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Shadow of the Bat[mobile]: Character Copyright After DC Comics v. Towle

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**SHADOW OF THE BAT[MOBILE]:
CHARACTER COPYRIGHT AFTER
*DC COMICS V. TOWLE***

Missy G. Brenner*

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INTRODUCTION

For a world constantly trying to make sense of its own struggles, comic book writers’ ability to divide reality into boxes and speech bubbles is as refreshing as it is entertaining. In comics, villains are identifiable external sources of chaos which routinely are brought to justice by an array of heroes—some of whom are relatably conflicted, others idealistically noble. A steady stream of reboots, film and television adaptations, and superhero-themed merchandise allow us to follow unending variations on our favorite theme. Given that superhero characters work as hard for the success of their franchises as they do for their beloved cities, it is surprising how much intellectual property law struggles with the protection of characters. Any new hero on the scene must not be too similar to those who have gone before, as claims for copyright infringement of famous characters are perhaps harder to defeat than the notorious Bane.¹

Our intuition tells us that a character like Superman feels protectable.² But what about Spiderman’s Aunt May? Intuition is less helpful. Does the copyright in the comics in which she appears also protect her image when used in a different work? Characters cannot be registered separately for copyright,³ but that does not exclude them from copyright protection.⁴ Our Aunt May’s exact visual depiction, straight out of the comic book cell, is protected as part of the copyrighted comic.⁵ However, if another depiction is less exact, the law struggles to

1. Bane is counted among Batman’s most challenging villains—he is generally known as “The Man Who Broke the Bat” after snapping Batman’s back across his knee. *See* DOUG MOENSCH (w), JIM APARO (p) & DICK GIORDANO (i), *BATMAN VOL. 1 SER. NO. 497: THE BROKEN BAT* (1940).

2. *See, e.g.,* *Detective Comics v. Bruns Publ’ns*, 111 F.2d 432 (2d Cir. 1940) (holding Superman copyrighted).

3. U.S. COPYRIGHT OFFICE, *COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES* § 313.4(H) (3d ed. 2014).

4. COPYRIGHT ACT OF 1976, 17 U.S.C. § 408 (West 2017). (“[R]egistration is not a condition of copyright protection.”).

5. *See* discussion *infra* Part II.

determine at what point that depiction shows an older woman, not Aunt May. Without her name, would she even be recognizable? And since names cannot be protected by copyright,⁶ why does the name seem important to the analysis? Courts have attempted to articulate a test for when the copyright in an original work should also shield characters from copying⁷—essentially, trying to determine whether an Aunt May should be treated like a nameless background character, or like a Superman. Unfortunately, the result is an unsatisfying scattershot of case law that creates unpredictable results for authors.⁸

In a recent addition to this cluster of cases, *DC Comics v. Towle*,⁹ the Ninth Circuit took an expansive view of character copyright that declared Batman’s gadget-equipped vehicle, the Batmobile, protectable as a character.¹⁰ This Comment analyzes the reasoning and policy repercussions of the *Towle* decision and its inadministrable “gut feeling” protection scheme. Part I provides brief background information regarding modern copyright law. Part II traces the history and expansion of character copyright, including problematic precedents created throughout the doctrine’s development. Part III explores the culmination of these precedents in the *Towle* decision. Part IV analyzes the legal repercussions involved in the *Towle* reasoning and current state of character copyright law. Finally, Part V offers a proposal for a new character copyright test, or, better, a switch to trademark law that uses overtones already present in character cases to alleviate future uncertainty.

I. BACKGROUND

A. *The Scope of Copyrightable Subject Matter*

1. *Requirements of Copyrightability*

Copyright arises in any original work of authorship that is fixed in a tangible medium.¹¹ An author is a person “to whom anything owes its

6. *Copyright Protection Not Available for Names, Titles, or Short Phrases*, United States Copyright Office Circular 34, <https://www.copyright.gov/circs/circ34.pdf>; see, e.g., *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th Cir. 2001).

7. See discussion *infra* Part II.

8. See discussion *infra* Parts II, III, IV.

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

10. *Id.* at 1022–23. The court employed a three-part test for character copyrightability, relying heavily on a single precedent for the proposition that a car could be a character. See discussion *infra* Parts IV, V.

11. 17 U.S.C. § 102 (2017). Eight potential categories are enumerated, but the list is non-exhaustive and the statute contemplates new methods of expression. 17 U.S.C. § 102(a) (2017). The work is fixed when it is embodied with the author’s authority in either a copy or

origin; originator; maker.”¹² The originality requirement entails at least some “intellectual invention.”¹³ Still, the degree of originality required is low—independent creation by an author with minimal creativity is sufficient.¹⁴ Even a selection or arrangement of individually non-copyrightable elements may give rise to a copyright, albeit only in the creative arrangement.¹⁵ In contrast, when telephone books containing non-copyrightable factual information are arranged in the standard way (alphabetically by last name), there is no originality.¹⁶ The Supreme Court has rejected the historic “sweat of the brow” doctrine, which emphasized that copyright was the reward for an author’s time, effort, and expense.¹⁷ Copyright must have some limits: “not all copying . . . is copyright infringement.”¹⁸

As copyright arises automatically in all works of authorship that are fixed in a tangible medium, it is important that the doctrine maintains existing limitations to avoid impoverishing the public domain. The doctrines to follow provide some of these limitations.

2. Key Limitations on Copyrightable Subject Matter

a. Useful Articles

Two-dimensional and three-dimensional pictorial, graphic, and sculptural works are considered copyrightable subject matter; however, the copyright cannot be aimed at protecting the design of a useful article.¹⁹ A “useful article” has some “intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey

phonorecord, and it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101 (2017).

12. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884).

13. *Id.*

14. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 346 (1991).

15. *Id.* at 348.

16. *Id.* at 361–62.

17. *Id.* at 359–60 (expressly discarding the “sweat of the brow” doctrine in favor of the originality doctrine as the touchstone for copyright eligibility). The quintessential “sweat of the brow” discussion is found in *International News Service v. Associated Press*, 248 U.S. 215, 245 (1918).

18. *Feist*, 499 U.S. at 361.

19. 17 U.S.C. § 101 (2017) (“Such [pictorial, graphic, and sculptural] works shall include works of artistic craftsmanship *insofar as their form but not their mechanical or utilitarian aspects are concerned*; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”) (emphasis added).

information.”²⁰ Such articles include clothing or machinery.²¹ However, separable creative expressions applied to useful articles are protectable as pictorial, graphic, and sculptural works.²² To note a common example, a floral relief carved on a chair can be copyrighted, as it adds no functionality to the chair.²³ However, the design of the chair cannot be copyrighted.²⁴ Thus, although a bicycle rack was based on wire sculptures and arguably was more artful than other racks, the design could not be separated from its functionality, because each element of the design was chiefly influenced by utilitarian considerations.²⁵

b. The Idea/Expression Dichotomy

Factual material cannot be original, and therefore cannot be copyrightable by itself.²⁶ Where copyrightable material is mixed with facts or ideas, the copyright can only extend to protect the original expression of the author.²⁷ “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”²⁸

Similarly, when there are only a limited number of ways—or just one way—to express an idea, the expression is said to merge with the idea.²⁹ For example, if copyrights were permitted in such works as the instructions for entering a sweepstakes, there might be no substantially non-infringing way to communicate the procedure required for the sweepstakes entry.³⁰ A “thin” copyright might be allowed, meaning that

20. *Id.*

21. *Copyright Registration for Pictorial, Graphic, and Sculptural Works*, United States Copyright Office Circular 40, at *2, <http://copyright.gov/circs/circ40.pdf>.

22. 17 U.S.C. § 101 (2017).

23. H.R. Rep. 94-1476, 55, 1976 U.S.C.C.A.N. 5659, 5668.

24. *Id.*

25. *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1147 (2d Cir. 1987); *Ribbon Rack*, <http://www.ribbonrack.com/> (showing photographs of the bicycle rack in question). See generally *Varsity Brands, Inc. v. Star Athletica, LLC*, 137 S. Ct. 1002 (2017) (upholding the separability test and finding that the chevrons and other shapes on cheerleading uniforms were separable and therefore protectable designs, since they would be protectable if painted on a canvas rather than sewn on clothing).

26. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 346, 348–49 (1991).

27. *Id.*

28. 17 U.S.C. § 102(b) (2017); see also *Baker v. Selden*, 101 U.S. 99 (1879) (holding that blank accounting books are not copyrightable, nor is the method of accounting underlying the author’s work).

29. *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675, 678–79 (2d Cir. 1967) (holding that sweepstakes rules could not be copyrighted because the “subject matter would be appropriated by permitting the copyrighting of its expression”).

30. *Id.* at 679.

there is only a thin layer of creative expression overlying facts or ideas, such that only virtually identical copying would constitute infringement.³¹

An arguable outgrowth of the idea/expression dichotomy, the *scènes à faire* doctrine, teaches that “stock characters, settings, or events that are common to a particular subject matter” cannot be copyrighted “because they are commonplace and lack originality.”³² Any elements that may be considered “indispensable, or at least standard, in the treatment of” a given subject fit within this category.³³ The inclusion of such *scènes à faire*—commonplace, rudimentary material—does not defeat copyright registration for the work as a whole, if it is otherwise sufficiently original.³⁴ The doctrine merely aims to preserve stock thematic content for other authors who wish to treat a topic as it is normally treated, without granting to any one author a monopoly over a particular genre or storyline. In addition, it helps constrain the breadth of liability for copyright infringement.³⁵ If elements that are considered *scènes à faire* were covered by copyright, then it would be difficult to determine whether an author extracted her stock content from the public domain or from copying. As a result, authors would be unable to write without seeking numerous advance permissions after attempting to determine the original author.³⁶ For example, a police procedural story long would have been copyrighted out of existence if common, unoriginal elements such as foot chases, seedy underworld characters, or an urban slum setting were protectable.³⁷

II. CHARACTER COPYRIGHT

A. An Overview of the Doctrine

1. “Sufficiently Original”

The doctrine of character copyright is another area where courts have imposed additional limitations on the monopoly granted by copyright. When an author expresses a character, that character constitutes only a part of that author’s larger expression. However, many

31. *Id.* (rejecting the “thin” approach but noting that other circuits follow it).

32. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(I). (3d ed. 2014).

33. *Id.*

34. *Id.*

35. *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004).

36. *Id.*

37. *See id.* (citing *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (using an example of police fiction to illustrate *scènes à faire* more concretely)).

storylines are equipped with a panoply of supporting and minor characters. These may serve as plot devices, comic relief, or even just a backdrop for a more realistic microcosm. The chorus in theater, the extras in film, and the background characters in books remind us that our life is populated with people that may drift through or even minutely affect our story.

Characters cannot be separately registered for copyright protection, although they may receive protection as part of the broader work if they contain sufficient original authorship.³⁸ Even when a character is “sufficiently original” to merit protection, that protection is limited to the artistic expression of the character.³⁹ Public use of the name or general idea underlying the character—due to the guiding principles of the idea/expression dichotomy—does not by itself give rise to infringement.⁴⁰ Therefore, courts must determine whether a character is sufficiently original.

The Seventh Circuit has illustrated the slippery slope that arises in determining whether a character is stock or original: “If a drunken old bum were a copyrightable character, so would be a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels, a masked magician . . .”⁴¹ In total, a character must avoid the pitfall of being a stock character to undergo the courts’ evaluation of sufficient originality. Characters like drunken old bums and common story elements like foot chases are ineligible for copyright protection despite the addition of expressive elements. In other words, courts decline to consider stock characters as having any expressive content.

2. *Applying the Idea/Expression Dichotomy*

When a character does surpass the sufficiently original threshold, “the original, visual aspects of a character may be protected . . . This may include the physical attributes of the character, such as facial features and specific body shape, as well as images of clothing and any other visual elements.”⁴² Conversely, a character’s concept, general personality, conduct, temperament, or costume cannot be covered by the copyright.⁴³ Note the tension between protectable “images of clothing” as physical manifestations of the character’s appearance, and “costume”

38. COMPENDIUM (THIRD) § 313.4(H).

39. COMPENDIUM (THIRD) § 911.

40. COMPENDIUM (THIRD) § 313.4(H).

41. *Gaiman*, 360 F.3d at 660.

42. COMPENDIUM (THIRD) § 911.

43. COMPENDIUM (THIRD) § 911.

as the general idea regarding the type or color scheme of clothing that the character wears.⁴⁴ Again, the principle is the idea/expression dichotomy: an author may exclude others from using his particular original expression of a magician, for example, but he may not prevent other authors from creating magician characters. Therefore, for sufficiently original characters, courts must tease out protectable artistic expressions and leave behind any underlying ideas.

For example, a sufficiently original character—say, Sherlock Holmes⁴⁵—has protectable artistic expression layered over the otherwise generic concept of a keenly observant detective. Consider the attributes that make Sherlock Holmes different from another detective, Hercule Poirot.⁴⁶ The distinctly British Holmes is known for his drug use, the hapless omnipresence of his associate Dr. John Watson, and a bohemian manner of housekeeping at odds with his methodical mind.⁴⁷ In contrast, the Belgian Poirot is as meticulous outwardly as he is inwardly, with a special obsession with his carefully waxed mustache.⁴⁸ Poirot is portrayed as small in stature,⁴⁹ while Holmes cuts a more vital figure, often involved in combat.⁵⁰ The idea/expression dichotomy calls for a character copyright to be carefully defined to ensure that future stories have a detective to solve their mysteries, but not necessarily a Holmes.⁵¹

44. However, a costume that is three-dimensional and wearable, such as a Halloween costume, may be copyrightable to the extent that it survives the useful article analysis, *i.e.* it has artistic elements separable from the utilitarian concerns of clothing. *See, e.g.*, *Chosun Intern., Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2d Cir. 2005); *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468 (6th Cir. 2015), *aff'd*, 137 S. Ct. 1002 (2017); *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, 912 F.2d 663 (3d Cir. 1990); *cf. Whimsicality, Inc. v. Rubie's Costume Co., Inc.*, 891 F.2d 452 (2d Cir. 1989).

45. Sherlock Holmes was first introduced in 1887 in the short story “A Study in Scarlet,” published in *Beeton's Christmas Annual* and written by Sir Arthur Conan Doyle. Holmes would continue to feature in Conan Doyle's stories until his exit in the “The Final Problem,” published in *Strand Magazine* in 1893, though he would be resurrected and featured in other media over time. Encyclopædia Britannica, “Sherlock Holmes,” <https://www.britannica.com/topic/Sherlock-Holmes>.

46. Hercule Poirot was a fastidious detective first introduced in 1920 in the novel *The Mysterious Affair at Styles*, by Agatha Christie. He would feature in a number of her works, exiting in *Curtain* in 1975. Encyclopædia Britannica, “Hercule Poirot,” <https://www.britannica.com/topic/Hercule-Poirot>.

47. Encyclopædia Britannica, “Sherlock Holmes,” <https://www.britannica.com/topic/Sherlock-Holmes>.

48. Encyclopædia Britannica, “Hercule Poirot,” <https://www.britannica.com/topic/Hercule-Poirot>.

49. *Id.*

50. Encyclopædia Britannica, “Sherlock Holmes,” <https://www.britannica.com/topic/Sherlock-Holmes>; The Arthur Conan Doyle Encyclopedia, “Sherlock Holmes,” https://www.arthur-conan-doyle.com/index.php?title=Sherlock_Holmes.

51. The original short stories introducing Sherlock Holmes have passed into the public

*B. The Evolution of Character Copyrightability**1. Judge Learned Hand's Influence*

As with many doctrines, character copyright looks back to Judge Learned Hand's jurisprudence for its origins. His seminal discussion of the appropriateness of character copyright occurred in 1930.⁵² In *Nichols v. Universal Pictures Corporation*,⁵³ the plaintiff was the author of a play, and the defendant was the author of an allegedly infringing motion picture.⁵⁴ At their core, both works featured a forbidden love between the children of Irish and Jewish parents, respectively.⁵⁵ The court acknowledged that at least some of the author's first work belonged to the public domain, noting that "her copyright did not cover everything that might be drawn from her play . . . We have to decide how much . . ."⁵⁶ The reason for such a determination was to ensure that any copyright in the play would cover only the author's expression, not the ideas needed by other authors to treat a similar subject.⁵⁷ The two plays in question had two sets of common characters: two lovers that were "so faintly indicated as to be no more than stage properties," and two fathers.⁵⁸

The court expressed a general hesitation to grant monopoly in a character.⁵⁹ Judge Learned Hand wrote that a copying author might:

so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that . . . he cast a riotous knight who kept wassail to the discomfort of his household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's 'ideas' in the play . . . [T]he less developed the character, the less they can be copyrighted . . .⁶⁰

In other words, characters ought to be left in the public domain unless they are so well-defined and original as to become proprietary. By this measure, the secret lovers were neither original nor well-developed; therefore, even if the defendant did copy his frustrated lovers

domain, enabling modern writers to use his character as it was defined in the first stories, but leaving out any added characteristics of the later, still-copyrighted stories. *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496 (7th Cir. 2014).

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

53. *Id.*

54. *Id.* at 119.

55. *Id.* at 119–20.

56. *Id.* at 122.

57. *Id.*

58. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

59. *Id.* at 121.

60. *Id.*

from the plaintiff, those characters were not protected by copyright.⁶¹ The lovers' fathers may have been better described in the play, but they were "low comedy" stereotypes of Jewish and Irish men; as such stock characters, or *scènes à faire*, the fathers were ineligible for protection regardless of originality.⁶² This first consideration of character copyright engendered a limited doctrine that helped encourage authors to draw from a vast public body of inspiration, while refusing to grant further rewards to an author who did not add her own expression to either a generic character or a well-worn stereotype.

2. *A Tale of Two Tests*

a. *The "Sam Spade Test"*

Following Judge Learned Hand's analysis, character copyright remained elusive, particularly with respect to literary characters lacking a visual representation. In a 1954 case, *Warner Bros. Pictures v. Columbia Broadcasting System*,⁶³ author Dashiell Hammett argued that his detective character, Sam Spade,⁶⁴ was not licensed for the creation of derivative works along with the rest of *The Maltese Falcon*.⁶⁵ The licensee of *The Maltese Falcon* story for radio, television, and movie development had sued Hammett for infringement, after Hammett had published new stories featuring Sam Spade and licensed the *Falcon* characters—but not the *Falcon* story itself—for additional derivative works.⁶⁶ The Ninth Circuit noted that where the character "constitutes the story being told," he is a copyrightable element; where he "is only the chessman in the game of telling the story he is not within the area of protection afforded by the copyright."⁶⁷ By being outside the scope of the story's copyright, the character's re-use in another work would be non-infringing.⁶⁸ This rather unsatisfying test for copyright eligibility—which was arguably outside the scope of an otherwise plain case of contract interpretation—became known as the "Sam Spade test."⁶⁹

The Ninth Circuit reasoned that Congress did not intend the nonexclusive sale of a copyright to foreclose an author's right to create

61. *Id.* at 121–22.

62. *Id.* at 122.

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

64. Sam Spade was first introduced in *The Maltese Falcon* by Dashiell Hammett in 1930. *Id.* at 945.

65. *Warner Bros.*, 216 F.2d at 949–50.

66. *Id.* at 948.

67. *Id.* at 950.

68. *Id.*

69. See *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1451 (9th Cir. 1988) (criticizing the *Warner Bros.* decision).

additional stories with his own characters, particularly where the characters are merely “chessm[e]n.”⁷⁰ Although a character *may* be licensed separately from its original story, a license may not be necessary because some characters are not covered under the original story’s copyright once separated from that story.⁷¹ In other words, unoriginal or stock characters need not be licensed for use in derivative works, as they are only copyrighted to the extent of the author’s exact original expression in the author’s copyrighted work. The next author in need of such a stock or unoriginal character may freely use it. Therefore, there could be no infringement between *The Maltese Falcon* and any new Sam Spade adventures.⁷² While the old and new works followed Sam Spade in a *noir*-style short story involving a “complicated search for a lost article of fabulous value,” the new story was not so like the *Falcon* as to be practically the same and the characters were merely storytelling “vehicles.”⁷³

Without directly saying it, the Ninth Circuit seemed to be invoking the *scènes à faire* doctrine in its consideration of Sam Spade—particularly in its brief discussion of the similar styles, settings, character cast, and subject matter.⁷⁴ If not, then the court arguably prevents character copying from ever being a basis for infringement, despite originality.⁷⁵ After all, if use of the same lead character in two stories does not speak to substantial similarity, it is difficult to imagine a character original enough or similar enough to somehow pass the threshold. Later, in *Gaiman v. McFarlane*,⁷⁶ Judge Richard Posner criticized the Sam Spade result for that reason and considered its holding to be contingent on two facts: (1) that Hammett wished only to use his own character in future works, while his own licensee was attempting to exclude him from such use, and (2) that despite a detailed description of Sam Spade’s physical appearance, “[t]he description of a character in prose leaves much to the imagination,” unlike a visual character.⁷⁷ A

70. *Warner Bros.*, 216 F.2d at 950.

