Copyright Protection for Fictional Characters

BY ALLISON S. BREHM AND ERIC W. MAY

It is often the characters portrayed in motion pictures, television shows, and all forms of fiction that drive the story. After all, what would Goldfinger be without James Bond, Rocky without Rocky Balboa, The Wizard of Oz without Dorothy, Tin Man, Cowardly Lion, or Scarecrow? Where such works are copyrighted, a component of that copyright protection may extend to the characters themselves.

A copyright-protected character can be exceedingly lucrative for the copyright owner. Copyright protects against copying of expressive elements of that character and thus paves the way for entire franchises to be built upon a single character.

Because of the central role characters can play in the plot development of any given creative work, it is no surprise that owners of the copyrights in such works seek to extend protection to the characters themselves. And yet, given that creators are often inspired by and borrow from the creative works of others, it is also no surprise that disputes arise as to the parameters of copyright protection for characters.

This article addresses the circumstances under which courts afford characters copyright protection. The article begins with a basic overview of copyright law, followed by an explanation of the factors that courts apply in assessing copyright protection for characters, and then delves into the variety of characters from films, television shows, novels, comic books, and advertisements that courts have analyzed.1

I. Copyright Law Basics

Copyright is a form of protection for authors of “original works of authorship.”2 It gives the owner the exclusive right to reproduce the copyrighted work, distribute copies to the public, and prepare derivative works, among other exclusive rights.3 Where a work is copyrighted, a component of that protection may extend to the characters within that work.4

Just because a work is copyrighted, however, does not mean that every element of the work is protected against copying. The primary objective of copyright is “to promote the Progress of Science and useful Arts.”5

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1 There are alternate bases that may be used to protect distinctive characters and their names which are not addressed in this article, including protection under trademark, unfair competition, and right of publicity laws. See 2 J. Thomas McCarthy, McCarthy on Trademark and Unfair Competition § 10:43.
5 U.S. Const. art. I, § 8, cl. 8.
As a means of satisfying this objective, copyright protects an author’s expression of ideas, but not the ideas themselves.6

Indeed, “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas . . . conveyed by a work.”7 Thus, “every idea . . . in a copyrighted work becomes instantly available for public exploitation at the moment of publication.”8

This is known as the “idea/expression . . . dichotomy” and it “applies to all works of authorship.”9 As the Supreme Court has explained, “[t]his result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”10

These principles hold equally true in the context of copyright protection for characters within a work. A character, it has been said, “is an aggregation of the particular talents and traits his creator selected for him.”11 Copyright protects characters whose talents and traits qualify as unique elements of expression, not simply basic ideas.

Where a dispute has arisen over the use of a character, courts will first consider whether the character allegedly copied constitutes protected expression or is free for the taking. Then, courts will consider whether copying of that character gives rise to a copyright infringement claim by determining the degree of substantial similarity between the original character and the alleged copy.12

This article focuses primarily on the first consideration and, specifically, the tests and factors that courts apply to determine whether or not characters are copyright protected and the particular characters that have been afforded copyright protection.

II. The Dominant ‘Tests’ Courts Apply in Determining Whether a Character Merits Copyright Protection

Ordinarily, characters are not afforded copyright protection unless the character is either (1) especially distinctive; or (2) so central to the story that the character is essentially the “story being told.”13

These tests stem from two decisions of the U.S. Courts of Appeals—one from the Second Circuit which governs New York among other jurisdictions,14 and the other from the Ninth Circuit, which governs California among other jurisdictions.15 Courts apply one or both of these tests, often depending on the type of character that is involved.

