WHO WILL SPEAK FOR THE SLENDER MAN?: DIALOGISM AND DILEMMAS IN CHARACTER COPYRIGHT

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Someone, at some time, invented Santa Claus. They did not invent him from whole cloth, of course. They drew on folklore and religious icons, and then got creative. Someone decided he lived in the North Pole; someone else decided he wore a furry red suit; someone else decided he traveled via flying reindeer.

Of course, Santa Claus has been around for a long time. Although he wasn't named "Santa Claus" until the relatively recent nineteenth century,[1] no one questions that Santa is well beyond the reach of copyright law. Creators of Santa-related poems, movies, songs, and books own copyright in their particular works, but no one "owns" Santa. If Santa were newer, we would surely treat him the same way. It would be unfair to deprive creators of the ability to build upon the Santa myth, to make it their own. Wouldn't it be? If we treated Santa as "owned," who would own him? And who would suffer?

At first glance, Slender Man and Santa Claus don't have much in common. According to their mythologies, both inspire children to change their behaviors—Santa cautions against naughtiness, and Slender Man tempts children to evil—but where Santa is jolly and generous, Slender Man is eldritch and cruel.[2] Slender Man's business suit and tentacled back could not be more different from Santa's red and white furs. But despite their character differences, they are legally similar: Both result from the curious combination of creativity and belief that makes folklore exist on the border of fiction and reality. In that respect, the only difference between them is time. While Santa Claus developed gradually and we cannot remember who contributed to his myth,[3] the character of Slender Man developed quickly, within the last decade, based on the contributions of identifiable Internet message-board creators.[4]

Professor Cathay Smith's Article, *Beware the Slender Man: Intellectual Property and Internet Folklore*, takes a detailed look at the development of the Slender Man character to provide an example of how

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1. *See generally* GERRY BOWLER, SANTA CLAUS: A BIOGRAPHY (2005) (tracing the history of Santa Claus through Saint Nicholas folklore).

2. *See generally* Justin Parkinson, *The Origins of Slender Man*, BBC NEWS MAGAZINE (June 11, 2014), https://www.bbc.com/news/magazine-27776894 [https://perma.cc/P9GB-PV5M] (describing the similarities shared by different Slender Man renditions).

3. *See, e.g.*, PHYLLIS SIEFKER, SANTA CLAUS, LAST OF THE WILD MEN: THE ORIGINS AND EVOLUTION OF SAINT NICHOLAS, SPANNING 50,000 YEARS 12–15 (1997) (describing theories regarding the contribution of nineteenth century author Washington Irving and various nineteenth century artists to Santa Claus folklore).

4. *See* Parkinson, *supra* note 2.

intellectual property law approaches iterative and collective creation.[5] Professor Smith approaches Slender Man as folklore, and explains why the definition fits.[6] She examines whether any of the individual contributors or communities that collectively created Slender Man can rely on copyright or trademark law to protect the Slender Man character.[7] Her conclusion, that folklore like Slender Man does not lend itself to copyright protection because it lacks individual "master mind" authors or joint authors, relies on "stock" characteristics, and lacks persistent protectable features,[8] is itself a valuable contribution to the literature. Although Professor Smith's analysis is specific to the Slender Man character, its principles apply broadly to folklore. Just as importantly, Professor Smith explains why assigning ownership over folklore like Slender Man—whether to the community that created it or to adapters who convert it into movies, books, and other commercial expressions—would do more harm than good.[9] Copyright law appropriately permits all kinds of creators to build upon folklore and grants each iterative builder copyright over their own contributions. But permitting those builders to own more than their own contributions is detrimental to the creative process. Allowing anyone to own Slender Man would be just as bad as allowing someone to own Santa Claus.

The most valuable contribution of Professor Smith's work, however, is what it suggests about copyright in characters. The process that built and refined Slender Man is far from unique. Recognizing this, and recognizing the ways in which Slender Man's development is typical of nearly all fictional characters (folklore or not), can inform our understanding of character-copyright law and highlight some of its perils.

