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The Idea/Expression Dichotomy in Copyright Law as related to Fictional Characters

by

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2014
DECLARATION

I hereby declare that the minor dissertation submitted for the LLM Commercial Law degree to the University of Johannesburg, apart from the help recognised, is my own work and has not previously been submitted to another university or institution of higher education for a degree.

CHRISTELLE ANN WOOD     19 NOVEMBER 2014
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The writing of this paper has been the most frustrating yet rewarding experience of my academic career. It has been a long journey. Life does not stand still, nor does it wait until you are finished and have time to manage it. This process has evoked what I suspect will be a lifelong passion for the law.

Johannesburg
2014
SUMMARY

This research will consider to what extent fictional characters may be protected by copyright law. The discussion will concentrate on the position in the United States of America, the United Kingdom and South Africa. It appears that the reluctance to afford copyright protection to fictional characters stems from their dichotomic nature. As such, the impact of the idea/expression dichotomy will be examined as it is the key issue in determining whether a fictional character will be protected by copyright.
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CHAPTER 1

INTRODUCTION

As a point of departure,¹

“Characters and characterizations which are products of the mind should be held to be protectable property interests...It should be apparent to even the least intelligent that these programmes are as valuable as the most gilt-edged security listed on the Stock Exchange. No court would hesitate to extend its protection to the lawful owner of a security, and yet equally valuable ‘character types’ are not given the same protection.”

Renowned characters such as Batman, James Bond and Mickey Mouse are exceptionally valuable commercial commodities. Some might even suggest that these characters are more well known and valuable than the works in which they feature.² To illustrate this point, the characters that make up the 2013 edition of the Forbes Fictional 15 have an aggregate net worth of $215.8 billion.³

Given the proliferation of such characters, this dissertation seeks to provide an analysis of the idea/expression dichotomy in relation to fictional characters and its impact thereof. What emerges from the discussion is that the distinction between idea and expression is often blurred, particularly when infringement claims focus on the fictional character independently from the work in which it appears.

The first part of this dissertation will provide a brief overview of copyright law as well as the idea/expression dichotomy. Given the dearth of South African authority in this unique field, this study will focus primarily on the position in the United States of America as this issue has featured there often. The method used in this research will be to provide an analysis of American case law illustrating the legal position in relation to the protection of fictional characters and how the maxim that there is no copyright in ideas influences such protection.

The discussion will examine the two main judicial tests articulated by the American courts in considering the copyrightability of fictional characters. Furthermore, reference will also be made to the position in the United Kingdom and will then conclude with a South African perspective.

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CHAPTER 2

CHARACTERS AND THE IDEA/EXPRESSION DICHOTOMY

It has been argued that because copyright law serves to protect creativity, it is the most obvious source of protection for fictional characters. Dean describes copyright as:

“[T]he exclusive right in relation to embodying intellectual content (i.e. the product of the intellect) to do or to authorise others to do certain acts in relation to that work, which acts represent in the case of each type of work the manners in which that work can be exploited for personal gain or for profit.”

Thus, copyright owners are afforded certain exclusive rights that allow them to profit from the use of their copyrighted work, including the right to reproduce, perform, broadcast or publish the work in question. In general, in order to achieve copyright protection, it must be shown that the particular work has been reduced to a material form and is original. In addition, a substantial part of the original work must have been taken by the infringer in order to find an action for breach of copyright.

Furthermore, a fictional character is made up of various components such as a name, physical appearance, personality traits, mannerisms and so forth. They can be seen in a variety of different mediums, including motion pictures, cartoons, games, novels and comic strips. They also come in many shapes and forms such as animals, humans, insects and aliens. However, copyright will not necessarily extend to every element of the protected work, for example, a fictional character’s name or associated catchphrase is unlikely to constitute a literary work.

As one commentator noted, the reluctance to extend copyright protection to fictional characters stems from their dichotomic nature. In this regard, it is often said that copyright

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4 Kurtz (n 2) 439.
6 s 6 of the Copyright Act 98 of 1978.
7 s 2(1) and 2(2) of the Copyright Act 98 of 1978.
8 Dean (n 5) 1-76.
9 Niro “Protecting characters through copyright law: paving a new road upon which literary, graphic, and motion picture characters can all travel” 1992 *DePaul Law Review* 359 360.
10 Niro (n 9) 360.
11 Niro (n 9) 360.
13 Turner “It’s a bird, it’s a plane or is it public domain?: analysis of copyright protection afforded fictional characters” 1982 *South Texas Law Journal* 341 343.
protection does not extend to ideas, but only the form in which they are expressed. This is known as the idea/expression dichotomy, which is one of the central tenets of copyright law. Thus, copyright serves not only to protect creativity by providing incentives to copyright owners to produce new work, it also encourages others to build upon the ideas conveyed by such work.

Copyright protects the artistic features of the work in question and not the concept it conveys. For example, in the case of a literary work, it is the expression of the literary work in a material format that is the subject of copyright protection. The ideas conveyed by such work are not entitled to protection. Dean argues that the maxim may be too simplistic, in that once an idea is expressed in the material form, the idea becomes integral to the work. The difficulty, however, lies in determining whether the relevant copying amounts to use of an idea, or, of an idea that has been expressed in the material form. This determination is frequently a question of degree and is particularly relevant in cases where copyright protection has been sought in relation to the personal characteristics and/or attributes of characters.

The idea/expression dichotomy arises both in the context of the subsistence of copyright and in relation to its infringement. However, the maxim is most often considered in the context of infringement. In such cases, a substantial part of the original work must have been copied in order to find infringement. Here, one needs to determine whether the similarity between the original work and the allegedly infringing work is due to the ideas or the expression of the ideas conveyed by the works in question. In many instances, it is difficult to differentiate an idea from its expression. Dean provides that in such cases the courts should be hesitant to find copyright infringement, as this may confer a monopoly “upon an idea free of the

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14 See Galago Publishers (Pty) Ltd v Erasmus 1989 1 SA 276 AD at 283.
15 Kurtz “Speaking to the ghost: idea and expression in copyright” 1993 University of Miami Law Review 1221 1222.
conditions and limitations imposed by patent law”. The attributes or artistic features of the applicable work must be adapted or transformed by the infringer for such use to amount to copyright infringement.

However, it is only partially correct to say that ideas are not the subject of copyright. As Laddie, Prescott and Vitoria explain:

“...Given that there exists a good copyright in a work, the law does not protect a general idea or concept which underlies the work, nor any one fact or piece of information contained therein. However, a more detailed collection of ideas, or pattern of incidents, or compilation of information may amount to such a substantial part of the work that to take it would be infringement of the copyright, although expressed in different language or other form, it being a matter of fact and degree whether the dividing line has been impermissibly crossed.”

Accordingly, it could be said that although a mere idea will not be protected by copyright, the development of such an idea will. However, not all fictional characters constitute a copyrightable component, some may represent the ideas of the author, while others may constitute an expression worthy of protection. The elements that make up a character must be sufficiently developed by the author in order to ensure that the character constitutes expression rather than an idea in the public domain. It could perhaps be said that there is no copyright in a character per se but it is protected by copyright law within the context of the work in which it appears. For that reason, it is submitted that it may be possible for copyright to be infringed by the use of another author’s character. This is premised on the fact that when examining the attributes, features and story which make up the character, these elements may, as a whole, represent a substantial part of the original work.

Similarly, the story in which the character appears consists of many different elements including the plot, setting, theme and dialogue. If these individual elements are separated from the original story, it will not necessarily constitute a substantial part of the work. As

28 Dean (n 5) 1-77.
29 Dean (n 2) 1-77.
30 See Rapid Phase Entertainment CC v South African Broadcasting Corporation 597 JOC (W) at 605.
31 Laddie, Prescott and Vitoria (n 12) 33.
32 Williamson “Copyright in literary and dramatic plots and characters” 1983 Melbourne University Law Review 300 302.
33 Niro (n 9) 360.
34 Turner (n 13) 344.
35 Zecevic “Distinctly delineated fictional characters that constitute the story being told: who are they and do they deserve independent copyright protection?” 2006 Vanderbilt Journal of Entertainment and Technology Law 365.
36 Laddie, Prescott and Vitoria (n 12) 1689.
37 Laddie, Prescott and Vitoria (n 12) 1687.
Coe explains “[a] fictional character does not exist within a vacuum; some context is essential”.

If a particular character is removed from the story in which it appears, it would not necessarily remain the same character. For example, if Batman was removed from Gotham City and placed in a jungle or an island with no villains to fight, he would no longer be Batman. As such, in order to determine whether copying of a character has taken place, one would have to have regard to the story in which the character features.
CHAPTER 3

THE UNITED STATES OF AMERICA

1 Introduction

There are a number of American cases dealing with the protection of fictional characters. What emerges from these decisions is that a character is unlikely to be afforded copyright protection unless it can be shown that the character is distinctly delineated or that the character is in effect the story being told. In discussing the case law at hand, this section considers both literary and graphic characters, which the courts have often treated differently.

2 Literary characters

The idea/expression dichotomy presents a great challenge for the authors of literary characters. A literary character is one that is dependent solely on the words of the author for any visible existence. These characters are especially problematic because:

"Using identical language or a close paraphrase to describe a literary character is analogous to copying the portrait of a visually depicted character. But when a literary character is copied, what is taken usually is more abstract, an amalgamation of traits and elements that conjures up mental images. It is far simpler to make visual comparisons than to compare abstractions."

Literary characters do not have a physical image against which comparisons can be made and therefore “the distinction between protectable expression and unprotectible idea has proven to be particularly elusive”. As a result, some courts have expressed a reluctance to extend copyright protection to literary characters.

The suggestion that literary characters may be protected seems to have first emerged in *Nichols v Universal Pictures Corporation*, where it was recognised that characters may be afforded copyright protection “quite independently of the ‘plot’,” although the court noted that such an instance had not previously arisen. In this case, the author of the play “Abie’s Irish Rose” brought an infringement claim against the defendant, Universal Pictures.

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42 See *Rice v Fox Broadcasting Company* 330 F 3d 1170 (9th Cir 2003) 1176.
43 *Turner* (n 13) 345.
44 *Turner* (n 13) 345.
45 *Kurtz* (n 2) 451.
46 *Kurtz* (n 2) 451.
47 45 F 2d 119 (2d Cir 1930).
48 121.
It was alleged that the film produced by the defendant entitled “The Cohens and The Kellys” infringed on the plaintiff’s copyright subsisting in the play.\textsuperscript{49} Both works revolve around a young couple, one Jewish and one Irish, and the conflict that the relationship causes within their families.\textsuperscript{50}

Despite the similarities the court found that there were too many differences between the respective works and that the defendant took no more than the law permitted.\textsuperscript{51} The only elements common to both works was an argument between the feuding fathers, a secret marriage, the birth of a child and a reconciliation.\textsuperscript{52} The court was of the view that the theme and characters were mere ideas and that the plaintiff had not adequately developed her characters.\textsuperscript{53} Hand J explained that:\textsuperscript{54}

“If 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. These would be 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. It follows the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.”

