May 2006); see also Blazquez, above n 76, fn 6.

against the access needs of new authors. Too restrictive intellectual property protection would remove too much from the public domain and cannot, I believe, be justified on the basis of protecting an author or copyright holder at that time from an unauthorised sequel. Such protection would result in an impoverished society, a view endorsed by the Judge Alex Kozinski:

Overprotecting intellectual property is as harmful as under protecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. *Overprotection stifles the very creative forces it is supposed to nurture.*¹⁴² (emphasis mine)

The recent cases in the United States and Germany would indicate openness on the part of the judiciary to permit the unauthorised sequel which operates within the parameters of fair and free use doctrine. To do otherwise would, I contend, be an unjust and indefensible over-protectionism that would act to fence off a rich intellectual commons from which all can draw inspiration. Moreover, it would thwart the consumer demand which exists for the sequel, authorised or otherwise, thereby doing society a disservice.

To conclude: Once upon a time... there was a story, and the story was so good that it demanded a sequel...and the law of copyright (sometimes?) allowed an unauthorised sequel...so all ended happily ever after.

The end.

¹⁴² *White v Samsung Electronics America Inc* 989 F2d 1512 CA 9, 1993.