

IT’S A PROP!

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ABSTRACT. — The most up-to-date version of this article will be at <https://cduan.com/attach/article-character-copyright.pdf>

Is a car a character? A glove? A doll? At stake in these questions are millions of dollars, clashing creative forces, and a heated intellectual property controversy. Copyright law gives special treatment to characters in narrative works. That special copyright protection is divisive—characters are valuable, no doubt, but the rules have proven paradoxical, uncertain, and arguably incompatible with the creative ecosystem.

Yet underlying these longstanding disputes is a deceptively simple question: What is a character? Batman certainly is; what about his car? Undertheorization of the nature of “characters” has invited courts to expand special character copyright protection rules to things decidedly not character-like, in particular cars in motion pictures. Without a boundary delimiting characters, copyright law’s special solicitude for characters could threaten to swallow all sorts of literary elements within fuzzy, ill-defined tests.

This Article identifies the need for a test for characters, and offers such a test. Insofar as characters deserve special protection in copyright law, it is because characters are special in literature: Literary theorists have long understood that characters are unique vehicles that readers can connect and identify with. To do so, characters must think and act like their (human) readers; that is, they must have mental personalities and agency to act upon their thoughts. Agency and personality should similarly be the qualifying test for characters in copyright law. Such a test is consistent with existing case law, comports with the expectations of authors and readers, limits the scope of concerns over character copyright protection, and best promotes the underlying purposes of access to new creative works.

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INTRODUCTION

Visit Comic-Con and prepare to be overwhelmed. At the annual convening, thousands of fans of comics, television shows and films show off their often-hOMEMADE, always-impressive recreations of costumes and props from those favorite media franchises. Mythical swords twice the bearers’ heights, able to be wielded only because they are made out of foam. Capes and dresses adorned with hundreds of sparkles and made with an equal number of hours of sewing labor. Masks, armor, boots, staffs, wings.

All of these things, impressive displays of the awesome skill, dedication, and creativity of die-hard fans.¹ And all of these things, skimming

1. See generally Stacey M. Lantagne, *Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright*, 21 MICH. TELECOMMS. & TECH. L. REV. 263 (2015) (describing many aspects of fan culture).

the uncertain boundaries of copyright law.

Pit a multi-million-dollar media franchise against an enthusiastic fan community, and difficult copyright questions ensue. This is especially true of marquee characters—Wonder Woman, Harry Potter, Ant-Man—who are worth billions of dollars to Hollywood, and yet also priceless to imaginative fans and future artists who spring new creativity from these characters. As a legal regime intended to balance all the interests of creativity, what is copyright law to do with characters? The courts have struggled for decades with the scope of copyright law as applied to Superman and James Bond.² Legal scholarship has bitterly divided between support for strong economic protection of valuable characters on the one hand, and criticisms that character copyright law is incoherent and overprotective on the other.³

A grand unified theory of how copyright law should protect fictional characters is far from reality today, but amidst this vigorous debate, a key question remains unanswered. What exactly is a character in the first place? Judges and scholars have frequently drawn lines between “stock characters” and “protectable” characters,⁴ but left the larger class of “characters” undefined.⁵ Indeed, a recent on-point Ninth Circuit decision plainly

2. See *??s:convergence*.

3. See *infra* Section I.E.

4. See, e.g., *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015).

5. See, e.g., Francis M. Nevins, *Copyright + Character = Catastrophe*, 39 J. COPYRIGHT SOC'Y U.S. 303, 303 (1992) (“[A]nyone attempting to define ‘character’ for copyright purposes is immediately struck by the fact that the Copyright Act is no help.”). The Copyright Office’s definition is vague at best: “A character is a person, animal, or even an inanimate object that is used to portray the content of a dramatic work.” U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 804.3(B) (3d ed., updated 2021), <https://www.copyright.gov/comp3/>. Early attempts to define “character” largely assumed personhood and focused instead, perhaps circularly, on “characterization” as the defining characteristic of characters. See, e.g., Michael V.P. Marks, *The Legal Rights of Fictional Characters*, 25 COPYRIGHT L. SYMPOSIUM 35, 37–38 & n.12 (1975) (discussing E. Fulton Brylawski, *Protection of Characters—Sam Spade Revisited*, 22 BULLETIN COPYRIGHT SOC'Y U.S. 77, 78 (1974)). Since people are plainly characters and the difficult questions pertain only to non-human entities, those earlier definitions do not resolve what non-human literary elements are characters—the focus of this Article. Some more recent scholarship has questioned the Ninth Circuit’s application of character copyright to cars, as inanimate objects. See Missy G. Brenner, Comment, *Shadow of the Bat[Mobile]: Character Copyright Af-*

recognized the question (in part because of an *amicus curiae* brief filed by this Article’s authors) and yet declined to answer it fully.⁶

This Article identifies the need for copyright law to have a definition of “character,” and fulfills that need. Drawing upon literary and psychological theory of characters, it shows that *the distinction between characters and other elements of narrative works, primarily props, is that characters alone enjoy agency and personality*: the ability to act upon free will, and a human-like mental capacity to make free-will decisions. The agency–personality line between characters and props meshes well with existing copyright doctrine and properly advances the underlying aims of copyright protection.

The need for clarity in what constitutes a character originates from the gradual and somewhat puzzling evolution of character copyright law.⁷ Historically, copyright law dealt with characters along two distinct doctrinal pathways. First, characters could be one element among many in a narrative work, the others including plot, themes, props, scenery, and the like.⁸ Alternatively, for drawn works like comic books, courts treated illustrated characters like paintings or sculptures, which receive copyright protection under somewhat different doctrines and rules.⁹ Each of these theories of character protection—as narrative elements, and as visual works—had benefits and limitations. However, starting the late 1970s, courts began to conflate these two theories.¹⁰

The resulting “hybrid” theory of character copyright generally removes many of the limitations of either the narrative-elements or visual-works

ter DC Comics v. Towle, 57 SANTA CLARA L. REV. 481, 514–15 (2017); Matthew D. Bunker & Clay Calvert, *Copyright in Inanimate Characters: The Disturbing Proliferation of Microworks and the Negative Effects on Copyright and Free Expression*, 21 COMM’N L. & POL’Y 281, 291–92 (2016), <https://www.tandfonline.com/doi/abs/10.1080/10811680.2016.1184908>. However, these do not provide a more general analysis of the nature of characters or the incorporation of a character definition into copyright law, as this Article does.

6. See *Carroll Shelby Licensing, Inc. v. Halicki*, Nos. 23-3731, -4008, at ? (9th Cir. May 27, 2025) (“In sum, Eleanor is not really a character. And even if Eleanor were a character, it is not entitled to copyright protection under *Towle*.”).

7. See *infra* Part I.

8. See *infra* Section I.A.

9. See *infra* Section I.B.

10. See *infra* Section I.C.

theories of character protection.¹¹ Courts and scholars have thus struggled with how to fit this newer, stronger theory into existing doctrinal boxes, have questioned whether it serves the underlying balance of copyright protection, and have wondered whether the special treatment of characters should exist at all.¹² Nevertheless, the economic attractiveness of a doctrinally easier pathway to copyright protection has led major media franchises to test the boundaries of the hybrid theory, by suggesting that it applies to things less and less like traditional humanoid characters: monsters, cars, gloves.¹³

If characters deserve special solicitude under copyright law, as the hybrid theory suggests, then there must be a limited class of narrative elements that deserve this special solicitude, lest the hybrid theory swallow all of copyright law.¹⁴ So what makes characters special? Literary theory and psychology offer a potential answer. Characters are those entities with which audiences can form personal connections. Humans innately will identify mental faculties in characters and will project themselves upon those characters to understand their motivations, intentions, and actions.¹⁵ Anyone who has imagined being their favorite superhero knows how this works.

But to serve as vessels for connection with human audiences, characters thus must exhibit the appearance of those connectable mental faculties. They thus must have the ability to take action like a human—agency—and human-like thought processes that drive those actions—personality.¹⁶ Other narrative elements, props in particular, lack agency and personality. Props are instruments of narratives that drive stories forward. However, props do not themselves make choices or take actions within those stories, and they do not have personalities that connect with audiences.¹⁷ Certainly the world of fiction offers plenty of law-professor-worthy edge cases—is the One Ring the character of Sauron or merely his clothing?—but

11. See *infra* Table 1.

12. See *infra* Section I.E.

13. See *infra* Section I.D.

14. See *infra* Part II.

15. See *infra* Section II.A.

16. See *infra* Section II.B.

17. See *infra* Section II.C.

the distinction is generally both sharp and intuitive.¹⁸

The agency–personality test thus draws the line between props and characters, and it is the proper test for whether a narrative element merits the special protection copyright law currently affords characters.¹⁹ It fits within the existing framework of character copyright law, in particular the “conceptual qualities” that courts have rhetorically required but rarely adjudicated.²⁰ It reconciles doctrinal paradoxes,²¹ and in particular channels copyright protection in props toward the proper legal framework of protection as graphical or sculptural works.²² And it helps to advance the balance that copyright policy aims to achieve, between the creators of fictional franchises and the fans who love them.

This Article proceeds as follows. Part I provides background on copyright law, focusing on the historical evolution of its treatment of characters and the ongoing scholarly debate. Part II turns to the question of what makes characters special, drawing from theories of characters in literary scholarship and psychology. It identifies agency and personality as the two key features of characters. Part III shows how those features can be incorporated into copyright doctrine as a threshold test for character copyright protection. Finally, Part IV evaluates the merits of the agency–personality test as a matter of copyright doctrinal logic and incentives for creativity.

I. BACKGROUND

Federal copyright law is the primary form of intellectual protection for creative works. The owner of a copyright in a work enjoys a lengthy period of protection during which, generally speaking, other works substantially similar to the copyrighted one may be deemed infringements subjecting their purveyors to damages or injunctive relief.²³ Copyright protection

18. See *infra* Section II.D.

19. See *infra* Part III.

20. See *infra* Section III.B.

21. See *infra* Section IV.A.

22. See *infra* Section III.C.

23. See 17 U.S.C. §§ 502–504. More precisely, certain acts of “copying” are deemed to be infringements of a copyright. See § 106. Copying may be proved with direct evidence or indirectly through evidence of access and substantial similarity. Since access is generally presumed when the copyrighted work is published and well-known,

thus offers powerful control over a creative work and its derivatives, and consequently powerful economic incentives to create such works.

The touchstone of what is copyrightable is “original expression,” and both of those words are significant. “Originality” requires that copyrightable matter must not be copied from someone else and that it must display at least a modicum level of human creativity or human ingenuity.²⁴ “Expression” captures the notion that copyright protection does not extend to ideas, such as general story arcs, literary tropes, mechanical operations, or common catchphrases; copyright protection inures only in the more specific “expression” that a creator clothes those ideas with.²⁵ But within these constraints of originality and expression, a wide range of aesthetic endeavors enjoy copyright protection: books, plays, music, movies, paintings, sculptures, and more. And individual parts of a work may be copyright-protected and separately infringed, say when a newspaper too extensively quotes certain parts of a book.²⁶

What about characters—do they enjoy copyright protection independent of the works that use them? For most of the twentieth century, copyright protection for characters in fictional works evolved along two independent tracks.²⁷ On the one hand, courts treated characters as a *narrative element*, alongside plot, scenery, dialogue, and other elements. In this

determinations of infringement tend to turn on whether the allegedly infringing instrumentality is substantially similar.

24. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

25. See *Baker v. Selden*, 101 U.S. 99, 103 (1880); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, ? (2021).

26. See *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, ? (1985).

27. This two-track framework is found, for example, in Nevins, *supra* note 5, at 321–22. This framework is emphatically distinct from the view that there are multiple, competing tests of copyrightability for characters. Cf., e.g., *Daniels v. Walt Disney Co.*, 958 F.3d 767, 773–74 (9th Cir. 2020) (applying two tests); Kiersten Daly, Note, *One Test to Rule Them All: Retiring the Dual Standard for Fictional Character Copyrightability in the Ninth Circuit*, 96 ST. JOHN'S L. REV. 1011, 1013 (2022). The different tracks reflect the fact that copyright law has different rules for different types of subject matter, and a single work may qualify as different types of subject matter. This is akin to music recordings, which receive two distinct forms of copyright protection as musical compositions and as a recorded performance. See, e.g., *Newton v. Diamond*, 349 F.3d 591, 592–93 (9th Cir. 2003). That copyright law protects a single thing as two types of subject matter according two different rules thus does not mean that there is a circuit split or conflict among rules.

narrative-element sense, characters could contribute to an overall conclusion of substantial similarity between works, but were typically not treated as a copyrightable entity in themselves.²⁸ Alternatively, courts treated characters as *visual works*, to the extent that they were graphically depicted as cartoons or dolls.²⁹ As visual works, characters were independently copyrightable, but subject to the limitations of copyright protection for pictorial, graphic, and sculptural works.³⁰ This two-track treatment of character copyright persisted up until the late 1970s, when case law began to conflate the two distinct doctrinal theories.³¹

A. Characters as Narrative Elements

Courts have long recognized that characters in a fictional work can be an expressive narrative element that, in comparison to an alleged copy, can contribute to a finding of substantial similarity³² or disprove infringement.³³ The classic example is *Nichols v. Universal Pictures Corp.* from 1930, in which the playwright of “Abie’s Irish Rose” accused a motion picture producer of copyright infringement.³⁴ In an extensive and detailed opinion, Judge Learned Hand compared the characters, plot, and themes of the

28. See *infra* Section I.A; Nevins, *supra* note 5, at 313–21.

29. See *infra* Section I.B; Nevins, *supra* note 5, at 321–27.

30. See *infra* notes 64–65 and accompanying text. These two doctrinal tracks are related to, but not the same as, the conventional distinction between literary and graphic characters. See, e.g., *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004); Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769, 806–09 (2013); Marks, *supra* note 5, at 38–39. That distinction draws lines between the physical nature of works (written words versus graphics), rather than copyright law’s doctrinal application. A graphical character can be analyzed under the narrative-elements theory, for example if a court focuses on similarities between cartoon characters’ personalities. See *infra* notes 47–52 and accompanying text. And theoretically, written words also confer protection upon a character as a visual work, if the written words are a precise enough blueprint of the visual appearance of the character (say, a computer program that draws the character).

31. See *infra* Section I.C.

32. See, e.g., *Sid & Marty Krofft Television v. McDonald’s Corp.*, 562 F.2d 1157, 1169 (9th Cir. 1977); *Malkin v. Dubinsky*, 146 F. Supp. 111, 112–13 (S.D.N.Y. 1956).