71. *Id.*

72. *Id.* at 951.

73. *Id.*

74. *See id.* at 951.

75. Indeed, despite articulating the “Sam Spade test,” *Warner Bros.* is cited for the proposition that, ordinarily, characters are not copyrightable. *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1451 (9th Cir. 1988).

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

77. *Id.* at 660. The Seventh Circuit briefly noted that it considered Sam Spade to be a “famously distinctive” character, in contrast to the Ninth Circuit’s decision. *Id.* Distinctiveness, however, is the province of trademark law. Courts’ confusion of distinctiveness with the tests for character copyrightability is another reason for a new, clearer standard in this area of law.

reader must “complete[] the work in his mind,” while moviegoers and comic-book readers passively receive prepared images.⁷⁸ These received images create a stronger impression of a character on the mind of the audience, such that the character would be recognizable in other settings.⁷⁹

b. The Delineation Test

Later, beginning in 1978, the Ninth Circuit would move away from the Sam Spade decision without expressly overruling it, seemingly relaxing the standard for character copyrightability. In *Walt Disney Productions v. Air Pirates*,⁸⁰ the Ninth Circuit cabined its *Warner Bros.* decision by stating that “it is difficult to delineate distinctively a literary character . . . [W]hile 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.”⁸¹ The court therefore seemed to confine the use of the “Sam Spade test” to literary characters, while approving another test for visual characters that hinged on an author’s ability to “delineate distinctively,” likely using visual expressions.⁸² The benchmark for sufficient delineation hearkens back to Judge Learned Hand’s discussion in *Nichols* and the *scènes à faire* doctrine: is the character so well-defined that it is more than a trope?

In *Air Pirates*, the Ninth Circuit applied its delineation test to Mickey Mouse⁸³ to determine if Disney could assert its copyright against parodic comic books featuring the famous mouse.⁸⁴ The case was decided under a previous version of the Copyright Act, which allowed for copyright in all copyrightable component parts of a work—including, under a line of older case law, characters.⁸⁵ As discussed, the court refused to follow the “Sam Spade test” and found that the cartoon Mickey was sufficiently delineated to be copyrightable, apparently

78. *Id.* at 661.

79. *Id.* Arguably, the court is continuing to borrow from trademark law in considering the impression of a character on the mind of an audience member. Ordinarily, this would speak to the distinctiveness of a mark and the scope of protection afforded it.

80. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

81. *Id.* at 755. This language predates Judge Posner’s criticism of the “Sam Spade test” in *Gaiman*, although both *Air Pirates* and *Gaiman* were preoccupied with the difference between visual and literary characters. *See supra* text accompanying notes 76–79.

82. *Id.*

83. Mickey Mouse’s most notable early appearance was in the cartoon short “Steamboat Willie,” in 1928, following his creation by Walt Disney and Ub Iwerks. Encyclopædia Britannica, “Mickey Mouse,” <https://www.britannica.com/topic/Mickey-Mouse>.

84. *Air Pirates*, 581 F.2d at 753.

85. *Id.* at 754.

relying on its fame and well-known visual aspect.⁸⁶ Had the court applied the “Sam Spade test,” it is unlikely Mickey would have obtained the same deferential treatment—arguably, the Mouse is the vehicle for storytelling in the same way that Sam Spade was. While a central character in many cartoons, Mickey Mouse is little more than a cartoon animal with a quick wit. Of course his visual expression is protectable, despite relatively minor changes over time, but it is unclear whether Mickey Mouse merits protection because he is an original character from copyrighted works, or because he has become so distinctive that he is a trademark for Disney. The question of whether courts are simply rewarding authors for the creation of successful, episodic characters overshadows the character copyrightability doctrine—including the later *Towle* decision.

C. Data Points in an Unpredictable Doctrine

Like other bodies of common law, the character copyright question is litigated largely through analogy to a tangled web of decisions. Although the modern delineation test purports to weed out those characters that are insufficiently described to be within a work’s copyright, most decisions simply can be reframed so that the character seems to be *scènes à faire*. The resulting doctrine operates as an exercise in arguing about whether there is truly anything new under the sun.⁸⁷ A number of problematic decisions have issued using the delineation test—sometimes in conjunction with the Sam Spade test—culminating in *Towle* in 2015.

In *Olson v. National Broadcasting Company*,⁸⁸ the television characters at issue were only depicted by “three- or four-line summaries in the . . . screenplay, plus whatever insight into their characters may be derived from their dialogue and action.”⁸⁹ Although the characters were not necessarily stock under the *scènes à faire* doctrine, what they said and did was not enough for the copyright in the script to cover the characters.⁹⁰ Since the copyright in a television show comprises the screenplay as a literary work,⁹¹ this result seems logical: with the

86. *See id.* at 755.

87. Ecclesiastes 1:9–10 (“So there is nothing new under the sun./ Is there anything of which one might say, ‘See this, it is new?’”).

88. *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446 (9th Cir. 1988).

89. *Id.* at 1452.

90. *Id.* at 1452–53.

91. A copyright only arises in a work of authorship fixed in a tangible medium. 17 U.S.C. § 102(a) (2017). The rights to perform and display a copyrighted work are then granted to the author as part of his bundle of rights. 17 U.S.C. §§ 101, 106(4)–(5) (2017). Therefore, the copyright in television shows and motion pictures cover the underlying scripts, as literary

copyright in the screenplay, and the screenplay containing only limited descriptions of the characters, it follows that the copyright with respect to the characters should not extend very far. Similar characters created for a different screenplay should not infringe, as insufficiently delineated characters have few particular traits and therefore are too easily called similar. Only the exact description of the character, as stated in the copyrighted screenplay, can be protected from copying. Such a scheme of protection generally rewards the author that spills a great deal of ink on original character development and refuses to punish alleged copying when characters are only vaguely outlined.

District courts within the Ninth Circuit's jurisdiction have protected characters that include the tenacious boxer, Rocky Balboa;⁹² the suave spy, James Bond;⁹³ and the havoc-wreaking Godzilla.⁹⁴ The first two cases wrestled with an articulation of the character copyright test and settled the matter by applying both the "Sam Spade test" and the delineation test, where either was sufficient to show copyrightability.⁹⁵ Despite these precedents and proceeding in the same district court, the analysis of Godzilla focused exclusively on the delineation test, without stating why.⁹⁶

In *Anderson v. Stallone*, following three successful *Rocky* films written by and starring Sylvester Stallone, a screenwriter wrote and submitted to the same production company his own treatment for a fourth *Rocky* film; naturally, he used the same cast of characters.⁹⁷ Stallone and the production company heard the screenwriter's pitch, entered some preliminary contract discussions, but chose not to purchase the treatment.⁹⁸ However, the writer alleged that his work was used as the basis for Stallone's subsequent *Rocky IV* script, and he sued for copyright infringement, among other claims.⁹⁹ The court held that the writer was not entitled to copyright protection for his movie treatment because the treatment itself was an unauthorized derivative work of Stallone's copyrights in the original *Rocky* trilogy.¹⁰⁰

Crucial to the analysis was the wholesale importation of Stallone's

works, and airing the television show is an exercise of the rights to the audiovisual work.

92. *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *6-8 (C.D. Cal. Apr. 25, 1989).

93. *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296-97 (C.D. Cal. 1995).

94. *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998).

95. *Metro-Goldwyn-Mayer*, 900 F. Supp. at 1296; *Anderson*, 1989 WL 206431 at *7.

96. *Toho*, 33 F. Supp. at 1215; *cf. Metro-Goldwyn-Mayer*, 900 F. Supp. at 1296.

97. *Anderson*, 1989 WL 206431 at *1.

98. *Id.*

99. *Id.* at *1-2.

100. *Id.* at *11.

original cast of characters.¹⁰¹ The court declined to consider both whether any single character was covered under Stallone's copyright and whether any character was so well-delineated that it could be protected from outright copying.¹⁰² It held that the characters and their relationships were so integral to Rocky's story that they satisfied the "Sam Spade test," because those relationships constituted the story being told.¹⁰³ Further, the first three movies so highly developed the characters, their mannerisms, and their physical appearances that the characters were protected under Stallone's copyrights as a matter of law.¹⁰⁴

Therefore, the *Anderson* result was a relatively clear-cut application of character copyright doctrine. Although the court couched its decision in the importance and delineation of the *Rocky* characters' relationships, the critical fact seemed to be that a second author had replicated another author's cast of characters and transplanted them into his own work, intending them to be identifiable in name, manner, and appearance as the same as the original author's. However, the cases following *Anderson* had a much more difficult time addressing characters that were not identical or that have changed over time.

For example, in *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Company*, the court addressed whether James Bond's evolution over a series of works defeated his coverage under copyright.¹⁰⁵ The court re-formulated the delineation test, calling for "consistent, widely identifiable traits."¹⁰⁶ Sufficient delineation is achieved with such traits, relative to the consuming audience. If that audience can see the character, fewer traits may be needed; if the audience reads about the character, much more may be required. The identifiability requirement may explain why results seem to correlate with the author's market saturation. Despite the fact that multiple actors have played James Bond, the court found that James Bond had enough consistent traits to remain the same character regardless of the change in actor, year, setting, and story.¹⁰⁷ These traits were identified as "his cold-bloodedness; his overt sexuality; his love of martinis 'shaken, not stirred'; his marksmanship; his 'license to kill' and use of guns; his physical strength; his

101. *Id.* at *8.

