

Charisma, Uniqueness, Nerve, and Copyright?: Character Copyright on *RuPaul's Drag Race*

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RuPaul's Drag Race (RPDR) has catapulted the art of drag into the mainstream and changed the lives of numerous drag performers in the process. Queens often sign on to participate in the show with little more than a well-defined, unique drag character and a dream. They fail to realize what rights to their own original drag personas are relinquished to RPDR producers when they sign the show's Participant Agreement. This Note discusses how ambiguity in U.S. copyright law related to character copyright can affect drag queens and how the RPDR Participant Agreement's failure to explicitly address who owns what when it comes to drag characters could force queens to kill their own characters to appease producers. Finally, this Note proposes codifying character copyright within the Copyright Act to delineate how drag queens can protect their own characters prior to signing up for the show and suggests a default provision that treats visual characters within audiovisual works, such as drag personas, as contributions to collective works.

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INTRODUCTION

A. TERMINOLOGY

Female impersonation has been a part of theatrical performance since ancient Greece and has served as an act of theatrical resistance and commentary on the anxiety and fluidity surrounding gender roles in society.¹ The drag of today has come to represent much more than just female impersonation, however. For this reason, throughout this Note, the term “drag” will be used to refer to the art of drag performance, which is a multidisciplinary art form involving “costuming, makeup, and performative skills” (including, but not limited to, dance, lip-syncing, acting, and comedy).² An individual of any sexual orientation or gender identity can participate in the art of drag, but this Note will focus on “drag queens”—performers with female-coded personas whose history is tied to LGBTQ+ culture and politics.³ Appearing on *RuPaul’s Drag Race* is the height of many drag queens’ careers and opens doors to mainstream fame for members of historically marginalized groups.⁴ Fame within this multidisciplinary art form raises questions about queens’ intellectual property rights—particularly who owns the ability to publicly perform a drag character.

B. A BRIEF HISTORY OF DRAG

In East Asian theater traditions, such as Noh and Kabuki, female impersonation was part of an expression of an idealized version of femininity and was not inherently tied to homosexuality.⁵ In the West, theatrical drag performance became tied to acts of queer resistance, becoming synonymous with “mock[ing]

1. Jorge Sandoval, *The RuPaul Effect: The Exploration of the Costuming Rituals of Drag Culture in Social Media and the Theatrical Performativity of the Male Body in the Ambit of the Everyday*, 26 THEATRE SYMP. 100, 100–01 (2018).

2. Carlos A. Figueroa, Comment, “OH [YES], SHE BETTA [SHOULD]!”: *Dolling up Drag Queens’ Intellectual Property Rights*, 28 UCLA ENT. L. REV. 127, 129 (2021) (citing Jordan Fraser, *What Is a Drag Queen?: Getting a Better Idea of the Art-Form That’s Sweeping the World*, MEDIUM (Aug. 9, 2019), <https://medium.com/be-unique/what-is-a-drag-queen-eb1e2d768a46>).

3. *Id.*

4. *See id.* at 145–46.

5. Sandoval, *supra* note 1, at 101; Figueroa, *supra* note 2.

authority,” “challeng[ing] the status quo,” and the essence of all things camp.⁶ Drag is associated with the 1969 Stonewall Riots⁷ and underground urban club scenes—because impersonation of the opposite sex in public was considered vagrancy in many jurisdictions during the early twentieth century and until the early 1970s.⁸ Drag was also practiced in “speakeasy-like gatherings” during the Prohibition Era, further connecting it with the illicit.⁹

When men dressed as women in twentieth-century performances, they made clear to audience members they were just dressing as women for the sake of theatricality.¹⁰ This worked to ensure they did not fall victim to the homosexual panic that led some who dressed in women’s clothing to be considered criminal vagrants instead of artists.¹¹ During the early days of television, Milton Berle wore dresses for comedic purposes, but the joke was really how masculine he looked while wearing a dress.¹² In an interview with NPR, Frank DeCaro—writer, performer, and author of *Drag: Combing Through the Big Wigs of Show Business*—said that “[b]asically, a lot of drag in television, really up until *RuPaul’s Drag Race* . . . was take the straightest, hairiest, ugliest guy, put him in a dress, and a straight guy will fall in love with him.”¹³ Drag in the 1950s through 1970s often focused on poking fun at the dichotomy between extreme masculinity and extreme femininity.¹⁴ It was not until the 1980s, when gender ambiguity became more socially acceptable, that drag began to consist of more experimentation with the performative aspects of gender and the notion of gender as a spectrum rather than a binary.¹⁵ This is attributable to the success of musicals such as *La Cage aux Folles* and *The Rocky Horror Picture Show*, along with the rise in

6. Sandoval, *supra* note 1, at 101 (quoting ROGER BAKER, DRAG: A HISTORY OF FEMALE IMPERSONATION IN THE PERFORMING ARTS 23 (1994)). Susan Sontag describes “camp” as the “love of the unnatural: of artifice and exaggeration . . . [It] is esoteric—something of a private code, a badge of identity even, among small urban cliques.” *Id.* at 101–02 (quoting Susan Sontag, *Notes on ‘Camp,’ in CAMP: QUEER AESTHETICS AND THE PERFORMING SUBJECT: A READER* 53, 53 (Fabio Cleto ed., 1999)).

7. *Id.* at 100.

8. Figueroa, *supra* note 2, at 130; Risa Goluboff, *The Forgotten Law That Gave Police Nearly Unlimited Power*, TIME (Feb. 1, 2016, 11:00 AM), <https://time.com/4199924/vagrancy-law-history>.

9. See Figueroa, *supra* note 2, at 130; Darryl W Bullock, *Pansy Craze: The Wild 1930s Drag Parties That Kickstarted Gay Nightlife*, GUARDIAN (Sept. 14, 2017, 9:00 AM), <https://www.theguardian.com/music/2017/sep/14/pansy-craze-the-wild-1930s-drag-parties-that-kickstarted-gay-nightlife>.

10. See Sam Sanders & Josh Axelrod, *How Drag Queens Have Sashayed Their Way Through History*, NPR (June 27, 2019, 5:09 PM), <https://www.npr.org/2019/06/27/736320026/how-drag-queens-have-sashayed-their-way-through-history> [<https://perma.cc/X8RJ-YYTX>].

11. *Id.*; see Figueroa, *supra* note 2, at 130.

12. See Sanders & Axelrod, *supra* note 10.

13. *Id.*

14. See *id.*; see also Buck Wolf, *Comedy Is a Drag*, ABC NEWS (June 29, 2001), <https://abcnews.go.com/Entertainment/WolfFiles/story?id=92960> [<https://perma.cc/3GG6-RD35>] (emphasizing the comedic trope of gender-bending in comedy films such as *Some Like It Hot*).