33. See, e.g., *Olson v. Nat’l Broad. Co., Inc.*, 855 F.2d 1446, 1451–53 (9th Cir. 1988); *Reyher v. Child’s Television Workshop*, 533 F.2d 87, 92–93 (2d Cir. 1976).

34. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120 (2d Cir. 1930).

play and the film to conclude that no infringement had occurred.³⁵

Nichols itself dealt with all the relevant narrative elements, but Judge Hand's decision laid the groundwork for independent copyright protection of characters—and sharply narrowed the scope of such protection. Though it contemplated that plot similarity alone could give rise to copyright infringement, the opinion intimated that “the same may not be true as to the characters.”³⁶ Despite this skepticism that character similarities standing alone could suffice to show copyright infringement, Hand proffered a hypothetical case: “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.”³⁷ But even that hypothetical case of infringement seemed far-fetched:

[I]t would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's “ideas” in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.³⁸

The possibility of copyright infringement based on characters alone was a mere academic concern in *Nichols*—the court conceded that “as far as we know, such a case has never arisen.”³⁹ An actual test case arose about a quarter century later. *Warner Bros. Pictures v. Columbia Broadcasting System* concerned Dashiell Hammett's mystery novel *The Maltese Falcon* and its lead detective character Sam Spade.⁴⁰ Hammett assigned certain copy-

35. See *id.* at 121–23 (“In the two plays at bar we think both as to incident and character, the defendant took no more—assuming that it took anything at all—than the law allowed.”).

36. *Id.* at 121.

37. *Id.*

38. *Id.*

39. *Id.*

40. See *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 946 (9th Cir. 1954).

right interests to Warner Brothers, who in turn made the novel into a film.⁴¹ Several years later, Hammett reused Sam Spade in other stories, leading Warner to sue for infringement.⁴² Since the plots of the allegedly infringing stories differed substantially,⁴³ the sole basis for infringement was the Sam Spade character.

Echoing *Nichols*, the *Warner Bros. Pictures* court was skeptical that similarity of characters alone could be the basis of copyright infringement.⁴⁴ Given that authors regularly reused their own characters, it seemed unlikely to the Ninth Circuit that characters could be turned into alienable property rights divestable from their authors: “If Congress had intended that the sale of the right to publish a copyrighted story would foreclose the author’s use of its characters in subsequent works for the life of the copyright, it would seem Congress would have made specific provision therefor.”⁴⁵ Perhaps in an attempt to answer Judge Hand’s Twelfth Night hypothetical, *Warner Bros. Pictures* conceded the possibility that a character alone could be “within the area of protection afforded by the copyright,” but only to the extent that “the character really constitutes the story being told,” as opposed to situations when character is only the chessman in the game of telling the story.”⁴⁶

While later courts questioned the precedential strength of *Warner Bros. Pictures*,⁴⁷ the case’s narrow treatment of standalone character copyright protection is in line with the overall view up through the mid-1970s, that characters—even visually depicted ones—were one element of narrative ex-

41. See *id.* at 946–48.

42. See *id.* at 948.

43. See *id.* at 951 & nn.7–8.

44. See *id.* at 950.

45. *Id.*

46. *Id.*

47. The challenges to the case as precedent are largely along two grounds. First, because *Warner Bros. Pictures* also involved a contractual issue, the holding on character copyrightability is arguably non-binding dicta. See *Olson v. Nat’l Broad. Co., Inc.*, 855 F.2d 1446, 1452 nn.6–7 (9th Cir. 1988) (discussing *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 n.10 (9th Cir. 1978)). Second, *Warner Bros. Pictures* dealt with the unusual situation of an author allegedly infringing his own works with his own characters, and some courts have felt that its holding should be limited to that unusual situation. See, e.g., *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004).

pression but could not be the sole focus of the copyright analysis.⁴⁸ *National Comics Publications v. Fawcett Publications*, from 1951, is particularly interesting in this respect. In that case, the proprietors of the Superman franchise had contracted with a syndicate artist to produce and publish Superman comic strips.⁴⁹ The syndicate artist failed to include copyright notices on its strips, which worked a forfeiture of copyright protection in the strips.⁵⁰ If Superman as a character were independently copyrighted, then the forfeiture would have extended to the character in total; indeed it was for this reason the trial court granted summary judgment in favor of the alleged infringement (Captain Marvel).⁵¹ But Judge Learned Hand, again for the Second Circuit, disagreed and concluded that the forfeited copyright interests were not for Superman the character, but rather “the specific exploits of ‘Superman,’ as each picture portrayed them.”⁵² To the extent that Superman received copyright protection beyond exact graphical replications, then, such protection extended only against copying of plot, themes, and exploits—narrative elements in conjunction with the character as a narrative element.

B. Characters as Visual Works

Alongside the above case law skeptical of characters as independently copyrightable narrative elements is another line of case law, holding characters plainly copyrightable as independent works of visual arts. Since at least the turn of the twentieth century, courts have repeatedly found copyright infringement of drawn cartoon characters⁵³ and three-dimensional

48. See, e.g., *Detective Comics, Inc. v. Fox Publ'ns, Inc.*, 46 F. Supp. 872, ? (S.D.N.Y. 1942) (infringement of Batman based on “deliberate copying of drawings and cartoons”); *Warner Bros. Inc. v. Film Ventures Int'l*, 403 F. Supp. 522, 525–26 (C.D. Cal. 1975) (no infringement of *The Exorcist* despite later film having a possessed character whose head turns unnaturally); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970) (similar characters were part of “total concept and feel” giving rise to substantial similarity).

49. See *Nat'l Comics Publ'ns v. Fawcett Publ'ns*, 191 F.2d 594, 598 (2d Cir. 1951).

50. See *id.* at 599.

51. See *id.* at 597.

52. See *id.* at 600.

53. See, e.g., *Empire City Amusement Co. v. Wilton*, 134 F. 132 (C.C.D. Mass. 1903); *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (1914); *King Features Syndicate v. Fleischer*,

dolls.⁵⁴

To see why this line of cases is distinct and independent from the narrative-element line, consider *Fleischer Studios v. Ralph A. Freundlich, Inc.*, which concerned infringement of the cartoon character Betty Boop by an unauthorized doll.⁵⁵ Decided just four years after *Nichols* by the Second Circuit,⁵⁶ *Fleischer Studios* ought to have been a perfect test case for the open question of copyright infringement based on a character, because the accused doll obviously copied no plot, scenery, themes, or other elements of the Betty Boop cartoons.⁵⁷ Yet *Fleischer Studios* includes no citation to *Nichols* and has no difficulty with copyrightability of the Betty Boop character or infringement thereof.⁵⁸ Considering that Judge Learned Hand, the author of *Nichols*, was on the *Fleischer Studios* panel, why the omission?

Because, rather than treating the Betty Boop as a narrative element of a literary work, the Second Circuit considered the character under a different statutory category, namely “drawings or works of art.”⁵⁹ As such, Betty Boop the cartoon was protected as a visual work, in the same way that a painting or sculpture might receive copyright protection. Infringement could be premised on those graphic details alone.⁶⁰

Copyright protection of characters as visual works has a critical advantage over protection of characters as narrative elements. There is no

299 F. 533 (2d Cir. 1924).

54. See, e.g., *Rushton v. Vitale*, 218 F.2d 434 (2d Cir. 1955); *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623 (2d Cir. 1962).

55. See *Fleischer Studios v. Ralph A. Freundlich, Inc.*, 73 F.2d 276, 276–77 (2d Cir. 1934).

56. See *id.* at 276.

57. Cf. *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Grp., Inc.*, 443 F. Supp. 291, 302 (S.D.N.Y. 1977) (“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 . . .”).

58. See *Fleischer Studios*, 73 F.2d at 278.

59. *Id.* (“The cartoon characters displayed in bound leaf form constitute neither a printed literary, musical, nor dramatic work.”). To be clear, this part of the opinion dealt with a matter of statutory formalities, not copyrightability or infringement. See *id.* at 277 (challenging copyright validity based on formalities). Nevertheless, the discussion makes clear that the court viewed the character within this different category.

60. See *id.* at 278 (noting “the broad baby face, the large round flirting eyes, the lowplaced pouting mouth, the small nose, the imperceptible chin, and the mature bosom” as the “essential characteristics of appellees’ copyrighted character”).

question that a character, as a visual work, receives copyright protection standing alone, devoid of scenery, plot, or other aspects of expressive fiction. But the visual-works theory of character copyright faces a different set of limitations.

For one thing, courts typically have been stringent about the degree of similarity required before a finding of infringement of characters as pictorial or sculptural works.⁶¹ This has raised difficult questions where substantial similarity is based on “very subtle feature[s]” of human facial expression such as mouth or chin shapes.⁶² Courts have especially struggled when the copyrighted character is a drawing while the accused instrumentality is a doll, finding “interdimensional copyright infringement” only in especially clear cases.⁶³

Furthermore, functional and utilitarian elements of graphic or sculptural works are not protectable under copyright law.⁶⁴ Thus, to the extent that a character doll has functional or mechanical aspects, copyright protection will be limited only to separable aesthetic features of the character.⁶⁵

Most importantly, protection of live-action characters is difficult under a graphic-works rubric, because unlike a drawn cartoon, the appearance of live humans is not the product of artistry.⁶⁶ A particularly instruc-

61. See, e.g., *Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498 (2d Cir. 1982) (finding no infringement of a snowman doll based on differences in fabric and buttons used on allegedly infringing doll); *Detective Comics v. Bruns Publ'ns*, 111 F.2d 432, 434 (2d Cir. 1940) (limiting scope of injunction against copyright infringement of Superman to “portraying any of the feats of strength or powers performed by ‘Superman’ or closely imitating his costume or appearance in any feat whatever”).

62. *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 627 (2d Cir. 1962) (Clark, J., dissenting).

63. *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Grp., Inc.*, 443 F. Supp. 291, 302 (S.D.N.Y. 1977).

64. See 17 U.S.C. § 101 (“[T]he design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”).

65. See *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, ? (2017); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 915–18 (2d Cir. 1980).

66. See, e.g., Leslie Kurtz, *Fictional Characters, and Real People*, 51 U. LOUISVILLE L. REV. 435, 437 (2013) [hereinafter Kurtz, *Real People*] (“Real people are not protected by

tive and unusual case is *Columbia Broadcasting System, Inc. v. DeCosta*, which involved a creative mechanic who adopted a persona of a western rancher—complete with distinctive costume, epithet, motto, and identifying symbol—and performed at rodeos and other events.⁶⁷ When a television station began airing a show with a character of “shocking similarity,” the mechanic sued for misappropriation.⁶⁸

The unusual state-tort theory of *Columbia Broadcasting System* led to an unusual litigation posture, in which the mechanic argued that his character was not copyrightable (so that the state claim was not federally preempted).⁶⁹ Drawing from the graphic-works theory of character copyright, the First Circuit contemplated that Congress could have brought live-action characters within the scope of copyright protection “by filing pictorial and narrative description in an identifiable, durable, and material form.”⁷⁰ But in the court’s view, there was good reason why Congress had not done so:

[T]here comes a point where what is created is so slight a thing as not to warrant protection by any law. All human beings—and a good part of the animal kingdom—create characters every day of their lives. Individuals often go beyond the realm of unconscious creation and devise characterizations for their own and others’ amusement. Many a starred performer has so begun, and continued to grow on the borrowings from others. . . . [I]n view of the federal policy of encouraging intellectual creation by granting a limited monopoly at best, we think it sensible to say that . . . to the extent that a creation may be ineffable, we think it ineligible for protection against copying *simpliciter* under either state or federal law.⁷¹

In other words, humans so regularly portray their own images through

copyright; they are not the authors of themselves.”).

67. See *Columbia Broad. Sys., Inc. v. DeCosta*, 377 F.2d 315, 316 (1st Cir. 1967).

68. *Id.* at 317.

69. See *id.* at 319. The First Circuit would later revisit the preemption question in view of subsequent Supreme Court case law on the preemptive effect of federal copyright law. See *DeCosta v. Columbia Broad. Sys., Inc.*, 520 F.2d 499, 510 (1st Cir. 1975). Nevertheless, the court’s views on the scope of copyright protection are still informative.

70. *Columbia Broad. Sys.*, 377 F.2d at 320.

71. *Id.*

style, appearance, and accoutrements that copyright protection in these “ineffable” aspects of personal appearance, as graphical works or otherwise, would swallow the human condition within intellectual property law.

C. *Convergence and a Hybrid Theory*

Up through the 1970s, this dual-track state of the law largely prevailed. The narrative element of characters could be used as a component of copyright infringement but typically not as a standalone case; characters as visual works were separately protectable, subject to the limitations of such protection for pictorial, graphic, and sculptural works. Nothing, of course, precluded the assertion of both theories of protection for the same character; the focus would just shift depending on the nature of the allegedly infringing work.⁷²

Yet subsequent copyright cases on characters began to blur these two theories of protection, ultimately creating a new theory of character copyright protection that lacked the doctrinal safeguards of the other two. The first case along this line, a quarter century after *Warner Bros. Pictures*, was *Walt Disney Productions v. Air Pirates*.⁷³ There, Disney challenged an “underground comic book which had placed several well-known Disney cartoon characters in incongruous settings.”⁷⁴ The characters in the comic book were plainly the same in appearance as Disney’s.⁷⁵

The visual-works line ought to have made *Air Pirates* an easy case, at least with respect to infringement.⁷⁶ Indeed, the Ninth Circuit cited many of the visual-works cases⁷⁷ and remarked that “it is plain that copying a comic book character’s graphic image constitutes copying to an extent

72. *Compare* *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Grp., Inc.*, 443 F. Supp. 291, 302–05 (S.D.N.Y. 1977) (analyzing Star Wars characters solely as visual works, in comparison to dolls), *with* *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329–30 & n.10 (9th Cir. 1983) (analyzing Star Wars characters as narrative elements, in comparison to *Battlestar Galactica*).

73. *See* *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

74. *Id.* at 753 (internal quotations removed).

75. *See id.* at 756 (“Defendants do not contend that their admitted copying was not substantial enough to constitute an infringement . . .”).

76. There was also a difficult fair use issue. *See id.* at 756–59.

77. *See id.* at 755 (citing cases).

sufficient to justify a finding of infringement.”⁷⁸ When the comic book authors pointed to *Warner Bros. Pictures* to argue that “characters ordinarily are not copyrightable,” the court could simply have responded that the narrative-element aspects of the Disney characters were irrelevant to the visual-works aspect of protection.

