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NOTE

*DC COMICS V. TOWLE: TO THE BATMOBILE!*¹: WHICH FICTIONAL CHARACTERS DESERVE PROTECTION UNDER COPYRIGHT LAW

KATHERINE ALPHONSO*

“There is very small quantity of real fiction in the world; and the same images, with very little variation, have served all the authors who have ever written.”²

AN INTRODUCTION OF CONFLICTING INTERESTS

Imagine Angela Ridges is a world-famous author. Ten years ago, a string of personal tragedies motivated her to write her first novel. She wrote as an escape from her reality and her books resonated with millions. Her second release, the first installment of the *They Walk Amongst Us* trilogy, chronicled the Downey family’s ongoing battle against the supernatural. It became the bestselling, young adult book series of all time. She worked over eight years to create the extensive character list and mind-blowing plot twists of her fantastical universe. To date, it remains her most critically acclaimed work. Although she is currently working on a different project, Angela plans to revisit her trilogy in fu-

¹ BATMAN: THE MOVIE (Twentieth Century Fox Film Corp. 1966).

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² SAMUEL JOHNSON & JAMES MACAULAY, DOCTOR JOHNSON: HIS LIFE, WORKS & TABLE TALK 86 (T. Fisher Unwin, Centenary ed. 1884).

ture crossover novels. She knows each of her minor characters have a story of their own to tell.

Now imagine Jackson Akers is one of her many adoring fans. Exactly six months ago, Jackson met Angela at a book signing event he attended. He confided his hope of becoming a writer, and she inspired him to pursue his dreams. Jackson started by posting short stories on various fan fiction sites. Within a couple months, his stories garnered so much publicity he launched a website solely for his own postings. You see, Jackson used one of the minor characters from the *They Walk Amongst Us* trilogy as his heroine. The character was easily recognized by Angela's legions of fans, making Jackson's collection an instant success. Within that same year Dream Genie Publishing offered to publish Jackson's collection into a standalone novel.

A literary work of fiction intricately weaves plotlines, characters, conflicts, settings, and resolutions into one cohesive story.³ It is this unique arrangement of essential elements, which forms an author's artistic expression.⁴ Copyright law protects this artistic expression by granting exclusive rights that provide financial incentives for creating new works of art; while still encouraging others to freely build on raw ideas and elements left within the public domain.⁵ In addition, copyright law serves as the legal mechanism to control whether to reproduce, redistribute, and perform the work, as well as whether to prepare derivative works.⁶

Therefore, it is important to set limits on copyright protection, as it has the capacity to both enhance and diminish creativity.⁷ As Angela spent ten years refining her craft and making her characters relatable to readers, it is only fitting she reaps the financial benefits of her labor. Conversely, Jackson created an original work himself. While Angela's character did serve as the catalyst to his creativity, the plotlines, conflicts, and resolutions were distinctively his own. There is a thin line between encouraging new works of authorship and discouraging subsequent authors who may fear their work might be found substantially sim-

³ Katie Kazoo, *The Five Essential Elements of a Story*, KATIE KAZOO CLASSROOM CREW, http://www.katiekazoo.com/pdf/KK_FiveEssentialElements.pdf (last visited Aug. 12, 2016).

⁴ See Samuel J. Coe, Note, *The Story of a Character: Establishing the Limits of Independent Copyright Protection for Literary Characters*, 86 CHI.-KENT L. REV. 1305, 1310 (2011).

⁵ See *id.* at 1305.

⁶ 17 U.S.C. § 106 (2002).

⁷ See generally Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 590-91 (1987).

ilar to preexisting works.⁸ This thin line exists in the construction of all fictional characters.⁹

In a recent case, *DC Comics v. Towle*, the Ninth Circuit attempts to reconcile the rigid idea/expression dichotomy¹⁰ inherent in copyright protection for fictional characters.¹¹ *Towle* analyzes when it is appropriate to apply copyright protection to fictional characters that are individual parts of an entire work.¹² Since 1939, DC Comics has owned the copyright for comic books featuring the story of Batman, the world-famous Caped Crusader, who protects Gotham City from various villains.¹³ Introduced in 1941, the Batmobile is a highly technological automobile used as Batman's primary mode of transportation.¹⁴ Defendant, Mark Towle, ("Towle") owns Gotham Garage, where he builds and sells model replicas of automobiles featured in movies and television shows.¹⁵ Using its fame to market his company and attract collectors, Towle advertises some of his models as the Batmobile.¹⁶ DC Comics filed suit alleging an infringement of its exclusive rights under copyright law.¹⁷ The Ninth Circuit concluded that the Batmobile, as a fictional character part of a larger work of art, is entitled to copyright protection. Therefore, Towle "infringed upon DC's property rights when he produced unauthorized derivative works."¹⁸

⁸ Jasmina Zecevic, Article, *Distinctly Delineated Fictional Characters That Constitute the Story Being Told: Who Are They and Do They Deserve Independent Copyright Protection?*, 8 VAND. J. ENT. & TECH. L. 365, 367 (2006) (comparing how granting fictional characters automatic copyright protection limits the raw material available to subsequent authors, with how denying copyright protection altogether dampens the incentive for an original author to labor over character development).

⁹ *Id.*

¹⁰ The idea/expression dichotomy is rooted within two Constitutional concepts: the Copyright Clause and the First Amendment. *Bikram's Yoga College of India, L.P. v. Evolation Yoga, LLC*, 803 F.3d 1032, 1037 (9th Cir. 2015). Under the Copyright Clause, Congress grants authors exclusive rights to their original expressions, while promoting the expansion of ideas and information found within those original expressions. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 349-50 (1991). Copyright law also creates "a built-in First Amendment accommodation" when it distinguishes between ideas and expressions and only protects the latter. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *see generally* 17 U.S.C. § 102 (1990). Therefore, the "idea/expression dichotomy strike[s] a definitional balance . . . by permitting free communication of facts while still protecting an author's expression." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985).