15. See Sanders & Axelrod, *supra* note 10; Figueroa, *supra* note 2, at 130. Drag was briefly accepted as an art form among gay communities in the 1950s, as more gay bars began to pop up in urban centers, but the rise of a more masculine gay culture in 1970s led to drag’s waning popularity until the 1980s. *InQuery: Trixie Mattel Breaks Down the History of “Drag,”* THEM (Sept. 20, 2018), <https://www.them.us/story/inquery-drag> [<https://perma.cc/G288-2LD7>].

popularity of androgynous and gender-fluid stars such as David Bowie, Annie Lennox, Michael Jackson, and Boy George.¹⁶ DeCaro attributes the continued popularization of drag in the 1990s to the outdoor drag festival Wigstock in Manhattan's East Village, which is where the world discovered RuPaul and his "edgy, vulgar, playful ethos."¹⁷ Drag in the late 1980s and 1990s became more glamorous, sexualized, and critical of the gender binary, rather than operating within it, as mid-twentieth-century performers like Milton Berle did for comedic effect.¹⁸ Drag icon Divine, best known for her starring role in the first nonmusical movie of *Hairspray*, and RuPaul epitomize this avant-garde, socially and sexually critical era of drag—which allowed the medium to be accepted as an art form, rather than a mere comedic trope.¹⁹ Beginning in the 1980s and continuing in some iterations of the art form today,²⁰ "drag" came to mean "trying to look as much like a woman as possible."²¹ This spawned drag competitions at balls in New York City, as represented in the film *Paris Is Burning* and the more recent FX show *Pose*, and RuPaul's extremely successful competition show, *RuPaul's Drag Race*, first airing in 2009 on LogoTV.²²

This modern conception of drag is the ultimate illustration of Judith Butler's argument that all of gender is just a performance.²³ In this performance, drag artists create stage personas in which they embody characteristics of a type of gender expression that differs from what they present to the world on a daily basis.²⁴ There is a clear line between a drag performer's onstage persona and the person they are in their everyday lives. It is for this reason this Note will argue that drag personas are characters under copyright law and that contestants on

16. Figueroa, *supra* note 2, at 130; *see also* Caitlin Greaf, *Drag Queens and Gender Identity*, 25 J. GENDER STUD. 655, 656 (2016) ("Gender is not a dichotomous category of feminine/masculine or non-hyper/hyper but a social performance done by all.").

17. *See* Sanders & Axelrod, *supra* note 10.

18. *See* Figueroa, *supra* note 2, at 130–31; Sanders & Axelrod, *supra* note 10; Joke Hermes & Michael Kardolus, *The RuPaul Paradox: Freedom and Stricture in a Competition Reality TV Show*, 29 JAVNOST - PUB. 82, 82 (2022) ("Drag culture in the 1990s seemed to signify emancipation and liberation of enduring and stifling definitions of gender and sexuality."); Miss Rosen, *Revisiting New York's Legendary Drag Explosion of the 1990s*, BLIND MAG. (Feb. 3, 2021), <https://www.blind-magazine.com/stories/revisiting-new-yorks-legendary-drag-explosion-of-the-1990s/> [<https://perma.cc/A4Z3-KN23>].

19. *See* Figueroa, *supra* note 2, at 130–31; Sanders & Axelrod, *supra* note 10.

20. As discussed in the Introduction to this Note, drag today consists of much more than trying to look as much like a woman as possible (also known as "fish"). *See* Paige Turner, *The 11 Most Common Drag Queen Styles*, QUEERTY* (June 3, 2014, 9:06 AM), <https://www.queerty.com/11-common-drag-queen-styles-20140603> [<https://perma.cc/R56P-AWEQ>]. Drag is about experimenting with, critiquing, exaggerating, and/or toying the lines between stereotypical, heteronormative notions of gender. *See id.* One's drag can fall into multiple different categories, or no category at all, depending on what part of the gender spectrum a queen chooses to represent. *Id.* (describing common styles of drag, including fish queens, club queens, camp queens, pageant queens, and more); *Breaking Down Popular Drag Queen Styles*, DRAG SOC'Y (Feb. 11, 2021), <https://dragsociety.com/blogs/the-tea/breaking-down-popular-drag-queen-styles> [<https://perma.cc/C7US-9XRS>] (describing eight different drag styles).

21. THEM, *supra* note 15.

22. *Id.*; *Pose*, FX, <https://www.fxnetworks.com/shows/pose> [<https://perma.cc/CK9H-5ALB>] (last visited Dec. 20, 2022).

23. Greaf, *supra* note 16, at 655.

24. *See id.*

RuPaul's Drag Race (RPDR) need to be treated differently than contestants on other reality competition series because they are portraying copyrightable characters in the course of the competition rather than appearing solely as themselves.

Part I will provide an overview of character copyright jurisprudence as it currently exists and apply it to drag star Katya from *RPDR*. Part II will describe the immense power of RuPaul within the commercialized industry that drag has become and the importance of the *RPDR* franchise in catapulting drag performers to mainstream fame. Part III will discuss what intellectual property and other rights participants on *RPDR* and its spin-off works sign away and unique aspects of a participant agreement for a drag-centered reality competition show. Finally, Part IV will propose a scheme for codifying character copyright within the current Copyright Act (an amendment to the Copyright Act of 1976) and analyze why increased clarity in the character copyright regime may be a beneficial way to protect drag queens and other artists who create their own characters that are then featured on television shows.

I. CHARACTER COPYRIGHT AND DRAG QUEENS

A. CHARACTER COPYRIGHT OVERVIEW

Copyright is exclusively a matter of federal law. The Copyright Act of 1976 provides a set of rights that authors of original creative works can exercise with respect to their creations.²⁵ Copyright protection inheres in “original works of authorship fixed in any tangible medium of expression.”²⁶ Once an original work is fixed, unless an author chooses to alienate certain rights, they will have “exclusive rights to reproduce, distribute, display, and perform their work, as well as the right to make derivative works from their original.”²⁷ According to the Copyright Office, copyrights in characters within comic books, television series, and motion pictures cannot exist separately from the works in which they appear.²⁸ Despite the Copyright Office’s refusal to grant copyright registrations to characters themselves, courts have held that “copyright protection extends not only to an original work as a whole, but also to ‘sufficiently distinctive’ elements,” such as characters “contained within the work.”²⁹

Under this judicially created doctrine of character copyright, a character can obtain copyright protection independently of a work as a whole if the character can survive one of the tests assessing whether a character is sufficiently original

25. 17 U.S.C. §§ 101–805.

26. *Id.* § 102(a).

27. Sydney Altman, Comment, *Persona—Character Copyrights and Merger’s Role in the Evolution of Entertainment Expressions*, 67 EMORY L.J. 735, 744 (2018) (quoting Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 202 (2002)); see §§ 102(a), 106.

28. “A registration for a visual art work, a literary work, or a work of the performing arts that depicts or describes a character covers the expression set forth in the deposit copy(ies), but it does not cover the character *per se*.” U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(H) (3d ed. 2021).

29. DC Comics v. Towle, 802 F.3d 1012, 1019 (9th Cir. 2015) (quoting Halicki Films, LLC v. Sanderson Sales & Mktg., 547 F.3d 1213, 1224 (9th Cir. 2008)).

to be protectable expression rather than a mere idea or stock character.³⁰ Despite the Copyright Office's refusal to grant copyright registrations to original characters standing alone, character copyright claims can be asserted in court.³¹

The first of the two character copyright tests was established by Judge Learned Hand in the 1930 case *Nichols v. Universal Pictures Corp.*³² In *Nichols*, the plaintiff authored a play and the defendant created an allegedly infringing motion picture.³³ Both works tell a story of forbidden love between an Irish person and a Jewish person, and the court acknowledged that at least some of the components of the play were part of the public domain.³⁴ The works had characters in common: their sets of two lovers and two fathers.³⁵ Judge Hand found that the two frustrated lovers were stock characters that exist in similar form in various other stories of forbidden romances.³⁶ Although the lovers' fathers were found to be slightly more unique when compared to other stories of star-crossed lovers, the characters were still fashioned out of common Irish and Jewish stereotypes—also rendering them stock characters.³⁷ *Nichols* was the “first consideration of character copyright” by any court and set forth a limited test requiring that characters be left to the public domain unless they are sufficiently “well-defined and original.”³⁸ Neither the lovers nor their fathers satisfied this test.³⁹ Under what has come to be known as Learned Hand's distinctive-delineation test from *Nichols*, authors must add their own expression to generic characters; just drawing from the public domain, without more, will not create a protectable character.⁴⁰

This distinctive-delineation test was further defined nearly fifty years later in *Walt Disney Productions v. Air Pirates*, in which the Ninth Circuit held that, though it may be “difficult to delineate distinctively a literary character” because “many literary characters may embody little more than an unprotected idea, a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression.”⁴¹ This test prescribes a method of determining if a character is distinctively delineated based on visual elements, not just one's ability to distinguish what original material someone added to public domain stock characters.⁴² One could conceive of the *Air Pirates*

30. See Altman, *supra* note 27.

31. See *id.*

32. *Id.*; see generally *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (establishing the distinctive-delineation test for copyrighting individual characters).