I. SLENDER MAN AND DIALOGIC CREATION

Although copyright law, by its nature, assigns particular "authors" to works and grants ownership to those authors, the creative process necessarily incorporates something of what came before.[10] Meaning emerges not only from what a speaker says, but also from their speech's context, its similarities to other speech,[11] the preexisting meanings of its

5. Cathay Y. N. Smith, *Beware the Slender Man: Intellectual Property and Internet Folklore*, 70 FLA. L. REV. 601, 605 (2018).

6. *Id.* at 609.

7. *Id.* at 627.

8. *Id.* at 628.

9. *Id.* at 647.

10. *See* Elizabeth L. Rosenblatt, *Fair Use as Resistance*, 9 U.C. IRVINE L. REV. 377 (2019) (describing the relationship between dialogism and copyright).

11. Literary theorist Mikhail Bakhtin explained that signs such as syntax and vocabulary are associated with "speech genres" that contribute to speech's meaning. Mikhail Bakhtin, *Discourse in the Novel*, *in* LITERARY THEORY: AN ANTHOLOGY 674, 677 (Julie Rivkin & Michael

signs, and the expectations of its hearers. At its most basic level, literary theorists describe this principle as "dialogism": Because all expression positions itself within or in opposition to preexisting expression, all expression is in "dialogue" with other expression.[12] In this formulation, the author is a contributor to meaning, but not its sole maker; and all expression is "intertextual."[13] The dialogic nature of expression "decenters" any individual author, acknowledging that creativity is an "emergent property of social and cultural systems" that include not only authors but also their sociocultural contexts, such that the process of authorship always combines the derivative and the original.[14]

Folklore like Slender Man provides one particularly dramatic example of what Carys Craig describes as the "cumulative nature of cultural creativity."[15] Like Darwin's Galapagos, the Slender Man community is unique only in that it is discrete and observable. Because Slender Man's dialogic construction is more obvious than most, it is a valuable tool in identifying mismatches between copyright law and creative processes.

It is not merely that Slender Man's authorship is distributed among many individuals; it is that those individuals built upon pre-existing works to create a speech-genre of their own. When Eric "Victor Surge" Knudsen made the first Slender Man image and descriptor, he did not work in isolation: He responded to an online prompt by electronically manipulating a pre-existing (copyrighted, and in this case, uncredited) photograph and adding a caption.[16] After that, other individuals contributed, and then more did. Eventually, Slender Man evolved into something coherent and recognizable—but never something stable. Any version of Slender Man is but a snapshot in time; one link in an ever-branching chain with neither a beginning nor end.

Most of those snapshots are brief and obscure—stories or art pieces created for and consumed by participants in an Internet subculture. But some snapshots garner profit and prominence. The Slender Man character and myth have been featured in television shows, web series, and

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Ryan eds., 2d ed. 1998). For example, expressing content in Victorian-era English carries a very different sociocultural meaning than the phrasing it in text-speak.

12. *Id.* at 676.

13. *See* JULIA KRISTEVA, DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART 66 (Leon S. Roudiez ed., Thomas Gora et al. trans., 1980) (defining intertextuality).

14. Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1177 (2007); Jennifer Nedelsky, *Citizenship and Relational Feminism*, *in* CANADIAN POLITICAL PHILOSOPHY: CONTEMPORARY REFLECTIONS 131, 133 (Ronald Beiner & Wayne Norman eds., 2001).

15. CARYS J. CRAIG, COPYRIGHT, COMMUNICATION AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW 54 (2011). *See generally* GIANCARLO FROSIO, RECONCILING COPYRIGHT WITH CUMULATIVE CREATIVITY: THE THIRD PARADIGM (2018) (discussing cumulative creativity).

16. Smith, *supra* note 5, at 609–12.

games.[17] The most prominent snapshot of Slender Man to date is the Sony/Screen Gems film *Slender Man*, which received wide U.S. release on August 10, 2018.[18] The film had a budget of approximately $10 million and earned a U.S. gross of approximately $30 million despite receiving generally poor critical reviews.[19]

The evolution of Slender Man reveals tensions in the law of character-copyright that merit further examination.