Yet, perhaps prompted by more general criticisms of *Warner Bros. Pictures* from commentators and the intellectual property bar,⁷⁹ the Ninth Circuit went further in an attempt to negotiate the narrative-works line.⁸⁰ According to *Air Pirates*, the reluctance of *Warner Bros. Pictures* to recognize independent copyright protection in characters was a fear that “it is difficult to delineate distinctively a literary character.”⁸¹ *Warner Bros. Pictures* never used the word “delineate” and relied primarily on creative incentives to reach its holding,⁸² but no matter—distinct delineation was the test that the *Air Pirates* court needed, because “[w]hen the author can add a visual image,” the problem of distinct delineation “is reduced.”⁸³ Thus, “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,” rendering *Warner Bros. Pictures* inapplicable and the character copyrightable.⁸⁴

Again, a plausible reading of this passage of *Air Pirates* is that it simply recites the two lines of doctrine, recognizing that comic book characters can avail themselves of protection both as narrative elements and as visual works. But an alternate reading, one that courts and copyright holders were eager to assert, is that the Ninth Circuit created a new, hybrid theory of character copyright: independent protection of characters

78. *Id.* at 756.

79. See, e.g., Brylawski, *supra* note 5, at 102 (proposing that “the case law distinctions governing the protection of cartoon and literary characters should disappear”); Note, *The Protection Afforded Literary and Cartoon Characters Through Trademark, Unfair Competition, and Copyright*, 68 HARV. L. REV. 349 (1954), cited in *Air Pirates*, 581 F.2d at 757 n.14.

80. See *Air Pirates*, 581 F.2d at 755–56.

81. *Id.* at 755.

82. See *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954) (“The restriction argued for is unreasonable, and would effect the very opposite of the statute’s purpose which is to encourage the production of the arts.”).

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

84. *Id.*

as narrative elements. This novel hybrid theory broke free of the constraints of both of the then-extant doctrinal lines. Characters could now be copyright-protected independently and infringed without plot, themes, or other narrative elements being copied. And because protection was not explicitly based on the characters' visual appearance but rather also incorporated "conceptual qualities,"⁸⁵ the strictures of copyright protection for pictorial, graphic, and sculptural works now potentially did not apply.

Indeed, subsequent case law confirmed this relaxation of copyright law with respect to characters following *Air Pirates*.⁸⁶ Visual representation was no longer required—one court deemed Tarzan as written in novels to be "sufficiently delineated."⁸⁷ And the hybrid theory gave license to courts to find infringement based on the thinnest of similarities. James Bond was deemed protectable and infringed based on similarities that read like garden-variety tropes of espionage fiction.⁸⁸ *Anderson v. Stallone* held the Rocky Balboa character to be well-delineated in appearance and personality such that the character's copyright could be infringed in a screenplay—despite the screenplay being entirely words and having no visual depic-

85. *Id.*

86. An early and interesting example is *United Artists Corp. v. Ford Motor Co.*, which involved a dispute over the Pink Panther. See 483 F. Supp. 89, 90 (S.D.N.Y. 1980). That decision could be viewed as considering both the narrative-element jurisprudence insofar as the court considered non-character elements, *see id.* at 95–96, or the visual-works line insofar as the court closely scrutinized the physical appearance of the characters, *see id.* at 96. Yet the court also identified "the 'personality' of the character" as important, and found that copyright protection extended "not merely to the physical appearance of the animated figure, but also to the manner in which it moves, acts and portrays a combination of human and feline characteristics." *Id.* at 91. This could suggest an openness to expand character copyright protection beyond those two traditional frameworks. See Nevins, *supra* note 5, at 325–26.

87. *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981), *aff'd on other grounds*, 683 F.2d 610 (2d Cir. 1982).

88. See *Metro-Goldwyn-Mayer v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1298 (C.D. Cal. 1995) ("[B]oth heros are young, tuxedo-clad, British-looking men with beautiful women in tow and grotesque villains close at hand; moreover, both men exude uncanny calm under pressure, exhibit a dry sense of humor and wit, and are attracted to, and are attractive to, their female companions."); cf. Tom Parker Bowles, *The Book That Put the (Delightful) Drudgery into Espionage*, *ESQUIRE* (Jan. 30, 2023), <https://www.esquire.com/uk/culture/books/a42687869/the-book-that-put-the-delightful-drudgery-into-espionage/> (discussing several literary predecessors to James Bond).

Theory of protection:	Narrative element	Visual work	Hybrid (<i>Air Pirates</i>)
Infringement requires other copied elements? (I.e., no independent character protection)	Largely yes	No	No
Requires close visual similarity?	No	Yes	Not necessarily
Functional and utilitarian elements excluded?	No	Yes	Seemingly no
Generally limited to drawn (cartoon) characters?	No	Yes	No

Table 1: Summary of limitations of each of the theories of character copyright protection.

tion of Rocky.⁸⁹ Mere use of E.T.’s name and catchphrase “phone home” was held a copyright infringement of E.T. the character, on the theory that anything that “conjures up the image and appeal” of a protectable character is copyright infringement.⁹⁰ Infringement of character copyright by a product that “inevitably conjures up the image and appeal of the E.T. character. To be sure, courts regularly found no infringement of characters, but reflecting the hybrid theory of *Air Pirates*, those cases’ focus shifted almost entirely to questions of character delineation,⁹¹ along with free intermixing of characters’ visual and personality attributes.⁹²

About a quarter century after *Air Pirates*,⁹³ another comic book case

89. See *Anderson v. Stallone*, 11 U.S.P.Q.2d 1161, 1165 (C.D. Cal. 1989) (finding “bodily appropriation” of character into screenplay). How one “bodily appropriates” an intangible visual character in a textual treatment is never addressed by the court.

90. See *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 217 U.S.P.Q. (BNA) 1162, 1165 (S.D. Tex. 1982); cf. Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575, 583–85 (2005) (criticizing decision).

91. See, e.g., *Olson v. Nat’l Broad. Co., Inc.*, 855 F.2d 1446, 1452–53 (9th Cir. 1988) (A-Team); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (Mystery Magician).

92. See, e.g., *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 243 (2d Cir. 1983) (Superman versus Ralph Hinkley).

93. By this pattern, another major character copyright case ought to be decided around

would highlight the new reliance on the hybrid theory of character copyright. *Gaiman v. McFarlane* involved the *Spawn* series, which was a collaboration between Neil Gaiman and Todd McFarlane.⁹⁴ The question in the case was not infringement but rather joint authorship—Gaiman, who developed the concepts of several *Spawn* characters but could not himself draw, claimed joint authorship and thus demanded an accounting of profits against McFarlane, who illustrated those characters according to Gaiman's ideas.⁹⁵ Reasoning that the drawn characters were copyrightable and would not have existed but for Gaiman's ideas, Judge Richard Posner for the Seventh Circuit concluded that Gaiman was a joint author of those characters.⁹⁶

While *Gaiman's* theory of joint authorship is controversial in its own right,⁹⁷ the case's application of copyright law to the *Spawn* characters neatly isolates and tests all three theories of character copyright. McFarlane was the sole artist, so under a visual-works theory, Gaiman made insufficient contributions to the characters.⁹⁸ And under a narrative-element theory, Gaiman's copyright interests would be limited to a combination of the characters and other plot or thematic elements, thereby entitling him to no accounting of profits for other uses of the characters.⁹⁹ The *Air Pirates* hybrid theory—where characters can be independently copyrighted not just as visual works but as combined visual-narrative elements—was necessary for the case to be decided as it was.

2029.

94. See *Gaiman v. McFarlane*, 360 F.3d 644, 649 (7th Cir. 2004).

95. See *id.* at 650.

96. See *id.* at 661 (“Although Gaiman’s verbal description of Cogliostro may well have been of a stock character, once he was drawn and named and given speech he became sufficiently distinctive to be copyrightable.”).

97. In particular, the case decides, in a manner contrary to other circuit precedent, that a contributor to a work can be a joint author even when that contributor’s contributions are not independently copyrightable. See *id.* at 659. But see *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994).

98. The Seventh Circuit agreed that “[t]he description of a character in prose leaves much to the imagination, even when the description is detailed.” *Gaiman*, 360 F.3d at 660.

99. The characters were all secondary to the series, so they almost certainly would have failed the *Warner Bros. Pictures* “story being told” test. See *Gaiman*, 360 F.3d at 657–58.

D. Inanimate “Characters”

With the law of character copyright unmoored from its historical origins, it became possible to unmoor the law also from the characters themselves. Thus far, the cases described above have involved human or at least humanoid characters. The Ninth Circuit in *Air Pirates* characterized Mickey Mouse and friends as “animals endowed with human qualities,”¹⁰⁰ and in *Sid & Marty Krofft Television v. McDonald’s Corp.* drew a distinction between animated mayors and police officers, who were “characters,” and “anthropomorphic plants and animals,” which apparently were not.¹⁰¹ Yet following that case, courts became increasingly willing to apply the newly relaxed theory of character copyright protection to things less and less like typical “characters.”

First were animals having questionable anthropomorphic features. *Toho Co., Ltd. v. William Morrow & Co., Inc.* counted Godzilla as a protectable character, focusing primarily on the degree to which Godzilla was “sufficiently delineated” with an “underlying set of attributes,” namely being “a pre-historic, fire-breathing, gigantic dinosaur alive and well in the modern world.”¹⁰² To be sure, the court did seem to perceive some humanistic mental capacity in the dinosaur, remarking on how Godzilla had “shifted from evil to good” across films.¹⁰³ The same went for *Universal City Studios, Inc. v. Film Ventures International, Inc.*, in which a court adjudicating infringement of the film *Jaws* went out of its way to describe the shark as “a principal character in its own right,” being “maniacal and demonic, attacking people and boats for reasons beyond satisfying hunger.”¹⁰⁴ That case had plenty of evidence for substantial similarity among other literary elements, including other characters and specific scenes,¹⁰⁵ so characterizing the shark as a character seems an extraneous flourish borne of an

100. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 753 (9th Cir. 1978).

101. *Sid & Marty Krofft Television v. McDonald’s Corp.*, 562 F.2d 1157, 1167 n.9 (9th Cir. 1977).

102. *Toho Co., Ltd. v. William Morrow & Co., Inc.*, 33 F. Supp. 2d 1206, 1216 (C.D. Cal. 1998).

103. *Id.*

104. *Universal City Studios, Inc. v. Film Ventures Int’l, Inc.*, 543 F. Supp. 1134, 1137 (C.D. Cal. 1982).

105. *See id.* at 1137–39.

eagerness to use the novel character copyright rule announced just four years prior.

Second, courts have considered the copyright role of character accoutrements, namely their costumes and identifying accessories. Such consideration is only natural as a part of the infringement analysis, especially along the visual-works line—Spandex and a cape are a helpful indicator for determining if a character is substantially similar to Superman.¹⁰⁶ But what if a character's accessory alone is copied? At least two cases have held that replicas of Freddy Krueger's bladed glove infringed the copyright in the infamous character, on the theory that "[c]opyright protection is extended to the component part of the character which significantly aids in identifying the character."¹⁰⁷ Yet those cases rest on shaky ground. The sole support in both cases for that proposition is a trademark case about cheerleader uniforms that says nothing about copyright or characters.¹⁰⁸ And infringement of a character copyright by mere accessory is in strong tension with other case law observing that "[s]tirring one's memory of a copyrighted character is not the same as appearing to be substantially similar to that character."¹⁰⁹ The glove was perhaps copyrightable as a sculptural work, of course—it is fairly distinctive in appearance—but neither court made any attempt to conceptually separate out the utilitarian aspects of the glove as copyright law requires.¹¹⁰ These cases thus perhaps reflect the doctrinal laxity resulting from *Air Pirates*'s diversion of character copyright away

106. See, e.g., *Detective Comics v. Bruns Publ'ns*, 111 F.2d 432, 433 (2d Cir. 1940) ("Each [Superman and the accusedly infringing character] at times conceals his strength beneath ordinary clothing but after removing his cloak stands revealed in full panoply in a skintight acrobatic costume."); see also *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 359 (1914) (noting costume similarity as indication of copying from cartoon characters).

107. *New Line Cinema Corp. v. Easter Unlimited, Inc.*, 17 U.S.P.Q.2d 1631, 1632 (E.D.N.Y. 1989), quoted in *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293, 302 (S.D.N.Y. 2001); see also Alexa Browning, *The Horrors of Copyright Law: An Analysis of Character Copyright Issues & Iconic Horror Villains*, 13 NYU J. INTELL. PROP. & ENT. L. 163, 181–82 (Feb. 29, 2024).

108. See *Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979) (finding it "unlikely that [a copyright doctrine] is applicable to trademark infringements"); cf., e.g., *New Line Cinema*, 17 U.S.P.Q.2d at 1632.

109. *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983).

110. See *supra* notes 64–65 and accompanying text. It is left as an exercise for the reader to determine what the utilitarian aspects of a fictional dream murder weapon are.

from the visual-works case law.¹¹¹

Finally and most famously are the cases about cars. *DC Comics v. Towle* involved the comic book character Batman’s vehicle, the Batmobile.¹¹² Mark Towle ran a business that made custom cars based on those found in television shows and movies, including Batmobile replicas based on the 1966 television show and 1989 movie.¹¹³ DC Comics, the owner of copyrights in the Batman franchise, brought suit against Mark Towle for copyright infringement.¹¹⁴

Under the older theories, DC Comics would likely have faced serious uphill battles. As to the narrative-elements theory, Towle’s standalone cars copied none of the plot, scenery, themes, or other elements of the Batman narrative, which would have forced DC Comics to make the unlikely case that the Batmobile was the entire “story being told” per *Warner Bros. Pictures*.¹¹⁵ A visual-works theory of infringement would be much more plausible, given that Towle’s cars were “replicas” of specific Batmobiles,¹¹⁶ but because cars are plainly useful articles, DC Comics would have had to make intricate arguments about the conceptually separable aesthetic elements of the Batmobile as a sculptural work.