102. *Id.*

103. *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *8 (C.D. Cal. Apr. 25, 1989).

104. *Id.* at *7.

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

106. *Rice v. Fox Broad. Co.*, 330 F.3d 1175 (9th Cir. 2003).

107. *Metro-Goldwyn-Mayer*, 900 F. Supp. at 1296.

sophistication.”¹⁰⁸

While the reasoning seems sound—a character that is identifiable despite new surroundings is copyrightable—the actual traits that the court relied upon seem weak. The concept of a witty, alpha-male, world-class spy hardly seems distinct from the witty, alpha-male, world-class detective that we met in Sam Spade. If it is a visual depiction that makes James Bond better delineated than Sam Spade, why the court’s focus on non-visual traits to demonstrate consistency? Further, if non-visual traits can be the key delineators, then the favoritism toward visually depicted characters over literary characters seems unfounded—particularly when their appearances change, as with James Bond’s series of actors. Finally, speaking to the court’s selected traits, a spy that was not at least somewhat cold-blooded, a good marksman, and in possession of a passing familiarity with guns would be useless. Presumably the spy need not necessarily be a sexual, strong, sophisticated ladies’ man as with James Bond, but the fact that a spy would be such a fellow is certainly not beyond the pale. Even his affinity for martinis seems only to play into his hyper-masculine stock image: the man knows what he wants, including in a stiff drink. (Although, arguably, using the martini scene is a uniquely delineated way of portraying that masculinity.) Regardless, it seems questionable that a character is better delineated with the addition of a predictable stock set of traits, like when a typical spy is given the typical characteristics of a ladies’ man. Even if “license to kill” as a phrase could perhaps be copyrighted,¹⁰⁹ the concept of a spy permitted to kill is uncopyrightable as an idea. All in all, the court’s analysis seems to not only ignore the well-established *scènes à faire* doctrine, but also impermissibly considers uncopyrightable ideas as evidence of expressive character delineation.

Similarly, in *Toho Company v. William Morrow & Company*, the court relied on the consistent traits factor to differentiate Godzilla from other characters in fiction, thereby considering him better delineated than a stock monster character despite his changed traits over a series of works.¹¹⁰ Although over the course of the films in question, Godzilla transformed from an evil character into a good one, the court identified that Godzilla was consistently a “pre-historic, fire-breathing, gigantic

108. *Id.*

109. Subject to restrictions on the copyright of short phrases, “license to kill” could be considered a copyrightable element of the larger, clearly copyrightable works involving James Bond. *Copyright Protection Not Available for Names, Titles, and or Short Phrases*, *supra* note 6.

110. *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998).

dinosaur alive and well in the modern world.”¹¹¹ These traits were called “highly delineated” and “contain[ed] the requisite attribute of originality.”¹¹² Therefore, Godzilla was found copyrightable under the delineation test alone.¹¹³

The *Toho* case seems as troubling as the *Metro-Goldwyn-Mayer* result, if not more so. First, as in *Metro-Goldwyn-Mayer*, the traits highlighted as consistent in *Toho* do not seem to make Godzilla any better delineated than a dragon, dinosaur, or other stock beast that threatens some corner of the world. That he breathes fire makes him distinct from a stock dinosaur, but also moves him somewhat closer to a stock dragon.

Second, a technical question arises: is Godzilla a character in the traditional sense, or a plot device? His actions and appearance drive the story, but the real story also seems to be more about how people deal with his arrival than about the dinosaur itself. *Jurassic Park*¹¹⁴ and its offshoot *Jurassic World*¹¹⁵ both feature pre-historic dinosaurs in the modern world. *Jurassic Park* unleashes a variety of dinosaurs on unwitting scientists, while *Jurassic World* arguably follows a single dinosaur, the bioengineered *Indominus rex*, and the humans that fight against it.¹¹⁶ It seems unlikely that the dinosaurs from either movie—regardless of centrality to the plot—would be considered characters. The dictionary definition of character does not contemplate non-human characters.¹¹⁷ While characters clearly can encompass non-humans—think Disney’s Mickey Mouse¹¹⁸—the non-human characters that we love have been made deeply anthropomorphic. In *Toho*, while it is doubtful that Godzilla is particularly anthropomorphic in any of its appearances, the court neither relies upon nor discusses anthropomorphism as a factor for delineation in a non-human would-be character.¹¹⁹ This omission becomes problematic when the Ninth Circuit

111. *Id.*

112. *Id.* (citing *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978)).

113. *Toho*, 33 F. Supp. at 1215.

114. *Jurassic Park* was originally a novel. It was later a movie by the same name. The plot involves a dinosaur zoo whose security capabilities become overwhelmed, thus letting loose the dinosaurs to wreak havoc. MICHAEL CRICHTON, *JURASSIC PARK* (1990); *JURASSIC PARK* (Universal Pictures 1993).

115. *Jurassic World*, an offshoot of the *Jurassic Park* series, closely follows a single, particularly formidable dinosaur—much like *Godzilla*. *JURASSIC WORLD* (Universal Pictures 2015).

116. *Id.*; cf. *JURASSIC PARK* (film), *supra* note 114.

117. “[O]ne of the persons of a drama or novel; the personality or part which an actor recreates.” Merriam Webster, at <http://www.merriam-webster.com/dictionary/character>.

118. To name one backed by case law: Mickey Mouse; see *supra* text accompanying and following notes 80–86.

119. See generally *Toho*, 33 F. Supp.

turns to *Towle*.

In *Rice v. Fox Broadcasting Company*,¹²⁰ a masked magician that performs and then teaches his magic tricks in a video was not copyrightable.¹²¹ The Ninth Circuit adopted the delineation test as formulated in the foregoing district court cases, focusing on “consistent, widely identifiable traits.”¹²² In *Rice*, a magician had only appeared in one modest home video, while dressed in traditional magician suit-and-cape garb and performing magic tricks.¹²³ The character was not distinguishable from other magicians.¹²⁴ Another factor, then, may be the extent to which a character’s speech and conduct differentiate him from a stock character—a requirement that hearkens back to *Olson*.

In *Rice*, the court still alternatively evaluated the “story being told” “Sam Spade test” for copyrightability.¹²⁵ The magician, as the tool for communicating how to perform tricks, was just like the mere “chessman” under that analysis.¹²⁶ His dialogue was limited to some commentary and a narrative of how the tricks shown were performed.¹²⁷ Also, what the plaintiff considered the story—a rogue magician willing to disguise himself, risk the ire of his colleagues, and disclose the trade’s secrets—was more a demonstration of how to recreate popular magic.¹²⁸ Therefore, the character was not copyrightable under either of the two tests coexisting in the Ninth Circuit.¹²⁹ Following the *Rice* court’s application of both tests, it remains unclear whether the “Sam Spade test” is only appropriate for literary characters, if it is viewed as a second step in the copyrightability analysis, or if it is something else altogether.

In the Seventh Circuit’s *Gaiman* decision, an “unexpectedly knowledgeable old wino” named Nicholas Cogliostro¹³⁰ was depicted in the comic-book series *Spawn* and later deemed copyrightable.¹³¹ Not only does the case provide a recent counterpoint to the older and more conservative *Olson* opinion, it demonstrates how important the court-

120. *Rice v. Fox Broad. Co.*, 330 F.3d 1175, 1170 (9th Cir. 2003).

121. *Id.* at 1175.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1176.

126. *Rice v. Fox Broad. Co.*, 330 F.3d 1175, 1176 (9th Cir. 2003).

127. *Id.*

128. *Id.*

129. *Id.* at 1175 (citing the “especially distinctive” and “story being told” tests side by side, where success under either test alone would give rise to a copyright in the character).

130. Cogliostro first appeared in *Spawn #9* as a hobo, later revealed to be another Hellspawn, who has an anti-destructive influence on *Spawn*. NEIL GAIMAN (w) & TODD MCFARLANE (a), *SPAWN VOL. 1 SER. NO. 9: ANGELA!* (1993).

131. *Gaiman v. McFarlane*, 360 F.3d 644, 660–61 (7th Cir. 2004).

constructed character concept, including names, has become. In *Gaiman*, the court found the character's "age, obviously phony title ('Count'), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character."¹³² Without these additional traits, the court noted that Cogliostro would have undoubtedly been a stock character:¹³³ the drunken bum.¹³⁴ As a visual character, Cogliostro is more susceptible to sufficient delineation by the author. There is no question that the character was copyrightable; however, the court framed its holding in a suspiciously *Olson*-like three-line summary of traits that included facial features akin to a historical figure's, name and title, dialogue, actions, and age.¹³⁵

Overall, these cases demonstrate that the character copyright doctrine functions well when courts protect the precise expression of a visually depicted character that is being copied into an unauthorized work by another author—as in *Anderson*. However, the *Metro-Goldwyn-Mayer* and *Toho* courts amalgamated an overarching character concept, built out of the court's chosen traits, before comparing the original work to the allegedly infringing work to evaluate substantial similarity. The problem is that in the court's identification of certain traits that shape a character, the original character is reduced nearly to an idea, losing the nuances that might differentiate it from the allegedly infringing work. Authors that appear to invoke this character concept are found to infringe; the more famous the original character, the easier it is for new authors to have raised its specter through a mere handful of commonalities. The result is an expansion of the scope of the copyright protection.

Names cannot be copyrighted,¹³⁶ so name is an odd fact for the courts to rely upon except to the extent that a named character may be better delineated than an unnamed character. While that seems obviously true, it is unhelpful as a differentiator. Many characters, well-delineated and stock, may be named, and few unnamed characters seem likely to be the subject of a copyright dispute. It seems naive to think

132. *Gaiman*, 360 F.3d at 660.

133. *Id.* Query how delineating traits need to be to constitute an overall well-delineated character; compare Godzilla's traits, see *supra* text accompanying notes 111–112, to Cogliostro's traits here, or to the "three- or four-line summaries" of characters at issue in *Olson*, see *supra* text accompanying notes 89–90.

134. See discussion *supra* Part II.A.1.

135. See *Gaiman*, 360 F.3d at 660–61. Admittedly, the amount of ink spilled in giving life to Cogliostro is at issue, not the amount of ink spilled in the court's opinion. Even so, the *Gaiman* court left much to be desired when it stated the short and relatively nondescript list of facts on which it based its holding.

