

---

## Protecting Characters through Copyright Law: Paving a New Road upon Which Literary, Graphic, and Motion Picture Characters Can All Travel

Dean D. Niro

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Dean D. Niro, *Protecting Characters through Copyright Law: Paving a New Road upon Which Literary, Graphic, and Motion Picture Characters Can All Travel*, 41 DePaul L. Rev. 359 (1992)  
Available at: <https://via.library.depaul.edu/law-review/vol41/iss2/4>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# PROTECTING CHARACTERS THROUGH COPYRIGHT LAW: PAVING A NEW ROAD UPON WHICH LITERARY, GRAPHIC, AND MOTION PICTURE CHARACTERS CAN ALL TRAVEL\*

Dean D. Niro\*\*

## INTRODUCTION

Most everyone would recognize Bugs Bunny, Charlie Brown, Ebenezer Scrooge, and James Bond. These characters appear in a variety of mediums, including cartoons, comic strips, novels, and motion pictures. Today, in the age of sequels and retail advertising, characters have become an important commercial commodity. Characters, thus, need legal protection. The federal copyright statute may provide this protection.

The federal copyright statute provides an author protection in his "original work of authorship fixed in a tangible medium of expression."<sup>1</sup> Thus, a fictional character is protected by the copyright of the work in which the character originally appears.<sup>2</sup> Sometimes, however, a character can be removed from the original work in which it appeared, then resurface in another completely unrelated work. For example, a doll or figure resembling the cartoon character Bugs Bunny can be created. Likewise, literary characters, such as Ebenezer Scrooge, can be used in a modern movie—completely unrelated to Christmas.<sup>3</sup> Thus, the questions arise: Does a doll resembling the Bugs Bunny cartoon character infringe the copyright in the original cartoon series? Or, can the Ebenezer Scrooge character be used in a modern movie completely unrelated

---

\* © 1992 Dean D. Niro

\*\* Attorney, Niro, Scavone, Haller & Niro, Chicago, Illinois; J.D., DePaul University College of Law, 1991; B.S. University of Colorado, 1988.

The author wishes to express appreciation to Professor Roberta Kwall for her helpful comments and assistance on this paper. Many thanks to my father, Raymond Niro, for his helpful insight, not only in the preparation of this Article, but throughout my life.

This Article began as a paper for Professor Roberta Kwall's Intellectual Property Seminar at DePaul University College of Law. The paper then won the William Brinks Olds Hofer Gilson & Lione Prize for the best student paper in the field of intellectual property.

1. 17 U.S.C. § 102 (1988).

2. *Id.* §§ 101-914.

3. The Ebenezer Scrooge character appeared in Charles Dickens' story *A Christmas Carol*. The story *A Christmas Carol* can no longer be protected by copyright because Charles Dickens has been dead for over 50 years. The copyright in a work extends throughout the life of the author and for a period of 50 years after the author's death. 17 U.S.C. § 302. Because Ebenezer Scrooge is a well recognized character, for the purpose of this Article it will be presumed that the story *A Christmas Carol* would today be entitled copyright protection.

to Christmas without infringing the copyright in the original novel?<sup>4</sup> To answer these questions, the heart and soul of characters must be analyzed.

A character is comprised of many elements: name, physical appearance, attributes, mannerisms, speech and expression, habits, attire, setting, and locale.<sup>5</sup> A character's interaction with others and general personality traits are important elements of characterization. Characters very often come in a variety of forms. They may be human, animal, or some scientific creation.<sup>6</sup> Characters appear in novels, comic strips, and motion pictures. But, wherever a character appears, it represents the individual creation of the author. That said, some characters may represent only ideas of the author, while others may enter the realm of copyrightable expression.

However characters are defined, literary, cartoon, and motion picture characters often comprise the most important aspect of a particular work, even when they are not an integral part of the plot.<sup>7</sup> Indeed, the principal value of many cartoons and stories rests more in the characters themselves than in the plot.<sup>8</sup> Therefore, authors have a significant interest in protecting their characters.

As previously stated, copyright protection is afforded to all original works of authorship fixed in a tangible medium of expression.<sup>9</sup> Therefore, characters unquestionably qualify for copyright protection in certain limited circumstances.<sup>10</sup>

In this regard, courts are clear on one point: To be protected by copyright apart from the story in which it originally appeared, a character must be more than an idea in the public domain.<sup>11</sup> In order to be protected by copyright, the character must be a unique expression of the author's idea, capable of being

4. See *infra* p. 391 for a discussion of the copyright protectability of Ebenezer Scrooge.

5. Roger L. Zissu, *Whither Character Rights: Some Observations—The Eleventh Donald C. Bruce Memorial Lecture*, 29 J. COPYRIGHT SOC'Y 121, 122 (1981).

6. Zissu stated:

Characters may originate in visual or non-visual form. Their visual appearance may be in graphic or two-dimensional depictions such as cartoons, or in three-dimensional representations, such as dolls or stage actors. The non-visual characters may derive from verbal depictions in writings such as novels, short stories and plays. . . .

The characters may be human, animal or insect or even inanimate or invisible. They may cross over to different forms, dimensions and media and even be spun off from a lesser role in one television series to a leading role in another. Thus, visual characters, if two-dimensional, may subsequently become three-dimensional as well as literary characters and vice versa. For successful characters the value of character rights in the media and merchandising fields may well run into millions.

*Id.*

7. E. Fulton Brylawski, *Protection of Characters—Sam Spade Revisited*, 22 BULL. COPYRIGHT SOC'Y 77, 78 (1974).

8. *Id.*

9. 17 U.S.C. § 102 (1988).

10. 1 PAUL GOLDSTEIN, COPYRIGHT § 2.11.3, at 158 (1989). However, a party bringing an infringement action must first register the work for which the author asserts his right. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01, at 13-5 (1990).

11. *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157 (2d Cir. 1977).

infringed (or copied).<sup>12</sup> The essence of the character—its physical appearance, biological data, philosophical attitudes, and emotional dynamics manifested by interpersonal relationships—must be developed by the author before he or she can assert some form of property right in the character.<sup>13</sup> Therefore, a highly delineated character constitutes expression rather than a mere idea.<sup>14</sup>

Unfortunately, courts have struggled to decide when literary, cartoon, and motion picture characters are sufficiently delineated to be worthy of copyright protection. The inconsistent results have left the law on the subject in disarray, especially in the areas of literary, cartoon, and motion picture characters.

In determining protection of *literary* characters, the courts have applied a very strict “story being told” test. This test provides literary characters copyright protection only if the plot of the story where the character appears focuses on the development and relationship of the character.<sup>15</sup> On the other hand, courts have applied a less stringent “character delineation” test to determine the copyrightability of *cartoon* characters.<sup>16</sup> Thus, a cartoon character is protected by copyright if it is sufficiently delineated, while literary characters are not protected unless the character development dominates the plot.<sup>17</sup> To add to the confusion, the courts, in determining the copyrightability of motion picture characters, have applied both the “story being told” and “character delineation” tests.<sup>18</sup> Unfortunately, many courts are unsure which test is proper.

This Article examines both the history of copyright protection for literary, cartoon, and motion picture characters and the current state of the law. A reasonable alternative to the current law is proposed—an alternative that will decrease existing confusion about when a character may be protected by copyright. The same standard is proposed for literary, cartoon, and motion picture characters. The proposed test uses a sliding scale approach that incorporates elements of both the character delineation test and the story being told test.<sup>19</sup> The analysis begins with the history of copyright protection provided to literary characters.

## I. LITERARY CHARACTERS

Statutory copyright law protects “expression,” not mere “ideas,”<sup>20</sup> and a

---

12. James L. Turner, *It's a Bird, It's a Plane or Is It Public Domain?: Analysis of Copyright Protection Afforded Fictional Characters*, 22 S. TEX. L.J. 341, 349 (1982).

13. *Id.*

14. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

15. *Warner Bros. Pictures v. CBS*, 216 F.2d 945, 950 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955).

16. *Air Pirates*, 581 F.2d at 755.

17. *Id.*

18. *Anderson v. Stallone*, 11 U.S.P.Q.2d (BNA) 1161 (C.D. Cal. 1988).

19. *Id.* at 1171; *see also infra* Section IV (clarifying the test for literary, graphic, and motion picture characters).

20. *See Dellar v. Samuel Goldwyn, Inc.*, 150 F.2d 612 (2d Cir. 1945), *cert. denied*, 327 U.S.

literary character is "an intangible artistic creation that relies upon the writer's words for any visible existence."<sup>21</sup> Therefore, a literary character is created and defined solely by the author, but comes to life in the mind of the reader. Sometimes the reader may give literary characters a life of their own, apart from the story or novel in which they first appeared.<sup>22</sup> When this occurs, the question arises whether the character may be afforded copyright protection that is independent of the work itself. Judge Learned Hand paved the pathway for affording copyright protection to literary characters, a pathway that has become well travelled.

Judge Hand, in *Nichols v. Universal Pictures Corp.*,<sup>23</sup> suggested that literary characters may be protected "quite independently of the plot."<sup>24</sup> In *Nichols*, the author of the play *Abie's Irish Rose* alleged that Universal Pictures Corp. had copied his work in a movie entitled *The Cohens and The Kellys*.<sup>25</sup> Both works depict a struggle between an Irish Catholic family and a Jewish family.<sup>26</sup> In each, a child of the Catholic family secretly marries a child of the Jewish family.<sup>27</sup> When the children tell their parents of the marriage, the parents become outraged and disown the newly married couple.<sup>28</sup> In time, the married couple has a child that both the Irish and the Jewish parents wish to see. The disharmony ends when the Irish Catholic and the Jewish parents attempt to secretly see their grandchild, unbeknownst to them, at the same time.<sup>29</sup> At the secret visit, the Irish Catholic and the Jewish grandparents dis-

790 (1946); Note, *The Protection Afforded Literary and Cartoon Characters Through Trademark, Unfair Competition, and Copyright*, 68 HARV. L. REV. 349, 356 (1954).

21. Turner, *supra* note 12, at 345.

22. 1 GOLDSTEIN, *supra* note 10, § 2.7.2, at 127.

23. 45 F.2d 119 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930).

24. *Id.* at 121; see 1 NIMMER & NIMMER, *supra* note 10, § 2.12, at 2-175.

25. *Nichols*, 45 F.2d at 120. Both works involve feuding Irish and Jewish fathers whose children were in love, the marriage of the children, the birth of a grandchild, and a reconciliation. Other than those similarities, the stories had little in common. See Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 452 n.135.

26. *Nichols*, 45 F.2d at 120.

27. *Id.* In *Abie's Irish Rose*, the son was Jewish and the woman was Catholic. On the other hand, in *The Cohens and The Kellys*, the son of an Irish Catholic family married the daughter of a Jewish family:

"Abie's Irish Rose" presents a Jewish family living in prosperous circumstances in New York. The father, a widower, is in business as a merchant, in which his son and only child helps him. The boy has philandered with young women, who to his father's great disgust have always been Gentiles, for he is obsessed with a passion that his daughter-in-law shall be an orthodox Jewess. . . .

"The Cohens and The Kellys" presents two families, Jewish and Irish, living side by side in the poorer quarters of New York in a state of perpetual enmity. The wives in both cases are still living, and share in the mutual animosity, as do two small sons, and even the respective dogs. The Jews have a daughter, the Irish a son; the Jewish father is in the clothing business; the Irishman is a policeman.

*Id.*

28. *Id.*

29. *Id.*

cover each other and reconcile their differences.<sup>30</sup> Each story differs in the development of the characters and the final resolution.<sup>31</sup> Nevertheless, the controversy arising from these two stories sets the stage for a significant development in copyright law.

