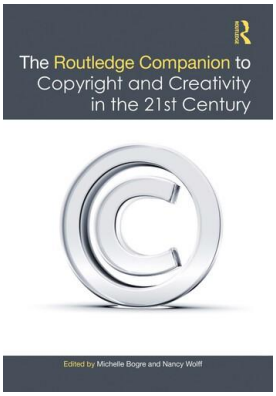

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IS A PICTURE REALLY WORTH MORE THAN A THOUSAND WORDS?

(The Scope of Copyright Protection for Fictional Characters)

Marcia Paul

Courts across the country have acknowledged that, at least on a theoretical basis, copyright protection can be accorded to a particular fictional character who appears in a copyright-protected work, provided that character is sufficiently delineated, whether verbally or pictorially. However, in practice, courts have granted that protection sparingly and, even then, much more readily to those pictorially depicted than those only verbally described. Is there a rational basis for the distinction, and is the entire treatment of this subject consistent with the underlying purposes of copyright? Those are the questions that this chapter will try to address.

Consider the following scenarios:

- I draw a mouse with floppy ears, big round eyes, and lascivious red lips fixed in a wicked grin, clad in a floral T-shirt, with tiny arms each with four fingers sporting violet nail polish, and squat legs capped by platform sneakers. I register my drawing of that mouse for copyright protection as a pictorial work.
- I write a novel about a family who decides to leave the city and move to a ramshackle barn in the country. The family consists of a mother, a father, and two kids, a boy and a girl. The plot is about the adjustments they have to make to rural life and their travails. The narrator of the novel is a mouse who lives beneath the barn. I describe her in my novel in exactly the same words I used earlier to describe the picture that I drew. The story of the family's adjustment is told through her eyes and voice from start to finish, but we learn nothing more about the mouse herself, except to the extent that we can hazard a guess about her views from her narration of their story. I register my novel for copyright protection as a literary work.
- I write a novel about that exact same family, with the exact same plot, except that the story is narrated by the daughter, a young girl. In one chapter, she encounters the same mouse and frightened, races to tell her family that they have company in the barn. In telling them, she describes the mouse in precise detail, down to her platform sneakers and violet nail polish, once again exactly as depicted in the drawing. Her dad is pretty sure she did not actually see the creature she describes, but he tells her that she has nothing to fear. Time and numerous other scares pass. Soon the girl forgets both her fright and the mouse, and the mouse never reappears in the story. I register that novel.

- After my first novel is published, I write a second novel about the flip-side travails of a different family, who decide to move from a small farm outside a town of 800 people to an apartment in a major metropolitan city. This family also consists of a mother, father, son, and daughter and, once again, the daughter encounters that exact same mouse in the bathroom of the apartment. Although she grew up in a rural setting, seeing a mouse in a city apartment frightens her. Again, she runs and describes the mouse to her father in exactly the same way, and once again, dad is somewhat dubious but reassures her. In time, she forgets the mouse and the mouse never again appears in the story. I register that novel.
- I license the rights in that second novel to an animation studio which gives visual life to my mouse in a movie. The movie is true to my verbal character description and the story line does not provide any more information about the mouse than in my novel. The studio registers the movie as a derivative work.

In each of these five scenarios, the mouse is my original creation. In all five, she has exactly the same attributes. The only difference is that in the first scenario she is described pictorially in a drawing, in the next three she is described in words, and in the last, my original verbal description is amplified by her visual depiction in the movie. As we will see, copyright protection is available for the first. My mouse may be entitled to copyright protection when she is a narrator because of her central role in the story even though it is not about her. The law is least likely, if at all, to grant protection in the third scenario because she plays a bit role in the story of the family and is not the driver of the narrative or the main character in it. Although she neither narrates nor is the focus of the fourth and fifth examples, she has a better chance of being protected because she appears in more than one work (my second novel) or because the studio added a pictorial description (the movie). In each of these scenarios, I created the exact same distinct mouse, with particular features and characteristics. Why is it that the law treats those depictions differently, and should it? Is the mouse who appears as a character in each of these works copyright-protected, standing alone from the work in which she appears? To answer these questions, we first look at how the law on point has evolved.