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

34. *Id.* at 120, 122.

35. *Id.* at 122.

36. See *id.*

37. *Id.*

38. See Missy G. Brenner, Comment, *Shadow of the Bat[Mobile]: Character Copyright After DC Comics v. Towle*, 57 SANTA CLARA L. REV. 481, 489–90 (2017).

39. *Id.*; *Nichols*, 45 F.2d at 122.

40. Brenner, *supra* note 38, at 490; see Altman, *supra* note 27.

41. 581 F.2d 751, 755 (9th Cir. 1978) (citations omitted).

42. See Brenner, *supra* note 38, at 492.

test as compelling one to look to visual elements to determine if a character is more than just a trope.⁴³ The *Air Pirates* court went on to find that its distinctive-delineation test, which looks at distinctive visual elements in cartoons, gave rise to character copyright protection in Mickey Mouse.⁴⁴

Air Pirates also cited another prevailing character copyright test in its analysis: the “constitutes the story being told” test.⁴⁵ This test grants an author the right to copyright a character in a story when the character “constitutes the story being told” and is more than just a “chessman in the game of telling the story.”⁴⁶ In finding that character copyright subsists in Disney cartoon characters, the *Air Pirates* court applied both the “constitutes the story being told” test and the distinctive-delineation test and limited the scope of the former test when holding that copyrightable characters have “physical as well as conceptual qualities, [and are] more likely to contain some unique elements of expression.”⁴⁷

Post-*Air Pirates* cases continued to apply both the distinctive-delineation and the “constitutes the story being told” tests in character copyright cases.⁴⁸ The Central District of California applied both tests separately to find that the cast of characters in the *Rocky* films was protectable,⁴⁹ and the Central District later relied on both the “constitutes the story being told” test and a reformulated version of the distinctive-delineation test to find James Bond to be a copyrightable character despite variations in the character’s visual appearance across the large body of James Bond works.⁵⁰ The test was reconceived to include an identifiability requirement—asking if Bond had enough consistent traits to make him identifiable as the same character regardless of changes in actor, setting, and story.⁵¹ A copyrightability test that asks if a character is original enough to be recognizable in various surroundings might make James Bond’s copyrightability make sense.⁵² However, the court’s focus on Bond being a “witty, alpha-male, world-class spy”—which are all nonvisual traits common among other characters—seemed to make character copyright almost an “I know it when I see it”-type analysis.⁵³

In 2015, the Ninth Circuit provided more clarity when it came to character copyrightability for visual characters.⁵⁴ *DC Comics v. Towle* placed visual

43. *Id.*

44. *Id.* at 492–93; *Air Pirates*, 581 F.2d at 754–55.

45. Altman, *supra* note 27, at 745.

46. Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc., 216 F.2d 945, 950 (9th Cir. 1954).

47. Altman, *supra* note 27, at 745 (alteration in original) (quoting *Air Pirates*, 581 F.2d at 755); see also *Daniels v. Walt Disney Co.*, 958 F.3d 767, 771–74 (9th Cir. 2020) (applying the distinctive-delineation and “constitutes the story being told” tests independently of one another).

48. See *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995).

49. Altman, *supra* note 27, at 746; *Anderson v. Stallone*, No. 87-0592, 1989 WL 206431, at *6–8 (C.D. Cal. Apr. 25, 1989).

50. *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995).

51. Brenner, *supra* note 38, at 495; see *Metro-Goldwyn-Mayer, Inc.*, 900 F. Supp. at 1296.

52. See Brenner, *supra* note 38, at 496.

53. See *id.*

54. See *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015).

characters in a category of their own when holding that the Batmobile is a protectable character.⁵⁵ In contrast, the copyrightability of literary characters (meaning characters that only appear in prose) is still analyzed under the distinctive-delineation and “constitutes the story being told” tests.⁵⁶ The *Towle* test for visual character copyrightability requires (1) that a character “have physical as well as conceptual qualities”; (2) that it be “sufficiently delineated to be recognizable as the same character whenever it appears”; and (3) that it be “especially distinctive and contain some unique elements of expression” (meaning that it cannot be a stock character).⁵⁷

For the purposes of this Note, visual characters will include not only “cartoon or artistic renderings of characters,” but also “characters portrayed by real [people]”—meaning “live-action characters,” like drag queens.⁵⁸ This means that *Towle* is the appropriate test under which to analyze the copyrightability of drag personas created by the artists that appear on *RPDR*.

B. ILLUSTRATION: DRAG RACE STAR KATYA AS A COPYRIGHTABLE CHARACTER

RPDR fans first met queen Yekaterina Petrovna Zamolodchikova, more commonly known as Katya, on Season 7 of *RPDR*.⁵⁹ Katya is the drag persona created by Brian Joseph McCook.⁶⁰ Katya appeared on both Season 7 of *RPDR* and Season 2 of *RuPaul’s Drag Race: All Stars (All Stars)* and hosts a popular YouTube show called *UNHhhh* for World of Wonder (WOW), the production company behind the *Drag Race* franchise.⁶¹ When viewers are first introduced to Katya during the first episode of Season 7, Brian McCook introduces Katya in a confessional by saying, “Katya is at the intersection of glamour and comedy. You can find her right on the corner, selling her ass.”⁶² Katya almost always wears a blonde wig and bright red lipstick, her looks are often inspired by the former Soviet Union and 1970s and 1980s fashion, and McCook has described his drag character as a “Russian bisexual transvestite hooker.”⁶³ Sometimes, she even

55. *Id.* at 1021–23; Timothy Lauxman, Note, *The Wørd: Scope of Copyright Protection for Live-Action Characters—An Analysis of Stephen Colbert’s Character “Stephen Colbert,”* 6 ARIZ. ST. U. SPORTS & ENT. L.J. 303, 319 (2017).

56. See Lauxman, *supra* note 55, at 318–19; see also *Daniels v. Walt Disney Co.*, 958 F.3d 767, 771 (9th Cir. 2020) (applying the *DC Comics v. Towle* approach to characters called the Moodsters, which were “not mere literary characters,” that Plaintiff alleged were infringed by Disney in its creation of the movie *Inside Out*).

57. *Towle*, 802 F.3d at 1021 (internal quotation marks and citations omitted). This test synthesizes parts of *Metro-Goldwyn-Mayer, Air Pirates*, and other related cases. See *id.* at 1019–21.

58. See Lauxman, *supra* note 55, at 321.

59. *Katya*, DRAG RACE WIKI, <https://rupaulsdragrace.fandom.com/wiki/Katya> [https://perma.cc/R8AE-X7R3] (last visited Dec. 21, 2022); *Katya Zamolodchikova: Biography*, IMDB, https://www.imdb.com/name/nm7200459/bio?ref_nm_q1_1 [https://perma.cc/F2CH-TYLZ] (last visited Dec. 21, 2022).

60. *Katya Zamolodchikova: Biography*, *supra* note 59.

61. *Katya*, *supra* note 59.

62. *Id.*; *RuPaul’s Drag Race: Born Naked*, at 03:10 (LogoTV television broadcast Mar. 2, 2015).