¹¹ *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015).

¹² *Id.*

¹³ *Id.* at 1015.

¹⁴ *Id.*

¹⁵ *Id.* at 1017.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1027.

In reaching its decision, the court discussed three factors to determine whether it is appropriate to apply copyright protections to fictional characters in a comic book, television show, or movie.¹⁹ The character must (1) have “physical as well as conceptual qualities,” (2) be “sufficiently delineated,” and (3) be “especially distinctive” and “contain some unique elements of expression.”²⁰ Although the Ninth Circuit ultimately reached the appropriate outcome by protecting the Batmobile, these three factors do not ensure a fair and just result in all similar cases. First, this three-part test merely combines three standards already in use.²¹ Second, it does not offer concrete guidance with regard to fictional characters in literary works.²² Third, it fails to address the utilitarian function of an automobile.²³

Section I of this Note presents the history and purpose of copyright law by giving a brief background of its origin. It discusses how courts have since expanded copyright coverage to individual fictional characters, and chronicles the various challenges faced in applying the law. Section I also provides relevant facts and procedural history for the case. Section II examines the Ninth Circuit’s discussion and holding. Section III discusses the inherent limitations of the three-part test used in the decision. It explains the importance of rejecting categorical protection and analyzing copyright for all fictional characters on a case-by-case basis.²⁴ Section III also suggests three additional factors the court should consider when evaluating such issues. Finally, Section IV concludes that although the Ninth Circuit reached the appropriate result with regards to the Batmobile, the presented factors would better guide future courts to consistent and fair decisions.

I. GENERAL BACKGROUND

A. THE HISTORY AND PURPOSE OF COPYRIGHT LAW

Copyright law originates from the Constitution granting Congress authority “to promote the progress of Science and the useful Arts, by securing for limited times to authors or inventors the exclusive right to

¹⁹ *Id.* at 1019-23.

²⁰ *Id.* at 1021.

²¹ *Id.*

²² *Id.* at 1019.

²³ *Id.* at 1019-20.

²⁴ Coe, *supra* note 4, at 1309-10 (rejecting automatic copyright protection for fictional characters).

their respective writings and discoveries.”²⁵ Copyright protection applies to “original works of authorship fixed in any tangible medium of expression.”²⁶ Essentially, copyright law protects “tangible, original *expressions* of ideas, not ideas themselves.”²⁷

Under the current copyright statute, registration is not required for copyright protection.²⁸ It is granted automatically upon the creation of an original work of authorship.²⁹ While the United States Copyright Office may issue a certificate, the courts ultimately determine when a work is protected.³⁰ To qualify, there must be a slight or minimal degree of creative effort, resulting in an author’s independent creation.³¹ “[N]o matter how crude, humble[,] or obvious” the creative spark may be, the work need only be original and not copied.³² Pursuant to the United States Code, there is a finite list of categories automatically protected under this provision—with fictional characters noticeably absent from the list.³³

Judge Learned Hand first penned the concept of copyright protection for fictional characters when he suggested they might be shielded “quite independently of the ‘plot.’”³⁴ In *Nichols v. Universal Pictures Corporation*, the author of *Abie’s Irish Rose* alleged the studio copied his play with *The Cohens and The Kellys*.³⁵ In both works, the child of a Jewish family married the child of a Catholic family causing a rift between the parents.³⁶ In both works, the families reconciled only after a grandchild was born.³⁷ The court disfavored granting copyright protection to such stock characters because doing so would give exclusive rights to authors who simply made immaterial variations to unoriginal ideas.³⁸ But even though the court denied copyright protection for the fictional characters

²⁵ U.S. CONST. art. I, § 8, cl. 8. The *Towle* opinion discussed, in great detail, the historical progression of copyright law for fictional characters. Section I limits its discussion to a brief history of origination and overall purpose. Section II will provide a more expansive history by discussing how the court reached its holding. See *Towle*, 802 F.3d at 1019-21.

²⁶ 17 U.S.C. § 102(a) (1990).

²⁷ *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 533 (5th Cir. 1994) (emphasis added); see generally 17 U.S.C. § 102 (1990).

²⁸ WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 1:1 (2015).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345-46 (1991).

³² *Id.*

³³ 17 U.S.C. § 102(a) (1990).

³⁴ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

³⁵ *Id.* at 120.

³⁶ *Id.*

³⁷ *Id.* at 120-21.

³⁸ *Id.*

in this case, it opened the door for fictional characters in the future.³⁹ It stated “the less developed the character[], the less [it] can be copyrighted; that is the penalty an author must bear for marking [it] too indistinctly.”⁴⁰ This test extended copyright protection to “distinctly delineated” characters.⁴¹

Since the Second Circuit failed to define what constitutes a “distinctly delineated” character in *Nichols*, the Ninth Circuit attempted to impart clearer guidelines.⁴² In *Warner Brothers Pictures, Inc. v. Columbia Broadcasting System, Inc.*, the author of *The Maltese Falcon* sold limited rights to the studio for defined uses of his story.⁴³ He argued that since his individual characters were not included in the original bargain, he did not infringe by using the same characters in subsequent writings or by granting others the exclusive rights to the characters.⁴⁴ The court held it necessary to analyze the character within the entirety of the work because when characters were merely vehicles to tell the story, those vehicles were not protected.⁴⁵ This new test expanded copyright protection to characters that closely mirror the “story being told.”⁴⁶

Both the “distinctly delineated” and “story being told” tests lacked definitive structure, causing numerous problems with consistency and application.⁴⁷ First, the tests require judges to act as literary critics arbitrarily deciding which characters were distinguished enough to warrant copyright protection.⁴⁸ In *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, the court found Tarzan to be distinctively well developed and delineated enough to be copyrightable.⁴⁹ The court said: “Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle[,] and strong. He is Tarzan.”⁵⁰ At best, the court’s characterization served as a generic description of a type

³⁹ See generally Dean D. Niro, *Protecting Characters Through Copyright Law: Paving a New Road Upon Which Literary, Graphic, and Motion Picture Characters Can All Travel*, 41 DEPAUL L. REV. 359, 363-365 (1992).