In *Nichols*, the court held that the defendant took no more than the law permitted.<sup>32</sup> However, in the opinion written by Judge Learned Hand, the analysis was not limited to the literal text of the infringing work, because such analysis would permit a plagiarist to escape infringement by making immaterial variations.<sup>33</sup> The court held that the Irish Catholic and Jewish characters were stock figures or "ideas," and to permit plaintiff copyright protection in such characters would permit the plaintiff protection for that which was not original.<sup>34</sup>

Although in the *Nichols* opinion Judge Hand did not provide the characters from *Abie's Irish Rose* with copyright protection, he paved the pathway for doing so:

[W]e do not doubt that two plays may correspond in plot closely enough for infringement. . . . Nor need we hold that the same may not be true as to

30. *Id.*

31. As Judge Learned Hand noted in his decision:

There are but four characters common to both plays, the lovers and the fathers. The lovers are so faintly indicated as to be no more than stage properties. They are loving and fertile; that is really all that can be said of them, and anyone else is quite within his rights if he puts loving and fertile lovers in a play of his own, wherever he gets the cue. The plaintiff's Jew is quite unlike the defendant's. His obsession is his religion, on which depends such racial animosity as he has. He is affectionate, warm and patriarchal. None of these fit the defendant's Jew, who shows affection for his daughter only once, and who has none but the most superficial interest in his grandchild. He is tricky, ostentatious and vulgar, only by misfortune redeemed into honesty. Both are grotesque, extravagant and quarrelsome; both are fond of display; but these common qualities make up only a small part of their simple pictures, no more than any one might lift if he chose. The Irish fathers are even more unlike; the plaintiff's a mere symbol for religious fanaticism and patriarchal pride, scarcely a character at all. Neither quality appears in the defendant's, for while he goes to get his grandchild, it is rather out of a truculent determination not to be forbidden, than from pride in his progeny. For the rest he is only a grotesque hobbledohy, used for low comedy of the most conventional sort, which any one might borrow, if he chanced not to know the exemplar.

*Id.* at 122.

32. *Id.* at 121.

33. *Id.*

34. *Id.* at 122. Judge Hand stated:

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, his property is never extended.

*Id.*

the characters, quite independently of the "plot" proper, though, as far as we know, such a case has never arisen. 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 the Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinct.<sup>35</sup>

Thus, Judge Hand proposed a test through which a character could be provided copyright protection apart from the story in which it originally appeared if the character was well developed. Unfortunately, he failed to define what a well developed character would be.

The test Judge Hand promulgated burdens the author with the task of developing the character distinctly within the writings.<sup>36</sup> The gist of Judge Hand's test is that a poorly developed character constitutes nothing more than an "idea" not meriting copyright protection.<sup>37</sup> Therefore, "the penalty for painting a character too indistinctly is lack of protection for the copyrightable component of the character, namely the characterization."<sup>38</sup>

The test proposed by Judge Hand in *Nichols* did not produce any hard and fast rule as to how developed a character must be in order to be considered copyrightable. The Ninth Circuit attempted to clarify the haze left by *Nichols* in *Warner Bros. Pictures v. CBS*.<sup>39</sup> Unfortunately, the decision only increased the existing haze, creating still more confusion.

In *Warner Bros.*, the issue of copyrightability of a character in a novel was squarely before the court.<sup>40</sup> Dashiell Hammett published a novel entitled *The Maltese Falcon*. The primary character of the novel was a detective named Sam Spade. Dashiell Hammett granted Warner Brothers Pictures, Inc. ("Warner Brothers") the exclusive motion picture rights to *The Maltese Falcon*.<sup>41</sup> Subsequently, Hammett granted Columbia Broadcasting System, Inc. ("CBS") the rights to produce a radio show based on the series, entitled "The Adventures of Sam Spade."<sup>42</sup> The radio series included Sam Spade, as well as other characters from *The Maltese Falcon*.<sup>43</sup> Warner Brothers sued CBS on

35. *Id.* at 121.

36. See Turner, *supra* note 12, at 346.

37. *Olson v. NBC*, 855 F.2d 1446, 1452-53 (9th Cir. 1988) (finding that poorly sketched characters in the television program "The A Team" did not warrant protection).

38. Brylawski, *supra* note 7, at 86.

39. 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955) (known as the "Sam Spade Case").

40. *Id.* at 950.

41. *Id.* at 946-47.

42. *Id.* at 948.

43. *Id.*

the grounds that the agreement with Hammett had conveyed to Warner Brothers the exclusive rights to use the characters in *The Maltese Falcon*. Hammett claimed that the contract with Warner Brothers did not contain an express grant of the rights in the characters, and that it was the custom and practice for an author to use his characters in sequels.<sup>44</sup>

After examining the facts, the court held that without an express grant of rights to the characters in the contract with Warner Brothers, any rights to characters of the original story were not transferred with the motion picture rights to *The Maltese Falcon*.<sup>45</sup> Thus, because the character rights were not contained within the grant, Warner Brothers did not own the rights to the characters.<sup>46</sup>

The Ninth Circuit determined that Congress did intend the copyright statute to include characters within the realm of protection.<sup>47</sup> The court held, however, that the Sam Spade character was a mere vehicle for telling the story and thus was not entitled to copyright protection.<sup>48</sup> In so holding, the court suggested that a literary character could be protected by a copyright if "[t]he character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright."<sup>49</sup> This test, known as the "story being told" test, is inherently confusing.<sup>50</sup> The Sam Spade standard would lead to a result of excluding virtually all characters from copyright protection because it "seems to envisage a 'story' devoid of plot wherein character study constitutes all, or substantially all, of the work."<sup>51</sup>

Although some courts have accepted and applied the story being told test to literary characters,<sup>52</sup> a good number have adopted a test more in line with the character delineation test of *Nichols*.<sup>53</sup> These courts have held that a literary character can be protected by copyright when it acquires a distinctive person-

---

44. *Id.* at 948-49.

45. *Id.* at 949.

46. *Id.*

47. *Id.* at 950.

48. The decision was most likely prompted by the court's reluctance to deprive the author of the right to make further use of his character. The court did not want to create a situation where an author who sold rights to a story would also forfeit his rights to use his characters contained within the story. The court simply wanted Dashiell Hammett to retain rights in the characters he created.

49. *Warner Bros.*, 216 F.2d at 950.

50. Kurtz, *supra* note 25, at 455.

51. 1 NIMMER & NIMMER, *supra* note 10, § 2.12, at 2-175.

52. *Anderson v. Stallone*, 11 U.S.P.Q.2d (BNA) 1161 (C.D. Cal. 1989) (applying test to *Rocky* motion picture characters); *Warner Bros. v. Film Ventures Int'l*, 403 F. Supp. 522 (C.D. Cal. 1975) (applying the story being told test to movie characters).

53. *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982) (applying the delineation test to literary characters); *Filmvideo Releasing Corp. v. Hastings*, 509 F. Supp. 60 (S.D.N.Y.) (applying the delineation test to literary characters), *aff'd in part and rev'd in part*, 668 F.2d 91 (2d Cir. 1981).



ality.<sup>54</sup> According to this line of reasoning, a character acquires a distinct personality when it has been delineated to such an extent that its behavior is relatively predictable.<sup>55</sup> Therefore, under this theory, when such a character encounters a new situation, it can be expected to act in a manner that is distinctive to that particular character and unsurprising.<sup>56</sup>

One case that provided a literary character copyright protection because it was "sufficiently delineated" was *Filmvideo Releasing Corp. v. Hastings*.<sup>57</sup> In *Hastings*, the plaintiff brought a declaratory judgment action seeking permission to license, for television, twenty-three motion pictures concerning the character Hopalong Cassidy. In 1912, Clarence Mulford wrote and published a series of novels and short stories containing the Hopalong Cassidy character based in the Old West. Mulford licensed the rights to make a movie based on these books in 1935. Years later, the copyrights in the Hopalong Cassidy motion pictures expired while copyrights in the Hopalong Cassidy books were renewed. *Hastings* thus concerned the copyrights in the books and not the motion pictures. In the suit, the Southern District of New York found that the Hopalong Cassidy character was continually developed throughout the series of books.<sup>58</sup> The court ruled in favor of the owner of the copyrights in the novels, recognizing the copyright protectability of literary characters. In so holding, Judge Werker stated:

In my opinion, these [Hopalong Cassidy book] characters and others were sufficiently delineated, developed and well-known to the public to be copyrightable. The use of these characters for the purpose intended by [the plaintiff] therefore would constitute infringement with respect to the above numbered films irrespective and independent of the similarity of the story line.<sup>59</sup>

The court focused on the level of delineation of the Hopalong Cassidy characters.<sup>60</sup> Interestingly, no mention was made of the story being told test.

This holding is peculiar because the character, Hopalong Cassidy, is strikingly similar factually to Sam Spade in *The Maltese Falcon*. Cassidy is a portrait of a typical cowboy from the Old West,<sup>61</sup> while Sam Spade represents

54. See, e.g., *DC Comics v. Reel Fantasy, Inc.*, 696 F.2d 24 (2d Cir. 1982); *Detective Comics v. Bruns Publications*, 111 F.2d 432 (2d Cir. 1940); *Burroughs*, 519 F. Supp. at 391; *Hastings*, 509 F. Supp. 60; *Detective Comics v. Fox Publications*, 46 F. Supp. 872 (S.D.N.Y. 1942); *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914).

55. 1 GOLDSTEIN, *supra* note 10, § 2.72, at 128.

56. 1 *id.*

57. 509 F. Supp. 60 (S.D.N.Y.), *aff'd*, 668 F.2d 91 (2d Cir. 1981) (failing to deal with copyrightability or similarity of characters).

58. *Id.* at 65.

59. *Id.* at 66.

60. *Id.* at 65-66. Nothing in the case indicated anything particularly distinctive about the characters. The characters in the movie used the same names as those in the book, and both were rough characters set in the Old West. *Id.*

61. The court in *Hastings* described the version of Hopalong Cassidy as "a diamond in the rough" who was "quick tempered and given to cuss words": the typical cowboy. *Id.* at 65.

the stereotypical detective.<sup>62</sup> Both characters were highly delineated and extensively developed through a series of novels and short stories. The two decisions conflict and can only be reconciled, if at all, on two bases. First, the two cases were decided in two different circuits.<sup>63</sup> Second, in reading between the lines of *Warner Bros.*, it appears that a motivating factor in the court's decision was its desire to protect the author's rights in the characters he created.<sup>64</sup> The *Warner Bros.* decision was most likely prompted by the court's reluctance to deprive Dashiell Hammett of the right to make further use of the characters he created.<sup>65</sup> Other courts most likely recognized this distinction in *Warner Bros.* and, without comment, simply adopted the character delineation standard. Some courts have declined to accept the story being told test promulgated in *Warner Bros.*,<sup>66</sup> while others have suggested that this passage is "arguably dicta."<sup>67</sup> In any event, it appears from the ruling in *Hastings* that a literary character may be protected if the character is highly delineated, regardless of whether the character constitutes the story being told.

The confusion was compounded in *Burroughs v. Metro-Goldwyn-Mayer*,

---

62. See *Warner Bros. Pictures v. CBS*, 216 F.2d 945, 946-50 (9th Cir. 1954), cert. denied, 348 U.S. 971 (1955). The detective character Sam Spade has become the model upon which many detective characters are based today. Many novels were written using Sam Spade as the detective. The character was also used in a radio program. *Id.*

63. *Hastings*, 509 F. Supp. 60, was decided in the Southern District of New York, which sits in the Second Circuit. On the other hand, *Warner Bros.*, 216 F.2d 945, was decided by the Ninth Circuit. The *Hastings* court, but not the *Warner Bros.* court, would be compelled to follow Judge Hand's proposition in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), discussed *supra* notes 32-38 and accompanying text.

64. In *Warner Bros.*, if the court had found that the Sam Spade character was protected by the copyright in *The Maltese Falcon*, then Dashiell Hammett, the author, would not have been able to use the Sam Spade character in future works. The court took a protectionist view toward the author and fashioned its opinion accordingly. See *Warner Bros.*, 216 F.2d at 951.

65. Kurtz, *supra* note 25, at 454-55. Professor Kurtz further states, "The Sam Spade standard would have the result of excluding virtually any character from copyright protection, because it 'seems to envisage a story devoid of plot wherein character study constitutes all, or substantially all, of the work.'" *Id.* (quoting 1 NIMMER & NIMMER, *supra* note 10, § 2.12, at 2-175). The court did not want the author to lose his rights in his characters simply because he assigned the rights to the story in which the characters appeared.

66. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir.) (limiting the *Warner Bros.* decision to word portraits, not graphic characters), cert. denied, 439 U.S. 1132 (1978); *CBS v. De Costa*, 377 F.2d 315, 320 (1st Cir.), cert. denied, 389 U.S. 1007 (1967) (holding that the Sam Spade case did not necessarily support the proposition that a character is not copyrightable, because the court held only "that the contract of assignment did not convey the exclusive right to use the character in the novel, and . . . the sequel . . . was not so similar as to infringe the copyright"); *Ideal Toy Corp. v. Kenner Prods.*, 443 F. Supp. 291, 301 (S.D.N.Y. 1977) (declining to follow the "Sam Spade Case" because it was not the law of the Second Circuit and for policy reasons); see also *Goodis v. United Artist Television*, 425 F.2d 397, 406 (2d Cir. 1970) (holding that any conclusion that the characters from *The Maltese Falcon* are in the public domain "would be clearly untenable from the standpoint of public policy").