63. *RuPaul’s Drag Race, Best of Katya: RuPaul’s Drag Race*, YOUTUBE, at 00:12 (Feb. 9, 2021), https://www.youtube.com/watch?v=851YSGh_zH0; see generally *RuPaul’s Drag Race: Born Naked*, *supra* note 62, at 03:02.

speaks Russian while in drag—another unique aspect of her drag character that sets her apart from other queens in blonde wigs.⁶⁴ Katya’s full name was inspired by Russian gymnasts,⁶⁵ and this influence took center stage when Katya performed gymnastics on the main stage of *All Stars*.⁶⁶

Katya is a visual character, so her character’s copyrightability must be analyzed under the *Towle* test.⁶⁷ Katya has both physical and conceptual qualities to satisfy prong one of the *Towle* test. She often wears a blonde wig, red lipstick, and certain items of clothing inspired by Russia, prostitutes, the 1970s or 1980s, or some combination of these.⁶⁸ One also associates Katya with sexually charged humor, a Russian accent, and even the Russian language, which she employs for comedic effect.⁶⁹ Even when Katya participates in the Snatch Game, a celebrity impersonation challenge on *RPDR*, it is clear to viewers that it is Katya impersonating a celebrity, rather than Brian McCook (Katya out of drag) impersonating a celebrity. When dressed as a famous person on Snatch Game, Katya’s brand of humor and certain aspects of the way she does her makeup (such as aspects of her eye makeup and contouring) remain the same.⁷⁰ During all of the acting challenges on *RPDR*, queens are typically successful when they pick characters that allow them to highlight aspects of their own drag personas so that their overtly delineated drag characters remain center stage.⁷¹ When acting on the show, *RPDR* queens, such as Katya, always retain their drag personas as middlemen. An example of this middleman idea is the *All Stars* Season 2 Snatch Game in which Brian McCook as Katya played Björk.⁷² Katya’s delineated physical qualities and conceptual aspects allowed this to occur.

64. See, e.g., *RuPaul’s Drag Race All Stars: All Star Talent Show Extravaganza*, at 00:20 (LogoTV television broadcast Aug. 25, 2016).

65. *Katya*, *supra* note 59.

66. *RuPaul’s Drag Race All Stars: All Star Talent Show Extravaganza*, *supra* note 64, at 32:50.

67. See *supra* Section I.A.

68. See *supra* text accompanying note 63.

69. See generally *RuPaul’s Drag Race All Stars: All Star Talent Show Extravaganza*, *supra* note 64; *RuPaul’s Drag Race: Born Naked*, *supra* note 62.

70. See, e.g., *RuPaul’s Drag Race All Stars: All Stars Snatch Game*, at 22:37 (LogoTV television broadcast Sept. 1, 2016).

71. See, e.g., *RuPaul’s Drag Race: 9021-HO*, at 05:30 (VH1 television broadcast May 6, 2017). This is just one example of the acting challenges that are featured on each season of *RPDR*. One queen is typically in charge of casting other queens in their respective roles. In this episode, Peppermint describes her approach to casting as asking the other girls what roles they want. Queens—such as Aja, who wants to play certain characters because they are “bitchy and nasty”—express their preferences for certain characters because of how those acting challenge characters share traits with their own drag personas. *Id.*; see also *RuPaul’s Drag Race: Oh. My. Gaga!*, at 09:27 (VH1 television broadcast Mar. 24, 2017) (featuring Aja describing her drag style as “banjee” (meaning embodying urbanity and toughness), “cute,” and “dangerous”).

72. See *RuPaul’s Drag Race All Stars: All Stars Snatch Game*, *supra* note 70. When Katya portrays Björk, distinctive qualities of Katya carry through into the impersonation. The Russian accent Katya is known for blends with the Icelandic accent she attempts in her Björk portrayal. Further, Katya’s raunchy sense of humor is reflected in her embodiment of Björk, particularly when she answers that the Pit Crew “remove[s] their testicles” in response to a question from RuPaul and when she says she is “down for anything” in response to a sexual advance from drag queen Alaska portraying Mae West. See *id.* at 27:03, 29:25.

On prong two of *Towle*, Katya's character is also sufficiently delineated so that one recognizes her as the same character whenever she appears. Snatch Game is also a good example of this. Even when Katya is dressed as a celebrity, viewers can still recognize her underlying drag persona.⁷³ Katya also satisfies prong three of *Towle* in that her character is especially distinctive and contains unique elements of expression that make her more than a mere stock character. While many drag queens wear blonde wigs and red lipstick, Katya has a one-of-a-kind backstory as a fictional Russian prostitute. She has a unique accent and style of dress based on a caricatured conception of the former Soviet Union. Though most drag queens poke fun at the gender binary through exaggerated personas, Katya's "Russian . . . hooker" aesthetic is something more than mere female impersonation.⁷⁴

Katya is just one example of the copyrightable characters that star on each season of *RPDR*. To be on the show, a prospective participant must answer questions such as "What makes you special/unique?" with respect to their drag persona; describe the backstory behind their drag name; describe their special talents and what entertainers inspire them; and go into detail about how they perform in drag.⁷⁵ Applicants must also submit photos of themselves in drag and provide all of their social media links to the casting team.⁷⁶ All of this information ensures that the show is truly finding "America's next drag superstar" among a group of unique drag characters.⁷⁷ If these drag queens were not physically and conceptually distinct, sufficiently delineated so as to be recognizable as the same characters whenever they appear, and distinctive and unique enough to be more than mere stock characters,⁷⁸ *RPDR* could not exist as a competition because the queens would be indistinguishable from one another. *RPDR* is thus a competition show where copyrightable characters that pass the *Towle* test compete to be crowned "America's next drag superstar."

73. See, e.g., *id.*; see also RuPaul's Drag Race, *supra* note 63, at 16:37 (featuring Katya performing as her version of "Hello Kitty").

74. See RuPaul's Drag Race, *supra* note 63.

75. RuPaul's Drag Race Season 15 Casting Call, WORLD OF WONDER, <https://worldofwonder.typeform.com/to/oHfrGnru> [<https://perma.cc/QF63-GRJW>] (last visited Dec. 21, 2022).

76. *Id.* These photos and social media information, which often implicate use of one's drag persona in commerce, also raise statutory right of publicity and trademark issues. See *Publicity*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/publicity> [<https://perma.cc/94T9-TV82>] (last visited Dec. 21, 2022); 15 U.S.C. § 1127. It is worth noting that character copyright does not exist in a vacuum. With each copyrightable character there is also an accompanying marketable persona. A queen's trademarked persona or brand is, in theory, more difficult to assign away from the artist who originated the drag character. Usually, though, one's drag character brand does not attain any notable commercial success until after the queen has appeared on the show. A notable example of this is drag queen Trixie Mattel, who has since created her own line of cosmetics and her own motel in Palm Springs and engaged in other successful commercial ventures beyond just drag performance. See, e.g., *About Us*, TRIxie COSM., <https://trixiecosmetics.com/pages/about> [<https://perma.cc/GFE9-UFW4>] (last visited Dec. 21, 2022); *Story*, TRIxie MOTEL, <https://www.trixiemotel.com/about/> [<https://perma.cc/Q8R5-N2G3>] (last visited Dec. 21, 2022).