Furthermore, the only characters common to both works were the young lovers and the fathers. The court described the fathers as “the low comedy Jew and Irishman”, which had appeared in many other works prior to the plaintiff’s play.\textsuperscript{55} Moreover, it was found that the couples portrayed in the respective works were nothing more than mere stage properties and that “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”.\textsuperscript{56} A comedy that centres on the conflict between Irish and Jews and the marriage of their children “is no more susceptible of copyright than the outline of Romeo and Juliet”.\textsuperscript{57}

\textsuperscript{49} 119.  
\textsuperscript{50} 120.  
\textsuperscript{51} 121.  
\textsuperscript{52} 122.  
\textsuperscript{53} 121. Hand J stated that: “Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression is never extended.”  
\textsuperscript{54} 121.  
\textsuperscript{55} 122.  
\textsuperscript{56} 122.  
\textsuperscript{57} 122.
Hand J found that the characters were not especially distinctive and thus copyright infringement could not be found.\textsuperscript{58}

The analysis by the court has been termed the character delineation or the distinctly delineated test, which requires a consideration of the following two questions: Firstly “was the character as originally conceived and presented sufficiently developed to command copyright protection, and if so, secondly, did the alleged infringer copy such development and not merely a broader and more abstract outline.”\textsuperscript{59} The first of these questions relates to the court’s statement “the less developed the characters, the less they can be copyrighted”.\textsuperscript{60} This essentially means that the character must be well developed in order to be protectable. This stems from the maxim that ideas are not protected by copyright. The second question can only be answered once it has been established that the character is sufficiently developed to merit copyright protection.\textsuperscript{61} In order to establish infringement, it must be shown that what has been taken constitutes an expression and not an idea or general character type.\textsuperscript{62} The obvious difficulty here, lies in determining the extent to which a character must be developed before it will warrant protection.\textsuperscript{63} Unfortunately, Hand J failed to provide a definition as to what exactly constitutes a distinctly delineated character.

This case can be contrasted with Warner Bros Pictures v Columbia Broadcasting System,\textsuperscript{64} which introduced the so-called story being told test. The controversy in this case related to a mystery-detective novel entitled “The Maltese Falcon”, written by Dashiell Hammett. The story follows the adventures of a private detective named Sam Spade. Hammett granted Warner Brothers certain exclusive rights to use his detective novel in motion pictures, television and radio.\textsuperscript{65} Hammett later reused the characters in other works and entered into an agreement with Columbia Broadcasting System, in terms of which he contracted the rights to produce a series of radio broadcasts based on the same novel.\textsuperscript{66}

Subsequently, a dispute over the use and ownership of the characters arose. Warner Brothers alleged that it owned the exclusive rights to the novel as well as the characters and that the use

\textsuperscript{58} 122.
\textsuperscript{60} Kurtz (n 2) 453.
\textsuperscript{61} Zecevic (n 35) 371.
\textsuperscript{62} Zecevic (n 35) 371.
\textsuperscript{63} Nimmer (n 59) 2-169.
\textsuperscript{64} 216 F 2d 945 (9th Cir 1954).
\textsuperscript{65} 948.
\textsuperscript{66} 948.
by the defendants amounted to infringement of its copyright. Hammett argued that the agreement with Warner Brothers did not contain an exclusive right to use the characters and that it was custom for an author to reuse his characters in subsequent works. Stephen J agreed with Hammett, finding that the characters and character names were not specifically mentioned in the agreement and that the transfer of rights to Warner Brothers did not include Sam Spade or the other characters.

The court went on to state that characters may be copyrightable if they signify the story being told and would not attract copyright “if the character is only the chessman in the game of telling the story”. Stephen J was of opinion that the characters were not the story and ultimately sided with Hammett, stating that “the characters were vehicles for the story told, and the vehicles did not go with the sale of the story”. Hammett was therefore allowed to use the characters in other stories, despite the fact that he had granted Warner Brothers rights to the novel that created the characters. Consequently, a new test was formulated which emphasises the story as a whole rather than its individual components.

The court’s approach in Sam Spade has been criticised as being too restrictive because its application would amount to excluding “characters from the orbit of copyright protection”. Kurtz is of the view that the test is far more restrictive than that provided for in the Nichols case. She explains that while characters such as Sherlock Holmes and Tarzan might be regarded sufficiently delineated for copyright protection in terms of the Nichols standard, they might not constitute the story being told. This is so, even though both these characters have featured in a variety of stories being told.

It has been suggested that the court was perhaps reluctant to deprive the author of his right to reuse the characters that he created. However, Nimmer argues that the Sam Spade standard

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67 948.
68 948.
69 950.
70 950.
71 950.
72 Coe (n 16) 1306.
73 Nimmer (n 59) 2-169; 2-170.
74 Kurtz (n 2) 454.
75 Kurtz (n 2) 454.
76 454.
77 216 F 2d at 950. The court explained: “If Congress had intended that the sale of the right to publish a copyrighted story would foreclose the author’s use of its character in subsequent works for the life of the copyright, it would seem Congress would have made specific provision therefor….The restriction argued for is unreasonable, and would effect the very opposite of the statute’s purpose which is to encourage the production of the arts.”
“seems to envisage a ‘story’ devoid of plot wherein character study constitutes all, or substantially all, of the work”.\textsuperscript{78} Feldman agrees stating that “[i]ronically, while the rule articulated in \textit{Sam Spade} protects Hammett’s right to reuse his character, the rule potentially relegated all fictional characters to the public domain”.\textsuperscript{79} Therefore, Hammett was free to exploit the characters in other works but so could everyone else.\textsuperscript{80}

Coe, on the other hand, appears to prefer the \textit{Sam Spade} standard, stating that it is not an insurmountable standard to satisfy and that it is a far more accessible than the distinctly delineated test.\textsuperscript{81} He opines that the \textit{ Nichols} standard fails to provide guidance as to the extent to which a character should be developed in order to be protectable or “a benchmark for the point at which a character transcends a general idea into the realm of protectable expression”.\textsuperscript{82}

Kurtz offers that the statement by Hand J that “the less developed the characters, the less they can be copyrighted,” has led the courts to consider only whether a character is copyrightable and not whether there has been infringement.\textsuperscript{83} The effect is that the courts often only analyse whether or not a character is sufficiently developed without also comparing the characters in the original and allegedly infringing work to determine if they are substantially similar.\textsuperscript{84} Therefore, in an attempt to measure the development of characters, some courts have been inclined to look at the character in isolation without having regard to the context in which it appears.\textsuperscript{85} Additionally, the conflicting case law has led to the application of inconsistent standards and in some cases, the overprotection of characters.\textsuperscript{86}

This difficulty is illustrated in \textit{Filmvideo Releasing Corp v Hastings},\textsuperscript{87} a case which embraced the copyrightability of a literary character. This case involved the use of the cowboy character Hopalong Cassidy, created by Clarence E. Mulford, the author of the Hopalong Cassidy books. In 1935, Mulford granted the right to make a series of films based on the books to Prudential Studios Corporation.\textsuperscript{88} Some years later, the copyright in the films expired and

\textsuperscript{78} Nimmer (n 59) 2-170.
\textsuperscript{80} Kurtz (n 2) 455.
\textsuperscript{81} Coe (n 16) 1322.
\textsuperscript{82} Coe (n 16) 1312.
\textsuperscript{83} Kurtz (n 2) 440.
\textsuperscript{84} Kurtz (n 2) 440.
\textsuperscript{85} Coe (n 16) 1313.
\textsuperscript{86} Kurtz (n 2) 456-457.
\textsuperscript{87} 509 F Supp 60 (1981).
\textsuperscript{88} 62.
entered the public domain, while the copyrights in the Hopalong Cassidy books were renewed. The plaintiff sought to obtain a declaratory judgment to allow it to license the Hopalong Cassidy films for distribution and exhibition by means of television. The defendants alleged that the films constituted infringement of the copyrights in the Hopalong Cassidy books.

The court held that the portrayal of the character Hopalong Cassidy in the films was substantially similar to the character as it appears in the books and that both characters possesses the same basic traits. The court ruled that certain characters, particularly Hopalong Cassidy, were sufficiently delineated, developed and well known to be copyrightable. Finally, the court held that the use of the characters would constitute copyright infringement “irrespective and independent of the similarity of the story line”.

This judgment has been widely criticised as the court failed to take into account the obvious differences between the film and book versions of the character Hopalong Cassidy. The court itself described the book version of the character as a “diamond in the rough” who “was quick tempered and given to cuss words”. In contrast, it described the film version of the character as “simply Cassidy turned inside out. The kind, sentimental, thinking person became exposed to public view through the motion picture media”; Surprisingly, after providing this comparison, the court concluded that it could not find that the character shown in the film was that different from the character appearing in the books.

In the books, the character was a foul-mouthed, confrontational, tobacco-spewing youth, while the film version was an “alcohol-eschewing, straight shooting, western hero”. Clearly, the film version was not substantially similar to the book version of the character. The only elements, which were common to the respective works, was the Western setting and the fact that the characters shared their names, both of which, are insufficient to constitute a claim for copyright infringement. Thus, the court has been criticised for undercutting the traditional

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89 62.
90 62.
91 62.
92 64.
93 66.
94 66.
95 Coe (n 16) 1314.
96 65.
97 65.
98 65.
99 Kurtz (n 2) 459.
100 Kurtz (n 2) 460.
infringement comparison by failing to consider the difference between the overall impressions of the respective stories.  

Similarly, the same circuit struggled to articulate the elements that make Tarzan distinctly delineated in *Burroughs v Metro-Goldwyn-Mayer*.  

In this case, the court held that the copyright in the literary work “Tarzan of the Apes” covered the work as an entirety. In evaluating whether Tarzan was sufficiently delineated, the court described the character as follows: “Tarzan 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.” Based on this description, the court concluded that Tarzan was sufficiently delineated to merit copyright protection.

The above description is the extent of the court’s analysis relating to the level of delineation of the character. The court found that Tarzan was copyrightable yet failed to provide an explanation as to how the decision was reached. As Schienke commented, “some courts have used the ‘magically expedient’ phrase of ‘well developed’ to arrive [at and] solidify their reasoning”. However, the terms “distinctly delineated” or “well developed”, fail to indicate whether the characters are substantially similar to establish infringement. The description is not indicative of a well-defined character and “is nothing more than a simple collection of ideas for a stock character”. Furthermore, the difficulty with the description is that it appears to be of a general character type, which seems to apply to other literary characters as well, such as Kipling’s Mowgli from the “Jungle Book”. Therefore, by affording copyright protection to a mere character type, the use of a similar character in other works is severely limited.

The above cases illustrate instances where the court applied either the distinctly delineated test or the story being told test, it is most common, however, for the courts to apply both tests when determining the copyrightability of fictional characters. Such was the case in *Warner*  

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101 Coe (n 16)1315.
103 391.
104 391.
105 391.
107 Zecevic (n 35) 375.
108 Niro (n 9) 368.
109 Kurtz (n 2) 458.
110 Coe (n 16) 1314.
Bros v Film Ventures International,\textsuperscript{111} where the producers of the film “The Exorcist” brought a copyright infringement claim against the distributors of another film entitled “Beyond The Door”. The plaintiff’s film revolves around the demonic possession of a twelve-year-old girl, named Regan. Similarly, “Beyond The Door” concerns the demonic possession of a pregnant woman, Jessica, and her rapidly growing foetus.\textsuperscript{112}

The plaintiff did not claim that there was any similarity of story or plot but rather that the defendant’s film copied its character Regan and certain cinematic elements used in “The Exorcist”, including the “distinctive sounds, special lighting effects, levitation of Regan’s body and the bed she is confined to….”.\textsuperscript{113} The court found that the producers of both films used commonly accepted physical ways of depicting the struggle of possession and therefore it could not find infringement of the plaintiff’s cinematic techniques.\textsuperscript{114} The theme of demonic possession is an idea and therefore not protected by copyright.