136. *Copyright Protection Not Available for Names, Titles, and or Short Phrases*, *supra* note 6.

that, for example, if *Jurassic World* had called its central beast “Godzilla,” there would have been no copyright-related backlash. Indeed, under the *Toho* court’s description of Godzilla, *Indominus rex* could be infringing but for its lack of fire-breathing ability; under *Gaiman*, use of the Godzilla name would surely tip the balance toward infringement even if the fire-breathing trait was absent. The question becomes whether characters—or famously recognizable plot elements, like Godzilla—are in fact being protected as trademarks that invoke the franchises that birthed them.

Due to these decisions, character copyright remained a tangled doctrine as the Ninth Circuit neared 2015 and the *Towle* decision. Little clarity was available on what test to use and what factors to weigh in the analysis.

III. BATMAN AND FRIENDS . . . AND THEIR CARS?

A. Superheroes and the Delineation Test

The Second Circuit has focused on the delineation test to rule on the copyrightability of Batman himself and other superheroes.¹³⁷ The earliest of these cases, *Detective Comics v. Bruns Publications*, concerned Superman¹³⁸ and an infringing “Wonderman,” who wore a differently colored costume but otherwise was shown performing the same feats: crushing a gun, stopping a bullet, leaping a building, and championing the oppressed.¹³⁹ The court rejected the argument that Superman was an archetypal character based on a representation of Hercules and other mythological sources.¹⁴⁰ The combined pictorial and verbal representations of Superman evidenced “an arrangement of incidents and literary expressions original with the author” that gave rise to a copyright in the character.¹⁴¹ Notably, however, the court recalled

137. See *Sapon v. DC Comics*, No. 00 CIV. 8992 (WHP), 2002 WL 485730 (S.D.N.Y. Mar. 29, 2002) (holding Batman protected by copyright); *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24 (2d Cir.1982) (assuming copyright for Batman and the Green Arrow); *Detective Comics v. Bruns Publ’ns*, 111 F.2d 432 (2d Cir. 1940) (holding Superman copyrighted); *Detective Comics, Inc. v. Fox Publ’ns, Inc.*, 46 F. Supp. 872 (S.D.N.Y.1942) (directing a verdict for Detective Comics under the same reasoning as *Bruns Publ’ns*, and indeed against that same defendant, without discussion for infringing Batman and Robin with a parallel comic featuring The Lynx and Blackie the Mystery Boy).

138. Superman first appeared in *Action Comics #1* in his classic backstory, as a superpowered child, Clark Kent, who grow up to use his gifts for the world’s good. JERRY SIEGEL (w) & JOE SHUSTER (a), *ACTION COMICS VOL. 1 SER. NO. 1: SUPERMAN: CHAMPION OF THE OPPRESSED* (1938).

139. *Bruns Publ’ns*, 111 F.2d at 433.

140. *Id.* at 433–34.

141. *Id.*

Nichols and limited part of the previously granted injunction to prohibit only close imitations, while expressly avoiding the grant of a monopoly over the idea of a super human who acts for the good of mankind.¹⁴²

In a similar evaluation for Batman¹⁴³ at the district court level, the court echoed themes from the treatment of Godzilla and James Bond: consistent features creating an immediately recognizable identity could preserve copyrightability even when a character is repeatedly adapted.¹⁴⁴ In fact, it was essential that iterations of the “new” Batman must still be fundamentally the “old” Batman.¹⁴⁵ Finding the evolution of the character not to be a bar to copyright,¹⁴⁶ the court went on to consider the characteristics that make Batman unique.¹⁴⁷ “Bat iconography” was discarded as the dispositive feature; other crime-fighting heroes and detectives had used bat-like costume features, bat icons, and bat signal projections.¹⁴⁸ The key protectable elements were Batman’s horned cowl, cape, and the bat symbols on his chest, utility belt, and gloves, as well as a backstory that eschewed super powers in favor of a tragic commitment to stopping crime.¹⁴⁹ Finally, the court noted episodic development of Batman’s character via interaction with others, including Robin and various villains—particularly where Batman refuses to kill, unlike those against him.¹⁵⁰

Superheroes seem more likely to pass the delineation test than many other characters: their abilities, whether innate or technology-driven, are often distinguishable from other superheroes; they are often visually depicted in comic books; they have well-developed characteristics and histories that are integral to how they oppose villains; their appearances are often highly stylized, with elaborate costuming or disguises that maintain some consistency in colors and symbols. Each superhero is designed carefully to stand apart from stock hero ideas, lest it fail

142. *Id.* at 434.

143. Batman, already in black winged cape and gray suit, first appeared in *Detective Comics* #27 to fight crime. BILL FINGER (w) & BOB KANE (a), DETECTIVE COMICS VOL. 1 SER. NO. 27: THE BAT-MAN: THE CASE OF THE CHEMICAL SYNDICATE (1939).

144. *Sapon*, 2002 WL 485730 at *2.

145. *Id.*

146. *Id.*

147. *Id.* at *3.

148. *Id.* “In the film *The Bat Whispers* (1930) the main character wore a black robe with a realistic bat-shaped head, and used a batsignal reflected on a wall. In the 1930’s, Black Bat Detective Mysteries featured a nondescript detective called ‘The Black Bat.’ (Les Daniels, *Batman, The Complete History: The Life and Times of the Dark Knight* 25-26 (1999) (‘The Complete History of Batman’)). A character called the ‘Bat’ debuted in *Popular Detective* magazine in 1934.” *Id.* (internal citations in original).

149. *Id.* at *3-4.

150. *Sapon v. DC Comics*, No. 00 CIV. 8992 (WHP), 2002 WL 485730, *4 (S.D.N.Y. Mar. 29, 2002).

commercially. To that end, each one has a niche: Aquaman has oceanic powers; Captain America adds a retro feel to the classic super-soldier story; Spiderman shoots webs. Thus, the results of these cases seem predictable and fair, particularly when juxtaposed with the struggles that courts have endured while deciding copyrightability for characters that stand out less.

B. But . . . A Car?

In a rather strange twist on character doctrine in *Halicki Films, LLC v. Sanderson Sales and Marketing*, the Ninth Circuit considered whether a car in a film could constitute an independently copyrightable character.¹⁵¹ The movie in question was *Gone in 60 Seconds*, in which a gangster specified forty-eight cars ranging from limos to exotics to be stolen and delivered within five days.¹⁵² Each car was given a codename by the would-be thieves, and “Eleanor” was the codename for a 1973 yellow Ford Mustang.¹⁵³ The Ninth Circuit did not investigate these finer plot points, intending to leave them to the district court:

The Eleanor character can be seen as more akin to a comic book character than a literary character. Moreover, Eleanor “display[s] consistent, widely identifiable traits,” and is “especially distinctive.” In both films, the thefts of the other cars go largely as planned, but whenever the main human character tries to steal Eleanor, circumstances invariably become complicated. In the Original GSS, the main character says “I’m getting tired of stealing this Eleanor car.” And in the Remake GSS, the main character refers to his history with Eleanor. Nevertheless, this fact-intensive issue must be remanded to the District Court for a finding in the first instance as to whether Eleanor is entitled to copyright protection. On remand the court should examine whether Eleanor’s “physical as well as conceptual qualities [and] . . . unique elements of expression” qualify Eleanor for copyright protection.¹⁵⁴

The case was not pursued on remand, so the required “fact-intensive inquiry” was never completed.¹⁵⁵

The court’s *Halicki* decision is problematic as a character copyright precedent for three reasons. First, three different vehicles are identified during the film that the car thieves refer to by the Eleanor codename—which was, again, used to indicate a type of vehicle, not a particular

151. *Halicki Films, LLC v. Sanderson Sales and Mktg.*, 547 F.3d 1213 (9th Cir. 2008).

152. *GONE IN 60 SECONDS* (H.B. Halicki Junkyard and Mercantile Company 1974).

153. *Id.*

154. *Halicki*, 547 F.3d at 1225 (internal citations omitted) (brackets in original).

155. *Id.*

vehicle. Second, the physical attributes of the car—a yellow 1973 Mustang—are not copyrightable under the useful articles doctrine because there are no artistic features that can be separated from the functionality of the car.¹⁵⁶ Third, no characteristics set the Eleanor cars apart as characters. There are virtually no physical attributes that make the Eleanor cars different or better delineated than any other Ford Mustang. There are only two conceptual attributes unique to the Eleanor cars: their codename and difficulty of theft. The fact that the car is hard to steal is better characterized as a plot device, without which the movie would be over quite quickly, rather than a character trait. For these reasons, the Ninth Circuit in *Halicki* missed its chance to clarify the boundaries of character copyright doctrine.

Then, in the 2015 *Towle* decision, the Ninth Circuit failed to make the course correction needed after *Halicki*. In *Towle*, comic book publisher DC Comics, Inc. sued Mark Towle, owner of Gotham Garage.¹⁵⁷ Mr. Towle marketed and sold what he advertised as Batmobile¹⁵⁸ replicas for car collectors, with options for a ready-made or kit-version of the 1966 television Batmobile or 1989 movie Batmobile.¹⁵⁹ Mr. Towle conceded that he was not licensed to sell any DC Comics trademarked or copyrighted materials; in contrast, DC Comics had licensed various producers for the television and movie adaptations, with express permission for the producers to author expressions of the Batmobile.¹⁶⁰ Therefore, DC Comics did not own the copyrights in the Batmobile expressions on which it based the lawsuit.¹⁶¹ For unknown reasons, DC Comics alone filed suit, so that the infringement had to be brought under the character copyright doctrine; unless DC Comics could prove that the Batmobile on the screen was the same as the Batmobile in the comic books, deserving of protection even outside the context of the original authored expressions in the comics, it could not sue. Mr. Towle denied copyright infringement on the basis that the Batmobile as it appeared in the 1966 television show and the 1989 movie was not one and the same character as in DC Comics' expressions.¹⁶²

At the district court level, the Batmobile was found copyrightable due to the following attributes: “one consistent name that identifies [the

156. See discussion *supra* Part I.A.2.a.

157. DC Comics v. Towle, 802 F.3d 1012, 1017 (9th Cir. 2015).

158. The Batmobile first appeared in 1941. *Id.* at 1015.

159. *Id.*

160. *Id.* at 1016–17.