67. *Olson v. NBC*, 855 F.2d 1446, 1451-52 (9th Cir. 1988) (holding that, regardless of whether the passage from *Warner Bros.* was dicta, lightly sketched characters could not form the basis for an infringement action).

*Inc.*<sup>68</sup> *Burroughs* was an action for copyright infringement brought by the author of the original Tarzan novel, *Tarzan of the Apes*, against the maker of a movie based on the characters in the novel.<sup>69</sup> The court held that the copyright in the literary work covered the work as an entirety, including the characters.<sup>70</sup> The court asserted:

It cannot be said that such a copyright contemplates protection of only the plot, leaving the characters free for public exploitation for, as in the case of plays, the "characters and sequence of incident [are] the substance" . . . . However, it is only well-developed characters that are subject to copyright protection.<sup>71</sup>

The court held that the character Tarzan was delineated in a sufficiently distinctive fashion to be copyrightable and protected from infringement by the copyright in the work itself.<sup>72</sup> The court stated the following reasons in finding sufficient delineation: "Tarzan is the ape man. He is an individual closely in tune with the jungle environment, able to communicate with animals yet able to experience human emotions, he is athletic, innocent, youthful, gentle and strong. He is Tarzan. . . . [T]he character Tarzan is copyrightable . . . ."<sup>73</sup>

The court's description of Tarzan appears to enter into the realm of "idea" rather than "expression." The description provided by the court is nothing more than a simple collection of ideas for a stock character. The court did not describe a well delineated character. The Tarzan character possesses many qualities other than those described by the court. The character Tarzan, most likely, is sufficiently delineated to afford copyright protection; however, the delineation of the character extends beyond the simple reasons expressed by the court in *Burroughs v. Metro-Goldwyn-Mayer, Inc.*<sup>74</sup> Courts have reasoned that the character must be distinctly delineated in such a manner as to constitute expression rather than idea in order to be subject to copyright protection.<sup>75</sup> Tarzan acquires his delineation through his personality, through the

68. 519 F. Supp. 388 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982). The plaintiff commenced an action against defendants for copyright infringement arising from defendant Metro-Goldwyn-Mayer, Inc.'s ("MGM's") 1981 remake of the film *Tarzan, The Ape Man*. Edgar Rice Burroughs wrote the first Tarzan work in 1912. In 1931, MGM entered into an agreement with Burroughs, under which MGM acquired the right to use the Tarzan character in an original story created by MGM. In 1932, MGM released its first Tarzan movie. In 1977, the heirs of Burroughs' estate terminated the renewal of the copyright in the Tarzan works. MGM did not become aware of the termination until after work in the then-present Tarzan movie had begun. *Id.* at 390.

69. The author entered into an agreement with MGM in 1932 that permitted MGM to use Tarzan, along with other characters from the novel. *Id.* at 389-90.

70. *Id.* at 391.

71. *Id.* (citing *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930)).

72. *Id.*

73. *Id.*

74. Tarzan's protectable features consist of his appearance and his personality. Both traits are difficult to summarize in a short literary discussion.

75. *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977).

reader's expectation of his actions.

Under the *Burroughs* logic, too vast an area is covered by the copyright on the generalized character. According to *Burroughs*, an author could infringe the novel *Tarzan of the Apes* if he created any human creature that lived like an animal in the jungle. The court itself had some difficulty expressing Tarzan's extensive delineation.<sup>76</sup> In any event, due to Tarzan's expressive delineation, he was provided copyright protection.

The uncertainty of which test is applicable to literary characters desiring copyright protection has led to problems. As of 1967, one commentator, Professor Kaplan, noted that no case of infringement of a literary character independent of plot, or the story being told, had occurred.<sup>77</sup> Yet, more recently, decisions upholding copyrights in literary characters have generally involved distinctive and fully delineated depictions,<sup>78</sup> while decisions denying copyright status have involved sketchily drawn or stock characters.<sup>79</sup>

In short, the test for the copyrightability of characters is unclear. Must the character merely be clearly delineated or must the character be an integral part of the plot? The *Warner Bros.* court may only have been saying that stock characters are unprotectable if their interaction with new situations is not both distinctive and predictable.<sup>80</sup> What seems clear, however, is that characters that are sufficiently delineated and that constitute a primary element in a plot are fully protected by copyright laws.

## II. CARTOON AND GRAPHIC REPRESENTATIONS

Cartoons and other graphic representations of characters have been given greater copyright protection than characters described by words.<sup>81</sup> Protectable

---

76. *See id.*

77. *See* Benjamin Kaplan, *An Unhurried View of Copyrights: Proposals and Prospects*, 66 COLUM. L. REV. 831, 839-40 (1967).

78. *See* *Detective Comics v. Bruns Publications*, 111 F.2d 432 (2d Cir. 1940) (Superman character was highly delineated); *Silverman v. CBS*, 632 F. Supp. 1344, 1355 (S.D.N.Y. 1986) (Amos & Andy characters protected by copyright), *rev'd on other grounds*, 870 F.2d 40 (2d Cir. 1989); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981) (Tarzan character protectable), *aff'd*, 683 F.2d 610 (2d Cir. 1982); *Filmvideo Releasing Corp. v. Hastings*, 509 F. Supp. 60 (S.D.N.Y. 1981) (Hopalong Cassidy cowboy character was highly delineated).

79. *See* *Olson v. NBC*, 855 F.2d 1446, 1452-53 (9th Cir. 1988) (characters in television pilot "Cargo" depicted only by three- or four-line summaries held not copyrightable); *Warner Bros. v. ABC*, 720 F.2d 231, 243 (2d Cir. 1983) (Superman character not infringed by bumbling superhero on television show "The Greatest American Hero"); *Miller v. CBS*, 209 U.S.P.Q. (BNA) 502, 505 (C.D. Cal. 1980) (defendant's television show about convict-turned-lawyer did not infringe plaintiff's book about a jailhouse lawyer); *Warner Bros. v. Film Ventures Int'l*, 403 F. Supp. 522, 525 (C.D. Cal. 1975) (Regan character from the movie *The Exorcist* not copyrightable because the story was not subordinated to the character); *Lone Ranger, Inc. v. Cox*, 39 F. Supp. 487, 490 (W.D.S.C. 1941) (the Lone Ranger from the "Lone Ranger" radio show held not copyrightable), *rev'd on other grounds*, 124 F.2d 650 (4th Cir. 1942).

80. I GOLDSTEIN, *supra* note 10, § 2.7.2, at 130.

81. *See, e.g.*, *Warner Bros. v. ABC*, 720 F.2d 231, 240 (2d Cir. 1983); *Silverman v. CBS*, 632 F. Supp. 1344, 1355 (S.D.N.Y. 1986).

elements of visually depicted characters differ in many respects from protectable elements in literary characters. The most evident difference is that literary characters are less concrete than cartoon characters. Protectable literary characters must be developed verbally to the point at which the character's response to incident becomes predictable,<sup>82</sup> whereas visually depicted characters can be sketched with a "few strokes of the pen and need not possess any behavioral attributes."<sup>83</sup> As Professor Kurtz states:

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.<sup>84</sup>

A graphic character may be created or drawn on paper. Once such a character becomes physically manifested on paper, it exits the realm of idea and enters that of expression.

A graphically depicted character conveys a concrete, physical image. Unlike literary characters, which can only be pictured in a person's mind, cartoon characters may be seen through one's eyes.<sup>85</sup> The characterization of a cartoon figure is acquired through its physical depiction: facial expressions, anatomical features, and attire. The public can readily predict how a cartoon character will appear in successive works. Thus, a cartoon character's concrete expression allows for easy comparison to infringing works.

The Second Circuit addressed the issue of providing copyright protection to cartoon characters in *Detective Comics v. Bruns Publications*.<sup>86</sup> In *Detective Comics*, the court held that the character Wonderman infringed the copyrights in eleven monthly issues of *Action Comics* magazine, featuring the character Superman.<sup>87</sup> The court focused on the similarity of the two characters' costumes and antics of miraculous strength.<sup>88</sup> The court then stated:

We think it plain that the defendants have used more than general types and ideas and have appropriated the pictorial and literary details embodied in the complainant's copyrights. . . . So far as the pictorial representations and verbal descriptions of "Superman" are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author, they [the representations] are proper sub-

---

82. See *supra* Section I (discussing the extent to which a literary character must be developed to be granted copyright protection).

83. 1 GOLDSTEIN, *supra* note 10, § 2.11.3, at 159.

84. Kurtz, *supra* note 25, at 451.

85. *Id.*

86. 111 F.2d 432 (2d Cir. 1940).

87. *Id.* at 433.

88. Both Wonderman and Superman had miraculous strength and speed. Each concealed his strength behind ordinary clothing. Further, the antics of each were similar, especially the fact that each would remove his clothing to reveal a skin-tight acrobatic costume. *Id.*

jects of copyright. . . ."<sup>89</sup>

The court thus granted the cartoon character Superman copyright protection. The court's examination went beyond the simple comparison of the character's physical features. While physical features are important to the protectability analysis, characters that perform certain actions and acquire distinct personality traits gain protection beyond mere physical appearance.<sup>90</sup> The copyright protection in the character Superman includes his personality and antics as depicted in the comic. Such antics and personality traits increase the extent of copyright protection provided a character.<sup>91</sup> As a result, even though Wonderman was not an exact physical replica of Superman, the similarity between the two characters' antics and personalities brought the character Wonderman into an area protected by the copyright in the character Superman.<sup>92</sup>

The court thus found that Wonderman infringed the copyright in the character Superman.<sup>93</sup> The court noted that the creator of a graphic character is "not entitled to a monopoly of the mere character of a 'Superman' who is a blessing to mankind."<sup>94</sup> The mere idea of a superhero with exceptional strength is not protected. Only the specific exploits, costume, and physical features unique to the particular character are protected.<sup>95</sup> Once protected, however, simply changing the names of the protected characters, as well as the plot and setting, will not avoid an action for copyright infringement.<sup>96</sup>

Another major decision regarding the copyrightability of characters is *Walt Disney Productions v. Air Pirates*.<sup>97</sup> *Air Pirates* involved the use, by the defendant, of Mickey Mouse, Minnie Mouse, Donald Duck, Goofy and other well known Disney characters in an adult comic book. In the comic, the story centered around "a rather bawdy depiction of the Disney characters as active members of a free-thinking, promiscuous, drug-ingesting counterculture."<sup>98</sup>

89. *Id.* at 433-34.

90. *See Detective Comics v. Fox Publications*, 46 F. Supp. 872 (S.D.N.Y. 1942).

91. *See Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977).

92. *Detective Comics v. Bruns Publications*, 111 F.2d 432, 433 (2d Cir. 1940); *cf. Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 366 n.9 (S.D.N.Y. 1988) ("The faces of cartoon characters are of course . . . copyrightable."); *Detective Comics v. Fox Publications*, 46 F. Supp. at 874 (cartoon characters' physical features, alone, are copyrightable).

93. *Bruns Publications*, 111 F.2d at 433.

94. *Id.*

95. *See Fox Publications*, 46 F. Supp. 872 (holding that the defendant infringed *Batman with Robin the Wonderboy* by deliberately copying the drawings and cartoons of Batman and his companion, Robin; defendant called its cartoon characters The Lynx and Blackie the Mystery Boy).

96. *National Comics Publications v. Fawcett Publications*, 191 F.2d 594, 603 (2d Cir. 1951).

97. 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

98. *Id.* at 753. The defendant, as put by one commentator, published "an 'underground' comic book which had placed several well-known Disney cartoon characters in incongruous settings where they engaged in activities clearly antithetical to the accepted Mickey Mouse world of scrubbed faces, bright smiles and happy endings." *Id.* at 753 (citing Kevin W. Wheelwright, Note, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. REV. 564, 571 (1976)).