In view of *Air Pirates* and its progeny, however, the Ninth Circuit had an alternative pathway available: It could determine whether the Batmobile was a protectable “character” standing alone.¹¹⁷ Drawing from *Air Pirates* and other hybrid-theory precedents, the Ninth Circuit arrived at a three-part test for assessing whether a character was copyrightable as an independent work. First, a court must find that the character has “physical as well as conceptual qualities.”¹¹⁸ Second, the character must be “sufficiently delineated” to be recognizable as the same whenever it appears.”¹¹⁹

111. See *supra* notes 86–92 and accompanying text.

112. See *DC Comics v. Towle*, 802 F.3d 1012, 1015–16 (9th Cir. 2015).

113. See *id.* at 1017.

114. See *id.* at 1017–18.

115. Cf. *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Grp., Inc.*, 443 F. Supp. 291, ? (S.D.N.Y. 1977).

116. *Towle*, 802 F.3d at 1017.

117. *Id.* at 1019.

118. *Id.* at 1021 (quoting *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978)) (internal quotations omitted).

119. *Id.* (quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003)).

This separates a copyrightable character from a mere stock character. Finally, a character must be “especially distinctive and contain some unique elements of expression.”¹²⁰ The *Towle* test is essentially an amalgamation of previous decisions that the Ninth Circuit refined to accommodate the facts of the case.

Towle cited to *Halicki Films v. Sanderson Sales & Marketing*, another case involving a maker of fictional car replicas.¹²¹ The copyrighted works in question, *Gone in 60 Seconds* and its associated franchise, involved the theft of a number of distinctive sports cars, including several Fastback Ford Mustangs codenamed “Eleanor.”¹²² The defendants made various cars that the film copyright holders accused as infringing.¹²³

In *Halicki Films*, the Ninth Circuit identified the *Air Pirates* hybrid theory as potentially applicable to the film cars, with the court suggesting that “Eleanor character can be seen as more akin to a comic book character than a literary character.”¹²⁴ Nevertheless, the appellate court remanded for further factfinding on the nature of the cars at issue.¹²⁵ The remand was well-advised. While *Halicki Films* surmised that “Eleanor” referred to a single car,¹²⁶ the subsequent district court decision found that the name actually referred to four distinct cars in the original film alone.¹²⁷

After correcting this and other factual discrepancies,¹²⁸ the district court applied the *Towle* copyrightability test that the Ninth Circuit had

120. *Id.* (quoting *Halicki Films v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008)) (internal quotations omitted).

121. *See Halicki Films*, 547 F.3d at 1218–19.

122. *See id.* at 1217; *Carroll Shelby Licensing, Inc. v. Halicki*, 643 F. Supp. 3d 1048, 1056–59 (C.D. Cal. 2022).

123. *See Carroll Shelby Licensing*, 643 F. Supp. 3d at 1052.

124. *Halicki Films*, 547 F.3d at 1225.

125. *See id.* To be clear, the case on appeal settled, and then a later case arose over breach of the settlement agreement, giving rise to the subsequent district court and Ninth Circuit opinions discussed herein. *See Carroll Shelby Licensing*, 643 F. Supp. 3d at 1052.

126. *See Halicki Films*, 547 F.3d at 1217 (discussing “a yellow 1971 Fastback Ford Mustang” as Eleanor).

127. *See Carroll Shelby Licensing*, 643 F. Supp. 3d at 1056–57.

128. *See id.* at 1054 (“[F]actual inaccuracies made their way into a published Ninth Circuit opinion that likely assumed the facts were true. Unfortunately, they were not.”).

enunciated in the interim.¹²⁹ Of particular difficulty was the element that a protectable character be “sufficiently delineated to be recognizable as the same character whenever it appears.”¹³⁰ The copyright holders highlighted “anthropomorphic characteristics” to the Eleanor cars such as “strength, talent, endurance, and a tendency to always save her leading man.”¹³¹ The district court, however, found that these personality traits were “more appropriately attributed to the human protagonists that drive the Eleanors.”¹³² Based on these and other concerns, the district court concluded that there was no protectable character and thus no infringement of copyright.¹³³

In the subsequent second-trip appeal to the Ninth Circuit, the parties continued to dispute the application of the *Towle* test to the Eleanor cars.¹³⁴ Because the appellate court’s decision relied in part on an early version of this article presented as an *amicus curiae* brief, it will be profitable to maintain some suspense at this point and discuss the courts holding at a later point, where it may be compared to this article’s proposed reading of the law. But what is worth observing now is how far the law of character copyright protection has evolved over the past half century—from rigorous and arguably limited application of traditional categories of protected works to a broader, more relaxed concept of free-floating character protection of such hazy scope that it applies to cars and gloves. More clearly delineating the scope of this newfound theory of copyright protection will be the remaining project of this article.

E. Scholarly Debate

The convoluted trajectory of copyright law’s treatment of characters has generated intense debates in the scholarship. Some support the gradual expansion of character protection in view of the economic value of characters, while others have criticized the development of the law as doctrinally inconsistent, incompatible with other legal regimes, or contrary to

129. See *id.* at 1055 (citing *Daniels v. Walt Disney Co.*, 958 F.3d 767, 771 (9th Cir. 2020)).

130. See *id.* at 1059 (quoting *Daniels*, 958 F.3d at 771).

131. *Id.* at 1062.

132. *Id.*

133. See *id.* at 1064.

134. See *Carroll Shelby Licensing, Inc. v. Halicki*, Nos. 23-3731, -4008 (9th Cir. May 27, 2025).

the policy objectives of copyright law.

The economic value of characters has figured prominently into the literature, in particular in the years prior to the *Air Pirates* decision.¹³⁵ In an oft-cited article, copyright attorney E. Fulton Brylawski called for reform of character copyright doctrine in view of characters being “very often the most valuable portion of the particular works or properties of which they are a part.”¹³⁶ More recent scholarship, in particular focused on *Towle*, has favored “an appropriately low bar for the copyrightability of characters,” given how “characters are central to the entertainment industry,”¹³⁷ and in particular observes that broad character copyright protection could enable authors to perform a “stewardship” role to protect valuable characters’ persona and cultural significance.¹³⁸

While economic incentives are important to copyright policy, it is not

135. See generally Marks, *supra* note 5, at 91–92 (listing articles discussing character copyright prior to 1975).

136. Brylawski, *supra* note 5, at 77–78; see also Marks, *supra* note 5, at 87 (“Protecting cartoon sequel rights would seem to accord with both expectations and the policy underlying the Copyright Act—promotion of intellectual production.”); Note, *supra* note 79, at 357 (“[D]enial of this protection might cause such authors to lose much of the potential value of their creation.”); David B. Feldman, Comment, *Finding A Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 CALIF. L. REV. 687, 711–12 (1990) (calling for statutory recognition of character copyrights, “to assure consistency in adjudicating authorship and ownership rights.”) (quoting Richard Wincor, *Copyright and the Spin-off Hero*, VARIETY, Jan. 9, 1963, at 8, 8 (“Artists who create characters that stir the imagination ought to be in a class with people who own homes and common stocks; all of these are private property.”)).

137. Kathleen Hanley, Comment, *Character Copyrightability in Chaos: How Unclear Character Copyrightability Tests Lead to Improper Results*, 71 AM. U. L. REV. 1145, 1148–80 (2022); see also Daly, *supra* note 27, at 1037 (“Should the court demonstrate a preference for certain character types or present inconsistent application of its tests, independent authors may forfeit opportunities for great financial gain and the public will lose the opportunity to enjoy such unique expression.”); Browning, *supra* note 107, at 190 (“Character copyright protection is a reliable legal approach to preserve horror villains that are the crux of their stories and should be applied to these villains to secure the future of the horror genre.”).

138. Michael Deamer, Note, *Copyright Law: DC Comics v. Towle: Protecting Fictional Characters through Stewardship*, 32 BERKELEY TECH. L.J. 437, 457–59 (2017) (discussing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 223–24 (2003)).

the only consideration.¹³⁹ Thus, scholars have responded to the above economic considerations with a litany of harms that expanded character copyright protection does to the public, and in particular to downstream creators who build upon existing characters.¹⁴⁰ For one thing, because characters are in part constructed in the minds of imaginative audiences, a regime in which copyright protection inheres solely in the author seemingly ignores audience contributions to the formation of characters in the mind.¹⁴¹ Especially motivated audience members may author fanfiction or unauthorized sequels, thereby contributing further creativity based on existing characters.¹⁴² So commentators have expressed concern that character copyrights could “stifle the creative contribution of secondary authors,” particularly for characters that “have become valuable subjects of cultural dialogue.”¹⁴³ Such discouragement of secondary authors, several scholars argue, could unfairly enhance the power of major media companies over

139. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts.”) (internal quotations and alterations removed) (quoting U.S. CONST. art. 1, § 8, cl. 8).

140. Cf. *id.* at 349–50 (“To this end, copyright . . . encourages others to build freely upon the ideas and information conveyed by a work.”).

141. See Tze Ping Lim, *Beyond Copyright: Applying a Radical Idea-Expression Dichotomy to the Ownership of Fictional Characters*, 21 VAND. J. ENT. & TECH. L. 95, 129 (2018) (“In the case of a written story, a reader gains ownership of a fictional character once she understands the creator’s concept of the fictional character in his or her own mind.”); Jani McCutcheon, *Works of Fiction: The Misconception of Literary Characters as Copyright Works*, 66 J. COPYRIGHT SOC’Y USA 115, 140 (2018) (discussing the “quintessentially elusive” nature of characters due to this multiparty conception process).

142. See, e.g., Lantagne, *supra* note 1, at 301; Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 472 [hereinafter Kurtz, *Independent Legal Lives*] (“[Characters] may form the modern myths out of which we operate. Forbidding their use will diminish the pool from which all artists must draw.”).

143. Jacqueline Lai Chung, Note, *Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters*, 49 WM. & MARY L. REV. 903, 907 (2007); see also Samuel J. Coe, Note, *The Story of A Character: Establishing the Limits of Independent Copyright Protection for Literary Characters*, 86 CHI.-KENT L. REV. 1305, 1307 (2011), <https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article> (“Such an expansive application of copyright protection actually runs contrary to the goals of intellectual property by withholding ideas from being used in new literary compositions.”).

grassroots creative communities¹⁴⁴ and perhaps even run afoul of the First Amendment.¹⁴⁵

Turning to the nuts and bolts of copyright law, extensive scholarship has questioned the fit between character protection and the overall copyright framework. For one thing, copyright protection in a character standing alone presupposes that the character is an independent “work” under copyright law, unlike any other kind of work typically protected by copyright.¹⁴⁶ A copyrighted work must be “fixed in a tangible medium,”¹⁴⁷ something impossible for a character that “must, in fact, be conjured up by the reader mentally.”¹⁴⁸ Excising the character from the underlying work too finely risks granting copyright protection to overall genres or ideas.¹⁴⁹ And what happens when copyrights expire for the first few works in a long-running character series, like Sherlock Holmes?¹⁵⁰ Scholars (and curious

144. See Cathay Y.N. Smith, *Beware the Slender Man: Intellectual Property and Internet Folklore*, 70 FLA. L. REV. 601, 643 (2018) (observing how community creation of a folklore character may clash with efforts by “sophisticated entities to claim exclusivity to collaboratively created folklore and quash further creativity on the subject”).

145. See, e.g., Nicole Geiser, Comment, *The Hollywood Circuit’s Protection of the Batmobile Provides an Uncertain Future for First Amendment Protections*, 14 J. BUS. ENTREPRENEURSHIP & L. 186, 203 (2021), <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1223&context=jbel> (“The main concern is that the Towle decision might represent overprotective copyright law infringing on the First Amendment by protecting microworks, which favor creators over the public.”); Bunker & Calvert, *supra* note 5, at 299 (“[R]ecognizing independent copyrightability in inanimate objects is simply one more step toward an intellectual property future that creates numerous difficulties from a free expression perspective.”).

146. See McCutcheon, *supra* note 141, at 132–57 (reviewing difficulties with the view that characters are “works”).

147. See 17 U.S.C. § 102(a).

148. Said, *supra* note 30, at 821–22; McCutcheon, *supra* note 141, at 143–44.

149. Elizabeth L. Rosenblatt, *Who Will Speak for the Slender Man? Dialogism and Dilemmas in Character Copyright*, 70 FLA. L. REV. F. 69, 74 (2018) [hereinafter Rosenblatt, *Dialogism and Dilemmas*] (“[C]haracters that can achieve independent copyright protection may embody at least some of the traits of genre. From a copyright standpoint, this means we should be wary of affording copyright over characters in much the same way as we are wary of affording copyright over ideas.”).

150. See *Klinger v. Conan Doyle Est., Ltd.*, 755 F.3d 496, 503 (7th Cir. 2014) (rejecting theory of character copyright based on later, still protected Sherlock Holmes works, when earlier works were in the public domain, based on the “spectre of perpetual, or at least nearly perpetual, copyright”).

artists) have identified difficult paradoxes about what parts of a character are still copyright-protected and what parts are in the public domain.¹⁵¹

The *Air Pirates* hybrid theory and in particular the consequent three-part test of *Towle*¹⁵² have especially come under critical fire for demanding courts to make “aesthetically non-neutral” and other improper value-laden judgments under copyright law.¹⁵³ Most prominently, the requirements of distinct delineation and consistency of identifiable character traits¹⁵⁴ favor “flat,” static characters over “round” ones that feature personality development and depth.¹⁵⁵ Such a result, commentators observe, seems backwards from a literary perspective, as well-rounded characters are a mark of good-quality authorship.¹⁵⁶ The flat-character requirement also seems to discourage reboots and reimaginings of existing media franchises that alter the main character—Daniel Craig’s grittier James Bond, for example.¹⁵⁷ Similarly, the requirement for “physical as well as conceptual

151. Leslie A. Kurtz, *The Methuselah Factor: When Characters Outlive Their Copyrights*, 11 U. MIA. ENT. & SPORTS L. REV. 437, 438 (1994); Nevins, *supra* note 5, at 334–42; Scott D. Locke, *Parallel Novels and the Reimagining of Literary Notables By Follow-On Authors: Copyright Issues when Characters are First Created by Others*, 17 CHI.-KENT J. INTELL. PROP. L. 271, 279–80 (2017) (citing Jenna Skoller, *Sherlock Holmes and Newt Scamander: Incorporating Protected Nonlinear Character Delineation into Derivative Works*, 38 COLUM. J.L. & ARTS 577, 578 (2014)); Elizabeth L. Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 U. COLO. L. REV. 561, 608 (2015) [hereinafter Rosenblatt, *Shrinking Public Domain*]; Ryan North, DINOSAUR COMICS (Jan. 7, 2022), <https://www.qwantz.com/index.php?comic=3843>.