Overview of Existing Law

Any discussion about copyright protection for fictional characters must start with *Nichols v. Universal Pictures Corp.* (a case cited most often for Judge Learned Hand's famous "abstractions" test to determine whether a work is expression rather than idea), because it is oft-cited for his parameters for copyright protection of characters.[1] He noted that when an infringement claim concerns a character rather than a story, the idea/expression dichotomy is especially illusive. To illustrate, he said:

> 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 casted a riotous knight who kept wassail to the discomfort of the household, or a vein 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 series of the Origin of Species. If follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear from marking them too indistinctively.[2]

While Judge Hand's *Nichols* quote has been repeated by courts around the country, much of the law on point has been created by the Ninth Circuit. Initially, that court came down firmly against a broad view of copyright protection for characters, drawing a distinction between when

a character "is only the chessman in the game of telling the story," in which case no protection attaches, and when a character constitutes "the story being told" when the character may be protected.[3] Hammett sold the motion picture rights to his novel *The Maltese Falcon* to Warner Bros., which produced a very popular movie featuring Humphrey Bogart as the main character, Sam Spade. Thereafter, Hammett granted CBS the right to make a radio series entitled *The Adventures of Sam Spade*. Nothing appeared in the radio series from the novel except for the Sam Spade character. Warner Bros. argued that its exclusive right to the novel precluded CBS's use. The court found that there was no protection for fictional characters like Sam Spade, reasoning that literary characters are difficult to delineate and therefore may be nothing more than an unprotected idea: "The characters of an author's imagination and the art of his descriptive talent, like a painter's is like a person with his penmanship, are always limited and always falls into limited patterns. The restriction argued for [protection for the character] is unreasonable, and would affect the very opposite of the statute's purpose which is to encourage the production of the arts."[4]

The Ninth Circuit revisited this question in *Walt Disney Prods. v. Air Pirates*, where the defendant published an underground comic book with well-known Disney characters engaged in activities "antithetical to the accepted Mickey Mouse world of scrub faces, bright smiles, and happy endings."[5] Noting that comic book characters have "physical as well as conceptual qualities, [and are] more likely to contain some unique elements of expression," the court struggled to limit the *Sam Spade* case to its particular facts, in effect cabining that decision to literary characters, not illustrated ones.[6] Subsequently, this distinction was extended to characters visually depicted in a television series or a movie[7] and to characters that "have displayed consistent, widely identifiable traits."[8]

District courts in the Ninth Circuit have evinced considerable difficulty trying to apply those various authorities. For instance, in *Anderson v. Stallone*, the court characterized the Ninth Circuit law as "fraught with uncertainty."[9] It noted that although subsequent Ninth Circuit decisions (*Air Pirates* and *Olson*) implicitly limited *Sam Spade*, those cases concerned visually depicted rather than purely literary-depicted characters. With that backdrop, the court found the *Rocky* character at issue, depicted visually in film, entitled to protection as a highly delineated character with specific character traits and sufficiently central in three movies to constitute "the story being told."[10] Reviewing the aforementioned Ninth Circuit cases, the court summarized:

> In determining whether a character deserves copyright protection, courts look at many elements of the character—visual depictions, name, dialog, relationships with other characters, their actions and conduct, personality traits, and written descriptions—to determine whether it is sufficiently delineated such that it is a unique expression.[11]

That court also rejected the defendant's argument that, in order to perform this analysis, it had to dissect the various elements of that character to strip out the unprotectable stock elements before deciding whether the two characters are substantially similar, because "it is the unique combination of elements that makes up a protected character."[12]

Most recently, the Ninth Circuit in *D.C. Comics v. Towle* considered the protectability of the Batmobile from the Batman television shows and films, a fictional, high-tech automobile with external bat-like features, equipped with futuristic weaponry and technology.[13] The court traced the history of character protection for cartoon characters from *Air Pirates* through *Halicki* and concluded that a three-part test exists for determining whether characters in comic books, television programs, or motion pictures will be protected: (i) it must have "physical as well as conceptual quality"; (ii) it must be "sufficiently delineated"; and (iii) it must be "especially distinctive" and "contain some unique elements of expression."