Disney Productions claimed that use of these characters infringed its copyrights. The court held that Mickey Mouse and the other Disney characters were worthy of copyright protection apart from the story in which they originally appeared.<sup>99</sup> The court distinguished *Warner Brothers Pictures v. CBS*,<sup>100</sup> stating that "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."<sup>101</sup> While granting Disney's characters copyright protection,<sup>102</sup> the court left open the question of whether a similarity of characters may be infringing although consisting merely of graphic depiction or whether in addition to similarity of physical image there must also be similarity of the character's personality, pattern of speech, abilities, and other traits.<sup>103</sup> "Thus, visual similarity plus a similarity in character traits, may prove sufficient to constitute an infringement even where the names of the . . . characters differ."<sup>104</sup>

In a factually similar case, *Warner Bros. v. ABC*, the Second Circuit spelled out what characteristics constituted sufficient delineation to deserve copyright protection.<sup>105</sup> The court found that the television show "The Greatest American Hero," featuring as its main character Ralph Hinkley, was not sufficiently similar to the fictional character Superman and did not infringe plaintiff's copyrights in numerous works featuring the character Superman.<sup>106</sup> The plaintiffs owned the copyrights in various works embodying the character Superman, thereby acquiring copyright protection for the Superman character itself.<sup>107</sup>

The court defined the character Superman as "a brave, fearless hero endowed with superhuman powers" who came to Earth from a fictional planet.<sup>108</sup> Superman uses his exceptional strength, speed, X-ray vision, fantastic hearing, and ability to fly to overcome evil villains that he confronts in each of his adventures. When Superman is not fighting criminals, he takes on the persona of the mild-mannered, bumbling newspaper reporter Clark Kent. The plaintiff claimed that Ralph Hinkley displayed characteristics similar to Superman.

99. *Id.* at 754-55.

100. 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955).

101. *Air Pirates*, 581 F.2d at 755. The court expressly distinguished *Warner Bros.*, stating that "[b]ecause comic book characters . . . are distinguishable from literary characters, the *Warner Brothers* language does not preclude protection of Disney's characters." *Id.*

102. *Id.*; see also *United Features Syndicate v. Sunrise Mold Co.*, 569 F. Supp. 1475, 1480 (S.D. Fla. 1983) (cartoon strip characters protected); Bayard F. Berman & Joel E. Boxer, *Copyright Infringement of Audio Visual Works and Characters*, 52 S. CAL. L. REV. 315 (1979).

103. See 1 NIMMER & NIMMER, *supra* note 10, § 2.12, at 2-176.

104. 1 *id.*

105. 720 F.2d 231, 241 (2d Cir. 1983) ("[I]n determining whether a character in a second work infringes a cartoon character, courts generally consider not only the visual resemblance, but also the totality of the character's attributes and traits.").

106. *Id.* at 235.

107. See *Detective Comics v. Bruns Publications*, 111 F.2d 432, 433 (2d Cir. 1940) (granting the comic book character Superman copyright protection).

108. *Warner Bros.*, 720 F.2d at 236.

The Ralph Hinkley character is an "ordinary guy" who stumbles across a red suit and cape that, when worn, provides Hinkley with fantastic powers similar to those of Superman. Hinkley, however, has great difficulty with his superpowers, using them fearfully and awkwardly.<sup>109</sup>

The court gave great deference to the totality of the character's attributes and traits.<sup>110</sup> It stated that an alleged infringing character must capture the "total concept and feel" of the copyrighted character to infringe.<sup>111</sup> Thus, in determining infringement of a copyrighted character, the court found:

Ultimately, care must be taken to draw the elusive distinction between a substantially similar character that infringes a copyrighted character despite slight differences in appearance, behavior, or traits, and a somewhat similar though non-infringing character whose appearance, behavior, or traits, and especially their combination, significantly differ from those of a copyrighted character, even though the second character is reminiscent of the first one. Stirring one's memory of a copyrighted character is not the same as appearing to be substantially similar to that character and only the latter is infringement.<sup>112</sup>

The above statement sheds light on what constitutes sufficient delineation to afford a character copyright protection. The copyright in the character Superman lies in his appearance, behavior, and traits. The court held that Superman had no monopoly on self-propelled flight.<sup>113</sup> It reasoned that the protectable element of Superman was the total perception of the character: his appearance, demeanor, and superhuman skills.<sup>114</sup>

Superman's extraordinary skills alone, therefore, are not copyrightable. Again, the greatest emphasis was placed on the difference in character appearance, actions, and skills:

The total perception of the Hinkley character is not substantially similar to that of Superman. On the contrary, it is profoundly different. Superman looks and acts like a brave, proud hero, who has dedicated his life to combating the forces of evil. Hinkley looks and acts like a timid, reluctant hero, who accepts his missions grudgingly and prefers to get on with his normal life. Superman performs his superhuman feats with skill, verve, and dash, clearly the master of his own destiny. Hinkley is perplexed by the superhuman powers his costume confers and uses them in a bumbling comical fashion. In the genre of superheros, Hinkley follows Superman as, in the genre of detectives, Inspector Clouseau follows Sherlock Holmes.<sup>115</sup>

---

109. *Id.* at 236-37.

110. *Id.* at 241.

111. *Id.* at 240; *see also* *Eden Toys v. Marshall Field & Co.*, 675 F.2d 498, 500 (2d Cir. 1982) (noting "total concept and feel" is pertinent); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977) (same).

112. *Warner Bros.*, 720 F.2d at 242.

113. *Id.* at 243-44.

114. *Id.* at 243.

115. *Id.*



The Court found that Hinkley's traits differed significantly from Superman's.<sup>116</sup> The court did state, however, that, had the second artist endowed his character with Superman's general appearance and skills but portrayed him as a villain or in a different setting, the second character would not be a new addition to the superhero collection.<sup>117</sup> In not-so-express terms, the court therefore spelled out that a character may be sufficiently delineated to afford copyright protection when the character's physical appearance, demeanor, and behavior are known to be associated with that particular character.

*Walt Disney Productions v. Air Pirates*, along with these other cases, leaves little doubt that a cartoon character is a separate copyrightable component of the original work.<sup>118</sup> The character's visual element provides something concrete and tangible that can be the subject of objective comparison.<sup>119</sup> Thus, the faces and physical features of cartoon characters are copyrightable.<sup>120</sup> And the courts have even extended protection to include behavioral and emotional characteristics of the character as well.<sup>121</sup> The cases suggest that a cartoon character's physical features provide both a foundation for determining copyright protectability and the basis upon which infringement is determined. Superman's red cape and blue costume may warrant the author protection from others creating and using a similarly costumed character. But Superman's abilities, personality, and behavior, together with his distinct appearance, warrant Superman copyright protection beyond the more limited protection granted to his physical appearance alone. Clearly, stock or sketchily-drawn characters do not deserve copyright protection. But well-drawn characters that demonstrate emotion and behavioral attributes should be, and are, protected.

Characters that an author fails to adequately delineate, therefore, usually are not entitled to the sanctions of the copyright statute.<sup>122</sup> For example, a stick figure would not deserve copyright protection, because it is not adequately delineated. On the other hand, providing the stick figure with a green complexion, and endowing the figure with personality through interaction with other characters and surroundings, may give rise to copyright protection. Most

116. *Id.*

117. *Id.*

118. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978); see also *King Features Syndicate v. Fleischer*, 299 F. 533, 537 (2d Cir. 1924) (holding a cartoon character was protected by the copyright in the book in which it appeared); *United Features Syndicate v. Sunrise Mold Co.*, 569 F. Supp. 1475, 1480 (S.D. Fla. 1983) ("An individual character featured in a comic strip is a separate copyrightable component of the comic strip.")

119. Kurtz, *supra* note 25, at 450 ("The appearance of a cartoon character ordinarily creates the dominant impression against which another character may be compared. Thus, if the original aspects of visual expression are closely copied, that should be sufficient for a finding of infringement, even if the two characters behave differently.")

120. *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 366 n.9 (S.D.N.Y. 1988) ("The faces of cartoon characters are of course . . . copyrightable . . . but they are distinguishable from human faces in that they are essentially artifacts.") (citations omitted).

121. See *Warner Bros. v. ABC*, 720 F.2d 231, 240 (2d Cir. 1983); *Air Pirates*, 581 F.2d at 755; *Detective Comics v. Bruns Publications*, 111 F.2d 432 (2d Cir. 1940).

122. *Turner, supra* note 12, at 351.

certainly, the cartoon character Gumby, with his green complexion and unique personality, deserves copyright protection. Hence, the penalty an author must bear for making his character indistinct is loss of copyright protection for that character.<sup>123</sup>

### III. CHARACTERS APPEARING IN MOTION PICTURES

The issue of copyright protectability of characters appearing in motion pictures opens the door to a new array of problems. Motion picture characters are depicted visually, in the same manner as graphic characters. A viewer of a movie can see a tangible expression of the character portrayed in a motion picture. Motion picture characters appearing in motion pictures also acquire physical and emotional traits much like characters appearing in a literary work. Characters in motion pictures also acquire visual images in addition to the literary characteristics. Thus, due to the manner in which motion pictures are displayed, such characters do not fit squarely into either the literary or cartoon category. As a result, some motion picture characters have been treated as literary characters<sup>124</sup> while others have been treated as graphic characters.<sup>125</sup>

Two courts have wrestled with the dual aspects of motion picture characters. In *Anderson v. Stallone*,<sup>126</sup> the Central District of California applied both the restrictive story being told test and the character delineation test to determine whether the characters from the motion picture *Rocky* were protectable by copyright outside the movie.<sup>127</sup> The court applied both tests because it could not determine which test was proper.<sup>128</sup> The plaintiff in *Anderson* claimed that he wrote the story used in the motion picture *Rocky IV*. The court found that the characters from the previous three *Rocky* movies were protected by copyright and, therefore, could not be used in a novel or story without permission.<sup>129</sup>

The court first applied the character delineation test, stating that the "Rocky characters are one of the most highly delineated group [*sic*] of charac-

---

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

124. *See, e.g., Anderson v. Stallone*, 11 U.S.P.Q.2d (BNA) 1161 (C.D. Cal. 1989) (characters from the motion picture *Rocky*); *Universal City Studios v. Kamar Indus.*, 217 U.S.P.Q. (BNA) 1162 (S.D. Tex. 1982) (E.T.); *Warner Bros. v. Film ventures Int'l*, 403 F. Supp. 522 (C.D. Cal. 1975) (Regan from *The Exorcist*).

125. *See, e.g., Olson v. NBC*, 855 F.2d 1446 (9th Cir. 1988) ("A Team" characters); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) (H.R. Puff-stuff); *Silverman v. CBS*, 632 F. Supp. 1344 (S.D.N.Y. 1986) (Amos and Andy), *rev'd on other grounds*, 870 F.2d 40 (2d Cir. 1989); *Anderson v. Stallone*, 11 U.S.P.Q.2d (BNA) 1161 (characters from the motion picture *Rocky*); *Ideal Toy Corp. v. Kenner Prods.*, 443 F. Supp. 291 (S.D.N.Y. 1977) (*Star Wars* characters).

126. 11 U.S.P.Q.2d (BNA) 1161 (C.D. Cal. 1989).

127. *Id.* at 1166.

128. *Id.*

129. *Id.* at 1167.

ters in modern American cinema."<sup>130</sup> Further, the *Rocky* characters—Rocky, Apollo Creed, Clubber Lang, and Paulie—were delineated so extensively that they were protected from bodily appropriation when the group was transported into a sequel. The court did not decide whether any character, apart from Rocky himself, was alone sufficiently delineated to garner copyright protection.<sup>131</sup> But the court did find that the character Rocky, standing alone, was entitled to copyright protection.<sup>132</sup> The court also held that the other characters, as a group, were protectable by copyright.<sup>133</sup> The key, of course, was the tremendous detail with which the characters' physical and emotional traits were portrayed.<sup>134</sup> Indeed, the Rocky character's traits, ranging from his speaking mannerisms to his physical characteristics, were paramount.<sup>135</sup>

Second, in applying the story being told test, the court determined that the characters were so highly developed and central to the plot of the movies—the movies did not have intricate plots—that the characters constituted the story being told and deserved copyright protection.<sup>136</sup> The *Anderson* court recognized that both visual and literal elements are important in defining motion picture characters.

In *Sid & Marty Krofft Television Productions v. McDonald's Corp.*,<sup>137</sup> the Ninth Circuit also recognized the duality of television characters. There, the plaintiff alleged that the defendant, McDonald's Corporation, used characters from plaintiff's television program in its commercials.<sup>138</sup> The plaintiff's program featured the character H. R. Pufnstuf and a world inhabited by animated plants and fanciful creatures. The court stated, "The expression inherent in the H. R. Pufnstuf series differs markedly from its relatively simple idea. The characters each have developed personalities and particular ways of interacting with one another and their environment. The physical setting also has several unique features."<sup>139</sup> Thus, the court examined the degree of delineation of the characters' personalities. The court also turned its attention to the visual aspect of the characters and made a detailed comparison of the physical features of the two sets of characters.<sup>140</sup> After a thorough examina-

---

130. *Id.* at 1166.

131. *Id.* at 1167.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. 562 F.2d 1157 (9th Cir. 1977).

138. *Id.* at 1161-62.