161. *Id.* DC Comics contended that it maintained its merchandising rights, which the court generally accepted as including copyright ownership. This author disagrees.

162. *Id.* at 1017.

Batmobile] as Batman's personal vehicle," consistent use of "high-tech gadgets and weaponry," "bat-like motif," black color, the qualities of being "swift, cunning, strong and elusive," and depiction as a "superhero" in its own right—"Batman's sidekick if not an extension of Batman's own persona."¹⁶³ However, the district court also discussed the Batmobile's potential protectability as a copyrightable sculptural work—an idea the Ninth Circuit declined to reach following its character decision.¹⁶⁴

On appeal, the Ninth Circuit reformulated the character copyrightability test into a three-prong approach to evaluate whether the character: (1) has physical as well as conceptual properties; (2) is sufficiently delineated as to be recognizable whenever it appears through consistent, identifiable traits; and (3) is especially distinctive, containing some elements of original expression.¹⁶⁵ The court theorized that "even when a character lacks sentient attributes and does not speak (like a car)," the character can be protected if the copyrightability test is met.¹⁶⁶

The *Towle* court found that the Batmobile had consistent characteristics through its depiction in film and a television series.¹⁶⁷ A consistent physical appearance was not important, as long as there was evidence of consistent attributes.¹⁶⁸ "The changes in appearance . . . resemble costume changes that do not alter the Batmobile's innate characteristics, any more than James Bond's change from blue swimming trunks (in *Casino Royale*) to his classic tuxedo affects his iconic character."¹⁶⁹ Several physical attributes were cited, including bat-like features, like exaggerated fenders, a curved windshield, a bat emblem, and sometimes bat wings; more power than an ordinary car; and crime-fighting gadgets that change in number and function but are always some new item at the height of technology.¹⁷⁰ Of course, the Batmobile of the 1966 television show and the Batmobile of the 1989 movie are drastically different; the former, including the dramatic fenders and curved windshield cited by the Ninth Circuit, is based on a 1955 Lincoln Futura concept car,¹⁷¹ while the latter featured bits and

163. *DC Comics v. Towle*, 802 F.3d 1012, 1017–18 (9th Cir. 2015) (approving the district court's findings).

164. *Id.* at 1018, n.4.

165. *Id.* at 1021. The test combines elements of previous decisions into the tests, though it notably excludes the "Sam Spade test."

166. *Id.* at 1021–22.

167. *Id.* at 1022.

168. *Id.*

169. *DC Comics v. Towle*, 802 F.3d 1012, 1022 (9th Cir. 2015).

170. *Id.* at 1021–22.

171. "Building the Batmobile Part 1," <https://www.youtube.com/watch?v=FAjt-Vhmwgw>; see also <http://1966batmobile.com/history/futura/>.

pieces of Chevrolet Impala, Honda, and Ferrari cars, plus a custom body.¹⁷² Nonetheless, applying its new test, the Ninth Circuit found the Batmobile copyrightable.¹⁷³

Not only was the Ninth Circuit's decision in *Towle* decided for the wrong reasons under the standards of character copyright, but it failed to correct or clarify the faulty precedent in *Halicki*. Despite the fact that in *Halicki*, the Ninth Circuit suggested but ultimately punted on Eleanor's copyrightability, the *Towle* court held *Halicki* out as a blessing of car characters.¹⁷⁴ Under the *Towle* reasoning, the Batmobile was not only a character in its own right, but an especially distinctive¹⁷⁵ and therefore protected character,¹⁷⁶ despite the separate copyrights in the 1966 *Batman* television series and 1989 *Batman* movie.¹⁷⁷ The *Towle* court simply incorporated all these Batmobile versions into one Batmobile copyright arising out of the comic books.

Taken together, these decisions amount to an expansion of character copyright to include inanimate objects at worst, or mere stock characters at best. With no governing legislation or Copyright Office regulations to guide the doctrine, it is challenging to imagine what pictorial "characters" might *not* be copyrightable.

IV. ANALYSIS

The current state of character copyright is untenable, particularly in the Ninth Circuit. Growth and change are to be expected in any doctrine, but the outer boundaries of character copyright remain unmarked,¹⁷⁸ and a definitive test for protection is still not clearly articulated.¹⁷⁹ There are four key issues with the *Towle* decision. First, the *Towle* court should not have entertained DC Comics' use of the character copyright doctrine at all. Second, even if character copyright was an appropriate vehicle for the infringement claims, the *Towle* court should not have relied so heavily on *Halicki* for the proposition that a car can be a character without providing guidance to screen non-character cars. Third, the

172. "Building the Batmobile Part 2," <https://www.youtube.com/watch?v=uoWv999XU-0>.

173. *Towle*, 802 F.3d at 1022.

174. *Id.* at 1019–20.

175. Furthering the confusion between the trademark standard for distinctiveness and the copyright standard for delineation, the court reiterates the "especially distinctive" language of *Halicki*. *Id.* at 1019 (citing *Halicki Films, LLC v. Sanderson Sales and Mktg.*, 547 F.3d 1213, 1225 (9th Cir. 2008)).

176. *Towle*, 802 F.3d at 1021–22.

177. *Id.* at 1016.

178. Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on A Legal Problem*, 35 CARDOZO L. REV. 769, 786 (2013).

179. *Id.*

Ninth Circuit's test was ill-formulated and missed its chance to clarify character copyright law. Finally, even though the Ninth Circuit likely reached the right result, its reasoning for protecting the Batmobile was improperly based on the inconsistent or uncopyrightable traits of the Batmobile.

A. *Forcing the Suit*

First, momentarily setting aside criticisms of the law, the question of character copyright should not have been before the court. While Mr. Towle's creations were infringing unauthorized copies—he copied the exact expression of the authors of the 1966 and 1989 Batmobiles¹⁸⁰—he was sued by the *wrong plaintiff*.¹⁸¹ DC Comics did not own the copyright in the television series and movie which produced the Batmobile expressions that Mr. Towle then copied.¹⁸² To have standing to sue, DC Comics had to prove that the Batmobile as expressed in those two derivative works was the same Batmobile that appeared in the comics for which DC did hold copyrights—otherwise, the copyright owners of those specific Batmobile models were the producers licensed to create them.¹⁸³ Using the character copyright doctrine was a creative and ultimately successful way to recover for an injury that DC Comics itself did not suffer. The court permitted a forced character copyright analysis to transfer author's rights to DC Comics that DC had previously licensed away.

B. *Misplaced Reliance on Halicki*

Second, even if the character copyright doctrine was properly before the court, the court improperly extended the reach of the doctrine in both *Halicki* and *Towle*. By relying on *Halicki*, the *Towle* court sidestepped the most controversial question in the case: whether a car should be considered a character. Recall that the *Halicki* court emphasized Eleanor's "hard to steal" characteristic as improving its originality, but failed to explain whether originality was measured against other cars generally, other cars stolen in the film, other pseudo-anthropomorphic cars, or some combination thereof.¹⁸⁴ Again, all the

180. *Towle*, 802 F.3d at 1015.

181. *See id.* at 1016–17; *see also supra* text accompanying notes 160–61. Again, DC Comics had licensed the right to create a Batmobile as a derivative work to the producers responsible for the television show and film on which Mr. Towle modeled his copies. DC Comics argued that it had kept its merchandising rights—and therefore its copyrights—despite its licenses. The court agreed; this author disagrees.

182. *See id.*

183. *See id.*

184. *See Halicki Films, LLC v. Sanderson Sales and Mktg.*, 547 F.3d 1213, 1225 (9th Cir.

cars on the list to be stolen in the film had female codenames, and there is no indication that the Eleanor car demonstrated anything in the way of anthropomorphism.¹⁸⁵ The Eleanor cars seemed more to be the protagonist's instrument of demise—ultimately, storytelling tools.¹⁸⁶ Further fact-finding or reconsideration on remand never occurred. Such an opinion should not be relied upon for “cars are characters” precedent.

Despite these shortcomings, the *Towle* court leaned on *Halicki* and little else. The Ninth Circuit spent no time reflecting on the concept of a character-car and the *Halicki* precedent.¹⁸⁷ Instead, it cited *Halicki* for the proposition that a car could be a character and proceeded to apply the character test to the Batmobile.¹⁸⁸ While each Batmobile is certainly covered under the copyright in the medium in which it appears, the Batmobile's eligibility for characterhood is questionable. In this way, *Towle* commits the same error as *Halicki* and worsens the state of the law by blindly continuing down the car-as-character path.

Following the plain meaning principles of legal interpretation, a character is generally a person, animal, or anthropomorphic figure that interacts with others and experiences events. Neither *Halicki* nor *Towle* discussed whether it was important that the cars in question were or were not made more like humans by their authors. In evaluating whether a car could be a character, the Ninth Circuit did not need to take a bright-line position for or against cars as characters. In fact, several cars come to mind that clearly seem to play a character role: Herbie the Love Bug¹⁸⁹ or Christine,¹⁹⁰ for instance. While it is true that characters need not speak or be human, a character by definition is more than a mere object. The rationale is not so much that plot devices do not deserve protection as that plot devices are often *scenès à faire*—the similarities between the allegedly infringing work and the original work must be more than mere stock imagery, story elements, or characters. The *Halicki* and *Towle* decisions both apply the “delineation” test without regard to this threshold inquiry.

C. Flaws in the Test Itself

The third issue with the *Towle* decision is that the Ninth Circuit's

2008).

185. GONE IN 60 SECONDS, *supra* note 152.

186. *Id.*

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

188. *Id.* at 1019–20.

189. Herbie the Love Bug is a sentient 1963 Volkswagen Beetle that can drive itself and interacts with human characters. THE LOVE BUG (Buena Vista Distribution 1968).