⁴⁰ *Nichols*, 45 F.2d at 121.

⁴¹ See *id.* at 122-23.

⁴² Niro, *supra* note 39, at 364.

⁴³ *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945, 948 (9th Cir. 1954).

⁴⁴ *Id.*

⁴⁵ *Id.* at 950.

⁴⁶ See *id.*

⁴⁷ Zecevic, *supra* note 8, at 372-73.

⁴⁸ Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, Wis. L. Rev. 429, May-June 1986, at 456-57.

⁴⁹ *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981).

⁵⁰ *Id.*

fitting similar circumstances.⁵¹ It offered nothing to demonstrate why Tarzan was “distinctly delineated” from other like characters.⁵² Surely another athletic, innocent, youthful, gentle, and strong character could talk to animals and be in tune with the jungle without infringing on Tarzan: Kipling’s Mowgli, for instance.⁵³

Second, judges often misapply the standard, leading to the overprotection of characters.⁵⁴ In *Universal City Studios, Inc. v. Kamar Industries, Inc.*, Universal filed a claim against a manufacturer for inscribing “E.T. Phone Home!” and “I Love You, E.T.” on their mugs, pencil holders, and t-shirts.⁵⁵ The court found E.T. from *E.T.: The Extra-Terrestrial* to be a “unique and distinctive character [with whom] the movie revolves.”⁵⁶ The court said the name E.T. was “highly distinctive and . . . inseparable from the identity of the character.”⁵⁷ Over-focused on finding protection, the court basically copyrighted the name E.T.,⁵⁸ not the character.

Third, neither test necessarily protects the most developed characters in literary works.⁵⁹ Flat characters, though well defined by consistent and unyielding traits, remain unchanged by circumstance, as they do not have the ability to adapt and grow with new situations.⁶⁰ The most fully human, well-rounded characters are often intimately bound to the context of their stories and remembered through their connections with specific scenes.⁶¹ It is the exact circumstance of their fictional situation that makes them unapologetically who they are.⁶² Jean-Baptiste Grenouille—a character most will not recognize—for example, was the 18th-century French orphan in Patrick Süskind’s international bestseller, *Perfume: The Story of a Murderer*.⁶³ Jean-Baptiste’s internal struggles with loneliness, isolation, and desperation to fit in make him all too real.⁶⁴ Unfortunately, protecting characters who are “most recognizably human would take too

⁵¹ Kurtz, *supra* note 48, at 464.

⁵² *Id.* at 458.

⁵³ *Id.*

⁵⁴ Zecevic, *supra* note 8, at 372.

⁵⁵ *Universal City Studios, Inc. v. Kamar Indus., Inc.*, No. H-82-2377, 1982 WL 1278 at *2 (S.D. Tex. Sept. 20, 1982).

⁵⁶ *Id.* at 3.

⁵⁷ *Id.*

⁵⁸ *FAQ’s: What Does Copyright Protect?*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-protect.html> (last visited Aug. 31, 2016). The Copyright Office emphasizes that trademark law may protect some names, but copyright law does not.

⁵⁹ Zecevic, *supra* note 8, at 375.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ PATRICK SÜSKIND, *PERFUME: THE STORY OF A MURDERER* (Vintage Books, 1st ed. 2001).

⁶⁴ *Id.*

much from the public domain, from the common pool of that which is needed to create.”⁶⁵

B. TOWLE FACTS & PROCEDURAL HISTORY

DC Comics, one of the most distinguished names in the entertainment industry, publishes comic magazines.⁶⁶ Aside from publishing, a significant portion of its business is in merchandising and licensing its Batman trademarks and copyrights.⁶⁷ From the beginning, Batman has been depicted in various formats, including movies, comic strips, radio shows, television, animated movies, and theater.⁶⁸ One of the most identifiable elements of the Batman series is a high-tech automobile known as the Batmobile.⁶⁹ The 1966 television series, *Batman*, the 1989 movie, *Batman*, the 1992 movie, *Batman Returns*, the 1995 movie, *Batman Forever*, the 1997 movie, *Batman and Robin*, the 2005 movie, *Batman Begins*, and the most recent *The Dark Knight Rises* all featured different versions of the Batmobile.⁷⁰

Mark Towle owns a business creating replicas modeled after vehicles from a variety of television shows and movies.⁷¹ He also sells car kits that allow buyers to customize their own vehicles with various features and insignia.⁷² Towle conducts business through websites such as www.gothamgarage.net, www.gothamgarage.com, www.marktowle.com, and www.batmobilereplicas.com, all of which use DC Comics’ trademarks on the site.⁷³

On May 6, 2011, DC Comics filed a complaint against Towle for copyright infringement and various other causes of action resulting from Towle’s replicas of the 1966 and 1989 Batmobile.⁷⁴ Towle denied copyright infringement for two reasons: (1) the 1966 and 1989 Batmobiles were not copyrightable because of their utilitarian functions as an auto-

⁶⁵ Kurtz, *supra* note 48, at 465.