A. The ‘Especially Distinctive’ Test

Under the “especially distinctive” test, characters that are “sufficiently delineated” and that display “consistent, widely identifiable traits” merit copyright protection.16

This test originated in a Second Circuit decision from 1930, Nichols v. Universal Pictures Corp., involving alleged infringement of the play Abie’s Irish Rose by Universal Pictures’ film The Cohens and the Kellys.17 The court held that Universal Pictures did not infringe the story or the characters in the play.18

As for the characters, the court explained, in oft-quoted language, that “the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.”19

Viewing the only similar characters in both works—the lovers—the court explained that the “lovers are so faintly indicated as to be no more than stage properties. They are loving and fertile; that is really all that can be said of them, and anyone else is quite within his rights if he puts loving and fertile lovers in a play of his own, wherever he gets the cue.”20 Accordingly, the playwright could not prevail against Universal Pictures for copyright infringement based on characters that are not especially distinctive.21

B. The ‘Story Being Told’ Test

Arguably more stringent than the especially-distinctive test, the “story being told” test requires that the character be so central to the story that it is the story in order to merit copyright protection.

The landmark case that introduced the story-being-told test involves the “Sam Spade” character from Dashiell Hammett’s serial publication, The Maltese Falcon. In Warner Bros. Pictures Inc. v. Columbia Broadcasting System, Warner Bros. brought suit against Hammett and his licensees for copyright infringement based upon a dispute regarding the ownership and use of certain characters of The Maltese Falcon.22

After Hammett sold Warner Bros. certain rights to The Maltese Falcon, Warner Bros. claimed that it had acquired the exclusive right to the book, including the

Some courts within the Ninth Circuit have stated that it is unclear whether the “story being told” test was only dicta. E.g., Olson v. National Broadcasting Co., 855 F.2d 1446, 1451 n.6., 8 USPQ2d 1231 (9th Cir. 1988) (citing Walt Disney Productions v. Air Pirates, 581 F.2d 751, 755, 199 USPQ 769 (9th Cir. 1979)). Nevertheless, courts frequently consider the “story being told” test, in addition to the “especially distinctive” test. See, e.g., Rice, 330 F.3d at 1176 (applying both tests); Olson, 855 F.2d at 1452-53 (same); Bach v. Forever Living Products U.S. Inc., 473 F. Supp. 2d 1127, 1136 (W.D. Wash. 2007) (same); Anderson v. Stallone, 11 USPQ2d 1161, 1166-67 (C.D. Cal. 1995) (same); Metro-Goldwyn-Mayer Inc. v. American Honda Motor Co., 900 F. Supp. 1287, 1295-97 (C.D. Cal. 1995) (same).

6 Eldred v. Ashcroft, 537 U.S. 186, 219, 65 USPQ2d 1225 (2003) (65 PTCJ 224, 1/17/03); Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045, 29 USPQ2d 1877 (9th Cir. 1994); see also 17 U.S.C. § 102(b).
8 Eldred, 537 U.S. at 219.
9 Feist, 499 U.S. at 350.
10 Id.
13 See Rice v. Fox Broadcasting Co., 330 F.3d 1170, 1176, 66 USPQ2d 1829 (9th Cir. 2003) (66 PTCJ 208, 6/13/03).
14 Nichols v. Universal Pictures Corp., 45 F.2d 119, 121, 7 USPQ 84 (2d Cir. 1930).
15 Warner Bros. Pictures Inc. v. Columbia Broadcasting System, 216 F.2d 945, 950, 104 USPQ2d 103 (9th Cir. 1954).
16 Eldred v. Ashcroft, 537 U.S. 186, 219, 65 USPQ2d 1225 (2003) (65 PTCJ 224, 1/17/03); Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045, 29 USPQ2d 1877 (9th Cir. 1994); see also 17 U.S.C. § 102(b).
17 Eldred, 537 U.S. at 219.
18 Feist, 499 U.S. at 350.
19 Id.
22 See Rice v. Fox Broadcasting Co., 330 F.3d 1170, 1176, 66 USPQ2d 1829 (9th Cir. 2003) (66 PTCJ 208, 6/13/03).
23 Nichols v. Universal Pictures Corp., 45 F.2d 119, 121, 7 USPQ 84 (2d Cir. 1930).
24 Warner Bros. Pictures Inc. v. Columbia Broadcasting System, 216 F.2d 945, 950, 104 USPQ2d 103 (9th Cir. 1954).
individual characters, and any subsequent use of the characters in the book violated Warner Bros.’ rights. The Ninth Circuit held that the transfer of rights to Warner Bros. did not include Sam Spade and the other supporting characters. The court went on to explain the circumstances under which a character may be copyrightable: “[i]t is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.”