152. See *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015) (citing *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978)).

153. Said, *supra* note 30, at 786; cf. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work] . . .”), *quoted in* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994).

154. See *Towle*, 802 F.3d at 1021.

155. See, e.g., Kurtz, *Independent Legal Lives*, *supra* note 142, at 464 (“The most well-rounded characters, those that are the most fully human, may be the most inextricably bound to their context. A flatter character, with well-defined and consistent characteristics, may be more memorable and more readily removed from its initial context.”).

156. See *id.*; Said, *supra* note 30, at 819–21.

157. See Eric Naessig, *Independent Character Copyrightability and the Implications of DC Comics v. Towle: Formulating a Framework Based on the Realities of Character Construction*, 51 SW. L. REV. 174, 188–89 (2021) (arguing that the current character copy-

qualities”¹⁵⁸ favors graphically depicted characters over those painted in “word portraits,” thus favoring one art form over another.¹⁵⁹ And the test for uncopyrightable “stock characters” strangely invites courts to “look for stereotypes of all sorts,” which “provides judicial imprimatur for stereotypes associating specific characteristics with specific identity traits.”¹⁶⁰

The relaxed approach to infringement under the hybrid theory¹⁶¹ has also attracted criticism. Several commentators have noted that, where infringement is based not on a whole work but rather just a small part such as a character, law has failed to articulate rules for how small is too small.¹⁶² Furthermore, the judgment of similarities in intangible personality qualities of characters seems “inherently subjective” and forces courts “to operate *ultra vires* and hand down aesthetic decisions.”¹⁶³

Character copyright poses further doctrinal challenges in view of other forms of intellectual property protection. Graphical characters are often used as trademarks, as mascots for products or services—Tony the Tiger for Frosted Flakes, for example—leading to concerns that courts could improperly mix up copyright and trademark doctrines.¹⁶⁴ Some scholars have

right test requires copyright holders to “jeopardize protectability merely because creators sought to explore new avenues with their intellectual property”).

158. *Towle*, 802 F.3d at 1021 (quoting *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978)).

159. Said, *supra* note 30, at 806–13; Gregory S. Schienke, *A Reexamination of Copyright Protection and Fictional Characters: How Distinctly Delineated Must the Story Be Told*, 9 MARQ. INTEL. PROP. L. REV. 63, 64 (2005) (criticizing the “dichotomy within the law” between visual and literary characters).

160. Jasmine Abdel-khalik, *Scenes a Faire as Identity Trait Stereotyping*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 241, 259–72 (2018).

161. See *supra* notes 86–92 and accompanying text.

162. See Hughes, *supra* note 90 (arguing that copyright law lacks a clear definition of what constitutes a “work,” which leads to “microwork” claims of copyright protection); Margot E. Kaminski & Guy A. Rub, *Copyright’s Framing Problem*, 64 UCLA L. REV. 1102, 1105, 1124 (2017) (“But to figure out a character’s traits, which are relevant for both copyrightability and infringement, a court must decide whether to zoom in on parts of a work, or zoom out,” and “there is almost no area of copyright law” that addresses how to do the zooming).

163. Nevins, *supra* note 5, at 343.

164. See, e.g., Stacey M. Lantagne, *The Copymark Creep: How the Normative Standards of Fan Communities Can Rescue Copyright*, 32 GA. STATE U. L. REV. 459, 472–74 (2016) (“The interplay of characters acting as both trademarks and as copyrighted entities

pointed to the availability of trademark protection to justify narrowing character copyright;¹⁶⁵ others have pointed to character copyright to justify narrowing trademark protection.¹⁶⁶ And when live actors portray characters, there are further possibilities of conflicting interests between character copyrights and the actors' rights of publicity—Pierce Brosnan was the face of James Bond for almost a decade; should he be precluded from acting the part of the Tuxedo-clad provocateur?¹⁶⁷

These ongoing criticisms have led to the suggestion that character copyright largely acts “disguise” what would otherwise be a “weak claim” under general principles of law.¹⁶⁸ At the same time, the economic and cultural significance of characters is undeniable, giving rise to this vigorous and ongoing debate over the application of copyright law to characters.

II. THE CHARACTER OF CHARACTERS

As seen thus far, copyright law enables the protection of characters as independent works,¹⁶⁹ gives special deference to protected characters

is one of the areas where copymark creep is most visible.”); Hughes, *supra* note 90, at 583–85 (observing use of character copyright in confusion with trademark theories); Brenner, *supra* note 5, at 509 (“Finally, the Ninth Circuit’s third prong blurs the distinctions between traditional copyright tests and trademark tests.”); Kathryn M. Foley, Note, *Protecting Fictional Characters: Defining the Elusive Trademark–Copyright Divide*, 41 CONN. L. REV. 921, 953–57 (2009).

165. Kurtz, *Independent Legal Lives*, *supra* note 142, at 473–74 (“Unless there is a substantial taking of creative expression, copyright does not provide the best means of balancing the author’s rights over the character against the need to maintain the public domain. . . . [O]ther, more flexible legal doctrines are available.”).

166. See, e.g., Rebecca Schoff Curtin, *Zombie Cinderella and the Undead Public Domain*, 85 TENN. L. REV. 961, 966 & n.16 (2018) (citing articles); Justin Hughes, *Cognitive and Aesthetic Functionality in Trademark Law*, 36 CARDOZO L. REV. 1227, 1265–67 (2015).

167. See Kurtz, *Real People*, *supra* note 66, at 461 (“The copyright owner’s rights to the character can collide with the right of publicity belonging to the real person.”); Gregory Wakeman, *Why Pierce Brosnan Wears the Ugliest Suit Ever in the Thomas Crown Affair*, CINEMABLEND (Nov. 19, 2014), <https://www.cinemablend.com/new/Why-Pierce-Brosnan-Wears-Ugliest-Suit-Ever-Thomas-Crown-Affair-68301.html>.

168. Michael W. Carroll, *Copyright in Characters: A Proposal for Reform*, 58 AKRON L. REV. (forthcoming Aug. 1, 2025) (manuscript at 22), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1149&context=research>.

169. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978).

in the form of relaxed copyrightability and infringement standards,¹⁷⁰ and lays out a test for distinguishing protectable characters from unprotectable ones.¹⁷¹ Yet a question remains: What exactly is a “character,” meriting application of these special tests and doctrines, as opposed to the many other elements of literary or narrative works?

A possible answer, perhaps embraced by the plaintiffs in cases on inanimate characters¹⁷²—a character is whatever the copyright holder calls a character. There is some logic to this position. Authors, after all, know their own works best; Ernest Hemingway is free to make equals of the old man and the sea. And the *Towle* test, on its face, could plausibly encompass anything as a potentially protectable character—a rock can have physical (its shape) and conceptual (its history as a rock) qualities, it can be sufficiently delineated (through a photograph), and it can be especially distinctive (through its shape and coloring, say).¹⁷³

Yet such a broad reading of “character” seems inapt. For one thing, if anything in a narrative story can be a character, then the exceptional treatment of characters could swallow the general rules of copyright law, especially encouraging weak copyright cases through indiscriminate designations of things as characters.¹⁷⁴ More importantly, copyright jurisprudence’s consistent focus on *characters*, as opposed to narrative elements more generally, suggests intuitively that characters are special. Indeed, the appeals to the economic and cultural significance of characters¹⁷⁵ assume that characters are unique and distinct from the other elements of the works they inhabit.¹⁷⁶

The aim of this Part, then, will be to assess what makes characters special, and consequently to identify a test for distinguishing characters from other elements of narrative works. Because the concept of characters is

170. See *supra* notes 86–92 and accompanying text.

171. See *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015).

172. See *supra* Section I.D.

173. See *Towle*, 802 F.3d at 1021. As will be seen later, this is ultimately an incorrect application of the *Towle* test, but only because of implications of precedents, not because of anything *Towle* says on its face. See *infra* Section III.B.

174. See Carroll, *supra* note 168, at 22.

175. See *supra* notes 135–138 and accompanying text.

176. See Marks, *supra* note 5, at 87 (“The value of an individual cartoon is small; it is the right to use the character over time that gives it value . . .”); **??economic value**.

one of literature and not law, the proper approach is to follow in the footsteps of other legal scholars who have looked to narrative theory.¹⁷⁷ This will help to ensure that any legal definition of character aligns with the relevant field, and thus the expectations and practices of those in the creative arts.

A. *How Characters Work*

Narratology is the study of stories—what parts they contain, how they are constructed, and why they have emotional impact on audiences. Given the importance of characters to stories, then, there is an extensive narratology literature on the nature and theory of characters and the role they play in stories. Although the nature of characters has been an ongoing subject of debate,¹⁷⁸ the scholarship has largely converged on three major theories of character.¹⁷⁹

First, characters are devices that move stories forward. Characters are the vessels of action that cause the events of the plot. In this view, sometimes called the “synthetic” theory, the character is an artifice, an invented

177. See, e.g., Said, *supra* note 30, at 773–74; Rosenblatt, *Dialogism and Dilemmas*, *supra* note 149, at 74.

178. See, e.g., James Phelan & John Frow, *Reading Characters Rhetorically*, 30 *NARRATIVE* 256 (2022), <https://muse.jhu.edu/pub/30/article/855328/pdf>.

179. This is just a list of the sources that will eventually be cited throughout this text. *THE POETICS OF ARISTOTLE* (S.H. Butcher ed. & trans., MacMillan & Co., 4th ed. 1907), <https://hdl.handle.net/2027/uc1.c032295589>; JAMES PHELAN, *EXPERIENCING FICTION: JUDGMENTS, PROGRESSIONS, AND THE RHETORICAL THEORY OF NARRATIVE* (2007); John Frow, *Character*, <https://doi.org/10.1017/9781108639149.009>, in *THE CAMBRIDGE COMPANION TO NARRATIVE THEORY* 105 (Matthew Garrett ed., 2018); Uri Margolin, *Character*, in *THE CAMBRIDGE COMPANION TO NARRATIVE* 66 (David Herman ed., 2007); Uri Margolin, *The What, the When, and the How of Being a Character in Literary Narrative*, 24 *STYLE* 453 (1990); Ralf Schneider, *Toward a Cognitive Theory of Literary Character: The Dynamics of Mental-Model Construction*, 35 *STYLE* 607 (2001), <https://www.jstor.org/stable/10.5325/style.35.4.607>; Merja Polvinen & Howard Sklar, *Mimetic and Synthetic Views of Characters: How Readers Process “People” in Fiction*, in 6 *COGENT ARTS & HUMANITIES* (2019), <https://doi.org/10.1080/23311983.2019.1687257>; Fotis Jannidis, *Character*, *LIVING HANDBOOK NARRATOLOGY* (Peter Hühn et al. ed., Sept. 14, 2013), <https://www-archiv.fdm.uni-hamburg.de/lhn/node/41.html>; Nathan Murray, *The Death of the Character in Modern Fiction and Criticism* (2019) (unpublished Ph.D. thesis), <https://utoronto.scholaris.ca/server/api/core/bitstreams/219cf772-263a-454d-b87c-dd4d736e8585/content>.

construction by an author to achieve outcomes in the narrative.¹⁸⁰ Indeed, in the view of earlier structural narratologists arguing tracing their theoretical lineage back to Aristotle's *Poetics*, this synthetic role was the only proper one,¹⁸¹ captured in such catchphrases of literary criticism such as the "death of the character" and "the character is no one."

The synthetic theory arguably embraced a very broad concept of character, as anything to which causal action might be attributed. Indeed, "actants" within a story could be nonhuman props—Excalibur helps Arthur seek the Holy Grail just as Lancelot does. But more recent theory disfavors this "deflationary" view of characters,¹⁸² on a number of grounds. For one thing, the pure structural view generates paradoxes—if a character is nothing more than a piece of the author's constructed text, does a sequel make for two different characters or just one?¹⁸³ More importantly, treating characters merely as a synthetic tool conveying plot information "is very different from the way we act when we get lost in a book or immerse ourselves in the world of a work of fiction."¹⁸⁴

Narratologists have thus largely converged on two further purposes that characters serve, simultaneous to their synthetic role. First, characters are thematic symbols that represent broader societal ideas—Superman as representative of strength in the battle between good and evil, for example. More importantly, characters are *mimetic*—"an image of a possible person or at least as a hypothetical entity analogous to a human being."¹⁸⁵ Characters appear, in the minds of audiences, to exist apart from their texts and lead independent lives.¹⁸⁶ The character "is the major agent of the work, at the center of a stage that is commanded by his presence, his story, his

180. See, e.g., **margolin at 454**.

181. See, e.g., Amie L. Thomasson, *Fictional Characters and Literary Practices*, 43 *BRITISH J. AESTHETICS* 138, ? (2003) (arguing that a fictional character is "an abstract cultural artefact created at a certain time by the acts of an author writing a work of fiction").

182. Margolin, *supra* note 179, at 70.

183. See *id.*

184. *Id.*

185. Margolin, *supra* note 179, at 454.

186. See Frow, *supra* note 179, at 113 ("Fictional characters are a composition of person based in norms of social personhood and elaborated according to the conventions of particular genres; they are technically fabricated quasi-persons").

interest.”¹⁸⁷

This mimetic theory is often treated as the most important of the three,¹⁸⁸ and with good reason—it reflects what people do when they absorb a story. Psychologists observe that humans, as early as infancy, develop a “theory of mind,” the capacity to attribute conscious thought to other humans. The brain’s willingness to attribute humanity to things is exceptionally strong—witness the tendency to find a face in the punctuation symbols :-).

Narrative characters present a perfect target to for audiences to attach theory of mind. Any person, presented with description of other entities, will attempt to “mind read by tracking the motions of others and correlating those motions to purposes.”¹⁸⁹ Those correlative “purposes” are the character’s personality, which the author must reveal in order for the character to be believable. Thus, fiction is “uniquely suited to show us the privacy of a character’s consciousness,” and especially since the 18th century authors have used characterization of personality “to give people ever more intense doses of this singular experience—the mind-reading experience.”¹⁹⁰ Characters “establish[] the identification circuit with the reader,” enabling audience members to empathize with, feel for, and perhaps even imagine themselves as these characters.¹⁹¹ It is this process of mind-reading that gives rise to the mimetic capacity of narrative characters to be hypothetical, lifelike people.