139. *Id.* at 1169. The court stated, "The characters are also similar. Both lands are governed by mayors who have disproportionately large round heads dominated by long wide-mouths. They are assisted by keystone cop characters. Both lands feature strikingly similar crazy scientists and a multi-armed evil creature." *Id.* at 1167 n.9.

140. *Id.* at 1166. The court set forth a two-step test for substantial similarity. First, it must be determined whether there is substantial similarity in ideas. This may be accomplished by an "extrinsic test," which depends on specific criteria that can be listed and analyzed. Second, it must be determined whether there is substantial similarity in the expression of the ideas, which is accom-

tion, the court stated the degree to which delineation brought the "total concept and feel" of the characters out of the realm of idea and into that of protectable expression.<sup>141</sup> Once again, the importance of both visual and literary characteristics was recognized in evaluating the protectability of motion picture characters.

Some courts, however, recognize motion picture characters as containing only literary or conceptual elements. The Central District of California adopted such an approach in *Warner Bros. v. Film Ventures International*.<sup>142</sup> The plaintiff held the copyright in the movie *The Exorcist*, which featured as its main character a twelve-year-old girl named Regan. The character Regan was attempting to overcome her demonic possession with the help of a Jesuit priest. The plaintiff alleged that the main character in the movie *Beyond The Door*, a story also concerning demonic possession, infringed the copyright in the Regan character. The court held that characters in plays ordinarily are not protectable by copyright unless the character is "distinctively delineated."<sup>143</sup> The court relied on *Warner Bros. v. CBS*, the "Sam Spade Case," for the proposition that a character is not protectable under copyright law unless "the character really constitutes the story being told."<sup>144</sup> Thus, the court concluded that the *Exorcist* story was not subordinated to the character Regan and, therefore, Regan did not deserve copyright protection.<sup>145</sup>

Similarly, other courts have stated that a motion picture character cannot be protected by copyright if the character acts merely as a vehicle for telling the story.<sup>146</sup> In *Universal City Studios v. Kamar Industries*, the movie character E.T. was found protected by copyright because the character was central to the story.<sup>147</sup> E.T. was most certainly more than a mere vehicle for telling the story. Thus, these cases show that in applying the story being told analysis to motion picture characters, courts look at the plot and the role of the charac-

plished by an "intrinsic test." *Id.* at 1165-66; see Kurtz, *supra* note 25, at 468.

141. *Sid & Marty Krofft*, 562 F.2d at 1167.

142. 403 F. Supp. 522, 525 (C.D. Cal. 1975).

143. *Id.*

144. *Id.* (citing *Warner Bros. Pictures v. CBS*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955)).

145. The court stated:

I cannot conclude that the story "The Exorcist" was subordinated to the character Regan. Even, arguendo, if this were held to be true, there is substantial difference between the character of Regan, a demure child who turns into a profane monster and whose possession is driven from her by religious means, and Jessica, a mature woman in the early stages of pregnancy whose possession exemplifies itself by a more rapid than normal development of her fetus, and whose possession is not expelled by religious faith.

*Id.*

146. See, e.g., *Universal City Studios v. Kamar Indus.*, 217 U.S.P.Q. (BNA) 1162, 1165 (S.D. Tex. 1982).

147. *Id.* at 1166. The court in *Kamar Industries* found that E.T. was a distinctive and well developed character. *Id.* The application of the story being told test in this situation is peculiar. E.T. resembles a cartoon character more than a human. Most courts apply the character delineation to cartoon characters.

ter within the plot to determine whether copyright protection is proper. Therefore, the images created by the words must be examined, not just the detailed delineation of the character through visual means.

In contrast, other courts look strictly at the visual depiction of the movie character to determine whether the character is sufficiently delineated to afford copyright protection.<sup>148</sup> A case expressly addressing the visual nature of motion picture characters is *Ideal Toy Corp. v. Kenner Products*.<sup>149</sup> The producers of the movie *Star Wars* and their licensee, Kenner Products, claimed that Ideal Toy Corporation's ("Ideal's")<sup>150</sup> toys infringed the copyright in the film *Star Wars*.<sup>151</sup> Ideal made toy figures that were similar to the *Star Wars* characters Darth Vader, C-3PO, and R2-D2. The court agreed that the copyright in a dramatic work, such as a movie or play, can extend to cover characters in the story,<sup>152</sup> and found that a three-dimensional object can infringe a copyright in a two-dimensional object.<sup>153</sup> The analysis that the court found most useful for determining whether a character visually depicted in a movie should be given copyright protection required consideration of the degree to which the character was developed.<sup>154</sup> Thus, the visual development of the *Star Wars* characters was considered important:

The characters from "Star Wars" are elements in a drama; they have "character" because they are part of a plot in which they interact with each other. Thus, they have attributes which are suggested by the movie itself. The toys have no such qualities as they exist in their basic, copyrighted form. . . . Thus, any comparison will have to be made solely on the basis of physical appearance; in other words, the *sole* attribute of the dolls will have to be compared to only one attribute of the movie character.<sup>155</sup>

Nevertheless, the court found that the physical similarities between the toys and the movie characters were not substantial and therefore denied recovery for copyright infringement.<sup>156</sup>

148. See, e.g., *Silverman v. CBS*, 632 F. Supp. 1344 (S.D.N.Y. 1986); *Universal City Studios v. J.A.R. Sales, Inc.*, 216 U.S.P.Q. (BNA) 679 (C.D. Cal. 1982); *Ideal Toy Corp. v. Kenner Prods.*, 443 F. Supp. 291, 302 (S.D.N.Y. 1977).

149. 443 F. Supp. 291 (S.D.N.Y. 1977).

150. *Ideal Toy Corp.* was the plaintiff in a declaratory judgment action in which it sought a finding that it did not infringe any rights possessed by Twentieth Century-Fox Film Corporation and Kenner Products based upon licenses in the characters from *Star Wars*. *Id.* at 292.

151. *Ideal Toy*, 443 F. Supp. at 293.

152. *Id.* at 301.

153. *Id.*

154. *Id.* The court quoted Professor Nimmer's conclusion that "[a] character is most readily protectible where both the original work and the copied work consist of cartoons or other graphic representations rather than 'word portraits.'" *Id.* (quoting MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 30, at 135 (1976)).

155. *Id.* at 302.

156. *Id.* at 303. The court specified the similarities and differences of each as follows:

Briefly, the similarities and differences are these: Both Darth Vader and Knight of Darkness are large, black-colored figures sporting capes and black helmets. However, the Knight's head is quite different in appearance, being rounded and simple in line

In *Universal City Studios v. J.A.R. Sales, Inc.*,<sup>157</sup> the Central District of California was faced with a similar problem. There, the plaintiff asserted a claim for copyright infringement of the motion picture *E.T.—The Extra-Terrestrial* by an E.T. doll.<sup>158</sup> The court recognized that the character E.T. possessed unique elements of expression and was potentially subject to protection under copyright as an element of the motion picture.<sup>159</sup> Thus, the court granted the owner of the copyright in *E.T.* preliminary relief enjoining the production of dolls resembling the character E.T.<sup>160</sup> In so holding, extensive weight was given to the physical elements of the motion picture character E.T.<sup>161</sup>

As the foregoing discussion indicates, current jurisprudence in this area mandates that a character must be sufficiently developed before a character copyright infringement claim can be successful.<sup>162</sup> A broad, abstract outline of a character is insufficient to warrant the character copyright protection apart from the original work in which the character appeared. Copyright protection may be afforded to characters visually depicted in a television series or motion picture.<sup>163</sup> But, once again, as with cartoon and literary characters, it is not

while Vader's head is a complex of sharp edges and protrusions. Furthermore, the Knight's torso is dominated by a shiny, silver metallic tunic, and he sports a prominent grey ray-gun, a weapon totally different from that of Vader.

C-3PO and Zem-21 are both humanoid robots made of metal; both display metallic joints and protrusions. However, Zem-21 is a bright silver color, while C-3PO is distinctly bronze- or gold-colored. More importantly, Zem-21 sports a rather grotesque green head which dominates the rest of his body and which is totally unlike C-3PO's bronze- or gold-colored head. Finally, Zem-21's body is distinctly supple (a product of its "human" origins), while C-3PO's body is more mechanical and rigid.

At the short end of the line, both R2-D2 and Zeroid are small, round, computer-type metallic robots with domed tops and two appendages. However, Zeroid is grey while R2-D2 is predominantly white; Zeroid is "thin" while R2-D2 is "thick"; Zeroid moves on rather sizable tractor treads and its "arms" do not reach the ground, while R2-D2 moves on its much slimmer appendages alone.

*Id.*

157. 216 U.S.P.Q. (BNA) 679 (C.D. Cal. 1982). This case was different than *Universal City Studios v. Kamar Industries*, discussed *supra* notes 146-47 and accompanying text. In *J.A.R. Sales*, the defendant was producing a doll that resembled the motion picture character E.T. In *Kamar Industries*, the defendant was selling mugs with the slogan "E.T.—phone home" written on them.

158. *J.A.R. Sales*, 216 U.S.P.Q. (BNA) at 679-80.

159. *Id.* at 683.

160. *Id.* at 684.

161. *Id.* at 683. The characters in the computer game Pac-Man have also been found to be protected under copyright. See *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982). The gobbler and ghost monsters were expressions. The defendant used the same basic characters with similar features that, for the gobbler, included the relative size and shape of the body, the Y-shaped mouths, the distinctive gobbling action, and the manner in which the character disappears upon being captured. *Id.* at 618.

162. See also *Smith v. Weinstein*, 578 F. Supp. 1297, 1303 (S.D.N.Y.) (finding stock characters too general to deserve protection), *aff'd*, 738 F.2d 419 (2d Cir. 1984).

163. *Olson v. NBC*, 855 F.2d 1446, 1452 (9th Cir. 1988).

clear which standard should be applied in determining when motion picture characters are protected from bodily appropriations.<sup>164</sup>

#### IV. A PROPOSED TEST TO DETERMINE THE COPYRIGHT PROTECTION AFFORDED LITERARY, GRAPHIC, AND MOTION PICTURE CHARACTERS

The question still remains: When is a character entitled to copyright protection? As stated, literary characters can gain protection if the character is expressly delineated and especially distinctive.<sup>165</sup> But the courts do not spell out what makes a character expressly distinctive.<sup>166</sup> Some courts deny copyright protection to literary characters unless the character constitutes the story being told.<sup>167</sup> But such a test would seem to protect characters that appear in stories devoid of a plot, where the character study constitutes all, or substantially all, of the work.<sup>168</sup> There may exist rare examples of such character study works, but, for most practical purposes, if the story being told rule were followed, essentially all literary characters would be excluded from the realm of copyright protection.<sup>169</sup> The story being told test is archaic and rarely applied. It serves actually to prevent protection of well developed and delineated characters. Further, such a test is not in accord with *Nichols v. Universal Pictures Corp.* or the protection granted to cartoon characters.

Likewise, the protection of cartoon characters is murky. The level of delineation necessary for a cartoon character to acquire copyright protection is unclear. Does delineation arise simply from the character's physical appearance? Or is more required, such as the character's traits and behavior?<sup>170</sup> The only clear aspect of these tests is that common or stock characters cannot be protected by copyrights.<sup>171</sup> Because of these uncertainties, it is difficult to determine the extent of copyright protection a character may be afforded outside the story in which it originally appeared.

There has been just as much confusion in determining the copyright protectability of motion picture characters. In *Anderson v. Stallone*,<sup>172</sup> the court

---

164. See *Anderson v. Stallone*, 11 U.S.P.Q.2d (BNA) 1161, 1165 (C.D. Cal. 1989) (court stating that it did not know which test to apply).

165. *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982).

166. See *id.* at 391 (discussing the character Tarzan).

167. See *Warner Bros. Pictures v. CBS*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955); *Warner Bros. v. Film Ventures Int'l*, 403 F. Supp. 522 (C.D. Cal. 1975).

168. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

169. 1 NIMMER & NIMMER, *supra* note 10, § 2.12, at 2-175.

170. See *Warner Bros. v. ABC*, 720 F.2d 231, 243 (2d Cir. 1983) (finding attributes and non-physical characteristics determinative of copyright protectability).

171. See *Jones v. CBS*, 15 U.S.P.Q.2d (BNA) 1380, 1384 (S.D.N.Y. 1990) ("Basic character types are not copyrightable. . . . [O]nly a uniquely developed character with some degree of novelty is copyrightable."); *Smith v. Weinstein*, 578 F. Supp. 1297 (S.D.N.Y. 1984) (finding characters too basic and abstract to constitute an expression of an idea).