Although Regan has a visual element, the court treated the character as a literary character.\textsuperscript{115} The court held that characters in plays ordinarily are not protectable by copyright.\textsuperscript{116} However, it recognised that characters would be eligible for copyright protection if the character is distinctly delineated and the infringer copies such delineation.\textsuperscript{117} The judge found that the story “The Exorcist” was not subordinated to the principal character Regan and therefore the character could not be granted copyright protection.\textsuperscript{118} The court differentiated between the characters by describing Regan “as a demure child who turns into a profane monster” and whose demonic possession is overcome by religious means, and Jessica, a mature pregnant woman whose possession was not expelled by religious faith.\textsuperscript{119} Consequently, the court held that there was a substantial difference between the characters Regan and Jessica.\textsuperscript{120} Thus, not all famous and memorable characters will necessarily be afforded copyright protection.

\textsuperscript{111} 403 F Supp 522 (1975).
\textsuperscript{112} 525.
\textsuperscript{113} 523.
\textsuperscript{114} 524.
\textsuperscript{115} 525.
\textsuperscript{116} 525.
\textsuperscript{117} 525.
\textsuperscript{118} 525.
\textsuperscript{119} 525.
\textsuperscript{120} 525.
Another case involving the protection of a literary character is Bach v Forever Living Products US,\textsuperscript{121} where an ordinary seagull was deemed worthy of copyright protection. The literary character in question was Jonathan Livingston Seagull, the main character in a novel written by Richard Bach. The defendants made use of the title, main character, storyline, and photographs associated with the novel to promote its health and beauty products.\textsuperscript{122} The plaintiffs claimed that Jonathan Livingston Seagull was a highly delineated character, while the defendants argued that the character was little more than a collection of unprotectable ideas or a combination of unprotectable elements.\textsuperscript{123}

In considering the validity of character copyright, the court explained that a character may be afforded copyright protection if the character in question is sufficiently delineated or the central focus of the work.\textsuperscript{124} Although the court referred to both the distinctly delineated and the story being told tests, its analysis seems to have focused primarily on the distinctly delineated standard.

The court stated that a character would be entitled to copyright protection only where it constitutes a unique combination of elements.\textsuperscript{125} On that basis, it went on to consider the elements that make the character unique:\textsuperscript{126}

“...a thinking, talking, philosophizing, risk-taking, limit testing seagull...with an extraordinary name, Jonathan Livingston Seagull; who is anthropomorphised 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.”

In rejecting the defendants’ argument, the court explained that every literary character consists of elements that are not original.\textsuperscript{127} The court reasoned that it is the combination of those elements that determine whether a character is copyrightable.\textsuperscript{128} In affording copyright protection to Jonathan Livingston Seagull, the court focused on the level of delineation of the

\textsuperscript{121} 473 F Supp 2d 1127 (WD Wash 2007).
\textsuperscript{122} 1129.
\textsuperscript{123} 1135.
\textsuperscript{124} 1133.
\textsuperscript{125} 1134.
\textsuperscript{126} 1135.
\textsuperscript{127} 1135.
\textsuperscript{128} 1135.
character, finding that:\(^{129}\)

“Like other highly delineated literary and film characters, the Jonathan Livingston Seagull character is protected under copyright. Jonathan Livingston Seagull is a well-defined character – an ordinary seagull named Jonathan Livingston Seagull who is determined to fly higher and faster, who transcends his beginnings, and who teaches others to do the same. He is not a stock character and the fact that his character has not been delineated over time is inconsequential.”

Finally, it added that the character passed the story being told test and thus was entitled to copyright protection. The court described the character as the “title character in a book that is entirely about his development from an ordinary seagull into an extraordinary one”.\(^{130}\)

Thus, Jonathan Livingston Seagull constitutes an expression of the author’s idea and was accordingly protected from copyright infringement. It is important to note that this “ordinary” character only appeared in a single book. This suggests that a character does not necessarily have to be well known or repeatedly portrayed to be protected in terms of story being told test.\(^{131}\)

3 Graphic characters

In contrast, graphic characters are those that are visually depicted, for example those appearing in cartoon form, drawings or other graphic representations.\(^{132}\) The physical appearance of these characters are visually apparent to the audience and as such, characters represented in graphic form are generally afforded greater protection than their literary counterparts.\(^{133}\)

The approach in the Sam Spade case was taken further by the Court of Appeal in Walt Disney Productions v Air Pirates,\(^{134}\) which seems to have restricted the story being told test to literary characters.\(^{135}\) In this instance, Disney alleged that the use of its characters by parodists constituted copyright infringement. The defendants’ copied over seventeen of Disney’s cartoon characters in its adult “counterculture” comic books entitled “Air Pirate Funnies”.\(^{136}\) The defendants copied the images as well as the names of the plaintiff’s characters.\(^{137}\)

\(^{129}\) 1136.
\(^{130}\) 1136.
\(^{131}\) Coe (n 16) 1324.
\(^{132}\) Kurtz (n 2) 430.
\(^{133}\) Kurtz (n 2) 444.
\(^{134}\) 581 F 2d 751 (9th Cir 1978).
\(^{135}\) Feldman (n 79) 694.
\(^{136}\) 753.
\(^{137}\) 753.
However, the themes depicted in the defendants’ comics were distinctly different from those of Disney’s.\textsuperscript{138} While the plaintiff’s characters represent wholesomeness and innocence, the defendants’ characters are portrayed as “active members of a free thinking, promiscuous, drug ingesting counterculture”.\textsuperscript{139}

The parodists argued that fictional characters are never copyrightable and therefore cannot constitute a copyrightable component.\textsuperscript{140} The Ninth Circuit acknowledged that its earlier opinion in the \textit{Sam Spade} case “lends some support to the position that characters ordinarily are not copyrightable”.\textsuperscript{141} However, it distinguished the case on the basis that \textit{Sam Spade} involved the use of purely literary characters, while the present case concerned the use of visually depicted characters. In reaching its decision, the court drew a distinction between literary and visually depicted characters, by providing that:\textsuperscript{142}

> “While 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. Because comic book characters therefore are distinguishable from literary characters, the \textit{Warner Brothers} language does not preclude protection of Disney’s characters.”

The Ninth Circuit ultimately found in favour of Disney and granted the characters copyright protection. The court reasoned that while it is difficult to distinctively delineate a literary character, a character with a visual image reduces the difficulty.\textsuperscript{143}

The uncertainty created by the \textit{Air Pirates} case in respect of visually depicted characters was discussed in \textit{Metro-Goldwyn-Mayer v American Honda Motor}.\textsuperscript{144} In this case, a motion picture studio brought an infringement claim against Honda and its advertising agency, alleging that Honda's television commercial infringed its copyright in the James Bond character. The commercial in question features a young, glamorous couple in a Honda motor vehicle being chased by a grotesque villain in a helicopter. The villain then jumps onto the car’s roof, threatening harm. Thereafter, the male driver flirtatiously turns to his companion and releases the car’s detachable roof, sending the villain into space, allowing the couple a

\textsuperscript{138} 753.
\textsuperscript{139} 753.
\textsuperscript{140} 754.
\textsuperscript{141} 755.
\textsuperscript{142} 755.
\textsuperscript{143} 755.
\textsuperscript{144} 900 F Supp 1287 (CD Cal 1995).
The court begins its analysis by acknowledging that the law is not clear as to when visually depicted characters would be entitled to copyright protection. It opined that the *Air Pirates* decision may be viewed as either following the *Sam Spade* case by implicitly holding that graphic characters constitute the story being told or as applying a less stringent test for the protectability of graphic characters. According to the court, a rationale for adopting the latter view is that a graphically depicted character, as opposed to a literary character, is much more likely to be fleshed out in sufficient detail so as to warrant copyright protection. Due to the uncertainty surrounding the protection of visually depicted characters, the court found it appropriate to analyse the Bond character under both the *Sam Spade* story being told test, and the *Air Pirates* character delineation test.

The plaintiff argued that the Bond character was sufficiently unique and therefore deserved copyright protection in terms of either of the tests. According to the plaintiff, the unique traits of the character, include his physical strength, sophistication, marksmanship, cold-bloodedness, overt sexuality, his love of martinis “shaken, not stirred”, his “license to kill” and use of guns. On the other hand, the defendant argued that Bond was not entitled to copyright protection because the character had changed enormously from film to film and had been portrayed by a number of different actors over the years. The defendant claimed that even if Bond was sufficiently delineated, there was not much character development in the commercial’s hero and therefore the plaintiff could not assert that the defendant copied more than the broader outlines of Bond’s personality.

The court outright rejected the defendant’s theory and found that Bond was a copyrightable character under either of the tests. It held that James Bond has certain character traits, which have been developed over time through the various films in which he appears. Furthermore, it explained that although a number of different actors have portrayed the character, his

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145 1291.
146 1295.
147 1295.
148 1295.
149 1296.
150 1296.
151 1296.
152 1296.
153 1296.
154 1296.
various traits have remained constant. In conclusion, the court stated that the character passed the story being told test 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 judgment has been criticised for “giving the copyright owner control not only of the works created by that author but also a significant part of the genre into which the work falls”. The court described the characters as “young, tuxedo-clad, British-looking men with beautiful woman in tow and grotesque villains close at hand”. In addition, both “exude uncanny calm under pressure, exhibit a dry sense of humour and wit, and are attractive to and are attractive to, their female companions”. The elements mentioned are not particularly unique and there are only so many ways in which “character and wit can be expressed in a short commercial”. This approach is rather restrictive and has the effect of allowing the plaintiff to prevent others from using a similar character as well as a similar action movie genre.

Likewise, Rocky Balboa and other characters from the various Rocky films were found to be protectable characters in Anderson v Stallone. Here the court recognised that the Sam Spade standard is a more rigorous test but “out of an abundance of caution” it went on to consider the protectability of the characters under both tests.

According to the court, the characters were one of the most highly delineated group of characters in modern American film. Furthermore, the interrelationship and development of the various characters were central to the Rocky movies. In particular, the court explained that Rocky Balboa is such a highly delineated character that his name is the title of all the Rocky films and he has become identified by specific traits such as his speaking mannerisms and physical characteristics.

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155 1296.
156 1296.
158 1298.
159 1298.
160 Kurtz (n 157) 451.
161 Kurtz (n 157) 451.
162 11 USPQ 2d (BNA) 1161 (CD Cal 1989).
163 1166.
164 1166.
165 1166.
166 1166.
In relation to the story being told test, the court explained that the characters were so highly developed and central to the Rocky films that that they constituted the story being told.\textsuperscript{167} The court reasoned that the various Rocky films focused on the development and relationships of the characters, rather than on intricate plots.\textsuperscript{168}

Rocky Balboa is yet another character that the court has described as highly delineated without elaborating on what exactly makes the character unique. It seems that the courts struggled to avoid a literal interpretation of the story being told standard to both Bond and Rocky.\textsuperscript{169} Kurtz asserts that a literal approach would have left both characters unprotected as neither of the films can be regarded as stories devoid of plot.\textsuperscript{170} The courts focused on the relative importance of the plot and the characters to the respective films.\textsuperscript{171} In Rocky, the court found that the various Rocky films focused on the development and relationship of the characters and not on intricate plots or storylines.\textsuperscript{172} In James Bond, the court stated that audiences do not watch James Bond for the story but they watch it to see their hero at work.\textsuperscript{173} Both courts attempted to apply “the unworkable ‘story being told test’” and “simply threw in a kitchen sink of tests against the characters and found that they were protectable”.\textsuperscript{174} In any event, it appears that characters which are commercially successful are more likely to acquire copyright protection.