Meanwhile, in the Second Circuit, primary focus remains on the level of character development. In *Goodis v. United Artists Television, Inc.*, the court concluded that the defendant-publisher,

who had serialization rights to a novel and used the characters from that novel in new plot situations in the television series *The Fugitive*, was contractually entitled to do so.[14] The concurrence focused on the importance of granting authors stand-alone character protection so that characters could be used in sequels, because divesting the original author of that right "would be clearly untenable from the standpoint of public policy, for it would effectively permit the unrestrained pilfering of characters."[15] In *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, the successor to the author of the book *Tarzan of the Apes* licensed MGM the rights to use the Tarzan character in a screenplay and a remake.[16] The court determined that the Tarzan character, apart from the book in which he appeared, was sufficiently delineated to be protected (and therefore that license could be terminated), based upon this very general description of the attributes of the character: "Tarzan is the Ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions . . . He is athletic, innocent, youthful, and gentle and strong. He is Tarzan."[17]

In *Warner Bros. Inc. v. American Broadcasting Companies, Inc.*, the court noted that since *Nichols*, copyright protection had occasionally been granted to a literary character but more often to cartoon characters.[18] According to Judge Newman, most courts consider not only visual resemblance, but the totality of the character's respective attributes and traits and the extent to which the allegedly infringing character captures the "total concept and feel" of the copyrighted character: "A character is an aggregation of the particular talents and traits his creator selected for him. That each one may be an idea does not diminish the expressive aspect of the combination."[19] To reconcile the paradox that, in copyright law, generally, the defendant cannot escape infringement by pointing to elements he did not copy, but when considering character infringement courts pay attention to *both* similarities and differences, Judge Newman relied on the distinction between literary and graphic works:

> A story has a linear dimension: it begins, continues, and ends. If a defendant copies substantial portions of a plaintiff's sequence of events, he does not escape infringement by adding original episodes somewhere along the line. A graphic or three-dimensional work is created to be perceived as an entirety. Significant similarities between two works of this sort inevitably lessen similarity that would otherwise exist between the total perceptions of the two works. The graphic rendering of a character has aspects of both the linear literary mode and the multi-dimensional total perception. What the character thinks, feels, says and does and the descriptions conveyed by the author through the comments of other characters in the work episodically fill out a viewer's understanding of the character. ***At the same time, the visual perception of the character tends to create a dominant impression against which the similarity of a defendant's character may be readily compared, and significant differences readily noted.***[20]

Silverman v. CBS, Inc. was a copyright and trademark challenge to the defendant's efforts to create a Broadway play using characters from the famous radio and television series *Amos 'n' Andy*.[21] Some but not all of those programs were in the public domain. Having concluded that CBS had abandoned any trademark rights in the characters,[22] Judge Newman held that since the still-protected works were derivatives, all that the plaintiff could protect under copyright law was the incremental original additions in those derivatives, and concluded that: "we have no doubt that [the characters] were sufficiently delineated in the pre-1948 radio scripts to have been placed in the public domain when the scripts entered the public domain."[23]

Most recently, in *Salinger v. Colting*, a Swedish comic book writer decided to write a sequel to J.D. Salinger's renowned novel *The Catcher in the Rye*, the story of the iconic Holden Caulfield character.[24] The defendant aged the teenaged Holden Caulfield and put him in a new plot, using many elements of the back story from the novel. The district court (affirmed on point by the

Second Circuit) held that plaintiff was likely to succeed on both his claims for the creation of a derivative work and infringement of the character, on the grounds that the book was substantially similar to the original novel and that the character was entitled to stand-alone copyright protection and infringed, and that the sequel was not a fair use. To reach that conclusion, the court relied on both the depiction of the character and the use of other plot elements from the novel, illustrating the difficulty courts sometimes have in trying to define a fictional character, separating the character from the context in which he appears.