The mimetic aspect of characters essentially demands that characters have the appearance of free will. “A character is a completely fashioned will,” literary theorists observe, so that “the idea of will is central to modern

187. Hélène Cixous, *The Character of “Character,”* 5 *NEW LITERARY HIST.* 383, 386 (1974).

188. See, e.g., Margolin, *supra* note 179, at 457 (“In most theoretical discussions of [literary character], the mimetic or representational dimension is predominant.”).

189. BLAKEY VERMUELE, *WHY DO WE CARE ABOUT FICTIONAL CHARACTERS?* 34 (2009) (quoting SIMON BARON-COHEN, *MINDBLINDNESS: AN ESSAY ON AUTISM AND THEORY OF MIND* 34–35 (1995)).

190. *Id.* at 14 (quoting DORRIT COHN, *THE DISTINCTION OF FICTION* 23 (1999)) (internal quotations removed); see also Amanda Anderson et al., *Introduction to CHARACTER: THREE INQUIRIES IN LITERARY STUDIES* 1, 8–9 (2020).

191. Cixous, *supra* note 187, at 385. Certainly, there is debate among literary academics about whether readers *should* connect with characters in this way, but there is little doubt that readers (particularly non-academic ones) *do connect* with fictional characters. See Anderson et al., *supra* note 190, at 10–12.

understandings of character.”¹⁹²

While the theoreticians debate the mimetic role of characters, authors exploit that role. Best-selling author Orson Scott Card advises writers that “readers want to know your characters better than any human being ever knows any other human being.”¹⁹³ He then explains how to build a character’s actions, motives, and backstory—the character’s agency and personality traits—to achieve that understanding.¹⁹⁴ Authors themselves observe in their characters the “illusion of independent agency,” namely that “fictional characters are often experienced by their creators as having their own thoughts, feelings, and actions.”¹⁹⁵ Indeed, an empirical study of fiction authors confirms the common view that characters in an author’s imagination can take on lives of their own, perhaps even disagreeing with the course of action that the author expected.¹⁹⁶

192. Sara Ahmed, *Willful Parts: Problem Characters or the Problem of Character*, 42 *NEW LITERARY HIST.* 231, 234 (2011) (quoting 2 JOHN STUART MILL, *A SYSTEM OF LOGIC* 489 (London, John W. Parker 1843), <https://archive.org/details/asystemlogicrat21millgoog> (quoting German philosopher Novalis)). Although Mill and Novalis were referring to “character” in the sense of personal ethics, literary theorists have repurposed the quote to be about fictional characters. See, e.g., *id.*; Philip Fisher, *The Failure of Habit*, in *USES OF LITERATURE* 3, 7 (Monroe Engel ed., 1973).

193. ORSON SCOTT CARD, *ELEMENTS OF FICTION WRITING: CHARACTERS AND VIEWPOINT* 5 (2010).

194. *Id.* at 5–8. This is as good a place as any for one of us (C.D.) to document for posterity a relevant personal anecdote. Some years ago and for reasons unknown, I was inspired to write a science fiction short story about copyright law and memory erasure. Somehow I worked up the courage to send the draft to award-winning author Cory Doctorow, who was kind enough not only to read the piece but eventually to publish it. See *Stop the Music*, *BOING BOING* (July 28, 2015), <http://boingboing.net/2015/07/28/music.html>. His major criticism of the draft: I had written a thought experiment, not a short story. The difference between the two, he explained, was that a story is built around characters, exploring their personalities, motivations, and reactions—that’s why fiction grips readers in ways that philosophical tracts don’t. Believable characters persuade readers—one of the most important pieces of writing advice I have received, with obvious applications to legal writing as well.

195. Marjorie Taylor et al., *The Illusion of Independent Agency: Do Adult Fiction Writers Experience Their Characters as Having Minds of Their Own?*, 22 *IMAGINATION COGNITION & PERSONALITY* 361, 366 (2003).

196. See *id.* at 376.

B. *Agency and Personality*

The synthetic, thematic, and mimetic theories of character can help to construct a test for distinguishing characters from other narrative elements. Initially, note that the prevailing view is that characters serve all three of these roles simultaneously. Thus, for something to be a character, it must satisfy all three of these purposes.

Of the three theories, the thematic is probably the least helpful in distinguishing characters from other things. For one thing, there is some debate over whether the thematic role is actually a separate dimension of character theory, or merely a presentation of the other two roles—a character represents more universal ideas because of the author’s construction and because of how characters connect with audiences. Additionally, authors imbue symbolism into all sorts of non-character things in narratives.

The other two, by contrast, do give rise to useful tests. The synthetic role of characters as plot drivers show that characters must have *agency*, namely causal power within the narrative. Indeed, this is consistent with the mimetic aspect as well, in particular the requirement that characters have the appearance of free will. To demonstrate free will to the audience, characters in fictional works must have agency, the apparent power to perform volitional acts.¹⁹⁷

In addition, the mimetic aspect shows that characters must exhibit the sort of mental capacity to which the audience can attach a theory of mind. In other words, a character must have *personality*, that is, discernible mental properties that enable audience members to understand, appreciate, and connect. A computer program that acts purely based on predictable algorithms, for example, may have agency to cause changes in the world, but it lacks personality insofar as it exercises that agency in ways that do not reflect a theory of mind.

Character personality is distinct from projection of personality onto what are otherwise props. The Pequod may be described as “noble” and “most melancholy,” but the whaling ship cannot act out of pride or sorrow; it is a mere vessel of *Moby Dick*’s action, driven by Ahab and crushed by

197. See, e.g., Richard J. Gerrig & David W. Allbritton, *The Construction of Literary Character: A View from Cognitive Psychology*, 24 *STYLE* 380, 381 (1990); Brian J. Scholl & Patrice D. Tremoulet, *Perceptual Causality and Animacy*, 4 *TRENDS COGNITIVE SCIS.* 298 (2000).

the whale.¹⁹⁸

Physical appearance is important, but not solely what makes a character a character.¹⁹⁹ Costumes change, scars are earned, hairs gray without turning a character into someone else.²⁰⁰ Indeed, a familiar plot device in films is to separate appearance from character individuality. There is only one Thomas Crown, no matter how many lookalikes in bowler hats may be milling about; John Travolta and Nicolas Cage can literally switch faces without changing their underlying character identities.²⁰¹ Similarly, names may identify and distinguish characters, but characters are entities distinct from their names. The loving farmhand Westley was not the same character as the brutal murderer who commandeered Westley's ship, even though both were named the Dread Pirate Roberts.²⁰² Actions and personalities define the character, not superficial looks or names.

Narrative theory thus suggests an *agency–personality test*, under which an entity in a story must have volitional agency and a mind-like personality in order to qualify as a character. The test feels intuitively reasonable,²⁰³ and it is grounded in a substantial literature on the literary theory of characters.

C. Props Distinguished from Characters

Although copyright law has given much attention to characters, there has been much less attention given to other elements, in particular “stage

198. HERMAN MELVILLE, *MOBY-DICK* 77 (1851), <https://hdl.handle.net/2027/dul1.ark:/13960/t3kw6ns1s>.

199. See CARD, *supra* note 193, at 17.

200. See, e.g., *Metro-Goldwyn-Mayer v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (noting changes in appearance of James Bond).

201. See *THE THOMAS CROWN AFFAIR* (MGM Distrib. Co. 1999); *FACE/OFF* (Paramount Pictures 1997).

202. See *THE PRINCESS BRIDE* (20th Century Fox 1987); cf. Kurtz, *Independent Legal Lives*, *supra* note 142, at 460, 466–67 (noting uncopyrightability of names).

203. One commentator in passing provides a similar test, that “a character is generally a person, animal, or anthropomorphic figure that interacts with others and experiences events,” but reaches it only on the basis of unspecified “plain meaning principles of legal interpretation.” Brenner, *supra* note 5, at 507.

properties” or props for short.²⁰⁴ Unlike characters, which often possess distinct traits, props are inanimate elements that support a story’s setting or plot in addition to being functional or ornamental. And the agency–personality test laid out above distinguishes the two categories.

Props have no volitional agency or personality traits. Props invite action but do not make intentional choices within the plot. As a result, even the most well-delineated props can pique the audience’s interests, but do not connect on the emotional level that characters do. A *Star Wars* fan watching the duel of Jedi masters wants *to be* Darth Vader and *to have* a light saber; no one wants *to be a light saber*.²⁰⁵ They fail to perform both the synthetic and mimetic roles described previously, and thus they are not characters.

Consider two common uses of props. The “MacGuffin,” as explained by Alfred Hitchcock, is an object of desire to which the characters go to great lengths to obtain.²⁰⁶ A MacGuffin may lead characters through much trouble, but the prop does not resolve those troubles itself. The holy grail is out there to be found, but it is King Arthur, the character, who must execute on his quest by traveling afar and outwitting opponents on the flight speeds of unladen swallows.²⁰⁷ Indeed, as Hitchcock observed, as long as the characters *think* it is valuable, the MacGuffin itself is irrelevant.²⁰⁸ Swap the Maltese falcon²⁰⁹ for gold bars, paintings, the Ark of the Covenant, perhaps

204. For example, the Copyright Office offers guidance on the application of copyright law to illustrations of props, but not to the props themselves. See U.S. COPYRIGHT OFF., *supra* note 5, § 804.3(F) (“Illustrations of costumes, scenery, sets, props, and lighting may be included in a dramatic work. If the illustrations are copyrightable, they may be registered as visual arts works. A textual description of such works may also be registered as a literary work, but the registration does not extend to the costume, prop, set or lighting itself.”).

205. *STAR WARS* (Twentieth Century Fox 1977). Except Benedict Cumberbatch. See Marlow Stern, “Cumberb****es,” *Rejoice!*, *NEWSWEEK* (May 15, 2013), <https://www.newsweek.com/2013/05/15/benedict-cumberbatch-star-trek-star-wars-cumberbitches-and-more-237386.html>.

206. See, e.g., Thomas M. Leitch, *Narrative as a Way of Knowing: The Example of Alfred Hitchcock*, 30 *CENTENNIAL REV.* 315, 323 (1986).

207. See *MONTY PYTHON AND THE HOLY GRAIL* (EMI Films 1975); Norris J. Lacy, *Medieval McGuffins: The Arthurian Model*, 15 *ARTHURIANA* 53, 61 (2005).

208. See Lacy, *supra* note 207, at 54.

209. See DASHIELL HAMMETT, *THE MALTESE FALCON* (1930).

even a mere glow in a suitcase²¹⁰—the heist film still works. Characters are uniquely determinative of a story because their personality traits inform the action; the MacGuffin itself, being not a character, is fungible.

“Chekhov’s gun” is another trope of fiction, in which a prop foreshadows later events.²¹¹ When Q hands James Bond the exploding pen, there is certain to be a dramatic pen explosion later.²¹² But when that explosion happens is not the intentional choice of the pen: Either Bond, a character, pushes the plunger, or the pen goes off by accident and the characters must deal with the fallout. The pen may be important, even central, to the plot. But because the pen is a prop without its own thoughts or feelings, it does not drive the plot’s motion.

These two examples of props illustrate their role in narrative. Props do not perform the functions of characters; instead, *props help to sharpen the appearance of characters’ agency and personality*. Gorfinkel and Rhodes examine the role of props in films and general prop theory. Using films for their analysis, the authors argue that “the fidgeting with props is what sustains the illusion of the film’s natural bodying forth of its narrative contents.”²¹³ Similarly, particularly in speculative fiction, props define the nature of the world of the story—the variations from real-world physics, the imagined technologies available, how long a time ago and in what galaxy far away the tale occurs—creating a space for characters to act.²¹⁴ Props are no doubt important—they may indeed be “indispensable components of the presented world”²¹⁵—but their function and place in narrative is qualitatively different from characters.

D. Lord of the Hypotheticals

The agency–personality test of characterhood is simple to remember and grounded in theory, but how does it work in practice? A few hypotheticals based on contemporary fiction offer useful (and hopefully enter-

210. See *PULP FICTION* (Miramax Films 1994).

211. See Timothy Gao, *The Pistol as a Novel Weapon*, 66 *VICTORIAN STUD.* 34, 38 (2023).

212. See *GOLDENEYE* (United Artists 1995).

213. ELENA GORFINKEL & JOHN DAVID RHODES, *THE PROP* 6 (2025).

214. See Antoni Smuszkiewicz, *Props and their Function in Science Fiction*, 14 *SCI. FICTION STUD.* 222, ? (1987) (Elizabeth Kwasniewski trans.).

215. *Id.*

taining) testing grounds for the scope of the test.

As an initial matter, it should be clear that characters are not limited to fictional humans. In fiction, cars can talk, a toaster can be brave, the little engine could.²¹⁶ But each of these mechanical devices has agency and personality traits. Herbie the Love Bug can rejoice at winning races or sulk lovelorn among the streets of San Francisco; viewers feel jubilant or dejected along with the car.²¹⁷ Humans intuitively personify non-persons, and fiction often exploits this natural tendency.²¹⁸

Furthermore, narrative entities need not be human-like in personality to be characters.²¹⁹ In particular, people attribute non-human personalities to animals. Thus, famous animal characters such as Lassie and Black Beauty would likely have sufficient personalities to qualify as characters. It is perhaps this animal-personality logic that best supports the view that the Batmobile is a character. It is difficult to envision the Batmobile as having a human-like personality, but more reasonable to think of the autonomous vehicle as akin to a heroic steed like the Lone Ranger's Silver or Zorro's Tornado. Insofar as pet lovers empathize with their furry friends, it seems not implausible to attribute a similar animalian personality to the Dark Knight's ride.

Magical objects present more difficult cases. In almost all such cases, the object arguably has some volitional agency, insofar as the object's magic can cause changes in the world. If the magic is predictable, as in the case of a magic wand that responds to spells, then the object probably does not present any identifiable personality; the magic is closer to an advanced speculative technology like a light saber.

In other cases, the magical object is defined to contain a human soul—the One Ring of *Lord of the Rings* and the horcruxes of *Harry Potter*, for example. There is no question that Sauron and Voldemort, respectively, are characters when presented in humanoid form, but what about when they inhabit those objects? While one could plausibly argue that the ob-

216. See *CARS* (Pixar Animation Studios 2006); Thomas M. Disch, *The Brave Little Toaster*, *MAG. FANTASY & SCI. FICTION*, Aug. 1980, at 6; WATTY PIPER, *THE LITTLE ENGINE THAT COULD* (1930). See generally Brenner, *supra* note 5, at 507 (citing cars).