By the court’s analysis, Sam Spade, and the other characters of the novel, were not the story, but rather only the “vehicles for the story told.” Thus, Dashiell Hammett won the right to freely use Sam Spade in other stories, even though Hammett had assigned Warner Bros. the rights in the story that spawned the character. In the court’s words, “the characters were vehicles for the story told, and the vehicles did not go with the sale of the story.”

While the court’s discussion of copyright protection for characters was arguably dicta because the case concerned the scope of the transfer of rights in The Maltese Falcon, the story-being-told test has endured over time, although its continuing viability has been called into question.

Sam Spade, like many other hard-boiled private eyes who are a dime a dozen, has captivated the imaginations of audiences for ages. But why does a memorable character like Sam Spade fall outside of copyright protection?

One answer to this question may be that not every film noir has a character as memorable as James Bond. Indeed, everyone has seen The Maltese Falcon, but no one knows how Sam Spade drinks his martinis.

III. The Legacy of ‘Shaken But Not Stirred’

There is a reason why certain characters have endured in our imagination and have been afforded copyright protection by law. Copyright-protected characters have achieved a high degree of recognition or identification.

They conjure up distinct images in our imaginations simply by reading their names: James Bond, Mickey Mouse, Rocky Balboa, Godzilla, Tarzan, E.T., Scarlet O’Hara and Rhett Butler from Gone with the Wind; Tom and Jerry; and Dorothy, Tin Man, Cowardly Lion, and Scarecrow from Wizard of Oz.

Each of these characters has unique, identifiable traits and plays a central role in the underlying work—-which convinces courts that the characters merit copyright protection.

One of the most iconic characters who has earned copyright protection is James Bond. In Metro-Goldwyn-Mayer Inc. v. American Honda Motor Co., MGM brought an action against Honda and its advertising agency, alleging that TV ads infringed MGM’s copyright in the James Bond character.

The court found that the James Bond character is protectable. The character is sufficiently distinct in light of the traits that are specific to him: “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 sophistication.” Those traits have been further delineated over the course of the 16—now 22, soon to be 23—-films in which Bond has appeared.

Moreover, the James Bond character was “the story being told,” as “audiences do not watch Tarzan, Superman, Sherlock Holmes, or James Bond for the story[,] they watch these films to see their heroes at work. A James Bond film without James Bond is not a James Bond film.”

The same holds true for Rocky Balboa—a Rocky film without Rocky Balboa is not a Rocky film, as the court found in Anderson v. Stallone. In that case, the plaintiff wrote a treatment of Rocky IV that he hoped Sylvester Stallone and MGM would use as a sequel to Rocky III. The treatment incorporated the characters created by Stallone in his prior movies.

In affording copyright protection to the Rocky Balboa character, the court explained that the characters in the Rocky movies are one of the most highly delineated group of characters in modern American cinema. Rocky Balboa is such a highly delineated character that his name is the title of all four[,] now five[,] of the Rocky movies and his character has become identified with specific character traits ranging from his speaking mannerisms to his physical characteristics.

The court also found that the Rocky characters satisfied the story-being-told test—i.e., they were “so highly developed and central to the three movies made before Anderson’s treatment that they ‘constituted the story being told.’”
Godzilla is yet another character with discernible traits that appear in each of his films. As the court in Toho Co. v. William Morrow & Co. stated, Godzilla has "developed a constant set of traits that distinguish him/her/it from other fictional characters," including that "Godzilla is always a prehistoric, fire-breathing, gigantic dinosaur alive and well in the modern world." 42 43

Based on these characteristics, the court found that Godzilla was a "well-defined character with highly delineated consistent traits," which entitled the character to copyright protection. 44

Tarzan is also sufficiently distinct to merit copyright protection. In the court's unambiguous words, 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." 45

Many Disney characters like Mickey and Minnie Mouse, Donald Duck, the Big Bad Wolf, the Three Little Pigs, and Goofy also have their own distinct style. In Walt Disney Productions v. Air Pirates, the court reasoned that the "distinctive style in which each [of the Disney characters at issue] is drawn conjures up in a world-wide audience . . . associations with rather extensive groupings of traits, characteristics and qualities." 46

Indeed, "the principal appeal of each of the [Disney characters] to the primary audience of children for which they were intended lies with the character and nothing else." 47

If Mickey Mouse is protected, it is not surprising that copyright protection may also extend to comic book characters. In Decarlo v. Archie Comic Publications, for instance, the court found that the Archie Comics character Josie is copyright-protected.