Appellate law on point is not limited to the Second and Ninth Circuits. In *Gaiman v. McFarlane*, Judge Richard Posner held that two comic book characters were entitled to protection, but acknowledged the difference in the level of abstraction between literary and graphic expressions:

> The description of a character in prose leaves much to the imagination, even when the description is detailed—as in Dashiell Hammett's description of Sam Spade's physical appearance in the first paragraph of the *Maltese Falcon*. 'Samuel Spade's jaw was long and boney, his chin a jutting v under the more flexible v of his mouth. His nostrils curved back to make another, smaller, v. His yellow-grey eyes were horizontal. The v *motif* was picked up again by thickish brows rising outward from twin creases above a hooked nose, and his pale brown hair grew down— from high flat temples—in a point on his forehead. He looked rather pleasantly like a blond satan.'[25]

According to that court, even given that rather vivid verbal description, one hardly knows what Sam Spade looks like, in contrast to Humphrey Bogart playing the role: "[a] reader of illustrated fiction completes the work in his mind; the reader of a comic book, or the viewer of a movie is passive."[26]

Judge Posner revisited the issue in *Klinger v. Conan Doyle Estate, Ltd*., concerning *Sherlock Holmes*.[27] As in the *Amos 'n' Andy* case, some but not all of the *Sherlock Holmes* works were in the public domain; the defendant sued for a declaratory judgment that he was entitled to create a sequel using the character. The estate argued that there is a distinction between "flat" and "round" fictional characters, arguing that because the former were complete in their original formulation, when the first work in which they appear entered the public domain, they too entered the public domain, but "round" characters—developed over time and over a series of works—should remain protected until the last work lost protection. Judge Posner rejected this distinction on policy grounds and found *Sherlock Holmes* to be in the public domain.[28]

What can be distilled from this body of case law? Several principles emerge:

- Copyright protection can attach to a particular character standing apart from the copyright-protected work in which it appears.
- Courts take different positions on how to define a character and whether and at what point to divorce the character from the story in which it appears.
- Courts generally do not dissect the elements of a character, but rather view it as a unified whole, unless some aspects of the character are no longer copyright-protected.
- The more delineated the character, the more likely it will be granted copyright protection.
- If the entire story revolves around the character, it is more likely to be protected than if the character, no matter how fully delineated, is less central.
- The more integrated the character is in the story line (maxxing when the character is "the story being told"), the more likely a court is to find infringement of the work without reaching the issue of infringement of the character.
- Characters that are depicted both verbally and pictorially are most likely to be accorded protection.

- Characters who are depicted pictorially only are more likely to be accorded protection than those depicted verbally only.
- Using the same character in multiple works makes it more likely that it will be accorded protection, even if those works are in different media or by different authors.

What, If Any, Protection Should Be Available for Fictional Characters?

Should there be any copyright protection at all for a fictional character who appears in a work, independent of the protection accorded that work? If so, what should be the proper scope of that protection, and should it only be accorded in certain circumstances? Does it depend upon the mode of depiction of the character, or on the nature of the character's appearance in the work? How should the "character" be defined or separated from the context of the work in which it appears? In this author's view, while there are rational bases to support distinctions in response to these questions, the only distinction that *should* make a difference is how delineated the character is (isolated from the plot), i.e. where it falls on the idea/expression dichotomy.

Should Stand-alone Protection Be Accorded?

There is no principled reason why protection for a fictional character who appears in a work but is not the work itself should not attach, at least in some circumstances, as a fictional character can be an original work of authorship. If no such protection was available, the creator would be wholly deprived of the ability to create or license the creation of derivative works based on that character, as exemplified by the Holden Caulfield character in *Colting* and the "fugitive" in *Goodis*. If the character is but a stock character, or otherwise has a public domain status, or is insufficiently delineated, then it does not qualify for protection. But assuming that it crosses the line from idea to original expression, whether verbally or pictorially or both, protection should be available. A contrary view would argue that if a literary character can be protected, then other stand-alone elements of a literary work, like a setting (e.g. Jurassic Park) could likewise be protectable, divorced from plot. Perhaps so, but settings are more likely scènes à faire and even if not, why should Universal Pictures not have the exclusive right to create a theme park based on the setting of one of its movies? The originality, expression, and delineation requirements will narrow the number of qualifying aspects of a literary work that are independently protectable and the substantial similarity tests and fair use will leave ample room for use of ideas or themes, rather than concrete expression.