190. Christine is a sentient Plymouth Fury that interacts with—or really, violently attacks—human characters. STEPHEN KING, CHRISTINE (1983).

test fails to adequately capture when a character should be covered under the copyright in an original work. The Ninth Circuit stated that a character is protectable when it: (1) has physical as well as conceptual properties; (2) is sufficiently delineated as to be recognizable whenever it appears through consistent, identifiable traits; and (3) is especially distinctive, containing some elements of original expression.¹⁹¹ The first prong seems intended to evoke the traditional *Air Pirates* bias toward protection for visually rendered characters, while the second and third prongs both seem to point to the delineation test developed from *Nichols* onward.

At first glance, these three prongs are the most succinct articulation of character copyright yet, but the Ninth Circuit remains silent on whether and when the “story being told” language of the “Sam Spade test” is relevant. Lower courts are left to wonder whether the “Sam Spade test” ought to be applied only to literary characters, or used at all. For example, the first prong of the new *Towle* test requires physical characteristics in addition to conceptual ones.¹⁹² This requirement either indicates that literary characters are never protectable because they are merely conceptual, or that literary characters must be evaluated under a different, unmentioned standard. The former proposition is unsatisfying: if characters are to receive copyright protection at all, it seems logical that at least some literary characters are entitled to share in that protection. The latter proposition—use of a different standard—seems to point to the “Sam Spade test,” a test that courts have only intermittently applied.

Preference for visual characters makes sense insofar as copyright arises in tangible works of authorship. Characters are always a concept, unless they are rendered in a way that makes the character a tangible, fixed work of authorship.¹⁹³ A visual character is inherently better delineated and described in the copyrighted work, and there is a clear expression of the character to use in the infringement comparison. With literary characters and with characters that have evolved over time, the courts grant a copyright in what is ultimately a court-described character concept, allowing the author to enjoy a broad and, as seen in the scattershot of cases, somewhat unpredictable scope of copyright protection. It is true that having physical characteristics makes a character better delineated, but it is unclear whether the author of a physical character is really getting anything more than the copyright he

191. *Towle*, 802 F.3d at 1021.

192. *Id.*

193. Recall that copyright only arises in original works by authors that have been “fixed” to a tangible medium, like taking pencil to paper. See 17 U.S.C. § 102(a) (2017).

already owns in his work. Therefore, the first prong of the *Towle* test and the cases differentiating literary and visual characters seem redundant considering copyright's normal mode of operation.

The second prong of the *Towle* test is not problematic. It requires a character to be both sufficiently and consistently delineated, thereby incorporating the concerns of prior cases regarding characters that change over time or are depicted in various ways.¹⁹⁴ However, it is important that courts remain careful in applying the “delineation” test encapsulated in this second prong; they have historically looked to uncopyrightable character features—a method that seems to consider a protectable character to be one that is something more than the sum of its (uncopyrightable) parts.¹⁹⁵ The “delineation” test tallies up those story elements that, when combined, give rise to a sufficiently original character.¹⁹⁶ Courts must engage in fine line drawing to tease out that which defines and delineates the character, and that which constitutes plot devices, *scènes à faire*, and undeveloped characters—the tools of storytelling.¹⁹⁷

Finally, the Ninth Circuit's third prong blurs the distinctions between traditional copyright tests and trademark tests. The language of distinctiveness is historically the province of trademark law.¹⁹⁸ The *Towle* court is not the first court to use “distinctive” nearly interchangeably with “delineated” or “original” in character copyright decisions.¹⁹⁹ However, the inclusion of a distinctiveness requirement as its own prong raises questions, such as whether courts intend to import trademark law definitions for interpreting sufficient distinctiveness.

Such an importation could improve the predictability of the character doctrine by increasing the available body of law illustrating sufficient distinctiveness and providing a sliding scale for evaluation.²⁰⁰

194. *Towle*, 802 F.3d at 1021.

195. See discussion *supra* Part II.C.

196. Said, *supra* note 178, at 800–01 (discussing the need to ensure that those attributes which together constitute a visual or literary character do not bleed over into attributes of the surrounding story).

197. *Id.*

198. 15 U.S.C. §§ 1052(e)–(f) (2017); see also TMEP § 1209.1 (Jan. 2017). The spectrum of distinctiveness—from generic terms (like the name of good being sold) to fanciful or arbitrary terms (like “Exxon” for gasoline or “Apple” for computers, respectively)—is used to determine whether a mark may be registered for certain goods and services as well as how strong the mark will be for consumers. Arbitrary and fanciful marks are stronger and will be afforded greater protection against confusingly similar marks. Suggestive and descriptive marks are weaker and are afforded a narrower scope of protection, and generic marks are afforded none. Thus, the question of being distinctive is a trademark concern not used elsewhere in copyright.

199. See discussion *supra* Part II.C.

200. TMEP § 1209.1 (Jan. 2017).

After all, trademarks are most distinctive when they are unusual and fanciful²⁰¹—is a character not most original when it is unusual and fanciful? At the other end of the spectrum, generic marks cannot obtain protection at all—just as a trope character is not protectable. The majority of cases, of course, lies somewhere between, but the number of reference points for analogy and distinction in arguing cases could be greatly increased by making trademark “distinctiveness” law available. Also, trademark allows distinctiveness to be shown by evidence of secondary meaning, acquired through usage in the marketplace that builds meaning in the eyes of consumers, where the mark is otherwise not distinctive.²⁰²

Bringing this idea into copyright law could prevent situations where characters are forced into an ill-fitting category because of the court’s gut feeling that the character should be protectable. Instead, authors could demonstrate that the character is sufficiently recognizable that even when taken out of context, the consumer knows the character is the author’s work—therefore, the person appropriating the character is using the goodwill and recognition constructed by another author to attract consumers to his own work. Contrary to the rejected “sweat of the brow” doctrine, in which a person’s copying was prohibited because it constituted free-riding on another’s effort, the character-as-trademark rationale seeks to prevent the wrongful appropriation of a character that has become the symbol of a certain author and his business in the eyes of the consuming public. This policy protects the investment of the original author, but does not blindly reward effort by excluding others; the original author would have to demonstrate not only the similarity of the allegedly infringing character, but that the public would attribute the infringer’s work to the original author because of the character’s use.

However, the foregoing trademark policy does not reflect how courts are currently evaluating the protection of characters, although the decisions seem to be employing it without saying so. Courts should not mix doctrines lightly—such a combination should be made explicit, rather than sprinkled without mention or clarification throughout existing precedents. If the Ninth Circuit intended to link doctrines in the third prong of the *Towle* test, they neither discussed it nor applied the test in a way suggestive of the ensuing link.²⁰³

201. *Id.*

202. 15 U.S.C. § 1052(f) (2017).

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

D. “Hard Cases Make Bad Law”²⁰⁴

The fourth and final problem with *Towle* is that the court’s analysis distorted the scope of character protection, even though the result correctly stopped a bad actor from copying another author’s work. The court’s holding was overbroad: much of what the court cited as protectable attributes constituting a Batmobile character would be *scènes à faire*, and therefore outside the scope of protection, in other cases. Further, the court impermissibly amalgamated these unoriginal features of many Batmobiles, creating a construct or persona to receive protection and ignoring the requirement for consistent traits suggested in *Metro-Goldwyn-Mayer* and *Toho*.²⁰⁵ While this practice got the court to the desired result, it sets a poor precedent for future cases.

The Ninth Circuit cited a few lines that vaguely characterized the Batmobile as anthropomorphic, describing it as “leaping” after a criminal and “throbbing” with energy; on at least one occasion, the car drove itself to Batman’s side.²⁰⁶ However, there is no evidence that the Batmobile really interacts with Batman in a way suggestive of a character role. Autonomous interactivity with other characters and the world at large would be the greatest indication that an otherwise inanimate object is anthropomorphic and acting as a character, instead of a prop. In contrast, in the films featuring Herbie and Christine, other characters understood the car involved to be more than just a car.²⁰⁷ The Batmobile may be specialized for fighting crime, but it lacks any degree of interactivity that characters normally engage in. Therefore, the character copyright analysis is an awkward fit from the outset.

The *Towle* court failed to recognize that generally, superhero vehicles with outlandish capabilities belong in the *scènes à faire* category, just like “mechanized body armor.”²⁰⁸ Vehicles with outlandish capabilities are a critical piece of the hero puzzle. Superheroes must be able to quickly reach trouble spots with the proper equipment to fight the evil *du jour*. If the court had articulated better why the Batmobile was particularly original as compared to other vehicles and thereby limited its holding, it would have avoided the problem of overbreadth. Instead, it named only either run-of-the-mill

204. While this legal adage is of uncertain origin, one of the earliest known uses in the United States was by Justice Oliver Wendell Holmes. *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J. dissenting).

205. See discussion *supra* Part II.C.

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

207. See *THE LOVE BUG*, *supra* note 189; see also *CHRISTINE*, *supra* note 190.

208. *Horizon Comics Prods. v. Marvel Entm’t, LLC*, 2017 U.S. Dist. LEXIS 44662, at *13 (S.D.N.Y. Mar. 27, 2017).

attributes to support the Batmobile's copyright protection, or attributes that were not consistent across all Batmobiles.²⁰⁹ Of course, it appears that without these consistent-but-generic or original-but-inconsistent attributes, the court could not otherwise support the finding that the Batmobiles of the television and film expressions were the same Batmobile as in the comics' copyrights, owned by DC Comics.

The Ninth Circuit counted as delineating characteristics the Batmobile's different gadgets over the years: machine gun, Bat-phone, mobile crime lab, emergency Bat-turn maneuverability.²¹⁰ These characteristics may or may not be distinctive as compared to other vehicles, but the different iterations of the Batmobile each feature only those characteristics needed to get the job done on any given day. The court had to aggregate years of data and dozens of works to create a protectable "persona"—for lack of a better term—that constitutes the Batmobile. In fact, some of these elements ascribed to that persona were uncopyrightable or not original to the Batmobile. Uncopyrightable elements included the Batmobile name and the list of crime-fighting gadgets—the former being the province of trademark and the latter being mostly *scènes à faire*.