217. See *THE LOVE BUG* (Walt Disney Prods. 1968).

218. See VERMUELE, *supra* note 189, at 22–23.

219. This differentiates the agency–personality tests from other suggestions that characters must be anthropomorphic. See, e.g., Brenner, *supra* note 5, at 507.

jects are the incarnation of the character, the better view is that the objects are more like costumes that enrobe the characters' selves. This avoids difficult questions about the status of those objects before or after spiritual possession, or else they might somehow turn into or away from characters mid-story. The One Ring would thus be a prop to be used by Sauron in the same way that a tuxedo is a prop used by James Bond; the tuxedo is not James Bond himself.

Finally, magical objects may have inherent personalities separate from any other defined character. The magic carpet in *Aladdin*, Casa Madrigal in *Encanto*, and the ocean in *Moana* exemplify this. Artificially intelligent computers like Hal 9000 from *2001: A Space Odyssey* perhaps fall into this category too. At first glance, the full agency–personality test appears satisfied for these things—each acts autonomously, and based on some implicit internal thought process rather than mechanical determinism. On the other hand, though, the “personalities” of each may not be the kinds of personalities to which audience members would necessarily attach a theory of mind. Sometimes the magical object will produce expression to help invite that theory of mind. Hal sings; the carpet wags its fringes like a dog's tail. These expressions strengthen the appearance of lifelike personality. But in the case of the ocean and the *casita*, their actions are at least arguably more mysterious and less clearly like the kinds of minds that people encounter in daily life.

The above hypotheticals have started from inanimate objects and imbued them with different levels of animation. What about the reverse, taking humans and removing their humanity? Let's talk about zombies. A truly personality-devoid, shambling human shell ought to fail the agency–personality test. Nevertheless, it seems intuitive that a zombie could be a character. The best explanation is that, even for the most seemingly lost zombies, everyone still clings to the hope that they can be revived to their human selves. The classic trope of the hero refusing to kill the mind-controlled bystander reflects this optimistic belief that somewhere, deep inside, a human personality lurks within. As a result, one can have a theory of mind for a zombie; that is, one can imagine what it would be like to have a personality suppressed by outside forces. That might be enough to support zombies being characters.

Hive minds present a similar problem. Agent Smith is a single computer program entity in the Matrix, but can instantiate himself in multiple

bodies simultaneously; is he one character or several?²²⁰ The answer probably depends on the portrayal of the literally split personalities. In the case of Agent Smith, for example, the bodily instantiations appear able to think and coordinate simultaneously, suggesting that the multiple bodies are closer to arms of a single octopus rather than distinct characters. By contrast, when Captain Kirk of *Star Trek* is duplicated in a transponder accident, the two bodies have distinct personalities, one benign and one evil, suggesting two characters rather than one.

In most cases, of course, the application of the agency–personality test is simple. There is a single, distinct character that has individual mental capacity and volitionally acts on that capacity. Science fiction and fantasy unsurprisingly present difficult cases. But these cases highlight that the agency–personality test is capable of nuance consonant with the ambiguous nature of some entities as characters.

III. APPLICATION TO COPYRIGHT LAW

The distinction between props and characters informs the application of law in this case, because the special rules for character copyright should apply only to characters exhibiting agency and personality traits. Props are still entitled to copyright protection, in the same manner as any other element of a literary work. But the specific doctrines of character copyright, as applied to props, are illogical and unsupported; in any event a fair reading of the character copyright test would exclude props.

A. *The Test as a Threshold Question*

As an initial matter, the case law currently provides no test for whether an object in a work is a “character.” *Towle*, the doctrinal focus of this case at the district court, establishes

a three-part test for determining whether a character in a comic book, television program, or motion picture is entitled to copyright protection. First, the character must generally have physical as well as conceptual qualities. Second, the character must be sufficiently delineated to be recognizable as the

220. See *THE MATRIX* (Warner Bros. 1999).

same character whenever it appears. . . . Third, the character must be especially distinctive and contain some unique elements of expression.²²¹

This test determines “whether a character” is protectable as an independent work under copyright law, as opposed to an unprotectable stock character.²²² But it is not a test for whether an object is a character in the first place. The wording of *Towle* is not “a three-part test for determining whether *a thing is a character*”; it is “a three-part test for determining whether *a character . . . is entitled to copyright protection*.” The test thus assumes at the outset that the thing in question is a character. The three elements of the test similarly inquire about “the character,” not “the object” or some like wording, again revealing that the test assumes characterhood.

As a result, *Towle* does not state a rule for what qualifies as a character. That threshold determination is one for this Court to make here.

Specifically, while the Ninth Circuit held that the Batmobile qualified as a character, it stopped short of establishing guidelines to differentiate between characters and inanimate objects like props, which may share some recurring features but ultimately lack the same narrative significance as literary characters do.

B. “Conceptual Qualities”

Although *Towle* does not explicitly decide what a character is, the case provides an important clue. The test requires “conceptual qualities,” and those qualities include agency and personality traits.

The first element of the *Towle* test requires that a copyrightable “character must generally have physical *as well as conceptual qualities*.”²²³ The phrase “conceptual qualities” originated from *Air Pirates*, which explained further:

[M]ost of the cases dealing with cartoon characters have considered the character’s personality and other traits in addition

221. *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015) (internal quotations and citations removed); *accord Daniels v. Walt Disney Co.*, 958 F.3d 767, 771 (9th Cir. 2020).

222. *See also Towle*, 802 F.3d at 1022.

223. *Id.* at 1021 (emphasis added).

to its image. . . . In what appears to be the only two cases that have viewed a character only as an image . . . , the alleged copying was of a doll, which could have only an image and no conceptual character traits; therefore the issue of whether the comic character's depiction included a personality was not raised.²²⁴

Air Pirates thus provides two glosses on the phrase “conceptual qualities.” First, the term is used interchangeably with “personality” and “personality and other traits,” as distinct from the character’s “image.”²²⁵ Second, conceptual qualities are lacking in a doll but present in a cartoon character of otherwise identical image. Given that cartoon characters enjoy agency and personality traits, and given that dolls are inanimate props, *Air Pirates* suggests that “conceptual qualities” are those personality traits that props lack.

Subsequent case law is consistent with this interpretation of conceptual qualities as agency and personality traits.²²⁶ The vast majority of cases involve human characters: Sam Spade, James Bond, the A-Team.²²⁷ Adjudicated cartoon characters like Mickey Mouse have been anthropomorphic, and courts have noted that “a cartoon character’s image is intertwined with its personality and other traits.”²²⁸ Creatures of film have had distinct per-

224. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 n.14 (9th Cir. 1978) (citing *King Features Syndicate v. Fleischer*, 299 F. 533 (2d Cir. 1924); *Fleischer Studios v. Ralph A. Freundlich, Inc.*, 73 F.2d 276 (2d Cir. 1934)).

225. *See also Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996) (going “beyond the superficial similarities in the characters” to consider their motivations, skills, credentials, and relationships).

226. *See generally Kurtz, Independent Legal Lives*, *supra* note 142, at 445–74 (reviewing cases).

227. *See Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950–51 (9th Cir. 1954); *Metro-Goldwyn-Mayer v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995); *Olson v. Nat’l Broad. Co., Inc.*, 855 F.2d 1446, 1451–52 (9th Cir. 1988); *see also Gaiman v. McFarlane*, 360 F.3d 644, 660–61 (7th Cir. 2004); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121–22 (2d Cir. 1930); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 627 (2d Cir. 1982).

228. *See Air Pirates*, 581 F.2d at 757; *see also id.* at 754–55 (citing cases on animated characters); *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 241 (2d Cir. 1983) (considering “totality of the characters’ attributes and traits”); Kurtz, *Independent Legal Lives*, *supra* note 142, at 445–51.

sonality traits; Godzilla could not have switched from evil to good otherwise.²²⁹

Even the cases dealing with character copyright in cars do not contradict this interpretation. In *Halicki Films*, this Court acknowledged that “[t]he District Court did not directly examine the question of whether Eleanor is a character,” and so without sufficient facts declined to make that determination.²³⁰ And *Towle* dealt with a car that arguably had the volitional agency and personality attributes of a character. The Court, obviously well-apprieved of the Batman franchise, would have known that the Batmobile at issue was an autonomous-driving car with substantial intelligence—for example, politely stopping for passing children while driving itself to rescue Batman and Robin.²³¹ *Towle* itself calls the Batmobile “swift, cunning, strong and elusive,” compares it to “an impatient steed straining at the reins,” and quotes Robin complimenting the car.²³² Focusing on these features would have led *Towle* to view the Batmobile as a character with personality traits, akin to the Lone Ranger’s horse Silver or Zorro’s Tornado.²³³

229. See *Toho Co., Ltd. v. William Morrow & Co., Inc.*, 33 F. Supp. 2d 1206, 1216 (C.D. Cal. 1998); see also *Daniels v. Walt Disney Co.*, 958 F.3d 767, 769 (9th Cir. 2020) (“[A]nthropomorphized characters representing human emotions”); *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984).

230. *Halicki Films v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1225 (9th Cir. 2008) (remanding for further factfinding).

231. See *Penguin Sets a Trend*, in *BATMAN* (20th Century Fox Television Feb. 1, 1967); see also *DC Comics v. Towle*, 989 F. Supp. 2d 948, 967 (C.D. Cal. 2013) (noting Batmobile’s “sidekick” nature), *aff’d*, 802 F.3d 1012 (9th Cir. 2015).

232. *Towle*, 802 F.3d at 967, 1021 & n.6.

233. The Court’s mention in passing that “[e]ven when a character lacks sentient attributes and does not speak (like a car), it can be a protectable character,” *id.* at 1021, must be read in view of this underlying perception that the Batmobile is animate. The vocabulary of that sentence suggests such a perception—the Court did not say “even when an *object* lacks sentient attributes.” And “sentient” is not synonymous with volition or personality. Fiction abounds with robots that are merely programmed automata but nevertheless act with the appearance of agency and personality traits—Hal 9000, Rosie of *The Jetsons*, and WALL-E to name a few.

C. Props, Properly Analyzed

Distinguishing props from characters does not exclude props from copyright protection. Instead, props are still elements of the underlying fictional work and protected under the ordinary rules of copyright law.²³⁴ A prop is an element of the larger narrative work that courts can consider in analyzing substantial similarity for copyright infringement; there is no need to deem the prop a “character” to perform that analysis.²³⁵ The fact that ordinary copyright law still applies to protect props obviates concerns (such as those raised by other *amici*) that expansive character copyright protection is necessary for the interests of authors.

Furthermore, a prop may be an independently copyrightable work, particularly if it is depicted as a two- or three-dimensional image.²³⁶ *Towle* recognized this much, acknowledging that the Batmobile might be “entitled to copyright protection as a sculptural work.”²³⁷ This possibility reveals an important doctrinal concern. Under standard copyright law, a car or other useful article may be protected as a sculptural work—but only to the extent that the design of the article “incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”²³⁸ That test is no accident: Congress and the courts have long applied a higher standard to useful articles and industrial design, to avoid improper monopolies on useful tools and avoid turning copyright protection into a quasi-patent system.²³⁹

As elements in fictional works, props are more likely to contain fanciful aesthetic elements that could potentially be found conceptually separa-

234. See 17 U.S.C. § 102 (subject matter of copyright); § 501 (infringement).

235. See, e.g., *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1216 (11th Cir. 2000) (considering plants, statutes, and bowls); *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 n.5 (9th Cir. 1983).

236. See, e.g., *Hayden v. Koons*, No. 1:21-cv-10249, at 2, 9–10 (S.D.N.Y. July 18, 2022).

237. *Towle*, 802 F.3d at 1018 n.4.

238. *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1008 (2017) (quoting 17 U.S.C. § 101).

239. See *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1143–44 (2d Cir. 1987) (discussing legislative policy behind uncopyrightability of utilitarian designs); see also *Star Athletica*, 137 S. Ct. at 1013 & n.2 (noting limited scope of protection for useful articles); *Baker v. Selden*, 101 U.S. 99, 102 (1880).

ble.²⁴⁰

If useful articles become “characters” simply by receiving names and camera footage, then any creator of a useful article could circumvent this legislative balance of copyright protection. A threshold test that restricts character copyright to characters ensures that other elements of fictional works, in particular props which are frequently useful articles, are subject to the standard rules of copyright law.

D. Example Application: *Shelby v. Halicki*

The above framework can help to evaluate the *Carroll Shelby Licensing, Inc. v. Halicki* case, particularly in comparison to the Ninth Circuit’s recent decision there. As noted above, the case concerns a number of sports cars named Eleanor that appear in the films, and whether those cars enjoy the special copyright rules for characters.

Under the agency–personality test, *Carroll Shelby Licensing* is a simple case, because the cars at issue are props, not characters. For one thing, the cars never choose the course of the plot; they are objects—MacGuffins—to be stolen by the characters.²⁴¹ While Appellants “assign anthropomorphic characteristics” to the Eleanor cars such as “strength, talent, endurance, and a tendency to always save her leading man,” the district court found that these personality traits were merely projected onto the cars and were “more appropriately attributed to the human protagonists that drive the Eleanors.”²⁴²

Furthermore, for an entity to have the personality traits of a character, it must have one identity. Multiple, distinct cars in the films share the name

240. See, e.g., *Nat’l Theme Prods. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1353 (S.D. Cal. 1988) (finding that certain theater costumes “primarily represent the artists’ arbitrary conceptions responsive to their aesthetic sensibilities”); Rebecca Ishaq Foster, *Protect the Bastard Child of the Arts: Copyright Protection for Theatrical Costumes*, 22 Sw. U. L. REV. 431, 442 (1993) (“Costumes are a shorthand for conveying the expression of such intricacies of a character.”); Kelly Gregg, Comment, *Intellectual Property Norms in American Theater*, 88 U. CHI. L. REV. 1829, 1845–46 (2021) (“Although most of the work of set and costume designers is likely unprotected, there are portions of a set or costume designer’s work that may be able to avoid the useful-article doctrine.”).

241. See *Carroll Shelby Licensing, Inc. v. Halicki*, 643 F. Supp. 3d 1048, 1056–59 (C.D. Cal. 2022).

242. *Id.* at 1062.

“Eleanor.”²⁴³ There is no suggestion that *Gone in 60 Seconds* is a speculative-fiction meditation on the divisibility of personality; the Eleanor cars are not Agent Smith. To the extent that the cars have any personality, each has its own.