A. *Dialogism, Character, and Genre*

Even more obviously than most kinds of works, folkloric characters like Slender Man are comprised of the creative efforts of many individuals working in relation to, but independently of, each other. Every contributor is responsible for creating, reinforcing, or popularizing some aspect of the character and its body of work, and every contributor's work adds meaning to existing and future works. Thus, each contribution is both original to a particular contributor, and integral to the content and meaning of other contributors' works. Thus, neither the meaning nor the expressive value of any given iteration of the character can be wholly (or even predominantly) ascribed to any one contributor.

I say "more obviously than most" because to some extent, this is true of all characters. It is even more true of characters that attain independent copyright. The Ninth Circuit has held that a character is independently copyrightable only when it (1) has "physical as well as conceptual qualities," (2) is "'sufficiently delineated' to be recognizable as the same character whenever it appears," (3) displays "consistent, identifiable character traits and attributes," and (4) contains "especially distinctive" and "unique elements of expression."[20] Because of the test's emphasis on consistency, copyright is more likely to attach to characters that appear in multiple works than in single works. Because of the test's emphasis on physical qualities and distinctiveness, copyright is more likely to attach to characters that are visually depicted in, for example, comics or audiovisual works, which are more likely to be created by multiple contributors.[21] In fact, one might argue that the act of ascribing meaning

17. Several of these are credited as being based on a character by Victor Surge. *See* VICTOR SURGE, IMDB, https://www.imdb.com/name/nm6881486/?ref_=ttfc_fc_wr3 [https://perma.cc/D6VM-PN6S].

18. *See* SLENDER MAN, IMDB, https://www.imdb.com/title/tt5690360/ [https://perma.cc/9XCN-E46Y].

19. *Id.*

20. DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015).

21. *See* Gaiman v. McFarlane, 360 F.3d 644, 661 (7th Cir. 2004) (holding that without the description behind it, a picture of comic book character Cogliostro would have been only a drawing, not a character, and suggesting that the drawing would be uncopyrightable); Anderson v. Stallone, No. 87-0592 WDKGX, 1989 WL 206431, at *7 (C.D. Cal. Apr. 25, 1989) (stating that "a graphically depicted character is much more likely than a literary character to be fleshed

to a character is even more inherently relational than the act of ascribing meaning to (say) a narrative, as a character exists only in relation to its textual surroundings, as interpreted by contributors including authors, readers, and interpretive communities. To be considered copyrightable separately from the work(s) that contain it, a character must exist not only in its original context but also in whatever other context it may be placed. Thus, characters are constantly being defined and redefined as they are contextualized and recontextualized, even when they are not folklorically created.

Slender Man provides a particularly powerful example of characters' relational meanings. Indeed, Slender Man—like many aspects of folklore—is not only a character, but also an entire genre. Copyright law does not grant ownership over genres.[22] No one owns the law enforcement procedural, the regency romance, or the cyberpunk adventure. At least since 1930, when Judge Learned Hand decided *Nichols v. Universal Pictures*,[23] we have understood that genres are "ideas" rather than expressions—even when genres are relatively new, as one might argue is true for the Slender Man genre. "Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction from what she wrote. It was only a part of her 'ideas.'"[24] In that case, the court held that "[a] comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of Romeo and Juliet."[25] So, too, a heartwarming story based on a jolly Christmastime gift giver, or a horror story based on a tall, faceless tempter. The only difference is that Santa and the Slender Man have been given names. Does their naming make them any less genre-defining?

I argue "no."[26] One may argue that merely containing a particular character is insufficient to identify a work as belonging to a particular

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out in sufficient detail so as to warrant copyright protection," but also concluding that "this fact does not warrant the creation of separate analytical paradigms for protection of characters in the two mediums"). Copyright ownership in visually- and audiovisually-depicted characters may be too readily assigned to text writers, but the existence of copyright typically depends the reader's ability to form an image (which is then translated into words). *See* Elizabeth L. Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 U. COLO. L. REV. 561, 575 (2015) (describing conventional wisdom that visually-depicted characters are more likely to be copyrightable than purely textual ones); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 741–51 (2012) (discussing copyright law's propensity to over attribute authorship of visual and audiovisual characters to text writers).