The court held her "unique bouffant hairstyle" and the "spotted cat costume that inspired the development of the character's appearance as a 'pussycat' " earned Josie copyright protection. 49 These elements, the court explained, "are not 'a mere delineation' of an idea or theme. They are, in fact, not necessary to the general theme of Josie at all; instead, they are distinct 'portior and literary details [that] embody an arrangement of incidents and literary expressions original with the author, [and as such are] proper subjects of copyright." 50

Unlike characters that have been represented visually, such as in movies, cartoons, or comic books, literary characters are less likely to be afforded such protection, as the Sam Spade case demonstrates. This is because protection for literary characters can present a "troublesome question" due to the "difficulties of distinguishing distinct attributes of a literary character from its embodiment of more general ideas and themes." 51

In Bach v. Forever Living Products U.S. Inc., the court nonetheless found the literary character Jonathan Livingston Seagull, who appears in a single book bearing the same name, merited copyright protection even though it was an "ordinary seagull." 52 The court detailed the specific, unique traits of the seagull character:

- a thinking, talking, philosophizing, risk-taking, limit-testing seagull with an extraordinary name; who is anthropomorphized into a human-like character who distinguishes himself by flying higher and faster and farther than any gull has ever flown before; and who emerges as an extraordinary and enlightened seagull who teaches other seagulls so that they might similarly lift themselves from a conventional life of scavenging the shores for food to extend themselves and succeed beyond their ordinary lives. 53

The court in Salinger v. Colting deemed Holden Caulfield, from J.D. Salinger's novel The Catcher in the Rye, also "sufficiently delineated" to merit copyright protection, although the court did not publish the reasons for granting copyright protection to the Caulfield character. 54

While many of the copyright-protected characters mentioned above have achieved iconic status, that is by no means a prerequisite. A character named "Bill," who appeared in just three television commercials and a print advertisement, as a "balding, Caucasian male dressed in a costume that appears to represent a stack of United States one dollar bills, and is "a metaphor for money that is not earning interest or any other form of investment return," is protected. 55

Bill "is lazy, unproductive, childlike, innocent, naive, and of average intelligence," and although these traits, alone, are not protectable, when "taken together with Bill's costume and his name, . . . the 'totality' of Bill's attributes and traits create a sufficiently developed character." 56 Bill was deemed to be "sufficiently distinctive to be protectable by copyright" even though he was not "as distinctive as Superman, Godzilla, James Bond or Ronald Reagan." 57

Even an inanimate object may be copyright-protected. In Halicki Films LLC v. Sanderson Sales and Marketing, the Ninth Circuit implied that a car character named "Eleanor" from the motion picture Gone in 60 Seconds, may be copyrightable. 58 Eleanor is a customized yellow Ford Mustang and, although "thefts of other cars go largely unplanned," whenever someone...
tries to steal Eleanor, “circumstances invariably be-

come complicated.” The court did not definitively rule on whether Eleanor is copyright-protected, but strongly suggested Eleanor’s physical and conceptual qualities qualify her for copyright protection.

Each of the aforementioned characters shares specific, easily identifiable, and unique traits that make the characters protectable under copyright law. Indeed, but for perhaps Eleanor the car, the characters that have achieved copyright protection are so distinct as to be unforgettable. Yet, not every unforgettable character earns protection.