⁶⁶ First Amended Complaint for Copyright Infringement; Trademark Infringement; Unfair Competition; Trademark Dilution; Declaratory Relief at ¶ 6, DC Comics v. Towle, 989 F. Supp. 2d 948 (C.D. Cal. 2013) (No. CV11-03934 RSWL (OPx)).

⁶⁷ *Id.* at ¶ 7.

⁶⁸ *Id.* at ¶ 8.

⁶⁹ *Id.* at ¶ 7.

⁷⁰ *Id.* at ¶ 8-9.

⁷¹ DC Comics v. Towle, 989 F. Supp. 2d 948, 953 (C.D. Cal. 2013), *aff’d*, 802 F.3d 1012 (9th Cir. 2015).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Towle*, 989 F. Supp. 2d at 954; *see also* First Amended Complaint for Copyright Infringement; Trademark Infringement; Unfair Competition; Trademark Dilution; Declaratory Relief at ¶ 7, DC Comics v. Towle, 989 F. Supp. 2d 948 (C.D. Cal. 2013) (No. CV11-03934 RSWL (OPx)), 2011 WL 6799526 (listing the other causes of action).

mobile; and (2) DC Comics did not own the copyright to the 1966 and 1989 Batmobiles pursuant to their licensing agreements with third parties.⁷⁵ The parties then filed subsequent cross-motions for partial summary judgment with regards to Towle's laches defense,⁷⁶ and DC's copyright, trademark, and unfair competition claims.⁷⁷

On February 7, 2013, the district court granted in part and denied in part DC's motion for partial summary judgment, and denied Towle's cross-motion for partial summary judgment.⁷⁸ In determining whether Towle's replicas of the 1966 and 1989 Batmobile infringed on DC's copyright protection, the court first analyzed whether a protection existed.⁷⁹ Towle argued the Batmobile, essentially a car, may not be protected under copyright law since objects cannot be copyrighted if used for utility.⁸⁰ A "[p]ictorial, graphic, and sculptural work[]' . . . shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects"⁸¹ To copyright the shape of an automobile, the design must contain some physical or conceptual feature "identified separately from, and . . . existing independently of, the utilitarian aspects of [that vehicle]."⁸² Where the shape and utilitarian function were inseparable, the vehicle was not copyrightable.⁸³

The district court dismissed Towle's argument and held the Batmobile was "sufficiently delineated" and therefore entitled to copyright protection as a character within the Batman franchise.⁸⁴ The Batmobile "exhibited a series of readily identifiable and distinguishing traits," including its name and the fact that it was Batman's personal vehicle.⁸⁵ It participated in various pursuits and was deployed against formidable opponents.⁸⁶ The Batmobile was a superhero in its own right, central to Batman's ability to come out victorious.⁸⁷ Although variations

⁷⁵ Appellant's Reply Brief at 24-31, *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015) (No. 13-55484); *see also* Notice and Motion of Plaintiff DC Comics' Motion for Partial Summary Judgment at 1, *Towle*, 802 F.3d 1012 (No. 13-55484) (listing the third parties as American Broadcasting Company ("ABC"), Greenway Productions, Inc. ("Greenway"), and Twentieth Century-Fox Television, Inc. ("Fox")).

⁷⁶ *Towle*, 989 F. Supp. 2d at 954-55 ("On February 14, 2012, [Towle] filed an Answer, asserting several affirmative defenses, including laches, unclean hands, and fair use.').

⁷⁷ *Towle*, 802 F.3d at 1017.

⁷⁸ *Towle*, 989 F. Supp. 2d at 973.

⁷⁹ *Towle*, 802 F.3d at 1019, 1023.

⁸⁰ Brief of Appellee at 40, *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015) (No. 13-55484); *see* 17 U.S.C. § 101 (2010).

⁸¹ 17 U.S.C. § 101 (2010).

⁸² *Id.*

⁸³ *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041-42 (9th Cir. 2014).

⁸⁴ *Towle*, 989 F. Supp. 2d at 966-68.

⁸⁵ *Id.* at 967.

⁸⁶ *Id.*

⁸⁷ *Id.*

undoubtedly occurred over the years, the Batmobile was always a “swift, cunning, strong[,] . . . elusive,” and “highly-interactive vehicle, equipped with high-tech gadgets and weaponry used to aid Batman in fighting crime.”⁸⁸ In addition, the Batmobile was “almost always jet black,” and often contained “bat-like motifs, such as a bat-faced grill or bat-shaped tailfins in the rear of the car.”⁸⁹

On February 20, 2013, the parties entered into a joint stipulation in which they agreed to certain facts and evidence.⁹⁰ Consistent with that stipulation, the district court ruled against Towle, enjoining him from further using the Batmobile in all business-related transactions.⁹¹ In addition, the district court awarded \$70,000 to DC Comics.⁹² Towle filed a timely appeal.⁹³

II. NINTH CIRCUIT’S THREE-PART TEST ANALYSIS

On appeal, the Ninth Circuit bypassed all analysis of the Batmobile’s utilitarian function and instead provided a comprehensive review of precedential cases for copyrighting fictional characters.⁹⁴ The court concluded past precedents established the three-part test necessary for determining whether a character in a comic book, television show, or movie was entitled to copyright protection.⁹⁵ First, the character must generally have “physical as well as conceptual qualities.”⁹⁶ Second, the character must be “sufficiently delineated” so as to be recognized as a particular character.⁹⁷ Although that character’s appearance may vary, it must “display consistent, identifiable . . . traits and attributes.”⁹⁸ Third,

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 957 n.1.