77. See RuPaul's Drag Race Season 15 Casting Call, *supra* note 75.

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

II. THE *RPDR* MONOPOLY

RPDR is currently in its fifteenth season, and, since its inception in 2009, has become much more than just a reality show. It is a “media empire”—earning Emmys and spawning international spin-offs.⁷⁹ The show has made drag a mainstream art form, but some have questioned if this is actually a good thing for the development of the art form and for its participants, who are often members of marginalized groups.⁸⁰ Although there are various criticisms that can be leveled against *RPDR*, including RuPaul’s transphobic comments from 2018⁸¹ and how the show still glorifies conventional beauty standards in a way that can be limiting to more avant-garde artists,⁸² what may be the most damaging to the progression of the drag art form is the monopoly the *RPDR* empire has on drag performance success.⁸³

When *RPDR* announced a British spin-off, there was concern in the United Kingdom that a *RPDR UK* would “create a two-tier economy” in which the few who have been on the show will begin taking performance jobs away from the “[many] who make their money through doing drag.”⁸⁴ This is already happening in the United States, where those who used to be drag “legends” in their respective cities are losing out on opportunities to those who have been on the show.⁸⁵ Those who have spent years cultivating local drag fame now fail to “sell out . . . venue[s],” while young, out-of-town queens are touring and selling out theaters.⁸⁶

Drag used to exist on the fringes of capitalist society, but *WOW* used the “low production costs” of reality television and the “self-branding [capacity] of . . . social media”⁸⁷ to cast talented queens and showcase them in a reality show format palatable to audiences already consuming shows like *American Idol* and *America’s Next Top Model*. *WOW* was able to cheaply produce a show offering

79. Katie Wudel, *Review: How RuPaul Channeled, and Flattened, a Century of Queer Life*, L.A. TIMES (Mar. 4, 2020, 7:00 AM), <https://www.latimes.com/entertainment-arts/books/story/2020-03-04/review-how-rupaul-channeled-and-flattened-a-century-of-queer-life>.

80. *See id.*; Hugh Montgomery, *Is RuPaul’s Drag Race Good for Drag?*, BBC (Oct. 2, 2019), <https://www.bbc.com/culture/article/20191002-is-rupauls-drag-race-a-good-thing-for-drag> [<https://perma.cc/UWQ3-MJR2>]; Dustin Johanna Satterfield, *Privilege and Marginalization in Drag Communities in the United States* 1, 3 (May 2015) (M.A. thesis, University of Montana) (available at <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=5531&context=etd>) [<https://perma.cc/4X3U-WUR4>].

81. In 2018, RuPaul said that he would probably not allow trans female contestants on the show if they had begun medically transitioning. Montgomery, *supra* note 80. He later apologized for the comment. *Id.*

82. *See id.*

83. *See id.*

84. *Id.* (quoting drag performer Amrou Al-Kadhi).

85. *Id.* (quoting Patrick Crowley, *34 Drag Performers Around the World Sound Off on the Influence of ‘RuPaul’s Drag Race’ & More*, BILLBOARD (June 28, 2017) (quoting VivvyAnne Forevermore), <https://www.billboard.com/culture/pride/rupaul-drag-race-global-impact-queens-7842105/> [<https://perma.cc/E7KT-9CX3>]).

86. *See id.* (quoting Crowley, *supra* note 85) (quoting VivvyAnne Forevermore).

87. Zeena Feldman & Jamie Hakim, *RuPaul’s Drag Race: How Social Media Made Drag’s Subversive Art Form into a Capitalist Money Maker*, CONVERSATION (Oct. 9, 2020, 8:27 AM), <https://theconversation.com/rupauls-drag-race-how-social-media-made-drags-subversive-art-form-into-a-capitalist-money-maker-144967> [<https://perma.cc/DW9B-2RQS>].

consumers something new, the art form of drag, in a format they understood—a reality competition show.⁸⁸ Queens in the early days of the show (and many inexperienced queens today) did not know how to assess their monetary worth because drag did not enjoy commercial success before *RPDR* and in some cases even actively avoided capitalist norms.⁸⁹ This lack of knowledge has led and continues to lead to the exploitation and undercompensation of the very artists who make *RPDR* what it is.⁹⁰

Those who are alumni of the show have access to more gigs, professional representation, and management to help them negotiate for adequate compensation for their time and creative effort.⁹¹ Without *RPDR* the vast majority of drag artists would not have access to these tools.⁹² Additionally, many *RPDR* alums enjoy a level of mainstream success that is unparalleled within the drag industry.⁹³ It includes opportunities to appear in television shows, movies, and at non-queer-focused performance venues, as well as the life-changing economic success that can come from being well-liked on a popular TV show.⁹⁴ The problem with all of this is that *RPDR* is the only way for queens to gain access to these opportunities within mainstream popular culture and to the tools to navigate the commercial side of the entertainment industry.⁹⁵ Many queens struggling to make their living

88. *See id.*

89. Joey Nolfi, *How RuPaul's Drag Race Changed the Global Drag Economy*, ENT. WKLY. (June 12, 2020, 2:00 PM), [https://ew.com/tv/rupauls-drag-race-legitimized-business-drag/\(quoting RPDR Season 3 queen Mariah Balenciaga as saying, “\[w\]hen we came along, we didn’t know what our market value was or what our worth was. We didn’t know how much the clubs were bringing in based on our names being on a reality show We had to entertain, do our own hair, do our own makeup, and we were begging for the small rate and ration we were getting . . . \[but\] *Drag Race* has given a legitimacy to the business of drag” \(alteration in original\)\). Quoting *RPDR* Season 10’s Blair St. Clair, Nolfi discusses how *RPDR* “enable\[s\] queens to show that \[they\] are artists,” despite some thinking that drag is a “cheap profession” even today. *Id.* This underscores how *RPDR* sets the market value for drag, which can lead to the undercompensation of queens in the process.](https://ew.com/tv/rupauls-drag-race-legitimized-business-drag/(quoting+RPDR+Season+3+queen+Mariah+Balenciaga+as+saying,+[w]hen+we+came+along,+we+didn't+know+what+our+market+value+was+or+what+our+worth+was.+We+didn't+know+how+much+the+clubs+were+bringing+in+based+on+our+names+being+on+a+reality+show+.+.+.+We+had+to+entertain,+do+our+own+hair,+do+our+own+makeup,+and+we+were+begging+for+the+small+rate+and+ration+we+were+getting+.+.+[but]+Drag+Race+has+given+a+legitimacy+to+the+business+of+drag+(alteration+in+original)).+Quoting+RPDR+Season+10's+Blair+St.+Clair,+Nolfi+discusses+how+RPDR+enable[s]+queens+to+show+that+[they]+are+artists,+despite+some+thinking+that+drag+is+a+cheap+profession+even+today.+Id.+This+underscores+how+RPDR+sets+the+market+value+for+drag,+which+can+lead+to+the+undercompensation+of+queens+in+the+process.)

90. *See id.*; *see also* Luana Ferreira, ‘RuPaul’s Drag Race’: *Everything We Know About How Contestants Are Paid*, THE THINGS (July 13, 2021), <https://www.thethings.com/rupauls-drag-race-everything-we-know-about-how-contestants-are-paid/> [<https://perma.cc/5M6H-WN3P>] (noting that “[a]lthough the winner receives a \$100 thousand prize, the other contestants don’t make much money”). Most contestants see the show as an investment that may or may not pay off. Ferreira, *supra*. Additionally, things are even worse on the U.K. version of *RPDR*, which does not offer large cash prizes. *See id.* If one does not garner fame on the show that can be leveraged into additional opportunities, the investment in one’s craft needed to appear on the show will not be worth it. *See id.*

91. *See* Nolfi, *supra* note 89; Manuel Betancourt, *The Rise of RuPaul’s Drag Industrial Complex*, VICE (Mar. 24, 2017, 4:39 PM), <https://www.vice.com/en/article/3dmpdw/the-rise-of-rupauls-drag-industrial-complex> [<https://perma.cc/L4QS-KENJ>].

92. *See* Sam Chapman, *The Economics of Drag: No Contracts, Unresponsive Bookers, and Unreliable Payments*, STRANGER (Oct. 9, 2018, 11:54 AM), <https://www.thestranger.com/slog/2018/10/09/33568853/the-economics-of-drag-no-contracts-unresponsive-bookers-and-unreliable-payment> [<https://perma.cc/BS2K-6NVK>]; Betancourt, *supra* note 91.

