

# Daily Journal

www.dailyjournal.com

MONDAY, OCTOBER 12, 2015

## Batmobile ruling not new, but the test is

By Andrew J. Thomas

Recognizing that characters often are as valuable to content creators as plots and stories, courts have long held that fictional characters may be independently protected under copyright law. The scope of that protection can become murky when fictional characters, like real-world individuals, change over time — altering their appearance or evolving new traits. Last month, the 9th U.S. Circuit Court of Appeals sought to bring clarity to this question in resolving an unusual case involving claims that an inanimate object — the Batmobile — is a “character” subject to copyright protection.

In *DC Comics v. Towle*, the 9th Circuit affirmed a district court summary judgment ruling that defendant Mark Towle infringed DC Comics’ rights under copyright law when he built and sold replica cars that imitated the Batmobile as it appeared in the 1966 “Batman” television show and the 1989 “Batman” motion picture. In finding the Batmobile to be a copyrightable character, the court emphasized the vehicle’s “unique and highly recognizable name,” its consistent “bat-like” appearance, and its status as a highly interactive, sleek and maneuverable “crime-fighting car” with “high-tech gadgets and weaponry.”

The result itself does not break significant new ground. Federal courts have held since the early 20th century that fictional characters ranging from Superman and Tarzan to Sherlock Holmes, James Bond and Godzilla may be independently protected under copyright law. In *Halicki Films v. Sanderson Sales & Marketing*, 547 F.3d 1213 (9th Cir. 2008), the 9th Circuit even held that an iconic car could qualify for a “fictional character” copyright — in that case, the muscle car “Eleanor” that appeared in the 1971 film “Gone in 60 Seconds” and its 2000 remake and that displayed an almost emotional dislike to being stolen.

The fact that the Batmobile was protected even though it has varied in appearance over the years likewise is consistent with case law holding that fictional characters may evolve over time, yet still merit copyright protection, provided they retain a core set of distinctive attributes.

In the 1990s, for example, the Central District of California found that characters as diverse as James Bond and

Godzilla were protectable, even though both had changed significantly across the numerous films in which they appeared. The court explained that the fact that “many actors can play Bond is a testament to the fact that Bond is a unique character whose specific qualities remain constant despite the change in actors.” *MGM v. American Honda*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995). Even transforming from a malevolent monster to a benevolent one did not change the fact that “Godzilla is always a pre-historic, fire-breathing, gigantic dinosaur alive and well in the modern world.” *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1216 (C.D. Cal. 1998). In *Towle*, the court found that the Batmobile’s core attributes had been sufficiently delineated in comic books to be a protectable character, even before DC Comics licensed others to create the derivative television show and 1989 movie.

What is new about the 9th Circuit’s decision in *Towle* — or at least what is presented as new — is the opinion’s three-part test that aims to distill a general rule for all situations where copyright is claimed in a fictional character appearing in a comic book, television program or motion picture. First, the character must generally have “physical as well as conceptual qualities.” Second, the character must be “sufficiently delineated” to be “recognizable as the same character whenever it appears.” Third, the character must be “especially distinctive” and exhibit “unique elements of expression.” Each element of this test has a familiar ring.

The 2nd U.S. Circuit Court of Appeals first addressed copyright protection of fictional characters in *Nichols v. Universal Pictures*, 45 F.2d 119 (2d Cir. 1930). Judge Learned Hand explained that a character could be protected by copyright if sufficiently delineated, but that stock or flat characters enjoy no such protection. “[T]he less developed the characters,” Hand said, “the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.” This “character-delineation test” is a logical extension of copyright law’s idea-expression dichotomy: If a character is too indistinct, it represents a mere idea and not the expression of an idea. Following *Nichols*, courts in the 2nd Circuit have upheld copyright protection for numerous characters, in-

cluding Superman, Batman, Tarzan and, most recently, Holden Caulfield.

The 9th Circuit initially took a much narrower approach to the issue in a case involving the iconic detective Sam Spade. In *Warner Bros. Pictures v. CBS*, 216 F.2d 945 (9th Cir. 1954), the court announced that a literary character generally will not qualify for copyright protection but that it might be protected if it “really constitutes the story being told.” By contrast, the court said, if the character “is only the chessman in the game of telling the story,” it will not be protected. Owing in part to the posture of the case, the court held there was no copyright in the Sam Spade character separate from the copyright in the “Maltese Falcon” story.

Subsequent courts have questioned whether the story-being-told test is dicta or an alternative holding, since the 9th Circuit’s interpretation of the contract that purportedly assigned the “Maltese Falcon” rights appeared to fully resolve the issue. Plainly motivated by a desire to protect the original author’s ability to reuse his main character, even after he had assigned his story to the studio, the court in *Warner Bros. v. CBS* rather ironically formulated a test that afforded only quite narrow copyright protection to literary characters.

The 9th Circuit’s restrictive formulation of the story-being-told test was relaxed somewhat in *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978). That case involved the defendants’ use of classic Disney characters in counter-culture cartoons featuring drug use, promiscuity and other themes at odds with Disney’s family-friendly image. Holding that the characters in question were copyrightable, the court distinguished the “Sam Spade” case on the grounds that the Disney characters were visually depicted in the works under copyright, while Spade had existed only as a literary creation. Because cartoon characters have “physical as well as conceptual qualities,” the court reasoned they were “more likely to contain some unique elements of expression” than a purely literary character.

In *Towle*, the 9th Circuit formulated its three-part test as a synthesis of these decisions. On closer inspection, however, the three prongs largely collapse into two, and the test looks a lot like a repackaged version of the 2nd Circuit’s character delineation test. The first

### CONTENT MATTERS

This is a monthly column devoted to matters of interest to those who create content of all kinds (entertainment, news, software, advertising, etc.) and bring that content to market. Our hope is to shed light on key issues facing the creative content community. If you have questions, comments or topic ideas, let us know at [ContentMatters@jenner.com](mailto:ContentMatters@jenner.com). Because content matters.

prong mainly differentiates purely literary characters from the visually depicted characters present in comic books, television shows, and films — since, as *Air Pirates* recognized, visually represented characters present many more opportunities for delineation. The second prong of the 9th Circuit’s formulation is the *Nichols* “character delineation” test. And the third prong merely underscores that “sufficiently delineated” means “really quite delineated.”

One question left open is how far courts will go in according copyright protection to inanimate objects. Will every unique prop get its own copyright — at least where it appears in multiple films or TV shows? That seems unlikely, especially where a prop serves primarily as an aid in delineating a central human character — as in the case of Yoda’s green light saber, Indiana Jones’s fedora and bullwhip, or Wonder Woman’s golden lasso. This may be where the first prong of the *Towle* test makes a real difference — requiring “conceptual qualities” on top of the “physical qualities” that any visually depicted object will display.

Or perhaps cars are a special case. Houses, trees and other items may be imbued with human-like qualities in some works of fiction, but what other objects have been so anthropomorphized in popular culture — from “Transformers” to KITT to Herbie the Love Bug, all the way back to “My Mother the Car”?

Andrew J. Thomas is a partner in the Content, Media and Entertainment group in Jenner & Block’s Los Angeles office. He represents content owners in copyright, trademark and First Amendment matters. He can be reached at (213) 239-5155 or [ajthomas@jenner.com](mailto:ajthomas@jenner.com).



ANDREW J. THOMAS  
Jenner & Block