Should There Be a Separate Registration Requirement?

Since registration is required in order to sue for infringement,[29] is a separate registration requirement for fictional characters necessary? While works of pictorial, graphic, or sculptural nature can be registered, as can literary and audiovisual works,[30] fictional characters are not enumerated as protected works of authorship.

Over half a century ago, the US Copyright Office rejected the idea of creating a separate category for fictional characters, explaining:

> There are undoubtedly some characters that are developed in detail and with such breadth and depth that they emerge as separately identifiable parts of the copyrighted work in which they appear. Others, perhaps the large majority, cannot be said to represent independent creations apart from the particular literary or pictorial works depicting them. As is equally true in the case of detailed presentations of plot, setting, or dramatic action, we believe it

would be unnecessary and misleading to specify fictional characters as a separate class of copyrightable works.[31]

In the past half-century plus, the monetary value of characters, particularly with respect to their use in sequels, prequels, and remakes, has increased exponentially. If a stand-alone category for characters were created, the deposit copy accompanying the registration would have the salutary effect of putting third parties on notice of the precise scope of the claimed protection, but it would also raise a host of issues. What would an author actually register? A verbal description of the character exactly as it appears in the underlying literary work? How would the author/registrant divorce the character from the setting, plot, and interactions with other characters in the underlying literary work? Is the character a published work if it has never been used by the author independent of a published work in which it appears? Does it matter whether the character was created prior to its appearance in a published literary work or contemporaneously therewith, or whether the attributes of the character are defined not only by the original work, but also in a sequel or a movie version? While questions like these have been explored in many copyright infringement cases, creating a separate category of protection seems unnecessary and unduly complicated. The registration of a magazine protects each article in it, so too the registration of a novel should suffice to protect the characters in it.

How to Define the Attributes of the Character

That the level of delineation of a character is key directly derives from the idea/expression dichotomy. The amount left to the reader's imagination matters because without defined parameters, it is unclear what is protected and therefore whether or not a similar creation might infringe. What should a court consider in order to answer the question of whether a character has been sufficiently delineated? In the *Great American Hero* case, Judge Newman endorsed looking not only at the visual resemblance of the characters, but also at the "totality of the character's attributes and traits." In the *Jonathan Livingston Segal* case, the court listed "visual depictions, name, dialog, relationships with other characters, their actions and conduct, personality traits, and written descriptions." If these wide parameters were the proper focus, analysis of character infringement would merge with the overall substantial similarity analysis for the works at issue. Holden Caulfield's experiences with his prep school teacher are not part of the character, but are rather how that character functions within the context of the underlying work.[32] Of course, a fictional character in literature does not exist in a vacuum; it appears in the context of a story and, consequently, drawing the line between character and story may be difficult in some cases and probably most difficult to draw when the character is "the story being told." But the more you look at the interactions between the character and the story, the closer you come to comparing the substantial similarity of plot rather than substantial similarity of the character.

When a character—even a relatively minor character in a book—can be lifted and be put in another plot and yet still exhibit the same attributes it is capable of living, it should be allowed to live an independent copyright life. When it has actually been used for that purpose, such as in a sequel, that is proof positive of that character's independent copyright existence. This is important because lifting a character from a novel and putting him in a totally different plot (e.g. detective series in which same detective solves totally unrelated crimes) may not be an "adaptation" sufficient to qualify as a derivative ***of the original novel***, but if the character is stripped of plot and settings, the second use may well be a derivative ***of the character***.

Another issue in defining the scope of the character is authorship. Consider this example: I write a novel that delineates a character who is neither the main character in, nor the focus of, the novel and then I license the right to produce a movie based on that novel to a studio that selects

a particular actress to play that character. More than one work featuring that character has now been created by or under authority of the author, and viewers of the movie have a visual depiction of the character. But as the court said in the *Amos and Andy* case, it is the owner of the derivative work—the studio in our example—who adds the incremental delineation of the character. Absent a contract to the contrary, the original author still only owns the copyright in the verbal depiction, so to define the character, focus must also be on the question of who is the author of that character, rather than the author of the work in which the character appears.