⁹¹ Brief of Appellee at 5, *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015) (No. 13-55484).

⁹² *Id.* at 5.

⁹³ *Towle*, 802 F.3d at 1018.

⁹⁴ *Towle*, 802 F.3d at 1019-21. Essentially, the Court’s opinion included a discussion of whether (1) the Batmobile was copyrightable; (2) DC Comics owned a copyright interest in the Batmobile as it was depicted in the 1966 television show and 1989 movie; and (3) as a matter of law, Towle was prohibited from asserting a laches defense to the infringement claim. Since this Note specifically analyzes copyright protections on independent fictional characters, the majority of the discussion will focus on the first question. Question two is discussed very briefly, while question three is not discussed at all.

⁹⁵ *Towle*, 802 F.3d at 1021.

⁹⁶ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978).

⁹⁷ *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003).

⁹⁸ *Towle*, 802 F.3d at 1021.

the character must be “especially distinctive” and “contain some unique elements of expression.”⁹⁹

A visual character with distinct “physical as well as conceptual qualities,” is more likely to contain some unique element of expression.¹⁰⁰ In *Walt Disney Productions v. Air Pirates*, cartoonists published two comic book collections depicting over 17 Disney characters engaged in a “free thinking, promiscuous, drug ingesting counterculture.”¹⁰¹ The cartoonists portrayed these characters using the same name and remarkably similar physicality.¹⁰² The court explained it would be unreasonable to automatically grant copyright protection to individual, literary characters since it restricts the creativity of, and raw materials available to, subsequent authors.¹⁰³ Further, it is difficult to distinctively delineate literary characters because of the inherent difference in readers’ imaginations.¹⁰⁴ However, when the character is visually depicted, it is easier to reconcile its true nature.¹⁰⁵ The court held that since comic book characters were more easily distinguishable than literary characters, each affected Disney cartoon character was copyrightable.¹⁰⁶ This standard subsequently applied to television series and movies as well.¹⁰⁷

“Sufficiently delineated” characters that display “consistent, widely identifiable traits” and attributes are especially distinct from stock characters.¹⁰⁸ In *Rice v. Fox Broadcasting Company*, a magician owned the copyright to a home video revealing several well-known magic tricks.¹⁰⁹ Between 1995 and 1997, Fox filmed a series of television specials premised around exposing the secrets behind famous illusions.¹¹⁰ The magician filed suit alleging The Mystery Magician, the character in his video, was copyrightable and therefore Fox infringed upon his copyright.¹¹¹ The “magician character wore typical magician garb—a ‘black tuxedo with tails, a white tuxedo shirt, a black bow tie, and a black cape with red lining[.]’”¹¹² In addition, he only appeared in one home video that sold

⁹⁹ *Halicki Films, Inc. v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008) (quoting *Air Pirates*, 581 F.2d at 755).

¹⁰⁰ *Air Pirates*, 581 F.2d at 755.

¹⁰¹ *Id.* at 753 (quoting Kevin W. Wheelwright, Note, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. Rev. 564, 571, 582 (1976)).

¹⁰² *Air Pirates*, 581 F.2d at 753.

¹⁰³ *Id.* at 755.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *Olson v. Nat’l Broad. Co., Inc.*, 855 F.2d 1446, 1452-53 (9th Cir. 1988).

¹⁰⁸ *Rice*, 330 F.3d at 1175.

¹⁰⁹ *Id.* at 1173.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1174.

¹¹² *Id.* at 1175.

approximately 17,000 copies.¹¹³ There, the court held a magician performing tricks and illusions is not sufficiently delineated from all other stock magicians performing tricks and illusions.¹¹⁴

Characters who are “especially distinctive” and “contain some unique elements of expression” make it easier to distinguish as copyrightable.¹¹⁵ In *Halicki Films, Inc. v. Sanderson Sales & Marketing*, an automobile manufacturer created unauthorized replicas of Eleanor, the sports car from the movie *Gone in 60 Seconds*.¹¹⁶ The manufacturer used references to the film and the car when marketing the sale of its merchandise.¹¹⁷ Although the court remanded to the district court the question of whether Eleanor was entitled to copyright protection, it provided significant insight as to what constitutes “especially distinctive.”¹¹⁸ The court noted three aspects unique to Eleanor: (1) stealing other cars goes smoothly, but stealing Eleanor always becomes complicated; (2) the main character personifies Eleanor; and (3) the main character refers to having a history with Eleanor.¹¹⁹ Even though Eleanor lacked emotional qualities and could not speak, it can still be a protectable character if it is “especially distinctive.”¹²⁰

In applying this three-part test, the court in *Towle* held the Batmobile was a fictional character entitled to copyright protection.¹²¹ First, the Batmobile had “physical as well as conceptual qualities,” since it visually appeared in comic books, and was actually depicted in the television series and movies.¹²² Second, the Batmobile was “sufficiently delineated” so as to be recognized whenever it appeared.¹²³ It maintained “consistent, identifiable character traits and attributes,” such as “its status as ‘a highly-interactive vehicle, equipped with high-tech gadgets and weaponry used to aid Batman in fighting crime,’ [and] bat-like . . . appearance, with a bat-themed front end, bat wings extending from the top or back of the car, exaggerated fenders, a curved windshield, and bat emblems on the vehicle.”¹²⁴ Third, the Batmobile was “especially distinctive” and “contain[ed] some unique elements of expression,” because

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Halicki*, 547 F.3d at 1224; see *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945, 950 (9th Cir. 1954); see also *Air Pirates*, 581 F.2d at 755.

¹¹⁶ *Halicki*, 547 F.3d at 1218.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1225.