22. *See* 17 U.S.C. § 102(a) (2012) (excluding any mention of copyright protection for entire genres of work).

23. 45 F.2d 119 (2d Cir. 1930).

24. *Id.* at 122.

25. *Id.*

26. In past work I have argued that trademark law should not protect the names of literary characters when used as source-identifiers for literary works containing those characters. In that

genre, but in the context of folklore (at least), the use of the character fulfills the purpose of genre: To provide a framework within which the text is produced and interpreted within a community. As semiotician Daniel Chandler explained, "[A] genre can be seen as a shared code between the producers and interpreters of texts included within it."[27] Genre conventions not only position texts and readers in relation to each other but also position texts in relation to other texts, constructing meaning in the interstices between texts that defines how readers understand them.[28] The Slender Man example is illustrative: Professor Smith argues convincingly that the characteristics most often associated with Slender Man—that he is tall, thin, faceless, wears a suit, and haunts children—are so "stock" as to make Slender Man not amenable to copyright.[29] The mere addition of the name "Slender Man" to these characteristics should make no difference from a copyright standpoint. But the addition of the name *does* position a work within a particular genre. In this case, the label of "Slender Man story" identifies a work as a particular kind of (for example, spooky, paranormal) work with its own conventions, which frames audience expectations well beyond the mere presence of a particular villain.[30]

I do not mean to argue that character and genre are identical. But because of the relational nature of characters, I suggest that they may be overlapping categories. Yet, according to the legal framework described above, characters that can achieve independent copyright protection may embody at least some of the traits of genre. From a copyright standpoint, this means we should be wary of affording copyright over characters in much the same way as we are wary of affording copyright over ideas.

B. *Accretion and Character Authorship*

In addition, the explicitly accretive nature of the Slender Man character highlights a conundrum for copyright's authorship paradigm for characters. Copyright law defines two alternative types of (non-corporate) author: the "sole" author, who must be the "master mind" behind a particular work, and "joint" authors, who must collaborate with

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context, such names act not as trademarks but rather as the generic identifiers of the characters portrayed. Just as we must refer to a ball of cotton as a cotton ball, we must refer to a story containing the character of Sherlock Holmes as a Sherlock Holmes story. Rosenblatt, *supra* note 21, at 625. This argument implicitly relies on the existence of such a thing as a "Sherlock Holmes story"—a kind of thing that is capable of having a generic referent.

27. DANIEL CHANDLER, AN INTRODUCTION TO GENRE THEORY 5 (2000), http://visual-memory.co.uk/daniel/Documents/intgenre/chandler_genre_theory.pdf [https://perma.cc/WS4M-8P3A].

28. *Id.* at 6–7.

29. Smith, *supra* note 5, at 628.

30. *See* Smith, *supra* note 5, at 618–19 (discussing the various copyright and trademark claims related to Slender Man occurring after the story became popular).

the intent of joint authorship.[31] Because each individual story, game, or artwork incorporating Slender Man is likely to embody the expressive vision of a particular individual or team, each specific Slender Man work is likely to be solely authored by that individual or jointly authored by that team. But because characters (especially folkloric ones like Slender Man) gain meaning through accretive and interdependent dialog, assigning authorship to any contributor comes with a risk of over- or under-attribution. Granting later-contributing authors or teams ownership over their versions of the character surely overlooks the contributions of many forbears—for Slender Man, for example, Victor Surge—who contributed meaning but did not embark on explicit collaboration with those who came after them and thus do not fall into the "joint author" mold. On the other hand, it is at least as unfair, if not more so, to give earlier contributors (such as Victor Surge) control over later versions of the character when all they did was run an early leg of a creative relay. In fact, Surge has gained a certain degree of control over the character, although few would argue he created anything approaching a "distinctively delineated" character as a matter of copyright law.