The same holds true for the giant fire-breathing dinosaur known as Godzilla, who was afforded copyright protection in \textit{Toho Co Ltd v William Morrow}.\textsuperscript{175} In this case, a motion picture studio alleged that its Godzilla trademark and copyright had been infringed by the publisher of a compendium book entitled “Godzilla!”\textsuperscript{176} The plaintiff claimed that the defendant’s book featured photographs from its copyrighted films as well as an illustration of the Godzilla character.\textsuperscript{177} Additionally, the title of the defendant’s book was written in the distinctive lettering style used by the plaintiff in its merchandising activities.\textsuperscript{178}

\begin{itemize}
\item \textsuperscript{167} 1166-1167.
\item \textsuperscript{168} 1167.
\item \textsuperscript{169} Kurtz (n 157) 447.
\item \textsuperscript{170} Kurtz (n 157) 447.
\item \textsuperscript{171} Kurtz (n 157) 447.
\item \textsuperscript{172} Kurtz (n 157) 447.
\item \textsuperscript{173} Kurtz (n 157) 447.
\item \textsuperscript{174} Kurtz (n 157) 448.
\item \textsuperscript{175} 33 F Supp 2d 1206 (CD Cal 1998).
\item \textsuperscript{176} 1209.
\item \textsuperscript{177} 1209.
\item \textsuperscript{178} 1209.
\end{itemize}
The defendant argued that because Godzilla had taken on different shapes and personalities in the various Godzilla films, it had no constant traits and was therefore not sufficiently delineated to warrant copyright protection apart from any film in which it featured.\(^{179}\) The court disagreed and held that there are certain attributes of Godzilla which appear in every film, as the character “is always a pre-historic, fire-breathing, gigantic dinosaur alive and well in the modern world”.\(^{180}\) Although Godzilla’s personality may have changed from good to evil in the various films in which it appeared, it had a constant set of traits, which distinguished it from other characters.\(^{181}\)

However, not all characters are as well defined and famous as Godzilla and James Bond. Some characters possess mere generic qualities, such as the masked magician in *Rice v Fox Broadcasting Company*.\(^{182}\) In this case, the Ninth Circuit explained that only characters that are especially distinctive or the story being told would be afforded copyright protection apart from the copyrighted work.\(^{183}\) The plaintiff owned the copyright to a home video entitled “The Mystery Magician”, which featured a masked magician exposing the secrets behind well-known magic tricks.\(^{184}\) Similarly, the defendant developed a television series with a similar concept entitled “Specials”, also featuring a masked magician revealing the secrets to popular magic tricks.\(^{185}\) The plaintiff brought action against the defendant alleging copyright infringement and false advertising.\(^{186}\)

The plaintiff argued that the magician featured in the defendants work was substantially similar to the magician appearing in the home video and that his character was entitled to copyright protection as a graphical character.\(^{187}\) In respect of the similarities between the two works, the court held that the shared attributes were generic and commonplace to magicians. The court found that the magician character was not especially distinctive as it was no different from an ordinary magician. The plaintiff’s magician like other ordinary magicians wore a “standard magician garb-black tuxedo with tails, a white tuxedo shirt, a black bow tie, and a black cape with red lining”.\(^{188}\) The character had only appeared in a single video and

\(^{179}\) 1215-1216.
\(^{180}\) 1216.
\(^{181}\) 1216.
\(^{182}\) 330 F 3d 1170 (9th Cir 2003).
\(^{183}\) 1175.
\(^{184}\) 1173.
\(^{185}\) 1173.
\(^{186}\) 1170.
\(^{187}\) 1175.
\(^{188}\) 1175.
did not display consistent, widely identifiable traits. Moreover, the court held that the magician character could not be afforded copyright protection as it was “merely a chessman in the game of telling the story” and was therefore not the story being told.

The Seventh Circuit dismissed the story being told test in *Gaiman v McFarlane*, where the court pronounced that the *Sam Spade* decision was wrong and that the “Ninth Circuit has killed the decision”. Posner J opined that even if the decision were binding on the court, it would not be applicable because of the difference between literacy and graphic expression. The court explained that: “A reader of unillustrated fiction completes the work in his mind; [while] the reader of a comic book or the viewer of a movie is passive.”

McFarlane was a writer, illustrator and publisher of the comic book series “Spawn”. Gaiman, a comic book writer, was approached by McFarlane to write scripts for the comics. Thus, Gaiman wrote the storyline, while McFarlane drew the characters. Subsequently, Gaiman brought suit against McFarlane, seeking a declaration that he jointly owned the copyrights in the characters Angela, Medieval Spawn and Count Cogliostro.

McFarlane argued that the characters were not copyrightable and that they only became protectable because of his further work. He asserted that Gaiman had only contributed the ideas for the characters and that it was his drawings that constituted the expression. The court disagreed and stated that the characters were copyrightable from the beginning and that Gaiman jointly owned the copyrights with McFarlane. Their collaborative effort made the characters copyrightable.

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189 1175.
190 1176.
191 360 F 3d 644 (7th Cir 2004) 660.
192 660.
193 660-661. Posner J explained: “The description of a character in prose leaves much to the imagination, even when the description is detailed – as in Dashiell Hammett’s description of Sam Spade’s physical appearance in the first paragraph of *The Maltese Falcon*. ‘Sam Spade’s jaw was long and bony, his chin a jutting v under the more flexible v of his mouth. His nostrils curved back to make another, smaller, v. His yellow-grey eyes were horizontal. The v motif was picked up again by thickish brows rising outward from twin creases above a hooked nose, and his pale brown hair grew down – from high flat temples — in a point on his forehead. He looked rather unpleasantly like a blond satan.’ Even after this, one hardly knows what Sam Spade looked like. But everyone knows what Humphrey Bogart looked like.”
194 661.
195 649.
196 648.
197 657. McFarlane conceded Gaiman’s joint ownership of the character Angela at 650.
198 658.
199 657.
200 659.
McFarlane appealed to the “scènes à faire” doctrine, asserting that the characters were mere stock characters and too commonplace to be copyrightable. The court rejected this argument and found that “Cogliostro’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. No more is required for a character copyright”. The court acknowledged that while Gaiman’s verbal description of Colgiostro may have been of a stock type, once the character was drawn, named and given dialogue it became sufficiently distinctive to be copyrightable. It noted further that Gaiman’s contribution had expressive content, without which, the character would be nothing more than a drawing. Finally, in respect of Medieval Spawn, the court found that the character was sufficiently distinct to be copyrightable as a derivative work.

Schienke asserts that this judgment implies that all a character requires in order to be copyrightable is a characterization or personality portrait and a name. The difficulty with this approach is that it attaches too much weight to a character having a name, a component which is not copyrightable. Furthermore, it relies greatly on the visual representation of a character to impart characterisation. According to Schienke, this approach has led to a dichotomy within the law, “denying literary characters the luxury of characterization through art”. He further opines that, the courts, in an attempt to force characters into the parameters of the test articulated by Hand J in the Nichols case, are not applying character protection equitably. As a result, the distinction between literary and graphic characters has become a function of appearance rather than something inherent to the character’s personality.

In a more recent decision, it was found that the Batmobile from the well-known Batman comic books, television series and films is a protectable character. Towle was in the business of producing replica vehicles, including custom cars designed to resemble the Batmobile. Subsequently, DC Comics brought action for copyright infringement against

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201 660.
202 660.
203 661.
204 661.
205 661.
206 Schienke (n 106) 64.
207 Schienke (n 106) 63.
208 Schienke (n 106) 63.
209 Schienke (n 106) 63.
210 Schienke (n 106) 63.
211 DC Comics v Towle CV 989 F Supp 2d 948 (CD Cal 2013).
212 953.
Towle and Gotham Garage.

The Ninth Circuit recognised the uncertainty surrounding the correct legal standard to be applied in determining whether visually depicted characters are subject to copyright protection. The court referred to earlier decisions, where it was recognised that the owner of a copyright in various works embodying a character could acquire copyright protection for the character itself. Ultimately, the court sought guidance from the decision in *Halicki Films v Sanderson Sales and Marketing*, which implied that a character may be protected if either the distinctly delineated or the story being told tests are satisfied.

The defendant claimed that the Batmobile was not entitled to copyright protection as a fictional character because it is merely a car. The court noted that the relevant question is not whether the character is an object, but whether the character conveys a set of distinctive characteristics. The court held that the Batmobile was sufficiently delineated to warrant copyright protection. It explained that “it is undeniable that the Batmobile is a world-famous conveyance in the Batman franchise, exhibiting a series of readily identifiable and distinguishing traits”. Furthermore, it described the Batmobile as a highly interactive vehicle, which is made up of high-tech gadgets and weapons used to assist Batman in combating crime.

The court acknowledged that although the Batmobile, like Godzilla, is not identical in every work in which it features, “it is still widely recognizable because it often contains bat-like motifs, such as a bat-faced grill or bat-shaped tailfins in the rear of the car, and it is almost always jet black”. It held further that the Batmobile “is central to Batman’s ability to fight crime and appears as Batman’s sidekick, if not an extension of Batman’s own persona”. Alternatively, the court found that the Batmobile is a “pictorial, graphic, and sculptural work” entitled to copyright protection. Thus, the court concluded that the Batmobile was a

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213 965.
215 547 F 3d 1213 (9th Cir 2008).
216 966. This case similarly concerned the question of whether or not a car named “Eleanor” from the 1974 film “Gone in 60 Seconds” was copyrightable.
217 966.
218 966-967.
219 967.
220 967.
221 967.
222 967.
223 968.
character entitled copyright protection. This case supports the view that a character may be afforded copyright protection independently from the work in which the character appears.

4 Conclusion

It is clear from the above discussion that neither of the two tests as articulated by the courts are free from criticism. As Schienke commented “[w]hat makes a fictional character worthy of copyright protection seems to require Justice Stewart’s ‘I know when I see it’ test”. While the distinctly delineated test is straightforward in theory, it is has proven to be elusive in its application. The standard is vague and fails to elaborate on what exactly makes a character distinctly developed. The effect of this is that the courts tend to focus on whether or not the character is entitled to copyright protection rather than considering the question of infringement and the degree of similarity. As Kurtz explains “[a]ttempting to determine the extent of a character’s development, without making comparisons, leads to abstract and fruitless speculation”. The test places judges in a difficult position by requiring them to act as literary critics, a role which they are not qualified to assume.

Furthermore, in an attempt to separate the development of the character from the development of the story, the courts have failed to consider the overall impression of the work. Coe emphasises the importance of the surrounding framework in which the character appears. He asserts that when a literary character is examined, regard must be given to the surrounding context in order to ensure that protection is limited to expression and not ideas. He provides that the story being told test, allows courts to focus on the literary work as whole and that “once independent protection has been granted”, the test “complements the analysis of copyright infringement by asking whether there is substantiality similarity between the stories, not just the characters”. With that said, Coe appears to be one of the few advocates of the story being told test.