¹¹⁹ *Id.*

¹²⁰ *Towle*, 802 F.3d at 1021.

¹²¹ *Id.* at 1026.

¹²² *Id.* at 1021.

¹²³ *Id.*

¹²⁴ *Id.*

it was a bat-themed sidekick with a recognizable name and distinct physical attributes.¹²⁵

Once it established the Batmobile was a copyrightable fictional character, the court went on to analyze whether DC Comics' copyright protection was infringed.¹²⁶ Copyright ownership initially belongs to the original creator of the copyrighted work.¹²⁷ As the copyright owner, DC Comics enjoyed several exclusive rights, including the right to create derivative works.¹²⁸ Copyrightable derivative works use one or more preexisting works and add new copyrightable material to that work.¹²⁹ Additionally, DC Comics, as the copyright-holder to the Batmobile, had the exclusive right to grant others the right to create derivative works.¹³⁰ Therefore, any third party making unauthorized copies of any copyrighted derivative work infringes upon the original copyright.¹³¹ The court held DC Comics owned the copyright interest to the Batmobile, and therefore Towle infringed upon that copyright.¹³²

III. THERE IS ALWAYS ROOM TO IMPROVE: RECOMMENDED FACTORS

In *Towle*, the court read precedential cases as creating a three-part test necessary to determine whether a fictional character is copyrightable.¹³³ Regrettably, this three-part test is not enough to yield predictable and fair decisions in every similar claim. First, the three-part test merely combines three standards already in use. It offers little clarification as to what constitutes "especially distinctive" and "sufficiently delineated." Second, the three-part test only covers fictional characters depicted in comic books, television shows, and movies.¹³⁴ As it does not clearly apply to literary works, characters such as Oberyn Martell,¹³⁵ Bigger Thomas,¹³⁶ Behemoth,¹³⁷ and Mary Katherine Blackwood¹³⁸ are left ex-

¹²⁵ *Id.* at 1022.

¹²⁶ *Id.* at 1022-23.

¹²⁷ *U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1015 (9th Cir. 2012) (quoting 17 U.S.C. § 201(a) (2000)).

¹²⁸ *Towle*, 802 F.3d at 1023 (citing 17 U.S.C. § 106(2) (2002)).

¹²⁹ *Parts Geek*, 692 F.3d at 1015-16 (quoting 17 U.S.C. § 101 (2010)).

¹³⁰ *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 967 (9th Cir. 1992); 17 U.S.C. § 106(2) (2002).

¹³¹ *See Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1447-48 (9th Cir. 1994).

¹³² *Towle*, 802 F.3d at 1024, 1026.

¹³³ *Id.* at 1021.

¹³⁴ *Id.* at 1019.

¹³⁵ GEORGE R. R. MARTIN, *A SONG OF ICE AND FIRE: STORM OF SWORDS*, (Bantam ed., 2003) (the fictional Prince of Dorne).

¹³⁶ RICHARD WRIGHT, *A NATIVE SON*, (Harper Perennial ed., 1998) (the 20-year-old protagonist).

tremely vulnerable to plagiarism.¹³⁹ Third, the three-part test fails to resolve the question of characters with utilitarian function. It fails to distinguish between works of applied art, which are copyrightable, with works of industrial design, which are not.¹⁴⁰

There are commentators who think enumerating fictional characters in the Copyright Act¹⁴¹ would alleviate all issues arising out of this three-part test.¹⁴² However, if copyright protections were automatically granted to every fictional character, there would be an inevitable shortage of new artistic creations. As this Note illustrates, ideas build on ideas, and that is exactly how it should be. Works such as *Bridget Jones Diary*,¹⁴³ *50 Shades of Grey*,¹⁴⁴ and *10 Things I Hate About You*¹⁴⁵ would never have been created if copyright law were made too restrictive. By categorically listing fictional characters, artists would too often infringe on another's work simply because they drew inspiration from that work. Instead, the court should consider additional factors when deciding which fictional characters deserve copyright protection. The three additional factors are proposed and discussed below.

A. NUMBER OF CHARACTER APPEARANCES IN A SERIES

The development of recognizable qualities can be achieved through multiple appearances in various works because the character has a chance to be known. By reviewing a character's number of appearances within various works of art, courts can address two of the three limitations of the three-part test. First, it eliminates the concern for characters serving a utilitarian purpose. The more times a character appears, the more personality it develops outside of its mere use. As defined by copyright law, useful designs are deemed works of art if some feature can be identified or exist independent of its utilitarian function.¹⁴⁶ Second, it expands the court's analysis to include fictional characters in literary works. Literary works are just as numerous and important as comic

¹³⁷ MIKHAIL BULGAKOV, *THE MASTER AND MARGARITA* (Diana Burgin & Katherine Tiernan O'Connor trans., 1995) (the demonic black cat).

¹³⁸ SHIRLEY JACKSON, *WE HAVE ALWAYS LIVED IN THE CASTLE* (Penguin Books ed., 1984) (the 18-year-old narrator).

¹³⁹ See *Towle*, 802 F.3d at 1019.

¹⁴⁰ H.R. Rep. No. 94-1476, at 55 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664.

¹⁴¹ Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012).

¹⁴² David B. Feldman, Comment, *Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 CAL. L. REV. 687, 687 (1990).

¹⁴³ Adapted from JANE AUSTEN, *PRIDE AND PREJUDICE*, (Millennium Publications ed., 2014).

¹⁴⁴ Fan fiction for STEPHANIE MEYER, *TWILIGHT*, (Little, Brown and Company ed., 2005).

¹⁴⁵ Adapted from WILLIAM SHAKESPEARE, *THE TAMING OF THE SHREW*, (Barbara A. Mowat & Paul Werstine eds., 1992).