The Proper Character Infringement Analysis

Once a character is deemed worthy of protection, there is nothing unique about the analysis of whether it has been infringed. Substantial similarity can be determined by "comprehensive nonliteral" copying, for example, tracking the plot of a novel, but putting it in somewhat different words. Alternatively, it can be "fragmented literal" similarity, meaning although the overall structure or form of the original work was not copied, there was a taking of an important part(s) of the original work on either a quantitative or qualitative basis. In some circuits and with respect to some works, courts look at the "total concept and feel" of a work. Applying comprehensive nonliteral similarity or total concept and feel to a character would likely cast too wide a net, as a somewhat different expression of the same general character attributes might encompass similarities in idea rather than expression. Applying fragmented literal similarity makes the most sense, as taking a fragment (in this case, a character) can be sufficient to ground a finding of substantial similarity, but only if the fragment is the same or virtually identical, and qualitatively and/or quantitatively important to the work from which it has been taken.

Does It Matter in What Mode the Character Is Expressed?

A distinction based on whether the character is drawn pictorially or verbally has a certain logic. Judge Newman's comparison of the linear dimension of a story and the unitary perception of a graphic work in the *Great American Hero* case rings true, as the creator's claim for protection of the pictorial depiction is clearly defined, as opposed to a more open-ended verbal depiction. Think about the relatively high level of detail in the verbal depiction of Sam Spade in Hammett's novel quoted earlier, and then think, as Judge Posner noted in *Gaiman*, how much more room even that narrative leaves for a reader's imagination than watching Humphrey Bogart play that role in the movie.

Here's another way to think about the issue: Describe a character in detail and then ask five people to draw that character. It is highly likely that you are going to get five very different drawings of that same character. Then show the drawing of a character to those same five people and ask them to verbally describe what they see. While there will probably be some difference in choice of words, their descriptions are likely to be substantially similar. When you read a book, do you form a picture in your mind of characters in it? Most people, most of the time, do not. However, in some ways, a reader may form a more detailed—albeit subjective—definition of a character from a novel than from a picture of that character: The reader will likely learn a lot more about all of the attributes of that character because he or she can extrapolate more about that character from the plot, the character's interactions with other characters, the settings the character appears in, etc. But how a reader fills in the interstices while reading a novel or what a licensee adds by furnishing a visual depiction in a derivative work is not part of the original author's "work of authorship." All of these questions and distinctions may come into play in any particular case, but the mode of expression should not matter; how developed the character is by the author should control.

In conclusion, let us revisit the five scenarios at the beginning of this chapter. In all five, the mouse has the same degree of delineation, but the mode of expression and the role of the mouse in the stories differ, and, in the case of the second novel and the movie, the mouse appears in more than one work. There is no reason that any of these five scenarios should be treated differently because the mouse has been delineated by the author to the same extent in each and is *capable* of leading an independent copyright life, whether or not that independent life has yet been exploited. The necessary limits on the scope of protection in order to ensure that other creators have sufficient space are already built into existing law. If the mouse is not sufficiently delineated based on her characteristics or attributes (not based on how she functions in the story), then she is not entitled to any protection at all. The less detailed the delineation, the narrower the scope of protection. And the less prominent the mouse is in the work, the less likely it is that a second comer will be found to be infringing because the mouse is neither qualitatively nor quantitatively important to the original. And, of course, a second comer can make fair use of our mouse. These basic concepts of copyright law are more than ample to prevent undue extension of the copyright monopoly and yet reward and incentivize the creator of a fictional character, the twin goals of our copyright laws.