Several of the characteristics the court deemed original and bat-like, like the exaggerated fenders and distinctive rounded windshield of the 1966 Batmobile, were features of the Lincoln Futura concept car on which that particular Batmobile rendition was based.²¹¹ Indeed, the Batmobile is rarely seen the same way twice²¹² or even referred to by the same name in all circumstances; most recently, it was called the Tumbler and depicted as a tank.²¹³ The Batmobile is not an evolution of a single character; put another way, to copy one Batmobile is not to copy them all. Rather, the Batmobile is a different vehicle, customized to suit a storyline, often—but not always—with the same name and with wide variation in aesthetics. Therefore, Mr. Towle's copying of the 1968 and 1989 Batmobiles did not infringe DC Comics' copyrights in other

209. *Towle*, 802 F.3d at 1017–18 (listing the attributes as “one consistent name that identifies [the Batmobile] as Batman’s personal vehicle,” consistent use of “high-tech gadgets and weaponry,” “bat-like motif,” black color, the qualities of being “swift, cunning, strong and elusive,” and depiction as a “superhero” in its own right—“Batman’s sidekick if not an extension of Batman’s own persona”); cf. Jason Torchinsky, “All the Most Important Batmobiles in One Handy Chart,” JALOPNIK, <http://jalopnik.com/this-batmobile-timeline-shows-just-how-diverse-batmans-1575695589> (depicting numerous Batmobile versions over the years, including a red Batmobile, motorcycle, tank, or commercially available car Batmobiles, etc.).

210. *Towle*, 802 F.3d at 1022.

211. “Building the Batmobile Part 1,” *supra* note 171.

212. Torchinsky, *supra* note 209.

213. *BATMAN BEGINS* (Warner Bros. Pictures 2005).

Batmobile expressions because there simply is no unitary Batmobile, despite some commonalities among some of the designs.

These changes are much more drastic than James Bond shedding his swimsuit for a tuxedo. The Ninth Circuit combined characteristics, many of which are not originally attributable to the Batmobile or which are not consistent across all Batmobiles, to stretch character copyright to cover a superhero car belonging in the *scènes à faire* category. The court contented itself with generalities—crime-fighting, maneuverability, and black color—when in fact, the first Batmobile was red, and one Batmobile was even a tuned-up Ford Mustang.²¹⁴ While the extent of the creative expression in any given Batmobile is copyrightable, the Batmobile as a construct across many comics and films is simply not protectable through a character analysis because the Batmobile is not a character, and it lacks sufficient original and consistent traits even if it were.

V. PROPOSAL

*Holy copyright, Batman! What do we do now?*²¹⁵

To repair the four problems with the current state of character copyright—permitting a forced character analysis, the persistence of faulty precedent in *Halicki* that was worsened by *Towle*, the flawed *Towle* test, and its overbroad holding—courts and Congress should take three responsive actions. First, poor precedent should be overruled at the next opportunity. Second, Congress should fashion a more limited character copyright test. Third, Congress should also deploy trademark law to avoid forced analyses in situations like *Towle*, where there has been misappropriation of something that the consuming public recognizes as pertaining to a certain business or individual. Trademark law can be used to protect characters or non-character story elements that are distinctive relative to the media in which they appear and merchandise for which they are marketed.

A. The Judicial Fix

Likely the sole action that courts could undertake to repair character copyright without Congressional assistance is to overrule *Halicki* and *Towle*, to the extent that they blindly permit cars to be characters. As the Supreme Court denied certiorari in *Towle*,²¹⁶ another character-

214. Torchinsky, *supra* note 209.

215. In this author's defense, such an exclamation is by no means the strangest or corniest catchphrase made in the style of Robin, of the 1960s *Batman* television show.

216. *Towle v. DC Comics*, 136 S. Ct. 1390 (2016) (denying certiorari).

copyright case dealing with cars would have to percolate through the court system. Should the case come up in another circuit, that court could choose not to follow the Ninth Circuit and thereby signal the need for Supreme Court intervention. These actions would prevent increased stretching of character copyright based on faulty precedents. However, the likelihood of a fact pattern that permits a court to squarely address this issue is rather slim.

B. Reserving Character Copyright to Characters

Congress could bring about a more complete fix with a new character copyright test. Characters are valuable commodities, and whole industries are built around their creation, adaptation, and protection. The proper venue for mapping the future of the doctrine is the legislature. Congress should note the lack of administrability of the current test and the lack of Copyright Office guidance. Ideally, Congress should host a forum in which the public and the entertainment industry can present policy arguments for how the law ought to be. Such a growing area of copyright law as character copyright doctrine would be better governed by statute. However, characters should not be added to the list of registrable copyrights; since the Copyright Office generally does not employ a rigorous prosecution process, it would be easy for authors to claim insufficiently original characters that would then need to be invalidated via costly and time-consuming litigation.

Congress should employ a statutory test for the copyrightability of characters. While the delineation test has a rich history stemming from a respected judge, its administration is hazy at best and arbitrary at worst. The threshold requirement of characterhood should be an express first step in the character copyright inquiry. A character ought to be defined as an interactive—albeit not necessarily human—role in a story, where interactivity is evidenced by some degree of anthropomorphism, sentience (or at least perception), autonomous action, and influence on the events happening around it. A balancing test for characterhood would be flexible enough that a strong factor could cure a weaker one, but anthropomorphism and sentience should likely be given the most weight. In addition, anthropomorphism may be evidenced by the actions of other characters in the story and how they treat the story element in question.

For example, “Eleanor” could not act autonomously and was not sentient, though the cars with that code name seemed to influence events. Under this test, Eleanor would not be a character. Similarly, the Batmobile had some influence on events around it and a very limited degree of autonomous action, yet it did not perceive and understand

events. Conversely, both Herbie and Christine were capable of fully autonomous action, demonstrated an understanding of events, reacted to influence those events, and were highly personified. Not only did they display human emotion in some ways (comedic effect and rage, respectively), but the characters more or less responded to these particular cars as they would respond to a human or animal with the same characteristics.

In addition to the characterhood requirement, Congress should eliminate the lingering “Sam Spade test”—the language of the “chessman” versus the “story being told” seems generally unhelpful. Usage of this test in the case law is spotty, sometimes combined with the delineation test and sometimes absent entirely; it should be abrogated by statute to encourage consistency.

C. Giving In to the Silent Trend: Use Trademark Law Explicitly

Finally, Congress should bless the use of trademark law in character—and even non-character story element—protection. As discussed, courts have been vaguely employing trademark law while evaluating characters, turning repeatedly to their distinctiveness or their name recognition as indicators of copyrightability. Part of the *Towle* decision surely was the desire to punish a bad actor, who without authorization misappropriated the exact likeness of another’s work for his own commercial gain—going so far as to advertise his copies under the famous Batmobile name. However, the analysis that reached the desired result required a tortured reading of the law and a willfully blind consideration of facts concerning the Batmobile’s diverse designs. The law should employ trademark law in an overt and intentional way, rather than as a subtext in court decisions.

Besides starting anew with a fresh character copyright test, trademark law could be used to protect those characters or distinctive non-character elements—such as the Batmobile—where they are source-identifying in connection with the goods and services marketed: the comics, movies, television shows, toys, and other merchandise. The true goal of DC Comics in suing Mr. Towle was to protect its ability to profit from the Batmobile, its creation, and avoid public confusion that DC Comics had authorized or endorsed Mr. Towle to create authentic replicas. Had a trademark been registered or asserted under common law in the name “Batmobile” or in the design of the 1966 or 1989 Batmobiles, DC Comics could easily have asserted its rights against Mr. Towle. As the Batmobile—and many, many other characters or famous

non-character story elements²¹⁷—is often used as a marketing tool in connection with Batman-related merchandise, model cars (large or small), and new Batman adventures, it seems a natural subject of trademark law.

In addition, trademark protection would likely back the decisions regarding the copyrightability of Rocky, James Bond, and Godzilla, to name a few: all are largely recognizable characters, which helps avoid overturning more case law than necessary. Courts would benefit from some objective indicia to consider regarding secondary meaning, thereby reducing the arbitrariness of character decisions.

Of course, authors of popular and famous works would be better positioned to exploit their characters and protect them from infringement. What is really happening is ad hoc brand management accomplished by claiming copyright protections for uncopyrightable elements—useful articles, non-characters, or stock characters—that are nonetheless quite famous and therefore seem like they should be off-limits for the commercial gain of those who did not author them. The lawsuits are pursued because these creations have become so commercially important today, with enormous industries centered on the development and marketing of derivative works. There is, of course, nothing wrong with this commercialization, but as conventional wisdom counsels: call a spade, a spade. It is better to stop stretching copyright law by labeling uncopyrightable story elements “characters” in order to protect them when used outside the context of the original work in which they arose. In fact, trademark law is more flexible, as it is limited only to that which is capable of source identification—for example, there is no pesky “useful articles” or “idea/expression dichotomy” doctrines to avoid. As discussed in this Comment, nearly all character copyright cases are brought to prevent others from benefitting commercially from using story elements, whether characters or otherwise, to market additional goods or services that the public may improperly believe emanated from the original author. Trademark law offers the appropriate remedies for such misappropriation and likelihood of confusion. Story elements that are being used as trademarks should be protected as trademarks.

One criticism of using trademark law might be that trademarks do not expire unless no longer used in commerce. Therefore, a character used and protected as a trademark would not pass into the public domain for so long as it is used. Functionally speaking, it is unclear that there

217. See, e.g., brand management usage of characters like Mickey Mouse, the Disney princesses, Superman, and Spiderman, or non-characters like Star Wars’ AT-ATs or Thor’s hammer, Mjolnir.

would be much of a change in the manner of doing business; DC Comics could register a trademark in “Batmobile” or a silhouette of the Batmobile or other design mark in connection with films, toys, etc. at any time. A change in the law such as the one proposed might actually encourage companies to be judicious about which story elements are commercially important enough to protect, permitting others to lapse into the public domain.

CONCLUSION

The best cure for the currently unbounded character copyright doctrine is to check the courts with clear legislation. The Copyright Act should be amended, following a forum at which differing public interests would be represented. A new character copyright test should require a showing of characterhood to prevent decisions like the one in *Towle*. In addition, Congress should recognize that characters and other story elements are being used as trademarks. Therefore, characters and non-characters should be protected as trademarks when they are being used as such in connection with diverse media and merchandise—particularly since courts have played with trademark terminology during character copyright evaluations for years. Such a change would improve predictability and objectivity in results, while being familiar enough for courts to administer without exceptional difficulty.

Quick, to the (uncopyrightable) Batmobile!