In terms of the Sam Spade standard, a character that “constitutes the story being told” would be entitled to protection while one, which is merely a “chessman in the game of telling the

224 967.
225 Schienke (n 106) 80.
226 11 USPQ2d (BNA) 1161 at 1165 (CD Cal 1989).
227 Zecevic (n 35) 372.
228 Kurtz (n 2) 464.
229 Kurtz (n 2) 440.
230 Coe (n 16) 1317.
231 Coe (n 16) 1317.
232 Coe (n 16) 1326.
story”, would not.233 However, “[w]hat this distinction is supposed to mean, how any court could conceivably use it to divide protected from unprotected characters, and what gives a federal judge the aesthetic credentials to draw this line, are matters on which Judge Stephens maintains a sphinxlike silence”.234 This standard has caused confusion and many courts have refused to apply it, while others have simply ignored it or distorted its meaning in order to avoid its consequences.235

Kurtz is of the view that both tests should be discarded.236 She suggests that the starting point should be a comparison of the characters in the respective works to see whether they are substantially similar and not a consideration of whether the character is sufficiently developed to merit protection.237 Although, she acknowledges that a character’s development would be relevant when considering the question of infringement because only copying distinctive qualities would create similarity of expression rather than idea.238 By focusing on the substantially similarity of the works in question, “the analysis takes on clarity and concreteness”.239 The use of comparisons also allows for a consistent approach to all types of characters.240

As Nimmer argues, the issue of character copyright is “more properly framed as relating to the degree of substantial similarity required to constitute infringement rather than in terms of copyrightability per se”.241

233 216 F 2d 945 (9th Cir 1954) at 950.
234 Nevins “Copyright + character = castrophe” 1992 Journal of the Copyright Society of the USA 303 315.
235 Kurtz (n 2) 455.
236 Kurtz (n 2) 523.
237 Kurtz (n 2) 523.
238 Kurtz (n 2) 523.
239 Kurtz (n 2) 523.
240 Kurtz (n 2) 523.
241 Nimmer (n 59) 2-167.
CHAPTER 4

THE UNITED KINGDOM

1 Introduction

Under the Copyright, Designs and Patents Act 1988, copyright is conferred on an exhaustive list of works, including original literary, dramatic, musical, artistic and other works. Theoretically, in order to be afforded copyright protection, a fictional character would need to fall within the definition of one of the specifically mentioned categories of works. Surprisingly, there is a dearth of English case law relating to the protection of fictional characters. From the discussion that follows, it seems that the protection afforded to characters in the United Kingdom is of a much more limited scope than that provided for in the United States. In fact, it appears that the English courts do not recognise the concept of character copyright.

2 Literary characters

While the legal literature on this point is severely limited, it is generally accepted that English law does not recognise separate copyright in a literary character. An early case in point is the decision in Kelly v Cinema Houses Ltd, where Maugham J considered the extent of copyright in literary characters by noting that:

“If the plot of a story, whether it be found in a play or in a novel, is taken bodily with or without some minor additions and subtractions for the purposes of a stage play or a cinema file, there is no doubt about the case. But if a character only is, so to speak, ‘lifted’, or one or two single situations, the problem becomes more difficult...If, for instance, we found a modern playwright creating a character as distinctive and remarkable as Falstaff, or as Tartuffe, or (to come to a recent classic) as Sherlock Holmes, would it be an infringement if another writer, one of the servile flock of imitators, were to borrow the idea and to make use of an obvious copy of the original? I should hesitate a long time before I came to such a conclusion...I am strongly of the opinion that there can be no infringement in such a case if the character or the situation is devoid of novelty.

244 Martino “‘Popeye the sailor’: man of letters – the copyright protection of literary characters” 1988 European Intellectual Property Review (EIPR) 76 77.
245 McCutcheon “Property in literary characters – protection under Australian copyright law” 2007 EIPR 140 141.
246 1928-35 MCC 362.
There can, in my judgment, be no copyright in the idea of a woman, even if she be beautiful as well as jealous. One might almost as well claim a monopoly for a brave and handsome hero, a lovely blonde heroine or an unprepossessing villain with dark moustaches...It is the use which the author of play or film makes of these well-known characters in composing his dramatic scenes that the Court has to consider in a case of alleged infringement: in other words, the plaintiff has to show that the combination or series of dramatic events in the infringing work have been taken from the like situations in the plaintiff’s work.”

This case suggests that literary characters in the United Kingdom, even those which are novel and distinct, receive no discrete copyright protection. However, there is an inherent flaw in Maugham J’s analysis, as his question was raised in relation to the “distinctive and remarkable” character of Falstaff, “but answered in the context of the banal stereotype of the stock character”. As one commentator noted, the court failed to consider the question posed at its highest degree and simply substituted one question for another. It cannot be said that a handsome hero or a blonde heroine is distinctive or sufficiently delineated. These characters are unoriginal stock-types.

More recently, Vinelott J endorsed the traditional view that English law does not recognise character copyright in Tyburn Productions Ltd v Conan Doyle. In this instance, the plaintiff sought to distribute a television film entitled “The Abbott's Cry” in the United States, which featured the well-known characters Sherlock Holmes and his associate Dr Watson. The defendant in this case was the daughter of Conan Doyle, the celebrated author who created the characters. The plaintiff feared that the defendant would seek to prevent its distribution of the film and accordingly sought a declaration to the effect that the defendant had no rights in the characters. In addition, an injunction was sought to restrain the defendant from asserting that the characters vested in her.

Both parties submitted large volumes of evidence relating to the question of whether the characterisation and not merely the name of a literary character was protected in the United States. There was also a dispute relating to whether or not the claim that the

248 See also O’Neill v Paramount Pictures Corporation 1983 Court of Appeal Transcript 235, where May LJ stated that: “[W]hilst I agree that there is presently no copyright in fictional characters in books, films or plays, I am by no means satisfied, that an author of such works, particularly one consisting of a series of books about the same character, who has thereby become widely known, has no form of proprietary interest in that character.”
249 McCutcheon (n 245) 142.
250 Martino (n 244) 77.
251 Martino (n 244) 77.
252 1989 T No 2411.
253 75.
254 80.
255 80.
256 80.
characterisation of the characters as repeated in the later works but derived from the earlier works attracted copyright protection.\textsuperscript{257} The court found that it was unnecessary to consider these issues as the case turned on jurisdictional grounds.\textsuperscript{258} Vinelott J held the question as to whether the defendant was entitled to copyright in the characters was not justiciable in the English courts.\textsuperscript{259} Accordingly, as the question was not justiciable, the claims for the declaration and injunctive relief failed.\textsuperscript{260}

Thus, it appears that a literary character cannot stand alone and if it is to be afforded copyright protection, it will only be “on the back of the ‘substantial copying’ requirement”.\textsuperscript{261} Martino opines that a literary character may be indirectly protected by copyright, provided that it is distinctive and forms an important part of the work in question.\textsuperscript{262} The assessment is qualitative in nature and even though the copied component in which the characterisation features may be comparatively small, it may represent the essence of the work.\textsuperscript{263} Thus, if the character embodies the heart and soul of the story, it may be regarded as a substantial part.\textsuperscript{264} However, it is not the literary character itself that is protected but rather the entire work in which it appears.\textsuperscript{265}

3 Graphic representations

On the other hand, the reproduction of a character’s visual image will generally constitute copyright infringement.\textsuperscript{266} The House of Lords considered the unauthorised reproduction of a cartoon character in \textit{King Features Syndicate Inc v O and M Kleeman Ltd}.\textsuperscript{267} In this case, an American artist developed a number of drawings depicting the “grotesque and fictitious” character known as Popeye, the Sailor.\textsuperscript{268} These drawings were incorporated into comic form, which appeared in a number of newspapers and journals in America, Canada and the United Kingdom.\textsuperscript{269} Due the popularity of the character, the plaintiffs granted licences to companies in the United Kingdom to manufacture and sell products resembling the figure. The

\textsuperscript{257} 80.
\textsuperscript{258} 80.
\textsuperscript{259} 88.
\textsuperscript{260} 88.
\textsuperscript{261} Martino (n 244) 77.
\textsuperscript{262} Martino (n 244) 77.
\textsuperscript{263} Martino (n 244) 78.
\textsuperscript{264} Martino (n 244) 78.
\textsuperscript{265} Martino (n 244) 78.
\textsuperscript{266} Laddie, Prescott and Vitoria (n 12) 1685.
\textsuperscript{267} 1941 AC 417 HL.
\textsuperscript{268} 418.
\textsuperscript{269} 418.
defendants, without such license, proceeded to import brooches, dolls and other products embodying a similar figure.\textsuperscript{270} Subsequently, the plaintiffs sought an injunction to restrain the defendants from infringing its copyright.\textsuperscript{271}

On appeal, Viscount Maugham held that it is a question of fact as to whether a substantial part of the drawing had been reproduced.\textsuperscript{272} Furthermore, where the reproduction is not exactly the same, as in this case, the court must have regard to the degree of resemblance.\textsuperscript{273} Viscount Maugham recognised the difficulty in establishing an effective test to determine what would represent a copy or a colourable imitation thereof.\textsuperscript{274} Nevertheless, in examining the degree of resemblance, the court looked to \textit{West v Francis}\textsuperscript{275} for assistance, where it was stated that a copy is one, which gives every person who sees it the idea created by the original.\textsuperscript{276} Reference was also made to the decision in \textit{Hanfstaengl v Baines},\textsuperscript{277} where it was remarked that:\textsuperscript{278}

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Furthermore, Lord Russell of Killowen, in analysing whether the brooches constituted a reproduction of the drawings, considered the most prominent features of Popeye, specifically “the sailor’s cap, the nose, the chin, the mouth, the swollen forearms, the baggy trousers, and the enlarged feet”.\textsuperscript{279} He was of the view that a substantial part of the drawing had been reproduced and that this created a strong presumption that the figure appearing on the brooch was copied directly or indirectly from the drawing in question.\textsuperscript{280}

Lord Wright opined that the test to be applied is purely visual and requires a comparison of the works in question.\textsuperscript{281} He went on to state that it is not material that the respondents stole the idea of Popeye, or availed themselves for commercial profit from the popularity attained

\textsuperscript{270} 418.
\textsuperscript{271} 418.
\textsuperscript{272} 424.
\textsuperscript{273} 424.
\textsuperscript{274} 424.
\textsuperscript{275} (1822) 5 B & Ald 737.
\textsuperscript{276} 743.
\textsuperscript{277} 1895 AC 31.
\textsuperscript{278} 31.
\textsuperscript{279} 432.
\textsuperscript{280} 432.
\textsuperscript{281} 435.
by the character.\(^{282}\) The copyright subsisted in the drawings and not in the idea of Popeye.\(^{283}\) There would be no infringement if the respondents had independently produced a similar figure without copying the drawing directly or indirectly.\(^{284}\) Therefore, the question was whether the respondents copied the actual drawings.\(^{285}\) The House of Lords ultimately concluded that the respondents had infringed the appellants’ copyright subsisting in the drawings.

While the character constitutes an artistic work and therefore falls within the realms of protected copyright, the general idea of a pipe-smoking sailor who acquires superhuman strength from eating spinach remains in the public domain. The House of Lords made it clear that the copyright subsisted in the drawings and not some concept it conveys.

