

On the ownership of virtual persons

"This is not my tune / but it's mine to use"

-*Sadie*, Joana Newsom

The Great North Woods is haunted by authors, most of them safely dead (Frost, Kipling) or departed (Solzhenitsyn). When I began this essay, J. D. Salinger was very much alive, pursuing his curiously irritating monasticism in upstate New Hampshire. And as I wrote, Salinger was busy unleashing his lawyers to attack his quasi-namesake, J. D. California, for proposing to publish a novel called *60 Years Later: Coming Through the Rye*. *60 Years* was intended to be a follow-up piece to *Catcher in the Rye*, featuring the original character, Holden Caulfield, as an old man (now named Mr. C). This entire conflict may have been a hoax, in fact, but the litigation was in keeping with Salinger's reputation. He was an artist who, if he were able to, would probably have had security guards from the *New Yorker* come around to our houses and burn our copies of *Franny and Zooey*. Current IPR law, happily, did not give him the right to do that. But it did protect his imaginary worlds from imaginary threats.

The intersection between narrative fiction and legal fiction is a comparatively new one. Newer still is the notion of legal *protections* for fiction. Until quite recently, the law has regarded all dramatic works and most other pieces of fiction as little more than a lineup of the usual suspects for pornography, sedition, and blasphemy. If they happened to be clear of those charges, they were of scant further legal interest. Until the 19th century, authors attempting to make money from their muses had a wide range of options, but these hardly ever included legally protected royalties. They could search for a patron, like Virgil; or sell tickets to performance events, like Shakespeare; or incorporate their writing into a larger and harder-to-duplicate piece of artwork, like Blake; or get a government sinecure, like Newton; or get real jobs, like almost everyone else. The works themselves, as economic entities, were given only feeble protection in the mind of the law, and no protection whatsoever in the minds of the police.

And literature went on, of course, quite merrily. To quote Gillian Welch, "We're gonna do it anyway / Even if it doesn't pay." But her bitterness occurs at a rare point in history, when a (comparatively small number) of musicians could aspire to make a livelihood off selling contractual rights to their music, rather than performing it. Already, there is every sign that this state of affairs will not last long, and musicians will be the first ones up against the wall. But they're used to it.

For the present moment, we are deeply engrossed in these abstractions of content, wherein an author who publishes a novel thereby secures a plausible legal claim against the publication of a *completely different* novel, whose author will not even be born for a quarter century. As if the imagined worlds of fiction are a kind of gold rush, complete with claim jumpers and real-estate agents. Now, please note that there is no economic rationale here, no 'taking' in a tangible sense. It is absurd to suppose that the publication of *60 Years* could do anything but boost the sales of *Catcher in the Rye*. The taking is of an imaginary asset: the Holden Caulfield persona.

Legal cases of this nature are intended to put heads on posts, to keep at bay the "barbarians" who are, in this case, fanfic authors. Now, when I hear the horrible little internetism "fanfic," I have a very specific vision, and it is not a pleasant one. I see websites seething

with a morass of indistinguishable horrible stories, all of them about the same set of characters, whose personas and environment have already been fashioned by much better authors, freeing the fanfic writers for the simple choreography of sex or violence or ego with an arsenal of ready-made puppets. I see unspeakable things being done to innocent maiden apostrophes. I see the over-wide paragraphs demanded by browser windows, which somehow ruin even the most orphic prose. I see multi-colored background images tiled underneath the text, as if the whole thing is some perverse experiment in finding the breaking point of the human eyeball. And I am talking about prose, here. The poetry, brilliantly original free verse, all of it center-aligned.....oh god, I cannot even talk about the poetry.

This apocalyptic vision of mine is shared by a great deal of media consumers and critics, who reiterate in various ways a distinction between “real authors” (JD Salinger) and “fanfic writers” (JD California). The distinction begins with a fascinating legalism: the ownership of the fictional characters. The ownership of the setting also comes into play, but only in cases where the setting itself behaves more or less like a fictional character. Tolkein's Middle Earth is a uniquely invented geographic persona; in a different way, so is Lawrence Durrell's Alexandria. But the San Francisco shown in *Monk* is just San Francisco.

