

Characters and Copyright Protection

It would be unusual in a work of any genre for every part to be protected by copyright law even though the whole work bears the symbol ©. Only when an infringement is alleged and challenged does it become apparent that the phrase “original works of authorship” (Section 102(a) of the Copyright Act of 1976) is not self-defining as to what matter within the work is actually protected. Plots, themes, settings, scenes, devices, and characters are protected only to the extent that they are lifted above generic expression otherwise they are merely the architecture and machinery used to narrate a story.

In the initial stage of this assessment a distinction is made between protected expression and unprotectable idea. The Copyright Act of 1976 specifically excludes from copyright protection “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” (Section 102(b)). These eight abstractions of excluded material are no more self-defining than “original works of authorship.” Their meaning is only brought to life and become clear when dramatized in actual court cases. What we do know is that if the alleged infringement concerns any matter that falls into the excluded sphere can there can be no actionable claim.

Characters are included within the protected sphere only to the extent they have been developed as distinct personalities but when they are represented in generic or descriptive form they remain outside that sphere as unprotected ideas or mere concepts. This point was lucidly made by Judge Hand in a case decided in 1930. He said that “[i]f Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress.” The reason for this is that a riotous knight and a vain and foppish steward are “no more than Shakespeare's ‘ideas’ in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species.”

Although comic book characters are not listed in the Copyright Act, courts have long held that copyright extends not only to original works as a whole, but also to “sufficiently distinctive” elements “like comic book characters, contained within the work.” In *DC Comics v. Towle*, No. 13-55484 (9th Cir., September 23, 2015), certiorari recently denied, the defendant is (now was!) a custom builder of Batmobiles (at least until called out in the lawsuit!) What, if anything, has he taken that belongs to the plaintiff? In reaching its decision that the Batmobile is a character equally protected under copyright law as any developed fictional character the court identified the factors that distinguish the sufficiently distinctive from the unprotectable; the expression from the idea.

Omitting case citations, the Court first observed that

[n]ot every comic book, television, or motion picture character is entitled to copyright protection. We have held that copyright protection is available only “for characters that are especially distinctive.” . . . To meet this standard, a character must be “sufficiently delineated” and display

"consistent, widely identifiable traits." . . . Further, characters that have been "lightly sketched" and lack descriptions may not merit copyright protection.

Under this analysis Batman and Robin are protectable as distinctive superheroes. But what is the Batmobile? Is its depiction in both the 1966 television series and the 1989 motion picture of Batman's fight against dangerous villains in Gotham City anything more than a narrative device? Can the Batmobile be in the same category as its fictional owner?

Think of characters as existing on a continuum with the left side populated by those "lightly sketched" as explained by Judge Hand. As authors add traits, interests, histories, actions and relationships, and achieve interior psychological depth characters move increasingly to the right side of the continuum. Sherlock Holmes and Watson are the canonical pair in detective fiction, Batman and Robin equally so in the comic book genre. A character does not have to be human to have a central role in a story. Roy Rogers had his Trigger (never the subject of infringement). There has also been litigation over figurines similar to the inseparable android buddies, Zem-21 and Zeroid from Star Wars about which the court agreed only that defendant was taking advantage of the popularity of space fiction while dismissing the claim that the accused figurines infringed the copyright.

The court in *DC Comics* established a three-part test "for determining whether a character in a comic book, television program, or motion picture is entitled to copyright protection" which it applied to the Batmobile. The question is what is "distinctive" about the Batmobile sufficient to raise it into the expressive sphere and differentiate it from any old car?

First, because the Batmobile has appeared graphically in comic books, and as a three-dimensional car in television series and motion pictures, it has "physical as well as conceptual qualities," and is thus not a mere literary character. (The interior quotations are from cited cases which are omitted.)

Second, the Batmobile is "sufficiently delineated" to be recognizable as the same character whenever it appears. . . . As the district court determined, the Batmobile has maintained distinct physical and conceptual qualities since its first appearance in the comic books in 1941. In addition to its status as "a highly-interactive vehicle, equipped with high-tech gadgets and weaponry used to aid Batman in fighting crime," the Batmobile is almost always bat-like in 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.

The Batmobile also has consistent character traits and attributes. No matter its specific physical appearance, the Batmobile is a "crime-fighting" car with sleek and powerful characteristics that allow Batman to maneuver quickly while he fights villains.

The second part of the test is especially interesting in that it raises mechanical actors to equal status with characters modeled on human qualities and psychology, even though exaggerated.

Third, the Batmobile is "especially distinctive" and contains unique elements of expression. In addition to its status as Batman's loyal bat-themed sidekick complete with the character traits and

physical characteristics described above, the Batmobile also has its unique and highly recognizable name. It is not merely a stock character.

After applying its three-part test the Court concluded the Batmobile is a character entitled to copyright protection and that the defendant infringed DC's copyrights when he produced and sold unauthorized replicas.

The other significant issue addressed in *DC Comics* is the degree of copyright protection accorded to derivative works. Section 106(2) grants the owner of a copyright the right "to prepare [or authorize others to prepare] derivative works based upon the copyrighted work." A derivative work is defined as a "work based upon one or more preexisting works that recasts, transforms, or adapts the preexisting work." Unauthorized derivative works are infringements which expose the taker to actual or statutory damages.

The defendant in *DC Comics* produced replicas of the Batmobile as it appeared in the 1966 television show and 1989 motion picture, not in the original comic books. The 1966 and 1989 versions were derivative works based on the underlying copyrighted work, the Batmobile character itself. The court held that the defendant's replicas, which were built without permission from the corporate copyright owner but based on authorized derivative works, nevertheless infringed the copyright owner's exclusive right to control the use of its property.

What is true for corporate ownership of copyrights is equally true for individual authors who retain the right to "prepare derivative works," which incidentally happens with reappearing characters in serial works. The reasoning in *DC Comics* is particularly important because it reaffirms what is meant by creative expression, namely the elements in a work copyright is intended to protect.