For instance, the character named “Regan,” a 12-

year old girl who was possessed by demons in The Exorcist, failed the “story being told” test. In Warner Bros. Inc. v. Film Ventures International, the plaintiff-producer brought an infringement claim against defendant-producer for allegedly copying the character and certain elements of The Exorcist, including “distinctive sounds, special lighting effects, levitation of Regan’s body and the bed she is confined to, the spinning of [Regan’s] head 360 degrees and the falling back of her eyes with pupils covered” as Regan was possessed by demons. The Regan character was not afforded copyright protection because the story of The Exorcist was not “subordinated to the Regan character,” which the court contrasted with Disney’s Mickey Mouse cartoon character.

On the other end of the spectrum are characters who are so undeveloped or generic as to fall squarely and unquestionably within the category of unprotected ideas. Creative works are populated with such unprotectable, and frankly forgettable, characters, as detailed below.

**IV. Forgettable Stock Characters**

While characters may be copyright-protected, more often than not most of the characters that are depicted in any given work could never come close to satisfying the especially-distinctive or story-being-told tests. This is because characters are often so loosely drawn that they are only an abstract outline of a character or are otherwise one-dimensional, stock characters, such as the following that have been the subject of copyright infringement lawsuits:

- a young wizard character with “no discernible personality or distinguishable appearance”;
- a “blond, blue-eyed hero or doctors in ‘hot and cold’ romances”;
- Vietnam veteran characters depicted “only by three-or-four-line summaries”;
- children from different countries appearing in a children’s book in which “[n]one of the characters

is discussed on more than one page” and “the characters’ personality traits are undeveloped”;
- a “low comedy Jew and Irishman”;
- political “candidates and their scheming campaign strategists”; and
- “lawmen” who are engaged in murder and other criminal activity and are killed by their deputies.

In addition to these unprotected characters, many characters naturally flow from a given topic and thus do not qualify for copyright protection. This is known as the “scenes a faire doctrine,” under which “expressions indispensable and naturally associated with the treatment of a given idea ‘are treated like ideas and are therefore not protected by copyright.’”

For instance, in Porto v. Guirgis, there was an issue as to whether Satan and other biblical characters in a novel about “a trial of Judas Iscariot before a fictional World Court of Religion presided over by Solomon and held in the Federal Courthouse in New York’s Foley Square” merited copyright protection. The “Satan” character was denied protection because he was an “obvious figure in any story about eternal damnation” who “necessarily results from an author’s choice to depict a trial of Judas Iscariot.”

The court found that the depiction of many of the biblical characters was simply “dictated by the choice to tell a story about Judas and his alleged betrayal of Jesus.” Such characters are unprotectable “scenes a faire.”

As the above survey of cases and characters reveals, it is not always obvious which characters will merit copyright protection. Courts have afforded copyright protection to a wide gamut of characters—from film characters to cartoon and comic book characters to literary characters; from characters who have been developed over time in numerous works to characters who have appeared in a single novel or less than a handful of commercials.

A study of these characters reveals, however, that they all share unique elements of expression that render many of them the most memorable characters to have appeared in creative works. These characters have particular talents and traits that leave an indelible impression.

Indeed, the mere mention of “Bond . . . James Bond” calls to mind a whole host of unique elements of expression, from the way Bond takes his cocktails, to his appearance, to the types of cars he drives, to his grace under pressure. These are the characters that receive copyright protection.

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60 Id. at 1217, 1225.
61 Id. at 1225.
63 Id. at 525.
66 Olson v. National Broadcasting Co., 855 F.2d 1446, 1452, 8 USPQ2d 1231 (9th Cir. 1988).
67 Id. at 1217.
68 Id. at 1225.
69 Id. at 525.
70 Id. at 525.
73 Olson v. National Broadcasting Co., 855 F.2d 1446, 1452, 8 USPQ2d 1231 (9th Cir. 1988).
74 Id. at 1217.
75 Id. at 1225.
76 Id. at 1217.
77 Id. at 525.
78 Id. at 525.
79 Id. at 525.
82 Olson v. National Broadcasting Co., 855 F.2d 1446, 1452, 8 USPQ2d 1231 (9th Cir. 1988).
83 Id. at 1217.
84 Id. at 1225.
85 Id. at 525.
88 Id. at 525.
89 Id. at 525.
90 Id. at 525.
93 Id. at 525.
94 Id. at 525.