93. *See* Chapman, *supra* note 92; Betancourt, *supra* note 91.

94. *See* Betancourt, *supra* note 91.

95. *See* Cory G. Collins, *Drag Race to the Bottom?: Updated Notes on the Aesthetic and Political Economy of RuPaul’s Drag Race*, 4 TRANSGENDER STUD. Q. 128, 131 (2017); David Canfield, *There Has Never Been a Show Like RuPaul’s Drag Race*, VANITY FAIR (Aug. 27, 2021), <https://www.vanityfair.com/hollywood/2021/08/awards-insider-rupauls-drag-race-emmy-impact> (“Nowadays, it’s

as drag performers in their local communities are willing to give up most of their artistic rights and be compensated little to gain admission to the lucrative *RPDR* empire.⁹⁶ *RPDR* has no competitors in the market for mainstream drag television programming⁹⁷ and thus, as the next Part will illustrate, can easily compel those with little bargaining power to sign away the vast majority of their intellectual property rights in the original creative components of their drag characters.

III. WHAT QUEENS AGREE TO WHEN SIGNING UP FOR *RPDR*

After a queen fills out an application to be cast on an upcoming season of *RPDR*, the potential participant is emailed a Participant Agreement.⁹⁸ The Season 14 Participant Agreement referenced in this Part governs queens' rights and obligations, as well as what intellectual property rights they sign away to WOW and Viacom Media Networks, owners of the VH1 network where *RPDR* airs, should they be selected to participate in the show.⁹⁹ What follows will discuss the period during which *RPDR* queens are under exclusive contract with the franchise's producers, the compensation queens receive, and finally the treatment of intellectual property rights within the agreement.

A. THE EXCLUSIVITY PERIOD

On its face, the Participant Agreement reads like a standard competition agreement for reality television. Participants agree to be recorded at all times by producers, with or without their knowledge, and assume the risk of emotional injury inflicted on them by other participants, for example.¹⁰⁰ Participants agree to be subject to an "Exclusivity Period" from the effective date of their Participant Agreement until twelve months after the initial broadcast of the last episode.¹⁰¹ During this period, they cannot participate in any performance or media not produced by WOW, except they can do some live performances or personal appearances provided that they do not advertise their affiliation with the show and adhere to a strict confidentiality agreement with respect to the show.¹⁰² Live

near-impossible to imagine a *Drag Race* contestant who isn't obsessed by, and completely familiar with, the show. Its nickname, 'Drag Olympics,' holds up: It is *the* showcase, *the* opportunity, for queens with aspirations beyond local success.").

96. See Canfield, *supra* note 95 ("Before *Drag Race*—as in, just a few years ago—Symone was doing drag 'outside of a day job' to make ends meet. She was living paycheck to paycheck. She didn't even have the confidence, at first, to audition. But her friends pushed her to do so. When she got on *Drag Race*, she knew her life could change."). Season 13 winner Symone knew that *RPDR* could change her life, and she would, like the queens who came before her, go to great lengths to reach the main stage. See *id.*; see also Ferreira, *supra* note 90 (discussing how little queens are paid unless they win the show).

97. Collins, *supra* note 95.

98. RuPaul's *Drag Race Season 15 Casting Call*, *supra* note 75.

99. See generally WORLD OF WONDER PRODS., INC., "RUPAUL'S DRAG RACE": PARTICIPANT AGREEMENT (2021), <https://perma.cc/8USA-HC4F> [hereinafter PARTICIPANT AGREEMENT] (obtained via Bussy Queen, *Exposing the RuPaul's Drag Race Contract*, PATREON (Apr. 11, 2021, 8:02 AM), <https://www.patreon.com/posts/exposing-rupauls-49894485> [<https://perma.cc/8USA-HC4F>]).

100. *Id.* at 3–4.

101. See *id.* at 6.

102. *Id.*

performances that they engage in during the Exclusivity Period cannot be part of a tour or be intended to be performed more than twice within a twelve-month period.¹⁰³ Anything that a queen wants to do that does not count as a live performance (which includes “any project in any media”) must be approved by WOW, and queens agree not to participate in any live performances with any other past, present, or future show participants during the Exclusivity Period.¹⁰⁴

B. COMPENSATION

Participants are required to be available for WOW-produced shows during the entire Exclusivity Period in exchange for \$1,000 per show.¹⁰⁵ Participants receive \$500 per episode of *RPDR* they appear in and will make slightly more per episode should they participate in a subsequent season, such as *All Stars*.¹⁰⁶

These per-episode and per-show compensation amounts are minuscule when compared to how much queens spend to develop their drag to a level of aesthetic appeal to even be considered for a contestant spot on the show. Former *RPDR* contestant Kameron Michaels said, in reference to her appearance on the show, “I spent more coming into this competition than I did as the down payment on my house,” and another contestant, Miz Cracker, said that she spent more to prepare for the competition than she did on college.¹⁰⁷ The show does not provide contestants with any costume or makeup budget, and a *Vice* article analyzing the financial struggle of being an elite drag queen estimates that contestants may spend more than \$20,000 just to prepare to appear on the show.¹⁰⁸ If a contestant is sent home the first episode, they make only \$500 and maybe another \$500 if they appear in a finale episode.¹⁰⁹ So much for receiving a return on your investment.

C. INTELLECTUAL PROPERTY RIGHTS

In addition to assuming the risk of losing a lot of money if they fail to make it far in the competition, *RPDR* participants sign away most of their intellectual property rights when they agree to appear on the show. Participants agree that any “ideas, gags, suggestions, themes, plots, stories, characters, characterizations, dialogue, text, designs, graphics, titles, drawings, artwork, merchandise, digital works, songs, music, photography, video, film and other material” that in any way relate to the show will be deemed works made for hire and will be the sole property of WOW and Viacom.¹¹⁰ This is the only time the Participant Agreement references characters created by the queens on the show. The

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 2, 13.

107. Rachel Miller, *Shantay, You Pay: Inside the Heavy Financial Burden of Going on ‘Drag Race,’* VICE (Apr. 15, 2021, 12:41 PM), <https://www.vice.com/en/article/y3dmav/what-does-it-cost-to-go-on-rupauls-drag-race> [https://perma.cc/F4T8-KB94].

108. *Id.*

109. See PARTICIPANT AGREEMENT, *supra* note 99, at 13.

110. *Id.* at 9–10.

Participant Agreement also states that if the queens perform or display any original copyrightable material created by them but not made in connection with the show, the queens shall continue to “have the non-exclusive right to continue to use such original material in all media forever” and own the underlying copyright.¹¹¹ WOW and Viacom can just “exploit” the material “in connection with the Project.”¹¹²

Queens are willing to agree to give up so many of their intellectual property rights and accept so little in compensation because appearing on *RPDR* is the only way to achieve mainstream fame as a drag performer.¹¹³ This in itself raises some unconscionability concerns under contract law that are beyond the scope of this Note. What is within the scope of this Note, though, is how the Participant Agreement raises character copyright concerns in its failure to grapple with the issue of character copyright at all.

The Participant Agreement states that characters created by the queens both before and after they appear on the show that relate to the show in any way are works made for hire.¹¹⁴ This is in tension, however, with the Copyright Act’s definition of a “work made for hire.” Section 101 of the Copyright Act defines a work made for hire as being either a work made by an employee within the scope of their employment or “a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”¹¹⁵ The Participant Agreement explicitly states that *RPDR* participants are not employees.¹¹⁶ Thus, the character copyright in one’s drag persona has to fall within the second part of the work made for hire definition. An issue arises here in that one’s drag persona in itself is neither specially ordered nor commissioned by WOW and Viacom.¹¹⁷ The character copyright, meaning the drag persona, is what is applying to participate in the show. The persona does not exist solely for the benefit of *RPDR*. For many queens, their drag characters were created before the show came into existence and will continue to exist in substantially similar forms regardless of whether they appear on *RPDR*. Using the example from Part I.B, Katya was not

111. *Id.* at 11–12.