It is interesting to note that each drawing would constitute a separate work and may have a separate copyright.\(^{286}\) In such an instance, however, it may be difficult to determine which specific copyright has been infringed.\(^{287}\) The appellants in the *Popeye* case avoided this issue by selecting fifty-five of the earliest comic strips and conceded that if they could not prove infringement on one of these they could not establish infringement at all.\(^{288}\) As Laddie, Prescott and Vitoria point out:\(^{289}\)

> “[S]ince there were ‘salient features’ common to the character depicted in all the selected collection of drawings, and since the defendants’ product had clearly derived these features, ultimately, from some drawing originated by the claimants’ artist, it was held that the product infringed.”

This case suggests that the issue may be less likely to arise where the character concerned is unique and has highly original traits, which are adequately delineated in the applicable work.\(^{290}\) In order to find infringement, the reproduction of the character must constitute a collection of original ideas, which form a substantial part of the original work.\(^{291}\) The outcome would perhaps be different if the character concerned was less developed.\(^{292}\) The learned authors explain:\(^{293}\)

> “But it may far be otherwise where the character as such is not well delineated in this way but is little more than a general idea (eg an anthropomorphic rabbit in full evening dress); in such cases the originality of each

\(^{282}\) 435.
\(^{283}\) 435.
\(^{284}\) 435-436.
\(^{285}\) 436.
\(^{286}\) Laddie, Prescott and Vitoria (n 12) 1685.
\(^{287}\) Laddie, Prescott and Vitoria (n 12) 1685.
\(^{288}\) Laddie, Prescott and Vitoria (n 12) 1685.
\(^{289}\) Laddie, Prescott and Vitoria (n 12) 1685.
individual drawing may reside in specialties (eg angle of view, disposition) which are not common to the series of drawings as a whole. The distinction is between a series of drawing having nothing in common between them beyond such a general idea, and a series which possesses common features which go to confer a specific individuality on the character depicted therein.”

Although the reproduction in the *Popeye* case was not exact, the defendant made use of the distinctive features of the character. A claim for copyright infringement is, therefore, limited to copying which constitutes a substantial reproduction of the distinctive features of a character. Scanlan is of the view that copyright should be capable of existing in a fictional character. He submits that the *Popeye* case can be applied to support the argument that a fictional character can be removed from the work in which it originated, and that copyright can subsist in the characters original features independently of the copyrighted work. However, it requires an author to produce a character with attributes that are original and distinct from previous creations.

Another decision involving the reproduction of drawings can be found in *Mirage Studios v Counter-Feat Clothing Company Limited*. This case related to a group of four cartoon characters known as the “Teenage Mutant Ninja Turtles”. The defendants made drawings of humanoid turtle characters that were similar in appearance to those of the plaintiffs’ characters. Subsequently, the defendants began to license these drawings to various manufacturers for reproduction on clothing items. The plaintiffs sought an injunction to restrain the use of the characters on the basis that their reproduction constituted either a breach of copyright or unlawful passing off. The defendants argued that the plaintiffs did not have a claim, as there was no intellectual property rights in either the name or idea of the Turtles.

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290 Laddie, Prescott and Vitoria (n 12) 1685.
291 Laddie, Prescott and Vitoria (n 12) 1685.
292 Laddie, Prescott and Vitoria (n 12) 1685.
293 Laddie, Prescott and Vitoria (n 12) 1685.
295 Scanlan (n 294) 5.
296 Scanlan (n 294) 5.
297 1991 FSR. 145.
298 148, 150. The plaintiffs’ characters are heavily muscled, green in colour and can be seen carrying weapons and wearing masks over their eyes and coloured scarves on their elbows, wrists and knees. The defendants’ turtles wore coloured caps and bandanas and carried sports gear. They also wore coloured pads on their knees and arms.
299 145.
300 145.
301 146.
Browne-Wilkinson VC agreed that there can be no copyright in a name and therefore held that the names, Teenage Mutant Ninja Turtles and Ninja Turtles, were not subject to any copyright. Furthermore, he found that the defendant had copied the concept of the Ninja Turtles rather than the drawings themselves. Consequently, the drawings conveyed the idea behind the plaintiff characters “but not in terms of line reproducing it as a copy”. In considering whether there was copyright in the idea or concept of humanoid turtles, Browne-Wilkinson VC commented as follows:

“The second and more fundamental difficulty in copyright is the saying that ‘there is no copyright in ideas’. For myself, I find it difficult to determine what that phrase means in the present context. As I have said, although there are similarities in the graphic representations of the defendants’ product to those in the plaintiffs’ product, they are mainly reproductions of a concept, of the humanoid turtle of an aggressive nature. But whether that permits a claim in copyright or not seems to me to be a very open question; there is certainly an arguable case in copyright.”

This case illustrates the inherent difficulties associated with the idea/expression dichotomy. Although the court ultimately granted the injunction on the basis of passing off, “it was by no means clear, that at trial, there would be no problem in saying that the drawings of the concept of humanoid turtles infringed copyright in the claimant’s specific drawings”. The maxim that there is no copyright in ideas requires the court to differentiate between a general idea and the expression of such an idea. In this case, the defendant clearly copied the concept of muscular humanoid turtles. It is submitted that this concept is in fact unique and perhaps if the characters were carefully dissected, the similarities would be vast. Indeed, more than 50% of the public surveyed by the plaintiff identified the characters appearing in the defendant’s drawing as being those of the plaintiffs’ turtles.

Scanlan submits that in order to be successful in a copyright claim, the infringement must relate not only to the artistic work in question but also to the characteristics of the character copied. Furthermore, the recognition of copyright in a visual representation of the physical features and attributes of a fictional character would not create a complete monopoly for the

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302 154.  
303 151.  
304 151.  
305 154.  
307 Adebiyi “Fictional animated characters: do they have a legal identity or are they just a figment of the imagination?” 2013 Ent LR 269 271.  
308 151.  
309 Scanlan (n 294) 5.
author in relation to any reproduction of his character.\textsuperscript{310} Third parties would not be prohibited from creating similar graphic representations of effectively similar characters, even if the new work is inspired by an existing fictional character which is subject to copyright protection as an artistic work.\textsuperscript{311}

In 2011, the Patents County Court dismissed an action for copyright infringement against the British Broadcasting Corporation, in respect of its broadcast of an animated children’s television series called Kerwhizz.\textsuperscript{312} The plaintiff alleged that the defendant had copied his characters known as the Bounce Bunch, which he intended to use in an animated television show for children.\textsuperscript{313} The plaintiff claimed that the Kerwhizz human characters bore striking similarities to the Bounce Bunch such that they could only have arisen as a result of conscious or sub-conscious copying.\textsuperscript{314} The plaintiff had previously submitted a proposal, including drawings of the characters, to the defendant in the hope that the broadcaster would pursue the project.\textsuperscript{315}

In respect of the similarities, the court stated that, although side by side, the characters looked quite different and many of the similarities were at a high level of generality, there were certain points which supported the plaintiff’s case.\textsuperscript{316} The similarities, which were significant, included the colour scheme used for the characters, their ethnic mixture and the fact that the characters wore body armour with helmets and microphones.\textsuperscript{317} The court noted that although none of these points would be sufficient to raise an inference of copying, when considered as a combination, the onus would shift to the defendant to explain how their characters were created.\textsuperscript{318} After examining the evidence of the defendant, the judge held that it was clear that none of the relevant individuals were aware of the Bounce Bunch and therefore it could not be said that the defendant had deliberately or consciously copied the characters.\textsuperscript{319}

In examining subconscious copying, the court looked at the degree of familiarity with the Bounce Bunch, the character of the framework and the degree of objective similarity between

\textsuperscript{310} McGee and Scanlan “Copyright in character” 2003 Journal of Business Law 470 480.
\textsuperscript{311} McGee and Scanlan (n 310) 480.
\textsuperscript{312} Mitchell v British Broadcasting Corporation 2011 EWPCC 42.
\textsuperscript{313} par 1.
\textsuperscript{314} par 8. The Bounce Bunch are a group of multiracial student eco-rangers studying at the Eco-Guardians summer camp. Kerwhizz is a quiz combined with a futuristic race and consists of three human characters as well as their alien side-kicks.
\textsuperscript{315} par 1.
\textsuperscript{316} par 54.
\textsuperscript{317} par 54.
\textsuperscript{318} par 54.
\textsuperscript{319} par 105.
the characters. The judge found that none of the witnesses called by the defendant had any relevant familiarity with the Bounce Bunch.\textsuperscript{320} As for the character of the work, the court posed the following question: “[S]upposing the designers did encounter the Bounce Bunch, does the artistic work have particularly memorable qualities such as to enhance the likelihood of subconscious copying?”\textsuperscript{321}

In considering the objective similarities between the characters, the court adopted a comprehensive approach and carefully dissected the characters. The judge compared everything from the shape of their hands to the way their legs were connected.\textsuperscript{322} To illustrate the generic nature of the features relied upon by the plaintiff, reference was made to characters such as “Buzz Lightyear”, “The Power Rangers” and the “Star Wars Storm Troopers”.\textsuperscript{323} The judge found that the similarities relied on by the plaintiff were at the most nebulous level.\textsuperscript{324} The court held that certain elements were commonplace such as associating a male character with the colour blue and a female character with the colour pink.\textsuperscript{325}

The judge was of the view that although the similarities were not non-existent, they were of a high level of generality.\textsuperscript{326} The characters were simple, generic and not particularly memorable.\textsuperscript{327} On this basis, the court was not satisfied that a designer of this kind of artwork would retain a subconscious memory or influence from the Bounce Bunch.\textsuperscript{328} There was no casual connection between the characters.\textsuperscript{329} The action was accordingly dismissed.

These character types are commonplace in the world of children’s television and are analogous to stock characters.\textsuperscript{330} It appears that the judge compared the similarities rather than the concept. As one observer has noted, “it is the way in which such general conceptual themes are translated into artistic works that truly determine whether there was copyright

\textsuperscript{320} par 122.
\textsuperscript{321} par 124. See also Francis Day Hunter v Bron 1963 1 Ch 587.
\textsuperscript{322} par 129-130 and 138-141. For example at par 130, the court compared the characters hands as follows: “The Bounce Bunch have various different shapes joining their hands to their arms. Feng and Jomo have circles, Simrita and Yana have rings or bangles and Charlie has a sort of chevron shape. The Kerwhizz characters are entirely different. Their forearms and hands are effectively merged into a single armoured unit like the armour of Space Marines.”
\textsuperscript{323} par 128.
\textsuperscript{324} par 129.
\textsuperscript{325} par 138-139.
\textsuperscript{326} par 144.
\textsuperscript{327} par 125-126.
\textsuperscript{328} par 126.
\textsuperscript{329} par 145.
\textsuperscript{330} Adebiyi (n 307) 271.
infringement”. This case demonstrates that detail is essential and characters, which are of a general type, will not suffice.

4 Discussion

The Whitford Committee was established in 1973 to review the English law of copyright and designs. Amongst others, the Committee was tasked with considering the possibility of extending copyright protection to include “elaborated” ideas and also to consider whether a ‘character right’ should be introduced to supplement the existing copyright works in which the character appears. In relation to this issue, it stated as follows:

“Although a number of well established characters spring to mind, for example, James Bond, Mickey Mouse, Maigret, Sherlock Holmes and Callan, there would be very real difficulty in defining exactly what a character is, i.e., in deciding what are the essential features that make the character distinctive and which are therefore worthy of protection. Furthermore, the submissions on this topic were not particularly positive; most acknowledged that there would be difficulties and, on balance, admitted that the law might be better left as it stands, merely to provide copyright protection only against the reproduction of the literary or artistic form, leaving any further protection to proceedings for passing off.”