We can further isolate this distinction. What is at stake here are not the *names* of the characters, but their essence, their persona. When Alice Randall was taken to court for writing *The Wind Done Gone*, she had not plagiarized any particular passage from *Gone With the Wind*. Nor, pointedly, had she used the names of Margaret Mitchell's heroes and heroines: Rhett became R, Ashley became “Dreamy Gentleman,” and so forth, just as Holden Caulfield becomes “Mr. C”. The gist of the lawsuit was that Randall had stolen the *spirit* of Mitchell's characters and setting: that persona, in this sense, is the sort of thing that one might produce, own, buy, sell, and steal—that it is a capital commodity. The writers who produce these personas are “real authors,” those who appropriate them are writing fanfic.

Transparently, this distinction is based on a capitalist litmus test: *real* authors are the ones who produce profit for publishing companies, just as real musicians are the ones who produce profit for recording studios. Any writing that does not put money in the coffers of a major publisher is “writing for pleasure,” and has marginal status, both culturally and legally. Real authors (and real musicians) are cast, of course, as the sympathetic victims of fanfic authors and musicians who *sample*, like The Verve. But it is worth bearing in mind that authors and musicians, in round numbers, have never actually made two bucks in a row, while publishing houses and record labels have turned a pretty good profit over the years.

Now, if fanfiction is described as writing that steals pre-existing personas and settings, it is weirdly precise to describe *most* Western literature before 1600 as fanfiction. The works of Homer, Mallory, Dante, all of Shakespeare except *The Tempest*, Milton....all of these rely on stock characters, stock settings, and even pre-existing storylines. Indeed, the very power of forms like *Commedia dell'Arte* or the historical tragedies and comedies of Elizabethan theater is that the audience already knows what's going on. When you pick up *Paradise Lost* you don't wonder who's going to win at the end. When you set a story in Camelot, you don't need to spend twenty pages on exposition. Rather, you wonder how this iteration of the Great Story will be told. Even the lesser stories that make up the *Thousand Nights and One Night* or the *Decameron* are variations on a handful of standard themes, with entirely interchangeable characters.

As Western authors began to invent *new* characters, powerful unique personas, they must

have crossed a threshold of doubt about whether it was even a legitimate literary project to do so. Prince Hamlet, Don Quixote, and Eugene Onegin are all depicted very consciously as personas arising from fiction: each of them powerfully unique, but also rooted obsessively in the imitation or reflection of art. (I think the same may be true in the East. Sei Shonagon's self-portrait follows a similar pattern, and occupies a similar role in Japanese literature, though half a millennium earlier.)

But the persona that interests me for the moment, qua fanfiction, is Falstaff. Or, as he was probably known in life, John Oldcastle. John Oldcastle, who was executed in 1417, had appeared in at least five works, including several fictional pieces, before Shakespeare decided to rework him as a character in *Henry IV*. He was, in other words, a stock character. According to tradition, Oldcastle appeared as a figure in the play, but Lord Cobham—a descendant of the real Oldcastle—intervened before the script could be printed, and had Shakespeare change the character's name, leaving only one pun to reference the original:

*By the Lord, thou sayest true, lad. And is not my hostess of the tavern a most sweet wench?
As the honey of Hybla, my old lad of the castle. And is not a buff jerkin a most sweet robe of
durance?*

(*Henry IV*, part I, act I, scene ii)

Thus was born Falstaff, one of the most famous and indeed one of the most *unique* characters in Western literature. And without question, the Falstaff that we know and love is an invention of Shakespeare, but Lord Cobham's hereditary claim to the Oldcastle persona was, in a sense, upheld and legitimated.

There is an unquestionable strength and freedom to this kind of writing. I will use contemporary examples. When Moore wrote *The Watchmen*, he began by using characters from the Charlton comics pantheon, which had recently been purchased *en bloc* by DC comics. They freaked out, and he had to switch to new characters, more or less *a clef* renditions of the earlier ones. Again, Joss Whedon mentions that one of the major incentives for incorporating Dracula in *Buffy The Vampire Slayer* was that Dracula was public domain. Now, for writers of the caliber of Whedon or Moore, these little frictions are perhaps trivial, but they are, obviously, frictions. No one who looks back at 20th-century literature from the distance of two or three centuries will have the slightest interest in whether or not a given character was *legally defensible*, they will only care whether or not the character was compelling. Moreover, the critics of the 23rd century will have only contempt for the legal machinations that got between today's artists and their masterpieces. And they are right. We are wrong.

But it all seems so compelling. I want to quote, at some length, a piece from the website of one of my favorite living authors, Ursula Le Guin. It is followed by an admonitory coda from her agent:

It's all right with me — it's really none of my business — if people want to write stories for themselves & their friends using names and places from my work, but these days, thanks to the Web, "stuff for friends" gets sent out all over the place and put where it doesn't belong and mistaken for the genuine article, and can cause both confusion and real, legal trouble.