¹⁴⁶ 17 U.S.C. § 101 (2014).

books, television shows, and movies. If a character makes several appearances in a variety of works, the author solidifies physical and distinguishable traits, unique to that character. A viewer's understanding of a character deepens as she becomes familiar with what the character thinks, feels, says, and does, as well as through the comments of other characters.¹⁴⁷

In *New Line Cinema Corporation v. Bertlesman Music Group, Inc.*, a rapper wrote the song, *A Nightmare on My Street*, and shot a video about a fictional character named Freddy.¹⁴⁸ In the song and video, Freddy attacked various characters in their dreams.¹⁴⁹ One of the character's bedrooms was described as being "engulfed in flames."¹⁵⁰ Another character woke up from a nightmare only to find Freddy's hat on her bed.¹⁵¹ Long before the song and video released, New Line Cinema produced the *Nightmare on Elm Street* series, with the main character, Freddy Krueger.¹⁵² Freddy Krueger appeared in nine distinct motion pictures since 1984.¹⁵³ Throughout that time, Freddy Krueger developed into a character easily recognized for his six-inch bladed gloves, burnt face, and ability to kill people in their dreams.¹⁵⁴ Taken individually, the song sounded like the makings of another generic horror movie. Taken as a whole, however, its lyrics and images substantially mimicked Freddy Krueger's qualities and attributes.¹⁵⁵ The court held the combination of similarities between the two works was enough to protect the movie character of Freddy Krueger under copyright law.¹⁵⁶

To illustrate further, the Conan Doyle Estate recently filed a complaint against Miramax over a movie about a retired Sherlock Holmes.¹⁵⁷ Even though the author of the beloved series has long since lost his copyright ownership to public domain, his characters still qualify for copy-

¹⁴⁷ Warner Bros. Inc. v. American Broadcasting Companies, Inc., 720 F.2d 231, 242 (2d Cir. 1983).

¹⁴⁸ New Line Cinema Corp. v. Bertlesman Music Grp., Inc., 693 F. Supp. 1517, 1522-23 (S.D.N.Y. 1988).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1522.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Eric Diaz, *All 9 A Nightmare on Elm Street Movies, Ranked from Best to Worst*, THE NERDIST (Oct. 31, 2015), <http://nerdist.com/all-9-a-nightmare-on-elm-street-movies-ranked-from-best-to-worst>.

¹⁵⁴ *Biography for Freddy Krueger*, IMDB, <http://www.imdb.com/character/ch0002143/bio> (last visited Feb. 21, 2016).

¹⁵⁵ *Bertlesman*, 693 F. Supp. at 1524.

¹⁵⁶ *Id.*

¹⁵⁷ Ted Johnson, *'Mr. Holmes' Lawsuit Reaches Settlement, Says Arthur Conan Doyle Estate Attorney*, VARIETY (Sept. 3, 2015), <http://variety.com/2015/biz/news/mr-holmes-lawsuit-settlement-arthur-conan-doyle-1201585667>.

right protection.¹⁵⁸ Sherlock Holmes and Dr. Watson were intelligent men capable of solving mysteries and crimes through their ability to think outside of the box. If they only existed in one work, there would be nothing uniquely distinguishable about them. However, through the span of their adventures, chronicled in Arthur Doyle's four novels and 56 short stories,¹⁵⁹ Sherlock Holmes and Dr. Watson became characters known to the general public. Even those who have never read one of Doyle's books can give a general idea of the characters' friendship and mannerisms. The author fully developed the individual characters over the entire series.

B. WHAT THE CHARACTER LOOKS LIKE

Recognition can also be achieved through a character's physical appearance because it makes a character easy to recognize. By factoring in the physical appearance, courts can once again address a limitation to the three-part test and remedy the gap in coverage for literary characters.

In *Warner Brothers, Inc. v. American Broadcasting, Inc.*, an entertainment studio created a script about a young man who inherited a suit, which gave him magical powers.¹⁶⁰ When he wore the suit, he could fly, move really fast, and stop bullets.¹⁶¹ The court argued a distinction must be drawn between a "substantially similar character that infringes a copyrighted character despite slight differences in appearance, behavior, or traits, and a somewhat similar though non-infringing character whose appearance, behavior, or traits, and especially their combination, significantly differ from those of a copyrighted character, even though the second character is reminiscent of the first one."¹⁶² Simply put, just because a character is reminiscent of a copyrightable character does not mean there is an infringement.

Initially, courts reasoned literary characters are not as easily protected as graphic characters because there is no specific form attached to the literary creation.¹⁶³ The author's mind and the viewers' imagination will never agree to the character's physical appearance, no matter the amount of detail.¹⁶⁴ In addition, considering a character's appearance does not allow for the flexibility of characters taking on different forms.

¹⁵⁸ *Id.*

¹⁵⁹ ARTHUR CONAN DOYLE, *THE COMPLETE SHERLOCK HOLMES: ALL 4 NOVELS AND 56 SHORT STORIES 1* (Bantam Classics ed. 1986).

¹⁶⁰ *Warner Bros, Inc. v. Am. Broad. Cos., Inc.*, 720 F.2d 231, 234 (2d Cir. 1983).

¹⁶¹ *Id.*

¹⁶² *Id.* at 242.

¹⁶³ *See Columbia Broad.*, 216 F.2d at 950.

¹⁶⁴ *See id.*

However, it is easy to apply copyright protection to characters like The Hulk, Batman, Mickey Mouse, and Superman because they are physically easy to recognize. Superman's red and blue leotard could change color, but the overall effect of his costume remains the same. Batman might upgrade his suit, but it will always have the features inherent in his character.