172. 11 U.S.P.Q.2d (BNA) 1161 (C.D. Cal. 1988).

found that "[t]he precise legal standard th[e] court should apply in determining when a character may be afforded copyright protection is fraught with uncertainty. . . . However, out of an abundance of caution th[e] Court . . . determine[d] the protectability of the . . . characters under both tests."<sup>173</sup> Numerous commentators as well have expressed their displeasure with the current standards used to determine when a character may be protected by copyright.<sup>174</sup> Given the commercial significance of fictional characters generally, the confusion about when a fictional character may be protected by copyright protection must come to an end.

A unified test is necessary. The test to determine when literary, graphic, and motion picture characters are protectable under the copyright law should be both easy to understand and easy to use. The new standard should contain elements of both the character delineation test and the story being told test. Such a standard is proposed below.

The proposed unified standard uses a sliding scale approach, taking into consideration certain crucial factors. The physical depiction of the character, the personality traits of the character, and the setting of the story in which the character originally appears are considered in determining whether the character should be granted copyright protection. Weighing each of these elements, a court then determines whether the overall feel of the character is that of a highly recognizable or expressly distinctive character. A highly delineated or sufficiently distinctive character deserves copyright protection. Obviously, the trier of fact will be required to consider all aspects of the work that are important to the audience.<sup>175</sup> But the basic underlying principle of the unified test is that the more recognizable or distinctive the character, the more protection (through copyright laws) the character will be granted.

#### A. Delineation of the Character's Physical Appearance

In the unified, sliding-scale test for literary, cartoon, and motion picture characters, a court will first examine the character's physical delineation. A character's physical features alone may be sufficient to provide the character copyright protection.<sup>176</sup> But copyright protection in a character's physical features will limit protection only to exact duplicates or reproductions of the orig-

---

173. *Id.* at 1165 (referring to both the story being told and the character delineation tests).

174. See Brylawski, *supra* note 7, at 77 (noting that current analyses of copyright protection of characters is inconsistent and unclear); Kurtz, *supra* note 25, at 520-22 (suggesting that much of this confusion results from permitting the doctrines to drift too far from their conceptual moorings); Turner, *supra* note 12, at 348-49 (noting that characters do not easily fit into the literal language of the copyright statute).

175. Berman & Boxer, *supra* note 102, at 332.

176. See, e.g., Gracen v. Bradford Exch., 698 F.2d 300, 305 (7th Cir. 1983) (painting of Dorothy infringed the copyright in the movie *The Wizard of Oz*); Allen v. Men's World Outlet, Inc., 679 F. Supp. 360, 366 (S.D.N.Y. 1988) (faces of cartoon characters are protectable); United Features Syndicate v. Sunrise Mold Co., 569 F. Supp. 1475, 1480 (S.D. Fla. 1983) (comic strip characters protectable); Ideal Toy Corp. v. Kenner Prods., 443 F. Supp. 291, 302 (S.D.N.Y. 1977) (physical attributes of motion picture character protectable by copyright).



inal character.<sup>177</sup> Such protection will also prohibit reproductions of "the essential characteristics" of the original character with only "slight differences and variations."<sup>178</sup> The limitation on the degree of copyright protection was explained by the Ninth Circuit as follows:

The idea and the expression will coincide when the expression provides nothing new or additional over the idea. Thus, the expression of a jeweled bee pin contains nothing new over the idea of a jeweled bee pin. Returning to our own example, the idea of a plaster statue [*sic*] of a nude will probably coincide with the expression of that idea when an inexpensive manufacturing process is used. There will be no separately distinguishable features in the statue's [*sic*] expression over the idea of a plaster nude statue [*sic*].

The complexity and artistry of the expression of an idea will separate it from even the most banal idea. Michelangelo's David is, as an idea, no more than a statue [*sic*] of a nude male. But no one would question the proposition that if a copyrighted work it would deserve protection even against the poorest of imitations. This is because so much more was added in the expression over the idea. When idea and expression coincide, there will be protection against nothing other than identical copying of the work. . . . Therefore, the scope of copyright protection increases with the extent expression differs from the idea.<sup>179</sup>

Furthermore, this visual-depiction prong of the proposed test is simple to apply. A person can view the concrete and tangible elements of characters. It is easy, for example, to visualize cartoon characters. And the visual depiction provides something concrete to which the accused infringing subject can be compared.<sup>180</sup> For example, take the "Peanuts" character Charlie Brown. Men-

177. *King Features Syndicate v. Fleischer*, 299 F. 533, 534 (2d Cir. 1924); *Ideal Toy*, 443 F. Supp. at 302. The court in *Ideal Toy* examined the physical characteristics of a toy alleged to infringe the Darth Vader character from the movie *Star Wars*. The court found significant differences between the two characters' physical features. In so holding, the court stated:

The defendants have no more right to a monopoly in the theme of a black-robed, helmeted, evil figure in outerspace conflict with a humanoid and a smaller non-humanoid robot than Shakespeare would have had in the theme of a "riotous knight who kept wassail to the discomfort of the household" and who had conflicts with "a foppish steward who became amorous of his mistress."

*Id.* at 304. However, the toy could have infringed the movie character if it had been an exact reproduction. See *Gracen*, 698 F.2d at 305.

178. *Fleisher Studios v. Ralph A. Freundlich, Inc.*, 73 F.2d 276, 278 (2d Cir. 1934) (Betty Boop), cert. denied, 294 U.S. 717 (1935).

179. See *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1167-68 (9th Cir. 1977) (footnote omitted).

180. See *id.*; *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (finding difficulty of delineating a character is reduced with visual characters); *Detective Comics v. Bruns Publications*, 111 F.2d 432 (2d Cir. 1940) (basing infringement on similarity of physical aspects of characters); *Anderson v. Stallone*, 11 U.S.P.Q.2d (BNA) 1161 (C.D. Cal. 1989) (finding movie characters had physical characteristics that assisted a copyright analysis); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388 (S.D.N.Y. 1981) (noting physical features of Tarzan); *Ideal Toy Corp. v. Kenner Prods.*, 443 F. Supp. 291 (S.D.N.Y. 1977) (utilizing special copyright analysis for graphic characters).

tion of his name brings to mind an image of the round-headed, brown-eyed figure with a strand or two of curled hair upon his head. Numerous people have seen Charlie Brown depicted in a variety of cartoon strips. Charlie Brown has a distinct and concrete appearance that people can visualize.<sup>181</sup>



© 1958\*

Thus, Charlie Brown's physical characteristics, as portrayed in numerous publications, can easily be compared to an alleged infringing work. The express physical delineation of the character's appearance gives the character life apart from the work in which it appears.

Since cartoon characters have a concrete physical delineation, sufficient similarities in physical appearance between two characters should alone constitute copyright infringement, apart from the character's other attributes and traits. In fact, in a case where Charlie Brown and other Peanuts characters were reproduced into three-dimensional dolls, the court found that such dolls infringed the copyrights in the Peanuts characters.<sup>182</sup> The court reached that result without examining the characters' personalities or behavior.<sup>183</sup> Likewise, courts have found that the characters Betty Boop,<sup>184</sup> Raggedy Ann and Andy,<sup>185</sup> and Sparky the Horse<sup>186</sup> were infringed by either dolls or figures that depicted the cartoon characters. When a doll or toy is the alleged infringer, there is nothing to compare but the physical appearance of the characters.<sup>187</sup> As Professor Kurtz stated:

This similarity must be virtually exact . . . with no more than slight differ-

181. Charles M. Schultz, *Peanuts*, CHI. TRIB., Dec. 3, 1990, at C6 (Charles Shultz' character, Charlie Brown, from the cartoon strip "Peanuts").

\* Charlie Brown reprinted by permission of UFS, Inc.

182. *United Features Syndicate v. Sunrise Mold Co.*, 569 F. Supp. 1475 (S.D. Fla. 1983).

183. *Id.*

184. *Fleisher Studios v. Ralph A. Freundlich, Inc.*, 73 F.2d 276, 278 (2d Cir. 1934).

185. *Gruelle v. Molly-'Es Doll Outfitters*, 94 F.2d 172, 176 (3d Cir. 1937).

186. *King Features Syndicate v. Fleischer*, 299 F. 533, 538 (2d Cir. 1924).

187. *Ideal Toy Corp. v. Kenner Prods.*, 443 F. Supp. 291, 302 (S.D.N.Y. 1977) (examining the physical characteristics of a toy alleged to infringe the copyright in the characters from the movie *Star Wars*).

ences and variations, or it will not be sufficiently particular and concrete to amount to an appropriation of original elements of expression. If the horse Sparky is closely copied, there is infringement; if a horse reminiscent of Sparky is created, there is not.<sup>188</sup>

Visual aspects of cartoon characters may thus bring a cartoon character into the area protected by copyright. The physical appearance of a cartoon character creates a tangible impression of that character. Because a cartoon character is highly delineated in physical appearance alone, such characters should be protected by copyright outside the original depiction of the character.

Likewise, motion picture characters possess the same highly delineated physical characteristics as do cartoon characters. The motion picture character is concrete and tangible; it possesses elements separate from the words that comprise the story. A motion picture does more than tell a story; it conveys two-dimensional sights and sounds in a manner that stimulates most of the human senses.<sup>189</sup>

Obviously, however, there are differences between the visual representation of motion picture characters and the visual elements of cartoon characters. Motion picture characters are portrayed by actors, and in many motion pictures, the same characters have been portrayed by numerous actors. For example, the character James Bond has been portrayed by Sean Connery, Roger Moore, and Timothy Dalton, among others. Likewise, the character Rocky played by Sylvester Stallone could easily be played by some other actor. Creative expression cannot be found in the physiognomy of the actor.<sup>190</sup> Therefore, a motion picture character, portrayed by an actor, should rarely be provided copyright protection based upon the physical appearance of the character.<sup>191</sup> And any copyright protection lying in a motion picture character's physical appearance should be limited.

The limited copyright protection that motion picture characters should be given is justified, at least in part, by the fact that actors have protected rights in controlling unauthorized commercial exploitation of their likenesses.<sup>192</sup> The California Supreme Court, in *Lugosi v. Universal Pictures*,<sup>193</sup> held that the

---

188. Kurtz, *supra* note 25, at 450.

189. Berman & Boxer, *supra* note 102, at 324.

190. Kurtz, *supra* note 25, at 471.

191. Berman & Boxer, *supra* note 102, at 330-31. There, the authors noted:

[T]he more "human" the character is who is depicted in the movie or television work, the less likely that he or she will be found to be, in the event of copyright infringement litigation, sufficiently delineated to merit separate copyright protection. On the other hand, if presented in a science fiction, space, or horror setting, with the attendant visual and aural trappings, even the most simplistic and simple-minded of characters, with all due respect to "R2-D2" and "Pufnstuf," have a strong claim for copyright protection.

*Id.*

192. *Lugosi v. Universal Pictures*, 603 P.2d 425, 431, 205 U.S.P.Q. (BNA) 1090, 1096 (Cal. 1979).

193. 603 P.2d 425, 205 U.S.P.Q. (BNA) 1090 (Cal. 1979).

actor Bela Lugosi had a personal interest, during his lifetime, in controlling the use of his likeness in his portrayal of the character Dracula.<sup>194</sup> The California Supreme Court extended this right of publicity to include the actor's own likeness while portraying a particular fictional character.<sup>195</sup> But Chief Justice Bird noted in dissent that an actor's rights are limited to the use of his likeness only:

This protection extends only to the individual's likeness—a representation or image of the person—while portraying the particular character. Nothing herein is intended to extend protection to the idea for the character or to the character itself. Nothing in the right of publicity prohibits another person, for example, from developing and playing a sympathetic tramp character similar to the one portrayed by [Charlie] Chaplin.<sup>196</sup>

Therefore, the visual element alone should not provide a human motion picture character copyright protection.

Despite this separate right of publicity, however, the distinct visual and aural elements motion picture characters possess—separate from the word pictures of literary characters—cannot be ignored. The motion picture character's appearance should be a factor in determining whether the character deserves copyright protection.<sup>197</sup> The general physical features of a character serve as a base for determining the character's copyright protectability. But in order for a motion picture character to be afforded copyright protection, the character must acquire distinctive personality traits. In fact, the court in *Warner Bros. v. ABC*<sup>198</sup> examined the appearance of each actor in the subject film to determine whether the alleged infringer captured the "total concept and feel" of the copyrighted character in dispute. The court stated that part of Superman's character delineation comprised a tall, well built, dark and handsome man.<sup>199</sup> It then found that the alleged infringing character, Ralph Hinkley, was medium height and slight and had unkempt blond hair.<sup>200</sup> Because of these differences, the court held that the Hinkley character did not infringe.