At this point, according to the framework above, the analysis ends—the cars are not characters, and the *Towle* test is inapplicable. Of course, the cars may also receive copyright protection as graphic or sculptural works, but the nature of the cars as useful objects complicates that theory of liability. For example, the copyright holder in the case highlighted the Eleanor cars’ physical modifications such as “unique headlights, a unique combination of other exterior features, [and] a nitrous oxide switch.” These physical attributes contribute functionality to the car, boosting its power and aerodynamics. Even if these features are “a unique combination,” as the copyright holder contended in the case, prohibiting others from using that combination of features could effectively create a quasi-patent on certain fast cars, lasting over four times the duration of a normal patent and without any examination of obviousness. This is why physical attributes of a car are not copyrightable under the useful article doctrine to the extent they are inseparable from functionality.²⁴⁴

The Ninth Circuit, in its decision, adopted parts of this logic but nevertheless tried to fit it into the existing *Towle* test. As a reminder, that test provides three elements for determining “whether a character is entitled to copyright protection: (1) the character must have ‘physical as well as conceptual qualities,’ (2) the character must be ‘sufficiently delineated to be recognizable as the same character whenever it appears’ and display ‘consistent, identifiable character traits and attributes,’ and (3) the character must be ‘especially distinctive’ and contain ‘some unique elements of expression.’”²⁴⁵

As to the element of physical and conceptual qualities, the court recognized that its precedents had given little attention to the latter component.²⁴⁶ Explicating on conceptual qualities, the court supposed that they should “include anthropomorphic qualities, acting with agency and

243. See *id.* at 1056.

244. See *Star Athletica*, 137 S. Ct. at 1016.

245. *Carroll Shelby Licensing, Inc. v. Halicki*, Nos. 23-3731, -4008, at ? (9th Cir. May 27, 2025) (based on *Daniels v. Walt Disney Co.*, 958 F.3d 767, 771 (9th Cir. 2020)).

246. See *id.* (“Our precedent has primarily focused on ‘physical’ qualities.”).

volition, displaying sentience and emotion, expressing personality, speaking, thinking, or interacting with other characters or objects.”²⁴⁷ Because “Eleanor has no anthropomorphic traits,” the court concluded that “Eleanor is more akin to a prop than a character” and thus failed the first element of the *Towle* test.²⁴⁸ The court continued and found that the cars failed the other two elements of the test too, because the cars lacked consistency of appearance across films and because the car was not especially distinctive.²⁴⁹

At a broad level, the Ninth Circuit analysis is largely consistent with the proposed agency–personality framework of this Article, suggesting that courts in the future will have to at least perform some analysis of whether a thing is a “character” under copyright law. However, the Ninth Circuit’s approach differs in at least two respects. First, rather than making the determination of characterhood a threshold test, the Ninth Circuit incorporates the question into the protectability analysis overall. This has efficiency implications, insofar as courts must assess the whole *Towle* test even for plainly non-character things, potentially making early summary disposition more difficult. More importantly, the court appeared to be reluctant to limit conceptual qualities to just agency and personality, suggesting that other features such as speaking and interaction might qualify as conceptual qualities. But plenty of plainly non-character things can speak and interact. Thus, the Ninth Circuit’s formulation leaves open a fairly wide door for those hoping to shoehorn props into copyright law’s special character rules.

IV. THE VALUE OF PROP LAW

Distinguishing props from characters under copyright law does not just satisfy doctrinal logic. The distinction also serves the underlying purposes of copyright protection, namely promoting public access to new creative works and information,²⁵⁰ for two reasons. First, limiting the character copyright rule avoids expanding the many uncertainties of character pro-

247. *Id.*

248. *Id.*

249. *Id.*

250. See U.S. CONST. art. 1, § 8, cl. 8; *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994).

tection and creating new difficulties that could undermine the stability and foundation of copyright law. Second, limiting character copyright clarifies what exactly is distinctly copyrightable about characters, and better aligns the protection of characters under copyright law with their creative value.

A. *Cabining Character Copyright*

The line for character copyrightability has long “proved to be especially elusive.”²⁵¹ The many complexities of the doctrine and its theoretical foundations suggest value in cabining character copyright to its proper scope.

For one thing, the application of the test(s) for protectability of a character is far from clear. The “sufficiently delineated” test relies heavily upon a subjective assessment of delineation and leads to inconsistent results that place the judge in the role of art critic.²⁵² It can conflate copyright law with trademark protection and allow for protection of otherwise uncopyrightable short phrases.²⁵³ And the elements of the test seem inconsistent with the stated objective of weeding out stock characters.²⁵⁴ Modern literary practice favors “rounded” characters that develop and evolve in their personalities through the arc of a story.²⁵⁵ Yet the *Towle* requirement of “consistent, identifiable character traits and attributes” seems to protect flat, static characters more than rounded ones.²⁵⁶ Affording such protection to what seem more like stock characters rather than unique expressions of creativity therefore only serves to contribute to the confusion surrounding what defines a copyrightable character.

On a more theoretical level, the very notion of the “character” as a separable entity from the copyrightable work is questionable. Copyright protects only works “fixed in a tangible medium.”²⁵⁷ But an abstract character, however well delineated, cannot be fixed divorced from its underlying work, any more than the quality of blueness can be fixed without an un-

251. *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983); *see Hanley, supra* note 137, at 1169–80; *Chung, supra* note 143, at 922.

252. *See Said, supra* note 30, at 814–15; *Schienze, supra* note 159, at 80.

253. *See Hughes, supra* note 90, at 584–85.

254. *See DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015).

255. *See Said, supra* note 30, at 792–95.

256. *Compare Towle*, 802 F.3d at 1021, *with Said, supra* note 30, at 813.

257. 17 U.S.C. § 101.

derlying substance.²⁵⁸ Such inseparability from works fixed “by or under the authority of the author” further adds to the difficulty of distinguishing copyrightable aspects of characters from the rest of the work.²⁵⁹

Nor is the infringement determination simple for characters. “[T]he degree of similarity which will be considered substantial is one of the most uncertain questions in copyright.”²⁶⁰ In particular, because characters have both physical and conceptual characteristics, courts have struggled with whether infringement occurs when one, but not both, is copied.²⁶¹ Especially “[w]hen the character’s appearance is not the copyright owner’s creation,” say because the character’s appearance is that of a well-known actor, does visual similarity suffice for infringement?²⁶² “Surely Humphrey Bogart, who played the detective Sam Spade in the film *The Maltese Falcon*, could dress in similar street clothes and play a detective in another film” without infringing copyright—and yet the law even on that point is unclear.²⁶³ And if the conceptual qualities of a character change, that is, if the character is well-rounded, then courts may have no reliable or consistent means of determining what aspect of the character is being infringed.²⁶⁴

Uncertainty in copyright protection “can deter the creation of new works if authors are fearful that their creations will too readily be found to be substantially similar to preexisting works.”²⁶⁵ Cabining the complexities of character copyright to actual characters fosters greater certainty and advances the purposes of copyright protection.

B. Allocation of Creative Value

Cabining character protection to characters also serves the purposes of copyright by giving due credit to those other than the author who made creative contributions to a work. All elements of creative works, including

258. See McCutcheon, *supra* note 141, at 137.

259. See *id.* at 143.

260. Kurtz, *Independent Legal Lives*, *supra* note 142, at 472.

261. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978) (“We need not decide which of these views is correct . . .”).

262. See Kurtz, *Independent Legal Lives*, *supra* note 142, at 470.

263. *Id.* at 470 & n.230.

264. See Said, *supra* note 30, at 819.

265. *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983).

characters, are the sum total of “a dialogic process” of multiple contributors that produces “the cumulative nature of cultural creativity.”²⁶⁶ Because copyright law invests protection in only one authorial entity, it necessarily does not credit all contributors. A film is the sum total of creativity and decision-making of numerous actors, costume designers, film directors, and property masters, but each of them does not receive a separate copyright interest.²⁶⁷ Limiting the scope of copyright protection to what the copyright holder actually created, then, ensures that these third parties’ contributions are respected and not unwittingly handed off to another’s ownership.

With respect to props in a fictional work, at least two classes of non-author contributors are significant: prior creators and the audience for that work. Props are, of course, not alone in this respect: Characters are also the sum total of contributions by prior creators and the audience.²⁶⁸ This only makes expansive copyright protection for characters more complex and questionable, providing further reason not to expand the doctrine to non-character elements.

Prior creators. — When a creative work incorporates allusions, metaphors, and symbols referencing other works, the work owes its origin in part to prior creators.²⁶⁹ Props often do this. Sauron’s One Ring, with its powers of invisibility and control, falls into a classical tradition including Plato’s ring of Gyges and Germanic mythology via Wagner’s *Ring Cycle*.²⁷⁰ While lightsabers are unlike regular swords due to their plasma blade and strong connection to the Force, they share similarities with and were in-

266. CARYS J. CRAIG, COPYRIGHT, COMMUNICATION AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW 54 (2011); Rosenblatt, *Dialogism and Dilemmas*, *supra* note 149, at 71.

267. See 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 254–57 (2d Cir. 2015); Garcia v. Google, Inc., 786 F.3d 733, 741–42 (9th Cir. 2015) (en banc); McCutcheon, *supra* note 141, at 151.

268. See, e.g., Suzanne Keen, *Readers’ Temperaments and Fictional Character*, 42 NEW LITERARY HIST. 295, 299–300 (2011).

269. See also Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1034–37 (1990).

270. See Alex Ross, *The Ring and the Rings*, NEW YORKER (Dec. 15, 2003), <https://www.newyorker.com/magazine/2003/12/22/the-ring-and-the-rings>; Frederick A. de Armas, *Gyges’ Ring: Invisibility in Plato, Tolkien and Lope de Vega*, 3 J. FANTASTIC 120, 122 (1994). On whether the One Ring is a character, see *supra* Section II.D.

spired by samurai swords.²⁷¹ By styling the lightsaber after a sword symbolizing power and status, *Star Wars* effectively transfers the importance of the samurai sword to the lightsaber. Captain America's shield, with colors and design taken from the American flag, is another prop that owes its status to a pre-existing work that symbolizes patriotism and, particularly for the postwar period when the comic first appeared, "the narrative of America that he embodies defense rather than offense."²⁷²

Copyright law provides a variety of doctrines, including originality and the idea-expression dichotomy, to separate out the respective contributions of a work's author and the work's precedents.²⁷³ These doctrines can be applied to props.²⁷⁴

But treating props as characters risks conferring the symbolic, representational value of those props entirely upon one copyright holder, particularly given the lack of clarity on the standard for copyright infringement of characters.²⁷⁵ Indeed in the present case, the Shelby GT500 car at issue bears the name of the alleged infringer, referencing by name and appearance the contributions of Carroll Shelby's creative car design work.²⁷⁶ And if the prior contributions are in the public domain, then incautious application of character copyright can stifle downstream uses of creative inputs that ought to be available to anyone.²⁷⁷ Applying standard copyright law, rather than a specific character rule, best enables courts to sort out and provide due credit to the copyright holder and other prior contributors.

Creative audiences. — The audience for a work is also a creative contributor. The audience draws connections, fills in backstories, and augments

271. See John Man, *Sword vs. Lightsaber: How the Samurai Warrior Inspired the Jedi Knights*, SALON (Dec. 20, 2015), https://www.salon.com/2015/12/19/sword_vs_lightsaber_how_the_samurai_warrior_inspired_the_jedi_knights/.

272. See Jason Dittmer, *Captain America's Empire: Reflections on Identity, Popular Culture, and Post-9/11 Geopolitics*, 95 ANNALS ASS'N AM. GEOGRAPHERS 626, 630 (2005).

273. See, e.g., Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 518 (7th Cir. 2009).

274. See, e.g., Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986).

275. See *supra* text accompanying notes 260–264; see also Rosenblatt, *Shrinking Public Domain*, *supra* note 151, at 27–28 (noting difficulties with separating out copyright interests when characters have multiple creators).

276. See Halicki Films v. Sanderson Sales & Mktg., 547 F.3d 1213, 1215 (9th Cir. 2008); Carroll Shelby Licensing, Inc. v. Halicki, 643 F. Supp. 3d 1048, 1058 n.13 (C.D. Cal. 2022).

277. See Rosenblatt, *Shrinking Public Domain*, *supra* note 151, at 584.

the universe of a work in ways that enhance the total creative concept.

An audience does not passively consume fictional works; it actively participates in and contributes to the imagined story. Audience members do so because of the “narrative empathy” they experience with the work.²⁷⁸ But because any fictional work, no matter how detailed, can only reveal snippets of a character, story, or fictional world, it is up to the audience to fill in the gaps—to turn two-dimensional words or images into three-dimensional imaginings.²⁷⁹

How audiences fill in these gaps is just as creative and unpredictable as any other copyrightable work. The prevalence of fanfiction and collaborative works is testament to that creativity.²⁸⁰ Indeed, audiences may push the trajectory of a creative franchise in ways contrary to an author’s original wishes—Sherlock Holmes had to come back to life after 19th century Sherlockians vigorously protested Arthur Conan Doyle’s killing off the character.²⁸¹

Props rely on audiences’ creativity, due to the symbolic and referential nature of props. In order for props to convey deeper meanings or themes beyond their literal appearance, audience members must inject into a work personal associations, social contexts, and interpretations.²⁸² The lightsaber, One Ring, and Maltese Falcon have meaning as a chivalrous weapon, a force of evil, and a priceless *object d’art* not merely by the author’s literal explanations, but also by the audience explaining these props through their personal, imaginative connections—connections that often go beyond what the author intended.

Character copyright law interacts poorly with this dialogic creativity, investing investing rights in a sole author without acknowledging the value created by prior authors or audiences.²⁸³ Copyright law “does not

278. See Keen, *supra* note 268, at 297; ??connection.

279. See Ahmed, *supra* note 192, at 234.

280. See, e.g., see Lantagne, *supra* note 1, at 278–83.

281. See *id.* at 268–69.

282. See Mary LeCron Foster, *Symbolism: The Foundation of Culture*, in COMPANION ENCYCLOPEDIA OF ANTHROPOLOGY: HUMANITY, CULTURE, AND SOCIAL LIFE 366, 366 (2d ed. 2002).

283. See, e.g., Smith, *supra* note 144, at 643–45; Rosenblatt, *Dialogism and Dilemmas*, *supra* note 149, at 76–77.

generally recognize community rights to a work.”²⁸⁴ Separating props from the character copyright rule better allocates the value of copyright protection in view of the creative contributions of others.

CONCLUSION

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284. See Smith, *supra* note 144, at 624.