This discussion echoes the inherent difficulties associated with the American distinctly delineated test. The Committee recognised that it would be no easy task to determine what features make a character distinctive. Ultimately, it refused to recommend a further extension of the copyright legislation and suggested that unfair competition law would probably provide the most satisfactory solution to character rights, although it did not expand on this suggestion.

While it would be simple to create a separate category for the protection of fictional characters, this would not address the difficulty in distinguishing copyrightable from uncopyrightable characters. The main criticism levelled against the distinctly delineated test is that the courts tend to concentrate on the copyrightability of the character per se rather

331 Adebiyi (n 307) 271.
335 Leopold (n 333) 686.
336 Klement (n 243) 17.
than on the question of infringement. The dangers of focusing on a particular aspect of a work is perhaps best encapsulated by Laddie J in the following passage:337

“In copyright cases, chipping away and ignoring all the bits which are undoubtedly not copied may result in the creation of an illusion of copying in what is left. This is a particular risk during a trial. Inevitably, the court will be invited by the claimant to concentrate on the respects in which his work and the alleged infringements are similar. But with sufficient concentration one may lose sight of the differences. They may be just as important in deciding whether copying has taken place.”

It is submitted that the question as to whether English copyright law may be relied upon to prohibit the use of a character by another is one of degree.338 It has been recognised that “it is not impossible for copyright to be infringed by the parasitic use of another author’s character”.339 However, this is not because copyright subsists in the character itself, but because the combination of elements which make up the character, together with the story in which the character features may constitute a substantial part of the applicable work.340 A general idea is not a copyright work, therefore the combination of elements which make up the story must be detailed and original in order to constitute a substantial part of the work.341 Characters which are less developed may present a less persuasive case.342 As Laddie, Prescott and Vitoria note: “Not infrequently, actions which are dismissed because of the subsidiary or tangential nature of the copying really turn on the fact that the taken material was too general, or too commonplace and hence part of the common stock of the entertainment world.”343

5 Conclusion

From the above discussion, it is clear that character copyright is not justifiable in the United Kingdom. It has been suggested that the reason for the different treatment of fictional characters in the United Kingdom and United States is due to each country’s copyright legislation and the different definitions provided for in terms of what constitutes copyrightable works.344 While neither country’s copyright legislation specifically provides a

337 IPC Media Limited v Highbury-SPL Publishing Limited 2004 EWHC 2985 (Ch) par 11.
338 Laddie, Prescott and Vitoria (n 12) 1689.
339 Laddie, Prescott and Vitoria (n 12) 1689.
340 Laddie, Prescott and Vitoria (n 12) 1685.
341 Laddie, Prescott and Vitoria (n 12) 1685.
342 Laddie, Prescott and Vitoria (n 12) 1689.
343 Laddie, Prescott and Vitoria (n 12) 1689.
344 Klement (n 243) 17.
separate category for fictional characters, the American legislation contains a non-exhaustive list and therefore renders character copyright at least theoretically possible.345

The United Kingdom may need to re-examine the protection it affords to fictional characters. This is especially so when one looks at the rise of popular characters featured in films such as “Harry Potter”, “Lord of the Rings” and subsequent sequels. Some may suggest that a test should be formulated in order to assist the courts in determining whether a character is entitled to copyright protection. However, the difficulty in establishing a suitable test is demonstrated by the inconsistent application of character protection in America.

345 Klement (n 243) 17.
CHAPTER 5

SOUTH AFRICA

1 Introduction

Whether, and to what extent, fictional characters are protected in South African law is a matter of great uncertainty. However, it appears that a character may be protected in terms of copyright law or on the basis of passing off.

Although the unauthorised use of a character may be addressed by copyright law, there is a dearth of judicial decisions on this point. The courts have, however, recognised the concept of character merchandising, as involving:

“The commercial exploitation of famous and popular images for purposes of promoting or advertising products, services and businesses. Such an advertising image usually consists of the name, the portrait or some other attribute of a well-known personality or a fictional character from a movie film, a television series or a comic strip.”

The concept was initially rejected in the case of Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd. Here the first applicant was the producer of the well-known television series “Dallas”. The second applicant was a company in the business of character merchandising. The respondents used the names of certain characters from the television series on clothing items and named its restaurant the “Dallas Restaurant”. The applicants applied for an interdict to restrain the respondents from using, in respect of their businesses, any characters, locations, persons, titles, logos and concepts portrayed in the series.

The court submitted that the characterisation, names and concepts of a television or feature film do not as such constitute a proprietary right recognised by South African law. Van Dijkhorst J stated that while it was obvious that the respondents were cashing in on the popularity acquired by the series, the parties were not competitors in the ordinary sense of the word. The court held that the public would not expect the applicants to start manufacturing

346 Pistorius “The SABC, Madam & Eve, Mother Anderson and the mealie woman” 1997 9 SA Merc LJ 399 400.
347 Mostert (n 315) 413. See also South African Football Association v Stanton Woodrush (Pty) Ltd 2003 All SA 274 (SCA). In respect of the issue of character merchandising, Harms J stated as follows: “Character merchandising has become somewhat of a catchphrase, but as often is the case, catchphrases tend to obscure rather than enlighten...‘character’ merchandising rights are not new rights. One is simply dealing with the application of existing principles to new commercial realities” (par 11).
348 1981 (3) SA 1129 (T).
349 1132.
350 1150.
351 1154.
clothing or conduct business as a restaurant.\textsuperscript{352} Neither could it be said that the producers exercised quality control or approved the use of the names.\textsuperscript{353}

Ultimately, Van Dijkhorst J found that character merchandising was not so well-known in South Africa that he could, “without proper evidence in this regard, assume that the man in the street will have any knowledge thereof”.\textsuperscript{354} He went on to state that he would rather be inclined to find that the man on the street has no such knowledge of character merchandising.\textsuperscript{355} Accordingly, the application was dismissed.

It is interesting to note that, although the court reiterated that the case was not concerned with copyright protection, it still considered various English and American cases relating to character protection.\textsuperscript{356} Unfortunately, as the case did not turn on copyright grounds, the issue of character copyright, at least from a South African perspective, was not dealt with at length.

The stance in respect of character merchandising was, however, altered in \textit{Federation Internationale De Football Association v Bartlett}.	extsuperscript{357} The court stated that since the \textit{Lorimar} decision was given many years ago, markets may have changed and consumers may have become more sophisticated and knowledgeable.\textsuperscript{358} Joffe J later held that:\textsuperscript{359}

“I find that the concept of character merchandising has taken hold in South Africa. The man in the street would have knowledge thereof. He would make the link between the merchandising property and the events or circumstances which made it famous. He would be aware that the link is established by licensing or a license.”

The court defined character merchandising as the business of merchandising popular names, characters and insignia in order to increase the sales of consumer products in relation to which such names and characters are used.\textsuperscript{360} Joffe J recognised that the association of a famous character with a consumer product can enhance the product’s sales significantly.\textsuperscript{361}

\textsuperscript{352} 1152.
\textsuperscript{353} 1152.
\textsuperscript{354} 1153.
\textsuperscript{355} 1153.
\textsuperscript{356} 1153.
\textsuperscript{357} For example, the court referred to the English case of Conan Doyle v London Mystery Magazine Ltd 1949 RPC 312, where the judge refused to grant an injunction to restrain the defendants from using the name and address of Sherlock Holmes (1145).
\textsuperscript{358} 1994 (4) SA 722 (T). The applicants sought an interdict on the basis of passing off, unlawful competition and copyright infringement. It was alleged that the respondents made misrepresentations to the effect that they had the licensing rights in South Africa in relation to the 1994 World Cup. The applicants further alleged that the respondent attempted to extract royalty payments from the applicant’s sponsors and sub-licensees (730-731).
\textsuperscript{359} 736.
\textsuperscript{360} 738.
\textsuperscript{361} 736.
Furthermore, the fame and popularity of a character boosts the desirability of the product from the consumer’s perspective.\textsuperscript{362}

Joffe J granted an interdict on the basis of passing off and unlawful competition as the respondents, without the licence of the applicants, represented that they were associated with the 1994 World Cup.\textsuperscript{363} It also recognised that the applicants and their licensees had established a reputation and goodwill in South Africa. Accordingly, the court held that members of the public would associate any references to the 1994 World Cup with the applicants.\textsuperscript{364} The respondents were further interdicted from infringing the copyright in the applicants’ artistic works.\textsuperscript{365}

Thus, the recognition of character merchandising allows one to prevent the unauthorized use of a particular character in common and related areas.\textsuperscript{366} However, character merchandising in itself will not necessarily provide absolute protection, as a reputation and goodwill is still required.\textsuperscript{367}

Against this background, the “Madam & Eve” case can now be considered.

2 The Madam & Eve case

Another case, perhaps more closely related to the issue at hand, is \textit{Rapid Phase Entertainment CC v South African Broadcasting Corporation}.\textsuperscript{368} The controversy arose when the respondent screened an advertisement depicting similar characters as those appearing in the applicant’s cartoon strip entitled “Madam & Eve”.\textsuperscript{369} The applicant asserted that the respondent had wrongfully and unlawfully exploited its characters as well as the reputation, goodwill and advertising value of the cartoon strip.\textsuperscript{370} The applicant sought to interdict the respondent from broadcasting the advertisement, on the basis of copyright infringement, or, in the alternate, a delictual infringement of its common law rights.\textsuperscript{371} The applicant claimed that there had been

\begin{thebibliography}{9}
\bibitem{362} Juta Business Law 77 78.
\bibitem{363} 736.
\bibitem{364} 740.
\bibitem{365} 739.
\bibitem{366} 744.
\bibitem{367} Alberts “Character merchandising in South Africa- Recognition at last” 1995 Juta Business Law 77 78.
\bibitem{368} 597 JOC (W).
\bibitem{369} 599. “Madam & Eve” is a comic strip which “satirizes the relationship between South Africans who are separated by race, ethnicity and class and it looks at how those South Africans are attempting to come to terms, together, with the new South Africa”.
\bibitem{370} 598.
\bibitem{371} 598.
\end{thebibliography}
infringement of its literary work and/or artistic work and that the respondent copied it by reproducing and adapting it or broadcasting it.\textsuperscript{372}

The cartoon strip has three main female characters including a domestic worker, Eve, her employer, Madam and the employer's mother, Mother Anderson.\textsuperscript{373} Each of the characters are clearly recognisable by their “constant physical features, dress and general appearance”.\textsuperscript{374} An additional character appears on occasion, known as the “mielie lady”.\textsuperscript{375} The cartoon strip is set in Madam’s residence and reflects the characters participating in various domestic activities such as watching television and cleaning the house.\textsuperscript{376} Similarly, the advertisement broadcast by the respondent depicted three women sitting on a sofa watching television.\textsuperscript{377}

In respect of the allegation relating to infringement of the applicants literary work, Wunsh J held that the only possible relevant subject included in the definition of “literary works” is “stories”.\textsuperscript{378} He went on to state that although the cartoon strips may be regarded as “stories” in the broad sense, there was no evidence that any of the stories told in the strips had been reproduced or adapted.\textsuperscript{379}

In considering the cartoon strip as an artistic work, Wunsh J held the respondent had not reproduced the cartoon and therefore the question was whether there had been an adaptation of the work.\textsuperscript{380} The court found that the presentation in the dramatic form of an incident with live characters who do not have the same names of those featured in the artistic work, even if they do have generally similar physical characteristics or expressions, would not constitute a broadcast or transformation of the work in which the original or substantial features of the work remain recognisable.\textsuperscript{381} It held further that in order to find infringement, the artistic features of the artistic work must be transformed or adapted and not some concept it

\textsuperscript{372} 602.  
\textsuperscript{373} 599.  
\textsuperscript{374} 599.  
\textsuperscript{375} 599.  
\textsuperscript{376} 599.  
\textsuperscript{377} 602.  
\textsuperscript{378} 604.  
\textsuperscript{379} 604.  
\textsuperscript{380} 597.  
\textsuperscript{381} 606.
conveys.\textsuperscript{382} In referring to the \textit{Popeye} case, the court found that the respondent had not reproduced a substantial part of the sketches of the cartoons in three-dimensional form.\textsuperscript{383}

Furthermore, the court found that the most that could be said was that the broadcaster took advantage of the concept or idea.\textsuperscript{384} Wunsh J was of the opinion that the community would not consider the appropriation of the applicant’s idea to be unfair, dishonest or contrary to morality.\textsuperscript{385} He opined that the protection of proprietary rights to the characters should not be restricted to cases where they are used for character merchandising.\textsuperscript{386} However, he concluded that the characters featured in the advertisement were not the characters portrayed in the cartoon strip, although they were personifications of the same prototype.\textsuperscript{387} He further stated that he was not persuaded that the characters could be confused with each other or that the human personifications in the advertisement were colourable imitations of the cartoon strip.\textsuperscript{388} The application was therefore dismissed.