As for later contributors, it may, theoretically, be possible to identify the precise moment in Slender Man's literary development at which the character became distinctively delineated—if, in fact, it ever did. But doing so would overvalue the contributions of someone whose work, fortuitously, occurred at the moment of critical mass. In reality, even if they all add up to something copyrightable, each incremental contribution to the character is too slight or too cumulative to justify copyright ownership. No matter where a creator stands in an expressive dialog, it seems unfair to give any particular author "ownership" over a whole bucket's worth of character when they added only a single drop.[32] At the same time, trying to take into account the roles of an entire contributory community is both unwieldy and inconsistent with copyright's definition of authorship.[33]

With those tensions in mind, it makes sense that while each incremental addition to Slender Man may be owned by its individual contributor, the body of work—the Slender Man oeuvre, so to speak—cannot and should not be owned, any more than Santa Claus should be.

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31. 17 U.S.C. § 201 (2012); 17 U.S.C. § 101 (2012); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (holding that photographer, not photographic subject, is copyright owner); *see also* Lindsay v. The Wrecked & Abandoned Vessel R.M.S. Titanic, No. 97 Civ. 9248(HB), 1999 WL 816163, at *5 (S.D.N.Y. Oct. 13, 1999) (holding that creating storyboards and designing filming techniques were sufficient to make a film director a sole author although he did not literally perform the filming).

32. *See* 17 U.S.C. § 101 (using the term "authorship" in the context of requiring that a work as a whole represent an original creation, rather than a single addition or revision).

33. *See id.* (applying "joint authorship" protection only when authors intend to merge their creations into inseparable parts, not when their works are independent of each other).

But because the community cannot own its diffuse creation, it sits waiting for someone—in Slender Man's case, Sony—to incorporate it into a copyrighted work and claim it as their own.

Because copyright law extends to the original aspects of derivative works,[34] contributors whose additions to the public domain are "substantial" may gain ownership over their increments of expression,[35] but they gain no ownership over the public-domain character itself.[36] If that is true, how could Sony—or anyone else—claim ownership of Slender Man? The answer is found in the accretive nature of character-building. Slender Man is in the public domain only because it grew to its amorphous "whole" in an atmosphere of sharing, in which community members encouraged each other to build upon what came before. Ownership was extraneous to the character's creation, as it is for most folklore: While community members were no doubt personally invested in the character they helped craft, their investment depended on being part of a community of creators—not on the promise of exclusive market power over their works. As the community's body of work grew, older versions of the character become obsolete and newer versions took over, with the expectation that later comers would continue to place links in the creative chain. But while their norms-based ecosystem generated an accretive canon, it did nothing to stop a profit-motivated outsider from appropriating the community's work without adopting its norms.

Thus, when Sony exerts the rights that copyright law provides but the community had eschewed, Sony breaks the community's creative chain. Although the Slender Man community members can continue to build on the version(s) of the creature they created, they could not build upon Sony's version.[37] As Sony's film embodies the newest, most well-known version of the character, this prohibition is particularly chilling. To use a different folkloric example: If someone wants to tell a story about Cinderella, they are welcome to draw on the public-domain, fairy-tale version, but must steer clear of Disney's copyrighted version—which is the version many people know best.[38]

Moreover, while community norms may encourage cumulative creativity in the Internet folklore context, the combination of copyright law and market power gives profit-motivated outsiders incentives to overclaim. Copyright law provides owners with an exclusive right to

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34. 17 U.S.C. § 103(b) (2012).

35. *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976) (explaining that "to support a copyright there must be at least some substantial variation, not merely a trivial variation" from the public domain).

36. 17 U.S.C. § 103(b).

37. Smith, *supra* note 5, at 644 (describing Sony's early copyright assertions).

38. *See* Jane Yolen, *America's Cinderella*, 8 CHILD. LITERATURE EDUCATION 21, 21–22 (1977).

authorize the creation and distribution of substantially similar works as well as derivative works.[39] As a result, copyright owners gain penumbral protection beyond their creations. While such protection does not extend to the public domain on which their works are based, it does provide them with opportunities to overestimate their scope of ownership. At the same time, less powerful creators may respond to legal uncertainty and market power by underestimating the reach of the public domain—and even if they estimate correctly, they may lack the resources to defend their positions. The chilling result not only shrinks the public domain, but also cultivates a differential system, where well-resourced creators can build upon what came before but less-privileged creators face increased risk and expenses.