Furthermore, it follows logically that motion picture characters that rely less on the human form, such as cartoon characters, should be granted copy-

---

194. *Id.* at 431, 205 U.S.P.Q. (BNA) at 1096.

195. *Id.* The limitation on an actor's right to publicity is an issue currently in debate. However, that issue is beyond the scope of this Article.

196. *Id.* at 445 n.26, 205 U.S.P.Q. (BNA) at 1108 n.26 (Bird, C.J., dissenting).

197. *See Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983). In *Gracen*, a painting of Dorothy from a scene in the movie *The Wizard of Oz* was held to be not an original derivative work copyrightable under the Copyright Act, 17 U.S.C. §§ 101-914 (1988). The painting was an almost exact duplication of a scene from the movie. The character in the painting resembled Judy Garland, the actress who portrayed Dorothy. It depicted Dorothy in the same clothes and hair style as in the movie. The appearance of the character was given great weight. *Gracen*, 698 F.2d at 305.

198. 720 F.2d 231, 241 (2d Cir. 1983).

199. *Id.* at 235.

200. *Id.* at 236.

right protection in the character's appearance alone.<sup>201</sup> When a motion picture character (such as the *Star Wars* characters C-3PO, R2-D2, or Darth Vader) is compared with an object with no preexisting attributes, such as a doll, appearance is the only available means to determine copyrightability.<sup>202</sup> However, the more human the character, the more the combination of the character's physical, emotional, and behavioral traits must be examined.

Both the physical appearance and personality of the character should also be examined to determine whether the character's overall presentation justifies copyright protection.<sup>203</sup> With human characters, the physical appearance provides a starting point for analysis, but the nature of the character's personality traits is a significant factor in determining whether the character is protected under the copyright laws. With cartoon motion picture characters, however, the character's physical appearance alone may be sufficient to warrant copyright protection. In any event, a motion picture character's physical appearance should be protected when certain traits the character possesses are distinctive and have become associated with the character by the public. If not, no protection should be available unless the other criteria are met.

Rarely will a literary character be described in sufficient detail to warrant copyright protection based solely upon the character's physical appearance. Obviously, it is often difficult to describe the physical appearance of a character using words alone. A reader might use his or her own personal experiences to mold a visual picture of a literary character. But each reader would likely draw a slightly different picture based on his or her experiences. The following passage provides an example:

Michele, perspiring and rosy, was coming toward her, her red hair in disarray above her dark eyes, her slender, small-waisted figure reflected thricefold in the mirrors which Andre had installed on the walls so that she might watch her own progress. She wore a rather short white dress that ended just above her ankles, and black slippers on tiny feet.<sup>204</sup>

Logically, reading this passage causes each reader to draw a mental picture of the woman described. But in all likelihood each reader's mental image of the character will be slightly different. The preceding passage demonstrates nothing more than the author's idea. The author's description is too vague and too broad to amount to protectable expression. A literary description is not like a graphic representation that can be seen, because the details in a literary character are left to the reader to create in his mind. As the cliché goes, a picture is worth a thousand words.

An idea, such as a literary description, cannot be protected by copyright.<sup>205</sup>

---

201. *Ideal Toy Corp. v. Kenner Prods.*, 443 F. Supp. 291, 302 (S.D.N.Y. 1977).

202. *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1166 (9th Cir. 1977); *Ideal Toy*, 443 F. Supp. at 302.

203. *Warner Bros. v. ABC*, 720 F.2d 231 (2d Cir. 1983).

204. PATRICIA MATTHEWS, *DANCER OF DREAMS* 4 (1927).

205. *Sid & Marty Krofft*, 562 F.2d at 1168.

A copyright in a literary character's physical description would grant such a character too vast an area of copyright protection. This is not to say that a literary character's physical description can never be protected by copyright. An author may depict a literary character's physical characterization in such detail that the characterization may be protected by copyright. More often than not, however, the literary character's physical description will be combined with the character's personality traits to form a character deserving copyright protection.

The physical representation of any character (whether graphic, literary, or motion picture) may be protected by copyright outside the original work in which it appeared.<sup>206</sup> Protection afforded to a character's physical features, however, should be limited. Under the proposed test, the protection afforded a character's physical appearance is extended only to exact, or nearly exact, reproductions of the original character.<sup>207</sup> Protection should extend no further. Therefore, in sum, a character should be granted limited copyright protection in the manifestation of its physical appearance apart from any other features it may possess. The logical corollary of this principle is that the scope of a character's copyright protection should thus increase as the character develops distinctive personality traits associated with the character.

### B. Delineation of the Character's Personality Traits

The second element courts should examine in determining the copyright protectability of characters apart from the original work in which they appear is the characters' personality traits. Courts should ask whether the characters are uniquely developed.<sup>208</sup> Copyright protection should be granted only to well developed characters.<sup>209</sup>

As discussed above, a character's physical appearance may bring that character into the arena of copyright protection.<sup>210</sup> But not all characters are protectable based upon physical delineation alone. Even lightly sketched charac-

---

206. See *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979); see also *Pellegrino v. American Greeting Corp.*, 592 F. Supp. 459, 462 (D.S.D. 1984) (Ziggy character on greeting card protectable); *United Features Syndicate v. Sunrise Mold Co.*, 569 F. Supp. 1475, 1480 (S.D. Fla. 1983) ("Peanuts" characters protectable); *Ideal Toy*, 443 F. Supp. at 303 (*Star Wars* characters protectable).

207. *Ideal Toy*, 443 F. Supp. at 302-03; see *King Features v. Fleischer*, 299 F. 533, 538 (2d Cir. 1924) (holding that a three-dimensional object based on literary character can be infringement of literary character); *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (2d Cir. 1914) (holding that doll figures infringed a two-dimensional cartoon character).

208. *Jones v. CBS*, 733 F. Supp. 748, 753, 15 U.S.P.Q.2d (BNA) 1380, 1384 (S.D.N.Y. 1990) ("Basic character types are not copyrightable. . . . [O]nly a uniquely developed character with some degree of novelty is copyrightable.").

209. *Smith v. Weinstein*, 578 F. Supp. 1297, 1303 (S.D.N.Y. 1984) ("[N]o character infringement claim can succeed unless plaintiff's original conception sufficiently developed the character, and defendants have copied this development and not merely the broader outlines.").

210. See *supra* Section IV.A.

ters may be described in enough detail to afford copyright protection if the concrete elements that comprise the character's personality are developed in tremendous detail.<sup>211</sup> Therefore, the character's personality and behavioral traits may carry the character into the realm of copyright protection. Furthermore, in the case of characters that have protectable elements in the character's physical appearance, personality traits will expand the scope of copyright protection afforded the character.<sup>212</sup>

Therefore, a character must be sufficiently developed to be afforded copyright protection. To determine the extent to which the character is developed, courts should consider at least two criteria. First, the character must be more than a simple, stock character such as a voodoo doctor,<sup>213</sup> a prisoner belonging to a certain racial group,<sup>214</sup> or a gun-carrying cowboy. Second, the character's actions and display of emotions must add life to the character. A highly developed character is one that bears a unique resemblance to personalities discovered in the normal routines of daily life.<sup>215</sup> Hence, the standard of protectability of characters should be closely akin to the criteria that individuals apply in daily life to determine if one individual truly knows another.<sup>216</sup> A court must examine the character's actions, demeanor, and general behavioral and personality attributes to determine whether the character is distinctive and fully realized.<sup>217</sup> A character can be said to have a distinctive personality and thus be deserving of copyright protection when the character has been delineated to the point where the behavior is relatively predictable;<sup>218</sup> the char-

211. See *Olson v. NBC*, 855 F.2d 1446, 1452 (9th Cir. 1988) (finding the characters in a television series contained no descriptions that could be sufficient to afford copyright protection to characters taken alone); *Anderson v. Stallone*, 11 U.S.P.Q.2d (BNA) 1160, 1166 (C.D. Cal. 1989).

212. *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1168-69 (2d Cir. 1977) ("Therefore, the scope of copyright protection increases with the extent expression differs from ideas."); see *Warner Bros. v. ABC*, 720 F.2d 231, 242 (2d Cir. 1983); *Detective Comics v. Bruns Publications*, 111 F.2d 432, 433 (2d Cir. 1940).

213. *Jones v. CBS*, 733 F. Supp. 748, 753, 15 U.S.P.Q.2d (BNA) 1380, 1384 (S.D.N.Y. 1990) (denying copyright protection to a witch doctor character appearing in a television program because she was "not a developed character").

214. *Smith v. Weinstein*, 578 F. Supp. 1297, 1303 (S.D.N.Y. 1984) (finding the character appearing in a movie at a level of abstraction too basic to permit copyright protection).

215. 1 GOLDSTEIN, *supra* note 10, § 2.7.2, at 128.

216. 1 *Id.*

217. *Warner Bros. v. ABC*, 720 F.2d 231, 242-43, 222 U.S.P.Q. (BNA) 101, 110 (2d Cir. 1983); see *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 217 U.S.P.Q. (BNA) 307 (2d Cir. 1982); *Detective Comics v. Bruns Publications*, 111 F.2d 432, 45 U.S.P.Q. (BNA) 291 (2d Cir. 1940); *Silverman v. CBS*, 632 F. Supp. 1344, 229 U.S.P.Q. (BNA) 587 (S.D.N.Y. 1986), *rev'd on other grounds*, 870 F.2d 40 (2d Cir. 1989); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 215 U.S.P.Q. (BNA) 37 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610, 215 U.S.P.Q. (BNA) 495 (2d Cir. 1982); *Filmvideo Releasing Corp. v. Hastings*, 509 F. Supp. 60, 212 U.S.P.Q. (BNA) 195 (S.D.N.Y. 1981), *aff'd in part and rev'd in part*, 668 F.2d 91 (2d Cir. 1981); *Detective Comics v. Fox Publications*, 46 F. Supp. 872 (S.D.N.Y. 1942); *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914).

218. 1 GOLDSTEIN, *supra* note 10, § 2.7.2, at 128.

acter, when placed in a new plot situation, will react in ways that are at once both distinctive to that particular character and not surprising.<sup>219</sup> A character is protectable when it becomes easily recognizable to the audience. For example, when the audience "knows" the character—similar to when a person knows a friend—the character becomes protectable. The test can best be understood through the use of some examples.

First, examine cartoon characters. The cartoon character has a literary aspect beyond its visual depiction. The combination of a cartoon character's visual and behavioral elements should strengthen the character's protectable features.

Many cartoon characters have acquired distinct personalities. Again, examine Charlie Brown. People have grown to expect Charlie Brown to fail at whatever he attempts. For example, people expect Charlie Brown to always make the last out in baseball or miss kicking the football when his friend Lucy holds the ball. These traits enhance Charlie Brown's characterization. Such behavioral traits give a personality to a visually depicted character. Since a cartoon character is perceived in its entirety,<sup>220</sup> the addition of personality traits to a visually depicted fictional character only adds to the degree of delineation of that character. Thus, in the case of Charlie Brown, the copyright protection would extend beyond his mere physical appearance. A character should be found to infringe the Charlie Brown character even if the physical appearance of the infringing character does not encompass the essential physical characteristics of the Charlie Brown character. If the alleged infringer possesses a small degree of similar physical characteristics, but possesses substantially similar personality traits, the court should find infringement of the copyright in the original character.<sup>221</sup> Thus, the copyright protection afforded to a cartoon character that develops distinct personality traits should be extended to both appearance and personality.

Motion picture characters, like cartoon characters, possess physical characteristics as well as personality traits. In fact, some motion picture characters, such as Darth Vader or Frankenstein's monster, more closely approximate cartoon characters than human characters.<sup>222</sup> Those types of characters should be treated as cartoon characters in determining copyright protectability.<sup>223</sup> That is, the character's physical features may, in and of themselves, suffice for the requirement for copyright infringement; any personality displayed by the character simply increases the scope of the copyright protection afforded the character.

Consequently, characters portrayed by human actors should not be granted

---

219. 1 *id.*

220. *Warner Bros. v. ABC*, 720 F.2d 231, 241 (2d Cir. 1983).

221. *See Detective Comics v. Bruns Productions*, 111 F.2d 432 (2d Cir. 1940) (finding cartoon character Wonderman to infringe the copyright in the character Superman although physical characteristics of the two characters differed).

222. *Berman & Boxer*, *supra* note 102, at 330.