A point worthy of mention is that the court referred to both the \textit{Kelly} and \textit{Popeye} cases, as previously discussed, with apparent approval.\textsuperscript{389}

3 Discussion

There can be no doubt that the characters featured in the advertisement were based on the characters from “Madam & Eve”.\textsuperscript{390} The main appeal of the cartoon strip is the peculiar relationship between the employer and her employee in the domestic environment.\textsuperscript{391} This dynamic was clearly depicted in the respondent’s television advertisement. As Pistorius commented, the characters were not ‘prototypes’ of South African society, or of a typical domestic scene, as the appeal of both the cartoon strip and the advertisement rests in the dynamics of the interplay between the characters, much more than in their physical appearance.\textsuperscript{392} While Wunsh J agreed that there was appropriation, he was not satisfied that

\textsuperscript{382} 606.
\textsuperscript{383} 608.
\textsuperscript{384} 611.
\textsuperscript{385} 612.
\textsuperscript{386} 612.
\textsuperscript{387} 612-613.
\textsuperscript{388} 613.
\textsuperscript{389} 597, 608.
\textsuperscript{390} Pistorius (n 346) 399.
\textsuperscript{391} 597 \textit{JOC (W)} at 599.
\textsuperscript{392} Pistorius (n 346) 402.
the degree of appropriation was wrongful.\textsuperscript{393} Perhaps, the evidence put forward was insufficient or not particularly persuasive.\textsuperscript{394} In any event, to describe the characters as personifications of the same ‘prototypes’ is not realistic.\textsuperscript{395}

On the other hand, while Van Coppenhagen accepts that the characters may have been personifications of the same prototypes, she submits that the respondent went beyond copying the mere prototypes and utilised the applicant’s expressions of those prototypes.\textsuperscript{396} The respondents took not only the concept but also the features that make the characters recognisable and distinct.

Dean submits that the court would have reached a different outcome if it had paid due regard to the “look and feel” approach.\textsuperscript{397} The learned author opines that:\textsuperscript{398}

\begin{quote}
“The recognition of the “look and feel” of a work which arises from the selection, arrangement and style elements of the work, as a substantial part, shifts the dividing line between idea and expression further along the spectrum of idea and expression in the direction of the former than has generally been accepted to be the case in the past.”
\end{quote}

The “look and feel”, being the general aura and theme of a work, may be its most important and significant attribute.\textsuperscript{399} Dean asserts that the central theme of a cartoon strip may represent its “look and feel” which is entitled to copyright protection.\textsuperscript{400} He further states that once the central theme has been transformed into a television advertisement, it could be said that the transformation amounts to an adaption of that central theme.\textsuperscript{401} In the same way, a work may constitute an adaption of an artistic work, where the appearance of a cartoon character is represented in “a real life form”.\textsuperscript{402} This would be the case where a television advertisement features a person whose appearance is very similar to a cartoon character.\textsuperscript{403}

\begin{footnotes}
\textsuperscript{393} Pistorius (n 346) 402.
\textsuperscript{394} Pistorius (n 346) 402.
\textsuperscript{395} Pistorius (n 346) 402.
\textsuperscript{396} Van Coppenhagen “Multimedia works as cinematograph films” 2003 SALJ 388 400.
\textsuperscript{397} Dean (n 5) 1-79.
\textsuperscript{398} Dean (n 5) 1-79.
\textsuperscript{399} Dean (n 5) 1-78-79.
\textsuperscript{400} Dean (n 5) 1-75.
\textsuperscript{401} Dean (n 5) 1-75.
\textsuperscript{402} Dean (n 5) 1-75.
\textsuperscript{403} Dean (n 5) 1-75.
\end{footnotes}
Perhaps, the court would have reached a different conclusion had the comparison involved works of the same kind.\textsuperscript{404} It is submitted, that the community, would in fact, consider the appropriation by the respondents to unfair, dishonest and contrary to morality.

4 Conclusion

Although the above-mentioned cases are not directly related to the topic at hand, they perhaps demonstrate how the courts would approach such an issue. They also serve to illustrate that the South Africa courts are, indeed, aware of the potential economic value of fictional characters. Each of the cases cited above referred to various decisions from the United States and the United Kingdom. Thus, the South African courts are to a great extent influenced by their American and English counterparts. However, it is submitted that, based on the decision in \textit{Madam & Eve}, the South African courts would perhaps be hesitant to adopt the American approach and may be more inclined to seek guidance from the English courts.

\textsuperscript{404} Van Coppenhagen (n 396) 400.
CHAPTER 6

CONCLUSION

In the United States, it is clear that fictional characters per se are entitled to copyright protection. Since Hand J’s seminal opinion in the Nichols case, the courts have consistently applied the distinctly delineated test to determine whether fictional characters are protected by copyright law. Under this test, only characters that are sufficiently delineated and especially distinctive warrant copyright protection. Thus, a character that is too indistinct constitutes a mere idea and not the expression of an idea.

Although the test is simple in theory, it is elusive in application. Some courts have struggled to articulate what exactly makes a character distinctly delineated. The test is vague and fails to provide guidance as to when a character would enter the realm of protectable expression. The effect of this is that the courts tend to consider whether a character is copyrightable or sufficiently delineated without also comparing the similarities between the respective works. This approach has blurred the distinction between the concepts of copyrightability and infringement.

Stephen J articulated an arguably more stringent, if not insurmountable, test in the Sam Spade case. The story being told test makes a distinction between characters that constitute the story being told and those that are merely chessmen in the game of telling the story. It requires a character to be the story itself in order to gain copyright protection. As a result, the test has been criticised for being too restrictive because its application would amount to excluding all characters from copyright protection. Some courts have refused to accept it, while others have simply ignored it and applied the Nichols standard instead.

The application of both Nichols and Sam Spade has led to inconsistent standards and has engendered confusion. Despite the criticism, both tests have endured over time. In the United States, copyright protection for fictional characters therefore requires that characters satisfy one of two tests, the distinctly delineated test or the story being told test.

405 11 USPQ2d (BNA) 1161 at 1165 (CD Cal 1989).
406 Coe (n 16) 1312.
407 Kurtz (n 2) 440.
408 Kurtz (n 2) 440.
409 216 F 2d 945 (9th Cir 1954) at 950.
410 Feldman (n 79) 694.
411 Nimmer (n 59) 2-169; 2-170.
412 Kurtz (n 2) 455.
In contrast, the courts in the United Kingdom appear to treat fictional characters as merely incidents in a story and do not consider whether they are protectable in themselves. While English law acknowledges that copyright may subsist in a fictional character, it is only to the extent that they exist as copyrighted works. All the elements that make up a character form part of the story itself. Copyright does not subsist in the character itself but rather the collection of attributes, which make up the story in which the character exists, provided that it amounts to a substantial part of the original work.\(^\text{413}\) Thus, copyright protection may be granted to fictional characters “but only in their relationships with and integration into the sequence of incidents, scenes, locale, motivation and dramatic expression through which the story, novel or play is evolved”.\(^\text{414}\)

On the other hand, South Africa has not had much occasion to grapple with character copyright, however, the courts have clearly embraced the concept of character merchandising. It is conceivable that the judiciary would perhaps be reluctant to recognise character copyright and may be more inclined to seek guidance from the English courts. However, it remains to be seen what approach will be adopted.

The idea/expression dichotomy has proven troubling for the protection of fictional characters. It is clearly the prevailing view that a character must be sufficiently distinct in order to ensure that it constitutes an expression worthy of protection. The extent of such development, however, is not clear. As one commentator explains, “[t]he law does not possess the tools to distinguish great art from trash and judges are tasked with the function of acting as literary or artistic critics of last resort”.\(^\text{415}\)

Despite their obvious financial value, the copyrightability of fictional characters remains a contentious issue. However, not all characters can and should be afforded copyright protection. As the Seventh Circuit explained in \textit{Gaiman}, if all characters were afforded copyright protection “it would be hard to know whether the alleged infringer had copied the feature from a copyrighted work or from the public domain...authors would find it impossible to write without obtaining a myriad of copyright permissions”.\(^\text{416}\)

\(^{413}\) Laddie, Prescott and Vitoria (n 12) 1689.
\(^{414}\) Shears (n 332) 53.
\(^{415}\) Donnelly “The legal protection of fictional characters in intellectual property: protecting creativity, property rights or a monopoly?” 2013 King’s Inns Student Law Review 21 25.
\(^{416}\) 360 F 3d 644 (7th Cir. 2004) at 659.
It is submitted that the true test for copyright infringement is the degree of similarity between the allegedly infringing work and the original work. In order to establish infringement, it must be shown that the infringer copied the expression of the original work and that there are sufficient similarities between the respective works. The distinctiveness of the character would also be relevant, as only copying distinctive qualities would amount to copying of expression. However, the starting point should be a comparison of the characters in the original work and the alleged copy, not a determination of whether a character is sufficiently developed to warrant protection. Thus, the central question should be whether there is sufficient similarity between the characters to establish infringement.

In any event, a balance needs to be struck between protecting the interests of creators and promoting the progress of the arts. If fictional characters are granted independent protection, it would prevent future use of such characters by others. This could potentially impede creativity, defeating the goals of intellectual property law. Alternatively, if a character is deprived of copyright protection altogether, authors would have little incentive to develop remarkable characters. As the court stated in Metro-Goldwyn-Mayer “[a] James Bond film without James Bond is not a James Bond film”.

417 Kurtz (n 157) 449.
418 Kurtz (n 2) 463.
419 Kurtz (n 2) 523.
420 Kurtz (n 2) 523.
421 900 F Supp 11287 (CD Cal 1995) at 1296. See annexure 1 for examples of characters.
ANNEXURE 1

EXAMPLES OF CHARACTERS

Kerwhizz

The Bounce Bunch
Madam & Eve

Teenage Mutant Ninja Turtles
Popeye

Count Cogliostro and Spawn
Hopalong Cassidy

Rocky Balboa

James Bond
Air Pirates Funnies

Batmobile
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