Notes

1 Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931)
2 *Nichols*, 45 F.2d at 121. (This has been labeled by courts and commentators alike as the "distinct delineation" test.)
3 Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., 216 F.2d 945, 950 (9th Cir. 1954).
4 *Id*.
5 Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 753 (9th Cir. 1978).
6 *Id*. at 755.
7 Olson v. Nat'l Broad. Co., 855 F.2d 1446, 1452 (9th Cir. 1988) (no protection for unit of three Vietnam veterans described in three to four lines, citing the *Sam Spade* case, but noting that a character could be protected if "especially" distinctive).
8 Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003) (holding that the magician at issue, although visually depicted, was not sufficiently delineated and had not displayed consistent widely identifiable traits); see also Halicki Films, LLC v. Sanderson Sales & Mktg., 547 F.3d 1213, 1225 (9th Cir. 2008) (finding a car featured in a film to be more akin to a comic book character than a literary character because it had widely identifiable traits and was actually depicted in the film, but remanding the matter to determine whether the car's physical and conceptual qualities were sufficiently unique).
9 Anderson v. Stallone, No. 87-0592, 1989 WL 206431, *6 (C.D. Cal. April 25, 1989).
10 *Id*. at *6–8; see also, Toho Co. v. William Murrow & Co., 33 F. Supp. 2d 1206, 1215–16 (C.D. Cal. 1998) (*Godzilla* character sufficiently delineated even though changed over the years, because he had a constant set of distinguishing traits); Metro-Goldwyn-Mayer, Inc. v. AM Honda Motor Corp., 900 F. Supp. 1287, 1296–97 (C.D. Cal 1995) (*James Bond*) (same). And in Bach v. Forever Living Prods. U.S., Inc., 473 F. Supp. 2d 1127 (W.D. Wash., 2007), defendant used plaintiff's character *Jonathan Livingston Segal* as a corporate logo and in advertising.
11 *Bach*, 473 F. Supp. 2d at 1134.
12 *Id*.
13 DC Comics v. Towle, 802 F.3d 1012 (9th Cir. 2015).
14 Goodis v. United Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970).
15 *Id*. at 406 n.1 (Waterman, J., concurring).
16 Burroughs v. Metro-Goldwyn-Mayer, Inc., 519 F. Supp. 388 (S.D.N.Y. 1981) *aff'd* 683 F.2d 610 (2d Cir. 1982).
17 *Id*. at 391.
18 Warner Bros. Inc. v. Am. Broad. Cos., Inc., 720 F.2d 231 (2d Cir. 1983).
19 *Id*. at 243.
20 *Id*. at 241–42 (emphasis added).
21 Silverman v. CBS, Inc., 870 F.2d 40 (2d Cir. 1989).

22 There is some overlap in protection under copyright and trademark laws for fictional characters. See Professor Jane C. Ginsburg, "Intellectual Property as Seen by Barbie and Mickey: The Reciprocal Relationship of Copyright and Trademark Law," *Journal of the Copyright Society of the USA*, November 13, 2017; see also Frederick Warne & Co. v. Book Sales Inc., 481 F. Supp. 1191, 1196 (S.D.N.Y. 1979) (mere fact that the works were in public domain under the copyright laws did not mean that they could not acquire trademark significance).
23 *Silverman*, 870 F.2d at 50 (citing Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930)).
24 Salinger v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *vacated on other grounds*, 607 F.3d 68 (2d Cir. 2010). The author of this essay represented the plaintiff in that litigation.
25 Gaiman v. McFarlane, 360 F.3d 644, 661 (7th Cir. 2004).
26 *Id.* at 660–61.
27 Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496 (7th Cir. 2014).
28 *Klinger*, 755 F.3d 501–03; see also Columbia Broad. Sys. Inc. v. DeCosta, 377 F.2d 315, 320 (1st Cir. 1967) (rejecting argument that fictional characters are inherently uncopyrightable).
29 See 17 U.S.C. § 411 (2018); Fourth Estate Pub. Benefit Corp. v. Wallstreet.com, LLC, 139 S. Ct. 881 (2019).
30 17 U.S.C. § 102.
31 US Congress, House of Representatives, House Committee on the Judiciary, *Supplementary Report of the Register of Copyrights on the General Division of U.S. Copyright Law*, 89th Congress, 1st sess., 1965, 6.
32 Some commentators have argued that isolating the character from the plot for purposes of delineation actually increases the risk another character will be found infringing, because the character is more narrowly defined. See, e.g., Samuel J. Coe, "The Story of A Character: Establishing the Limits of Independent Copyright Protection for Literary Characters" *Chicago-Kent Law Review* 86, no. 3 (2011): 1316–17.