Physical appearance matters greatly when deciding if fictional characters are distinguishable enough to protect. In *Air Pirates*, the court said graphically depicted characters are easy to protect because there is an image to associate with the character.¹⁶⁵ In *Rice*, the court discussed the general appearance of the Mystery Magician.¹⁶⁶ In *Halicki Films*, the court placed no significance on Eleanor being a Fastback Ford Mustang in one film, and a Shelby GT-500 in another.¹⁶⁷ In all three cases, the court acknowledged a character's physical appearance in some way.

C. PAINTING THE WHOLE PICTURE OF A SINGLE CHARACTER

Fictional characters are individual parts of the collective whole; and a character's particular talents, appearance, and characteristics combine to make a complete expression.¹⁶⁸ By analyzing the entire work, courts can address all three of the limitations of the three-part test.

To illustrate, James Bond, taken individually, would not be unique enough to fall within copyright protections. He is a physically fit, charming, and suave secret agent with access to a slew of technological gadgets to aid him on his missions.¹⁶⁹ He works for the government and has qualified skills in weaponry.¹⁷⁰ That description, unsurprisingly fits hundreds of "super spies" in every action movie ever made—namely, Jason Bourne,¹⁷¹ Ethan Hunt,¹⁷² Bryan Mills,¹⁷³ and Harry Hart.¹⁷⁴ What makes James Bond distinguishable from all others is the combination of his personality traits, quirks, mannerisms, thoughts, and typical behaviors. Understanding the work in its entirety will not only provide more predictable and consistent decisions, it will likely result in a fair outcome.

¹⁶⁵ *Air Pirates*, 581 F.2d at 755.

¹⁶⁶ *Rice*, 330 F.3d at 1174.

¹⁶⁷ *Towle*, 802 F.3d at 1020 (citing *Halicki*, 547 F.3d at 1224).

¹⁶⁸ *Am. Broad.*, 720 F.2d at 243.

¹⁶⁹ *Metro-Goldwyn Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (1995).

¹⁷⁰ *Id.*

¹⁷¹ *THE BOURNE IDENTITY* (Universal Pictures 2002).

¹⁷² *MISSION IMPOSSIBLE* (Cruise/Wagner Productions 1996).

¹⁷³ *TAKEN* (20th Century Fox 2008).

¹⁷⁴ *KINGSMAN: THE SECRET SERVICE* (20th Century Fox 2015).

IV. CONCLUSION

Copyright law protects artistic expressions of an idea, while encouraging others to freely build upon the raw ideas themselves.¹⁷⁵ It is, therefore, paramount to set limits on copyright protection for fictional characters, as it has the capacity to both enhance and diminish artistic creativity.¹⁷⁶

In *Towle*, the Ninth Circuit had to decide whether the Batmobile was a fictional character entitled to copyright protection.¹⁷⁷ The court concluded past precedents established the three-part test necessary for determining whether a fictional character was copyrightable.¹⁷⁸ It held the character must: (1) generally have “physical as well as conceptual qualities,”¹⁷⁹ (2) be “sufficiently delineated” so as to be recognized as “display[ing] consistent, identifiable . . . traits and attributes,”¹⁸⁰ and (3) be “especially distinctive” and “contain some unique elements of expression.”¹⁸¹

Although the court ultimately reached the correct outcome by ruling the Batmobile was a character protected under copyright law, the three-part test used does not ensure a fair and just result in all similar claims. First, it merely combined three judicial standards already in use without elaborating on a clearer definition for “especially distinctive” and “sufficiently delineated.”¹⁸² Second, it failed to provide guidance with regard to fictional characters in literary works, limiting the analysis to only comic books, television shows, and movies.¹⁸³ Third, it dismissed the utilitarian function analysis of an automobile, falling short of distinguishing between works of applied art with works of industrial design.¹⁸⁴

Many commentators proposed enumerating fictional characters in the Copyright Act to help alleviate the issues arising out of the three-part test.¹⁸⁵ However, automatic copyright protections would greatly restrict individual creativity and hinder the objective of copyright law. By adding additional factors, courts are likely to achieve a consistent, unified standard. All three of the listed shortcomings can be alleviated or com-

¹⁷⁵ *Coe*, *supra* note 4, at 1309-10.

¹⁷⁶ See generally Rochelle C. Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 590-91 (1987).

¹⁷⁷ *Towle*, 802 F.3d at 1019.

¹⁷⁸ *Id.* at 1021.

¹⁷⁹ *Air Pirates*, 581 F.2d at 755.

¹⁸⁰ *Towle*, 802 F.3d at 1021; see *Rice*, 330 F.3d at 1175; see also *Halicki*, 547 F.3d at 1224.

¹⁸¹ *Halicki*, 547 F.3d at 1224.

¹⁸² *Towle*, 802 F.3d at 1021.

¹⁸³ *Id.* at 1019.

¹⁸⁴ *Id.* at 1019-20.

¹⁸⁵ *Feldman*, *supra* note 142, at 687.

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pletely addressed by reviewing: (1) the number of character appearances in a series, (2) the visual appearance of the character, and (3) the totality of the circumstances surrounding the claim. This case-by-case analysis helps address the inherent limitations of the current three-part test, likely providing more predictable and just results.¹⁸⁶

¹⁸⁶ See *Towle v. DC Comics*, 989 F. Supp. 2d 948 (C.D.Cal. 2013), *aff'd*, 802 F.3d 1012 (9th Cir. 2015), *cert. denied*, 136 S.Ct. 1390 (2016) (mem.). The Supreme Court denied Towle's petition for writ of certiorari regarding the Ninth Circuit's holding.