As for anybody publishing any story "derived from" my stuff, I am absolutely opposed to it & have never given anyone permission to do so. It is lovely to "share worlds" if your

imagination works that way, but mine doesn't; to me, it's not sharing but an invasion, literally — strangers coming in and taking over the country I live in, my heartland.....

A note from UKL's literary agency:

No formal policy but as with any of our authors we would object strongly on her behalf if anyone were to publish either stories or books using her characters and situations. Writing for your own pleasure is one thing but disseminating it is something else. It used to be that fan fiction would reach only a specific audience — a close circle of friends and acquaintances. But with the Web things have changed.

Now, a running theme in all of LeGuin's fictional worlds is that property ownership in general is pathological, but slavery, the ownership of persons, is especially horrific; the root evil, at least by analogy, of all social pathology. This moral concern is also precisely the one that prompted Randall to rework an epic novel set in the antebellum South, retelling it through the eyes of slaves. It is a fascinating irony that LeGuin defends the ownership of her *virtual* persons, and that this defense is then wielded like a bludgeon against Randall.

And it raises a host of squirrely questions about how far such logic can be expected to push. If the law is willing to view personas as capital assets, *fungible* capital assets, then what is the disposition of the personas we actually happen to have? Oldcastle was a real person, before he became Falstaff. Accepting that Randall was appropriating Mitchell's personas of the slaves, is it not reasonable to ask whether Mitchell had appropriated the personas of *actual* slaves, as Shakespeare did with Oldcastle? If so—since they had no Lord Cobham to defend them—that conversion of their *actual* persona into a commodified, legally defended *virtual* persona seems strikingly like an extension of slavery.

From this wild jumping-off point, let me sprawl forward (briefly) into the future of what commodified personas might look like. There is already a nascent trade in the production of avatars to represent people in virtual spaces. To date this primarily means the creation of imagery (sprites, etc.) by graphic designers, who certainly are concerned with property rights. A typical boilerplate (from Dodrio's Sprite site) reads “Please do not steal/copy/or claim as your own anything on this website without permission from the creators and/or owners...” and is repeated in variations several times on the page, as well as appearing in a pop-up window. To a limited extent there is also a trade in voice, cadence, and mannerism as components of persona. For instance, the prizes on that wretched, wretched show, *Wait Wait Don't Tell Me*, are designer answering-machine messages. Such messages are a stone age version of an “expert agent” persona: they are expected to do business in their owner's absence, and they are expected to have a distinctive, economic valuable personality. Add a few hundred thousand lines of code, and it is easy to imagine the answering machine that returns calls, checks your email, schedules your appointments, and apologizes to your sister-in-law about the barbecue. All with vibrant personality....but whose? And at what cost? In 2007, ConAgra digitized the then-deceased Orville Redenbacher to sell popcorn from beyond the grave. His grandson approved. But what if Gary Redenbacher had said no? What if ConAgra had wanted to run the undead Orville in a slot urging people to vote for Obama, or Bush? Who owns Orville's personality?

Again, we are several tiers into the widespread application of Peter Kramer calls, with wonderful accuracy, as “cosmetic psychopharmaceuticals.” We are probably more than halfway

to the point where a particular drug-and-therapy cocktail can at least be touted as producing a “signature personality,” the way that certain horrible celebrities market (and copyright) their signature fragrance. We all know people who have, in various ways, modeled their personalities on the image of various celebrities, or even fictional characters. I would imagine that millions of lovestruck Americans have tried to emulate Hepburn and Peppard's kiss from *Breakfast at Tiffany's*. In the future, it might be possible for Paramount to sue them, rather in the way that Disney sues day-care-centers who paint Mickey Mouse on the wall. And their position may not be unsympathetic, because for a very small fee, *honest* people would have been able to buy* Holly Golightly pills, which not only make you impish and eccentrically romantic, but also convey a legal right to act that way for a week after each purchase.

Of course, none of this will happen. It's paranoid, to begin with, and the future always twists in unforeseeable ways. But it is unquestionably a logical progression from the idea that personas are commodities. And it is this reality that authors should be asked to defend when they want to make property claims over their characters. Slavery has never worked out well, even when the slaves are fictional entities.

* I just love that tense. I don't even know what it's called.

NB: Thanks to Nathen Lester for correcting me about the band: The Verve, not Verve Pipe. Also, this essay was the jumping-off point for my novel *A Few Lifted Words*.