112. *Id.* at 12.

113. Eric Diaz, *The Continuing Impact and Legacy of RuPaul’s Drag Race*, NERDIST (June 30, 2021, 1:06 PM), <https://nerdist.com/article/rupauls-drag-race-legacy-impact-lgbtq-culture/> [<https://perma.cc/6N4Z-PXNZ>] (“Previously, you could start a career in drag and perhaps be successful without going on one specific reality show. Sure, there are plenty of queens out there who still don’t have a desire to go on *Drag Race*. But the current general perception is that for one to ‘make it,’ one *has* to be on this show.”).

114. PARTICIPANT AGREEMENT, *supra* note 99, at 9–10.

115. 17 U.S.C. § 101.

116. PARTICIPANT AGREEMENT, *supra* note 99, at 2.

117. *See* *Playboy Enters. v. Dumas*, 53 F.3d 549, 561–62 (2d Cir. 1995) (quoting MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 5.03(B)(2)(d), LEXIS (database updated Aug. 2022)) (holding that a work is specially ordered or commissioned when the party commissioning the work can make specific requests about the work and/or the party trying to claim work-made-for-hire ownership was the “motivating factor” behind its creation).

created for WOW so that Brian McCook could appear on *RPDR*. Brian McCook created Katya on his own¹¹⁸ and then decided to apply for *RPDR* with Katya as his drag persona. No one could make the argument that Katya was “specially ordered or commissioned for use” on *RPDR*.¹¹⁹ Katya does not exist because *RPDR* exists.

Section 201 of the Copyright Act sheds further light on what “specially ordered or commissioned for use” means in Section 101’s definition of a work made for hire. Section 201 is about authorship and ownership and states that in the case of works made for hire, the “person for whom the work was prepared is considered [its] author.”¹²⁰ This suggests that a work is a work made for hire when it is made for someone else. No drag queen exists for WOW and only for WOW. Thus, the work made for hire provision in the Participant Agreement might not be applicable to the character copyright in the drag personas that appear on the show.

If drag personas themselves are not works made for hire, then the section of the Participant Agreement about preexisting copyrightable material not made in connection with the show—under which queens still retain the copyright and grant WOW and Viacom the ability to exploit the material in connection with the show—would apply.¹²¹ This part of the Participant Agreement refers to material not made “specifically in connection with the Project”¹²²—a category one’s drag persona could fall under, though the phrase is ambiguous. It could be argued that one’s drag character develops and becomes more refined during one’s time on the show, which could make material parts of the character created in connection with the show. This would kick the character back into the work made for hire section of the Participant Agreement.

Given the lack of clarity surrounding character copyright, both in this Participant Agreement and in copyright jurisprudence writ large, drag queens who seek to appear on shows produced by companies other than WOW after their Exclusivity Period with WOW ends could be vulnerable to potential litigation. As the Participant Agreement reads, there is ambiguity as to whether WOW and Viacom own a former contestant’s drag persona, or at least aspects of it developed on the show as a work made for hire. As drag becomes more mainstream, famous queens could be asked to participate in competing productions, and WOW and Viacom could attempt to stop them from doing so by claiming copyright

118. See BuzzFeed Celeb, *Trixie Mattel and Katya Take the BFF Test*, YOUTUBE, at 02:47 (Aug. 6, 2020), <https://www.youtube.com/watch?v=BLakPo3USzw> (featuring Katya describing her first drag gig as “post-college,” which was before Katya appeared on Season 7 of *RPDR*); Joseph Shepherd, *KATYA: EXPOSED (THE FULL INTERVIEW) – Part 1*, YOUTUBE, at 02:52 (Oct. 17, 2019), <https://www.youtube.com/watch?v=sqM0WpnzpBI> (featuring Katya describing her first gigs in 2006 and the creation of the Katya character).

119. See § 101; see also *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 412–13 (7th Cir. 1992) (holding that a written work made for hire agreement under 17 U.S.C. § 101 “must precede the creation of the [work] in order to serve its purpose of identifying the . . . owner unequivocally”).

120. 17 U.S.C. § 201(b).

121. See PARTICIPANT AGREEMENT, *supra* note 99, at 11–12.

122. See *id.* at 11.

ownership in their character. Performing as one's own drag character could rise to the level of copyright infringement. The proposed codification of character copyright that follows seeks to clarify what rights creators of characters have when their characters appear on shows such as *RPDR* or in other motion pictures, audiovisual works, or collective works.

IV. THE CASE FOR CODIFYING CHARACTER COPYRIGHT: MAKING IT CLEAR WHAT PORTIONS OF DRAG PERSONAS ARE SIGNED AWAY TO THE *RPDR* EMPIRE

The prospect of a drag queen being sued for playing her own character after participating in *RuPaul's Drag Race* is not an unfounded fear. In 1996, former *Saturday Night Live* (*SNL*) cast member Dana Carvey was prevented from playing his Church Lady character on the prime time comedy show he starred in after *SNL*.¹²³ NBC claimed that the Church Lady character Carvey created was “its [own] intellectual property” and Carvey could not use it in his show on a different network.¹²⁴ This case was never litigated, and Carvey decided just to relinquish the character and play her gay nephew instead.¹²⁵ A dispute like this one between *WOW* and a drag queen, however, could be fatal to the queen's career because the queen is known for playing one character only. An even more extreme example of this is Stephen Colbert being forced to kill off his “Stephen Colbert” pundit persona¹²⁶ from *The Colbert Report*.¹²⁷ Colbert “revived” the character on *The Late Show* on CBS in July 2016 to discuss the Republican National Convention.¹²⁸ About a week later, Colbert announced that “another company” (presumably Viacom, which owns Comedy Central, where *The Colbert Report* aired) had contacted CBS to claim “Stephen Colbert” as its intellectual property, forcing Colbert to kill the character that shares his name for good.¹²⁹

Both Carvey's Church Lady and Colbert's “Stephen Colbert” are examples of actors “relinquish[ing]” copyright ownership in their characters due to the work made for hire doctrine that is also contained in the *RPDR* Participant Agreement.¹³⁰ The *RPDR* scenario is more complicated than the Carvey and Colbert scenarios, though, because *RPDR* contestants create their personas before they sign the Participant Agreement, rather than during their time on the show. As mentioned in Part III, this likely renders drag personas not works made for hire at all.

123. See Altman, *supra* note 27, at 756.

124. *Id.*

125. *Id.*

126. Colbert described his *Colbert Report* character as “a well-intentioned, poorly informed, high-status idiot.” Lauxman, *supra* note 55, at 304–05 (quoting Talks at Google, *Stephen Colbert—America Again: Re-Becoming the Greatness We Never Weren't*, YOUTUBE, at 36:50 (Dec. 14, 2012), <https://www.youtube.com/watch?v=-HpBHWUPa8Q>).

127. See Altman, *supra* note 27, at 737.

128. Lauxman, *supra* note 55, at 303–04.

129. *Id.* at 304–05.