223. *See supra* notes 165-69 and accompanying text.



similarly extensive protection. Because of an actor's right of publicity, the more "human" the character depicted in a movie or television work appears, the more personality the character must possess to acquire copyright protection.<sup>224</sup> A motion picture character stripped of the appearance and personality of the actor performing the part more closely resembles a literary character who can be analyzed and discussed only in terms of the character's behavioral or personality characteristics.<sup>225</sup> As Bayard Berman and Joel Boxer have stated, "'Rocky' without Sylvester Stallone or 'Julia' without Vanessa Redgrave can only be defined and delineated as a literary character, that is, only in terms of motivation, characterization, and relationship to the plot and other characters."<sup>226</sup> Therefore, an important measure of the protectability of a motion picture character is the character's personality. The motion picture character's personality may be ascertained from the character's dialogue and actions within the movie.

Examine the motion picture character James Bond. The fictional character James Bond is an international spy who has appeared in numerous movies. Even though James Bond has been portrayed in the movies by numerous actors over the years, his personality has not changed. James Bond is a calm, sophisticated, and intelligent secret agent for the British Government. He is always involved in perilous situations while attempting to battle the evils of enemy secret agents. James Bond is also a ladies' man and, in the course of his adventures, he attracts beautiful women. The copyright in the character James Bond does not lie in the physical appearance of James Bond, as portrayed by any actor. Rather, the copyright in James Bond lies in the character's antics, behavioral and personality, as depicted in the movie. Audiences, through watching multiple movies, have come to recognize certain personality traits as belonging to James Bond. His actions have also become somewhat predictable. James Bond's unique personality would garner the character copyright protection.<sup>227</sup>

That is not to say that physical appearance is irrelevant. Courts should examine a character's general physical characteristics in determining whether a character is protected by copyright.<sup>228</sup> The motion picture character's appearance provides basic physical outlines of the character. The appearance provides a foundation for the character's copyright protection. However, in examining motion picture characters, the focus of a court's analysis should always be on the uniqueness of the character's personality.

---

224. Berman & Boxer, *supra* note 102, at 330-31. See *supra* notes 192-96 for a discussion of an actor's right to publicity.

225. Berman & Boxer, *supra* note 102, at 330-31.

226. *Id.* at 330.

227. See *Anderson v. Stallone*, 11 U.S.P.Q.2d (BNA) 1160, 1166 (C.D. Cal. 1989) (recognizing that the character Rocky is protected by copyright).

228. See *Warner Bros. v. ABC*, 720 F.2d 231, 243 (2d Cir. 1983) (examining Superman's physical build and costume to determine the range of copyright protection afforded the character); see also *Anderson*, 11 U.S.P.Q.2d (BNA) at 1166 (finding the physical characteristics of the character Rocky important in determining copyright protectability).

Literary characters, on the other hand, derive their copyright protection almost exclusively from their distinctive personality. The court will thus protect literary characters that are delineated in significant detail.<sup>229</sup>

The character Ebenezer Scrooge in *A Christmas Carol* is a good example of a highly delineated character. Mr. Scrooge's stock characteristics—a grouchy old man who does not like Christmas—do not afford him copyright protection. But a reader of *A Christmas Carol* draws a mental picture of Mr. Scrooge's physical appearance. Further, a reader discovers Ebenezer's traits of greed and a cold-hearted dislike for Christmas. Scrooge's visits by three ghosts on Christmas Eve change him into a warm-hearted, generous man. The stock elements of greed, displeasure, or dislike for Christmas are not protectable in a character. However, Ebenezer Scrooge becomes human through the words of the story. He develops a personality distinctive to the Ebenezer Scrooge character. The public relates the name Ebenezer Scrooge to the man who hated Christmas. Scrooge's actions have become predictable. The overall perception of Ebenezer's character thus is that of a highly delineated character deserving the shelter of copyright protection.

Therefore, in determining whether a literary character may be protected by copyright, a court should first examine the physical description of the character. Since rarely will a literary character be physically described in a novel, the examination must proceed further with literary characters. The character's attributes, traits, behavioral patterns, and predictability must be examined.

"The less developed the [character], the less [it] can be copyrighted."<sup>230</sup> A character's stock elements are not protectable.<sup>231</sup> It is the character's physical appearance and its highly delineated personality that comprise the protectable features of a character. A character's physical depiction may alone be protectable or it may only be one of many factors which provide a fictional character copyright protection. In any event, a character is protected by copyright apart from its original work when the character's physical description, attributes, traits, and actions are delineated in a manner such that the overall perception of the character resembles that of a living human being.<sup>232</sup>

---

229. See, e.g., *Film Video Releasing Corp. v. Hastings*, 509 F. Supp. 60 (S.D.N.Y. 1981) (finding that characters appearing in a novel were infringed by movie character); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388 (S.D.N.Y. 1981) (finding the Tarzan character was highly delineated within the novel), *aff'd*, 683 F.2d 610 (2d Cir. 1982).

230. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (Judge Learned Hand's famous quote).

231. See, e.g., *Olson v. NBC*, 855 F.2d 1446, 1452-53 (9th Cir. 1988) (finding characters that are lightly sketched are less likely to deserve protection); *Warner Bros. v. ABC*, 720 F.2d 231, 243 (2d Cir. 1983) (looking at all of Superman's characteristics combined to determine protectability); *Warner Bros. v. Film Ventures Int'l*, 403 F. Supp. 522, 525 (C.D. Cal. 1975) (stating that characters must be distinctly delineated); *Fuld v. NBC*, 390 F. Supp. 877, 881-82 (S.D.N.Y. 1975) (stating that simple characteristics are not copyrightable).

232. See *Warner Bros. v. ABC*, 720 F.2d at 243; *Anderson*, 11 U.S.P.Q.2d (BNA) at 1166-67.

### C. *The Setting*

The setting of the original work in which a fictional character appears should also be examined if, after examining the character's physical appearance and personality traits, it is still unclear whether the character is entitled to copyright protection. The setting of the original work may either limit or expand the scope of copyright protection. When a character sits on the fence of protection or lacks sufficient delineation of physicality or personality to warrant protection, it may still be afforded copyright protection. Under such circumstances, the court should examine the setting in which the character originally appears in order to enhance the specific character trait lacking sufficient delineation. For example, a cowboy character originally appearing in a work that is set in the Old West would include, as part of its personality, the characteristics of that particular time period.

When the general appearance, demeanor, and antics of a character have been portrayed in a different setting, the copyright in the original character may still be infringed.<sup>233</sup> But if the appearance and behavior of the original character and the alleged infringing character are somewhat similar, yet still possess different qualities, then the setting surrounding the character may be used to determine the scope of copyright protection permitted. Examine the literary character Scarlett O'Hara from the novel *Gone with the Wind*.<sup>234</sup> To determine whether Scarlett O'Hara is sufficiently delineated to be afforded copyright protection, courts would apply the test previously discussed. Her physical features must be examined. Since she is a literary character, her appearance is a relatively limited factor. Yet in the novel her physical features are described in great detail. Hence, the character Scarlett O'Hara should have limited copyright protection in her physical features. These physical features set the foundation on which copyright protection is based. The rest of the test must then be applied to the character.

The personality of Scarlett O'Hara generates the most protectable element of the character. Throughout the development of the plot, Scarlett O'Hara develops personality traits. The reader discovers these traits as if a personal meeting took place. Scarlett O'Hara becomes human in the novel. Her personality and actions become relatively predictable. Thus, to a limited extent, Scarlett O'Hara's physical delineation should be protected by copyright, and most definitely her personality and behavioral traits are protectable.

So thus far a character that resembles Scarlett O'Hara, who appears in a

---

233. See, e.g., *Warner Bros. v. ABC*, 720 F.2d 231 (noting that copyrights in Superman character would be infringed if his general appearance and behavioral traits were duplicated by a character in a different setting); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (holding copyrights in numerous Disney characters infringed by use of exact reproductions of the characters in a foreign drug culture), cert. denied, 439 U.S. 1132 (1979).

234. MARGARET MITCHELL, *GONE WITH THE WIND* (1936). The story *Gone with the Wind* was set in the South during the Civil War. The novel examined the perils faced by plantation owners during that period. In particular, the novel focused on the life of Scarlett O'Hara and the effect that the loss of her plantation and the war had on her life.

work staged during World War II, with the plot focusing on the hardship the character faces due to the war, most likely would infringe the copyright in the character Scarlett O'Hara, even though the setting differs. The original Scarlett O'Hara character is protectable. Even if the original Scarlett O'Hara character lacked sufficient physical features or personality traits, the similarity of the settings of the two stories may enhance the scope of the original Scarlett O'Hara character's copyright protection.

Thus, the fact that a second work was set in the Civil War using a character resembling Scarlett O'Hara, but differing slightly in appearance or personality, may enhance the scope of the protection granted the original Scarlett O'Hara character to include the similar character of the second work. Likewise, a character used in a second work displaying the same general appearance and personality traits as the original Scarlett O'Hara would, most likely, be found to be encompassed within the realm of copyright protection offered the original character, regardless of where the second story was set. And when two settings differ significantly, the scope of copyright protection granted the original character may be limited.

Thus, the setting in which a character is placed may work to increase (or in some cases, decrease) the scope of the protection granted in the copyright.

#### *D. The Proposed Test—A Restatement*

A brief summary of the proposed test to determine the copyrightability of a character may be helpful at this point. First, the proposal applies one test to all characters—literary, graphic, and motion picture—seeking copyright protection. Therefore, the same test applies no matter what type of character is being analyzed. Furthermore, the proposed test involves three basic steps. In each step, a sliding scale evaluation is necessary, focusing on the level of delineation of the character.

A court must first examine the physical delineation of a character seeking protection. Any graphic depiction of a character will always warrant a limited amount of copyright protection in the character's appearance itself, without reference to any of the character's other traits. Thus, a graphic character would be protected from any substantially similar reproduction of its likeness. An extensive written description of a character may, likewise, warrant protection of the character's physical features. Such a situation, however, would rarely exist. Most likely, a character's physical description will act only as a foundation on which more extensive protection may be built.

The second step of the test requires a court to examine the personality of the character. A character's personality becomes highly delineated when its behavior becomes lifelike and somewhat predictable. Therefore, a character lacking a sufficient physical description to warrant copyright protection may still enter the realm of copyright protection if that character's personality is extensively delineated by the author. Moreover, a character's personality traits should be added to that character's physical description, thus enhancing the scope of copyright protection granted the character.

The third part of the test requires the court to examine the setting. This part of the test becomes pertinent when a character stands at the border of the area protected by copyright, but lacks sufficient characteristics to warrant copyright protection. When a character borders on protectability, elements of the setting may be incorporated into the character to push that character into the area protected by the copyright laws. But the setting may also act to limit the scope of protection afforded a borderline character.

The basic premise of the proposed test requires a court to determine the overall "touch and feel" of the character. The more recognizable the character, the more protection the character should be granted.

### CONCLUSION

Too much is at stake commercially for the confusion and lack of clarity to remain in determining whether a fictional character should be granted copyright protection apart from the work in which it originally appeared. Literary, graphic, and motion picture characters all possess similar characteristics. The characters all have certain elements of appearance as well as personality. The substance of the character may be derived from elements in the public domain and incorporated into the total mold of the character.<sup>235</sup> But when the author develops and defines his character, the character acquires an identity of its own.<sup>236</sup> The character becomes recognizable and distinct. At this point, the author has a recognizable interest in the character. A well defined character has a value—a value that may be taken and used by others. Only copyright can adequately protect the author's rights in his character.

It is unnecessary for courts to apply both the old "story being told" and "character delineation" tests because courts are uncertain as to which test is proper.<sup>237</sup> It is a waste of judicial economy. The time is ripe for a change.

A unified test, analyzing each type of character under similar standards, is offered to the courts. The test utilizes a sliding scale approach examining the character's physical features and personality. Only well developed and highly delineated characters acquire the refuge of copyright protection. The sliding scale approach permits a character that lacks sufficient delineation in one aspect of its characterization to still be afforded copyright protection. The total concept of the character must be analyzed. If the overall perception of the character is highly delineated, the character is protectable by copyright. Therefore, an author who does not adequately delineate his character cannot seek the shelter granted by the copyright statute. That is the penalty an author must pay for making his character indistinct.<sup>238</sup>

---

235. Turner, *supra* note 12, at 353.

236. *Id.*

237. Anderson v. Stallone, 11 U.S.P.Q.2d (BNA) 1160, 1166 (C.D. Cal. 1989).

238. 1 NIMMER & NIMMER, *supra* note 10, § 2.12, at 2-171 to 2-178.2.