II. SLENDERIZING CHARACTER COPYRIGHT?

Recent years have seen a handful of high-profile litigations seeking to control public-domain characters, particularly in the context of copyright expiration.[40] A scholar-author successfully argued that copyright protection had expired in the core characteristics of Sherlock Holmes.[41] But while a playwright has successfully argued that putative copyright holders in the character of Zorro could not prevent him from creating a musical based on the public domain version of the character, that same playwright—in an ironic twist—pursued litigation against the erstwhile rights holders for infringing copyright in his musical.[42] (The case recently settled.[43]) The thicket of ownership claims in Zorro provides an object lesson in why iterative creation complicates character copyright. And even if litigation did provide clarity, it is expensive and burdensome. A two-year litigation over whether the character of Buck Rogers was in the public domain closed in 2017 after one of the parties declared bankruptcy.[44]

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39. 17 U.S.C. § 106 (2012).

40. *See, e.g.*, Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 867 (9th Cir. 2017) (affirming grant of a preliminary injunction enjoining VidAngel from reproducing and publicly performing Disney's copyrighted works).

41. Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496, 501 (7th Cir. 2014).

42. Cabell v. Zorro Prods. Inc., No. 5:15-cv-00771-EJD, 2018 WL 2183236, at *1, *5 (N.D. Cal. May 11, 2018); *see also* Eriq Gardner, *'Zorro' Licensor, in Role Reversal, Faces Trial for Copyright Infringement*, HOLLYWOOD REP. (May 14, 2018, 10:42 AM), https://www.hollywoodreporter.com/thr-esq/zorro-licensor-role-reversal-faces-trial-copyright-infringement-1111593 [https://perma.cc/EX9Y-8YMX] (explaining the history of Zorro copyright litigation).

43. Order Granting Stipulation of Dismissal with Prejudice at 3, Cabell v. Zorro Prods. Inc., No. 5:15-cv-00771-EJD (N.D. Cal. Sept. 7, 2018).

44. Order for Statistical Closing at 1, Team Angry Filmworks v. Geer, No. 2:15-cv-01381 (W.D. Pa. Dec. 1, 2017) ("The court having been advised that defendant has filed for bankruptcy on November 28, 2017, in the United States Bankruptcy Court for the Western District of

Professor Smith's study of Internet folklore thus leads us to the question: Who defends the public domain in characters? Internet folklore not only demonstrates how collective and iterative creation generate tensions surrounding character copyright; it also demonstrates why characters are particularly susceptible to ownership by profit-seeking adapters of the public domain. Sony has every interest in enforcing its copyright, while the community on which its product is built lacks the cohesiveness or resources to resist. It is unreasonable to expect the diffuse Internet community of Slender Man creators to take on the burden of litigation. Nor can academics and copyright-policy nonprofits shoulder the burden of protecting the public domain—although in some settings they have done so.[45] Perhaps they would do so for Santa Claus. But should they need to? Professor Smith's Article highlights the perils of expecting them to and opens a door into to further exploration of character-copyright doctrine.

Pennsylvania at case no. 17-24771 and that no further action can be taken at this time. IT IS HEREBY ORDERED that the Clerk of Court mark the above captioned case closed.").

45. *See, e.g.*, Code Revision Comm'n v. Public.Resource.Org, Inc., 906 F.3d 1229, 1255 (11th Cir. 2018) (ruling in favor of a nonprofit advocacy group who argued that text of annotated Georgia state statutes was in public domain); Karen Katz et al., *Rescuing Rapunzel: Suffolk Law Professors and Students Work to Keep Fairy Tale Princess in the Public Domain*, IPWATCHDOG (June 16, 2018), https://www.ipwatchdog.com/2018/06/16/rescuing-rapunzel-fairy-tale-princess-public-domain/id=98218/ [https://perma.cc/QRL2-N5AP].