130. See Altman, *supra* note 27, at 747.

Reality competition shows like *RPDR* and comedy programming such as *The Colbert Report* and Netflix comedy specials are increasing in popularity. Participants, networks, and production companies may more often find themselves in situations in which a character pre-dates a show and cannot be considered a work made for hire but is embodied by on-screen talent on the network's programming.¹³¹ Codification of character copyright within the Copyright Act is thus necessary to establish default provisions¹³² for who owns the copyright in visual characters that are part of audiovisual works.¹³³

First, characters should be added to Section 102 of the Copyright Act, which defines the subject matter of copyright.¹³⁴ Currently, there are eight categories of copyrightable subject matter;¹³⁵ I propose adding visual characters and literary characters as categories nine and ten, respectively. Or, characters could be one category, and the Copyright Office could promulgate different standards for the registration of literary characters versus visual characters. Separating visual from literary characters is appropriate because different tests for the copyrightability of the two character types have developed in character copyright jurisprudence.¹³⁶

A visual character will be eligible for copyright registration if it satisfies the *Towle* test: (1) it has “physical as well as conceptual qualities”; (2) it is “sufficiently delineated to be recognizable as the same character whenever it appears”; and (3) it is “especially distinctive and contain[s] some unique elements of expression.”¹³⁷ If a drag queen wishes to register her copyright in her persona before signing a Participant Agreement to appear on *RPDR*, she would fall under the portion of the Season 14 Participant Agreement that references preexisting copyrightable material not made in connection with the show.¹³⁸ A queen who preregisters copyright in her character before auditioning for the show would still retain the copyright and grant WOW and Viacom the ability to exploit the material only in connection with the show¹³⁹—provided that a similar Participant Agreement exists in a world where character copyright is codified in the Copyright Act.

To cover queens who do not have the foresight, knowledge, or resources to register copyright in their characters before going on *RPDR*, I propose adding a

131. For example, a comedian could embody a persona (like a “Stephen Colbert” persona) in their stand-up, become well known for their live stand-up performances, and then tape a Netflix comedy special embodying a character they have been playing at their live shows for years.

132. What follows will be default provisions that parties will be free to contract around. In theory, copyright in a character that predates a show could be signed over to a network, but that will not be the default.

133. Namely, television and movies.

134. See 17 U.S.C. § 102.

135. *Id.* § 102(a).

136. See *supra* Section I.A (describing how literary characters are still analyzed under the distinctive-delineation test as well as the “constitutes the story being told” test).

137. *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015) (internal quotation marks and citations omitted).

138. See PARTICIPANT AGREEMENT, *supra* note 99, at 11–12.

139. See *id.*

section to the Copyright Act that will, as a default provision, treat visual characters within live-action, audiovisual works as contributions to collective works. A “collective work” under the Copyright Act usually covers literary works, such as “periodical issue[s], antholog[ies], or encyclopedia[s],” and is defined as a work “in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”¹⁴⁰ To make clear that a collective work can include nonliterary art forms, language that refers to “audiovisual works consisting of characters created by multiple individuals and/or created by the very individuals who portray them” should be added to the collective work definition. This language would cover *RPDR* queens, “Stephen Colbert,” and Church Lady.

Section 201(c) of the Copyright Act goes on to describe that “[c]opyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole.”¹⁴¹ Copyright in contributions to collective works “vests initially in the author of [each] contribution” and, “[i]n the absence of an express transfer” of any rights under copyright law, “the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.”¹⁴² As applied to *RPDR*, this would mean that copyright in each drag queen persona would vest initially in the persona’s creator. Using the example of Katya again, Brian McCook would own Katya, except for Katya’s appearances on *RPDR* and related revisions or later works within the franchise. McCook would not own Katya’s appearances on *All Stars*, for example. McCook could not prevent different edits of episodes of the show Katya was in from being aired wherever and however the copyright owners of *RPDR* see fit. WOW and Viacom, however, could not prevent McCook from using the Katya character on other networks’ shows. Katya could go on *The Tonight Show* or have her own show on any network—regardless of whether it was affiliated with WOW and Viacom.

It is worth noting that a contribution to a collective work could be signed away as a work made for hire via a written agreement under the current Copyright Act, but a copyrightable work (which a character will be under this proposal) is only a work made for hire when it is “specially ordered or commissioned.”¹⁴³ Katya and other drag queens were not commissioned for creation by the *RPDR* copyright owners, so the default language of Section 201(c) vesting copyright in the creator of the copyrightable work (character, under this proposal) would apply.¹⁴⁴

140. 17 U.S.C. § 101.

141. *Id.* § 201(c).

142. *Id.*

143. *Id.* § 101.

144. *See id.* § 201(c). The argument that “Stephen Colbert” and Carvey’s Church Lady would still be works made for hire under this collective work codification of visual character copyright is slightly stronger. “Stephen Colbert” and Church Lady could be considered “specially ordered or commissioned” under Section 101 because their creators were already appearing on shows on the networks claiming ownership of the characters when they created the characters. This means that an express agreement,

If WOW and Viacom wanted to own the entirety of one's drag persona within the proposed codified collective works character copyright framework, the boilerplate work made for hire clause in the Participant Agreement would not be enough. It likely is not even enough to cover the copyright in an entire drag persona now. WOW and Viacom would have to include an express clause in the Participant Agreement transferring ownership of the copyright in the entirety of the character to WOW and Viacom for uses beyond just reproducing and distributing the portrayal of the character (1) as part of *RPDR* as a collective work, (2) in any revision (re-edits, dubbing in different languages, etc.), or (3) in any later collective work of the same series.¹⁴⁵ Under this codified character copyright proposal, it will need to be made clear to drag queens in the Participant Agreement that they may be forced to choose between killing off their characters or only portraying their characters in WOW- and Viacom-sponsored media if the powers that be in the *RPDR* empire decide that they alone want to capitalize on a queen's fame resulting from their work on the show. Making this information clear to participants could reduce the number of queens who choose to participate in the *RPDR* franchise. This could lead to modifications to the Participant Agreement or allow competitor drag entertainment franchises to enter the mainstream media fold.

A reality of the monopoly power *RPDR* has on drag success in mainstream media is that many queens may still sign up for the show notwithstanding that they will be signing over control of the personas they created—the only characters they are known for—to a large, profit-driven corporate entity. Hopefully, codifying character copyright in the Copyright Act will either cause queens to register their characters and their ownership of them with the Copyright Office before going on the show or cause enough queens to forgo participation in the show because they do not want to sign away control over their characters to prompt WOW and Viacom to allow the proposed default Section 201(c) authorship provisions to govern drag personas.

CONCLUSION

The monopoly the *RPDR* franchise has on mainstream success as a drag performer is undeniable. The current *RPDR* Participant Agreement contains vague yet all-encompassing work made for hire language that attempts to assert some level of control over individuals' drag personas but probably cannot do so

signed by the parties, stating that the characters were works made for hire would render the networks/copyright owners in the shows the authors/copyright owners under Section 201(b). However, whether a work is "specially ordered or commissioned" depends on if the party requesting preparation of the work was the motivating factor inducing creation of the work or if the commissioning party made specific requests for work during a contractual relationship. *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 561–62 (2d Cir. 1995). If the creation of either character were not requested by the copyright owners in the programs or the copyright owners in the programs were not motivating factors, the characters would still fall under the default collective works rules described in my proposal, and copyright ownership would vest in the creators but-for the characters' appearances in the shows themselves.

145. See § 201(c).

because the personas were not created for *RPDR* and *RPDR* alone. Despite this, the lack of clarity in character copyright jurisprudence resulting from a refusal to recognize characters within the Copyright Act of 1976 puts queens at risk of having to kill their only characters or only participate in events sponsored by the producers of *RPDR*. Clarity in the character copyright space will hopefully give queens more rights in the drag personas they spend hours of time, large sums of money, and profound amounts of emotional and physical labor creating. At minimum, it will allow them to be more informed about what parts of their creative labor *RPDR* will own if they choose to participate in the show. It may take a group of queens deciding not to participate in *RPDR*, out of fear of losing control over their intellectual property rights, to compel the franchise to modify the sweeping nature of its Participant Agreement. Such a coordinated effort by queens would hopefully place more bargaining power back into the hands of the multifaceted drag artists with whom mainstream popular culture consumers have fallen in love.