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COPYRIGHT IN INANIMATE CHARACTERS: THE DISTURBING PROLIFERATION OF MICROWORKS AND THE NEGATIVE EFFECTS ON COPYRIGHT AND FREE EXPRESSION

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*In its September 2015 decision in *DC Comics v. Towle*, the United States Court of Appeals for the Ninth Circuit recognized the existence of a copyright for inanimate characters. The court held that the Batmobile – a fictional car driven by a fictional superhero – was an independently copyrightable work. This article explores the problems with the Ninth Circuit’s analysis and argues that increasing copyright protection for what the authors call “microworks” is misguided and harms First Amendment interests.*

In September 2015, the United States Court of Appeals for the Ninth Circuit in *DC Comics v. Towle*¹ held that the Batmobile,² Batman’s³ vehicle of choice in comic books, on television shows and at the movies, constitutes – like the Caped Crusader himself in prior judicial opinions⁴ – a copyrightable character.⁵ Thus, a fictional superhero character – one that has received “a large number of different interpretations” since it

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¹802 F.3d 1012 (9th Cir. 2015).

²“Batmobile” is a compound proper noun “with the derivative meaning *automobile designed with bat symbolism for Batman to use in his superhero role*.” Jerrold T. Katz, *The End of Millianism: Multiple Bearers, Improper Names, and Compositional Meaning*, 98 J. PHIL. 137, 157 (2001) (emphasis in original).

³See generally LES DANIELS, *BATMAN: THE COMPLETE HISTORY* (1999) (providing an extensive background on the Batman character).

⁴See *Sapon v. DC Comics*, 2002 U.S. Dist. LEXIS 5395, *3 (S.D.N.Y. Mar. 29, 2002) (observing that “courts have held Batman both alone and with Robin as copyrightable and infringed in a number of cases”).

⁵802 F.3d at 1022.

was created in 1939⁶ – and his fictional car now comprise a dynamic copyrightable duo, with the latter raising troubling cultural and legal concerns that are the centerpiece of this article. That’s largely because rather than emphasizing the non-utilitarian, above-the-hood aspects of the Batmobile,⁷ the car is now copyrighted as a character.

Batman himself, like his car, has gone through numerous incarnations since his creation as a comic book character in 1939. As one knowledgeable insider described this evolution:

Batman started off as a first cousin to the mystery men of the pulps in ‘39 and ‘40. He held the persona in varying degrees until the ‘50s when he became a sort of ebullient scout master for awhile. He was a bright, sunny fellow who would walk down the street in the middle of the day and people would say, “Hey, Batman, hi, how’s it going?” He stayed like that until the ‘60s when he effectively became a comedian or a perpetrator of camp.⁸

Of course, in the series of contemporary Batman films beginning in 1989 with Michael Keaton in the title role, different actors and directors have introduced varying interpretations of the character. The Batmobile itself was introduced into the comic book series in 1941, with widely varying characteristics,⁹ as will be discussed later.

The original drivable Batmobile – one of two versions that now plays a starring role in *Towle* some fifty years after it was built – was the creation of George Barris.¹⁰ Barris, a California car customizer, hurried in late 1965 to turn a Lincoln Futura into a nineteen-foot-long vehicle by the start of the next year that would serve as “one of many over-the-top props from a deliberately over-the-top 1960s television show,” *Batman*.¹¹ The car grew iconic over the decades, with *The New York Times* observing several years ago that “[t]o those of a certain age,

⁶Stijn Joye & Tanneke Van De Walle, *Batman Returns, Again and Again: An Exploratory Enquiry into the Recent “Batman” Film Franchise, Artistic Imitation and Fan Appreciation*, 7 CATALAN J. COMM. & CULTURAL STUD. 37, 41 (2015).

⁷See generally Erica Pruetz, *Protecting Car Design Internationally: A Comparison of British and American Design Laws*, 24 LOY. L.A. INT’L & COMP. L. REV. 475 (2002) (providing an overview on the aspects of automobiles that may and may not be copyrighted).

⁸Roberta E. Pearson & William Uricchio, *Notes from the Batcave: Interview with Dennis O’Neil*, in *THE MANY LIVES OF BATMAN: CRITICAL APPROACHES TO A SUPERHERO AND HIS MEDIA* 19-21 (Roberta E. Pearson & William Uricchio eds., 1991).

⁹Petition for Writ of Certiorari, *Towle v. DC Comics*, 2016 U.S. S. Ct. Briefs LEXIS 464, **13 (2016).

¹⁰Barris also built cars for *The Munsters*, *Knight Rider*, *The Beverly Hillbillies* and other television shows. Nick Madigan, *Driving; On the Fast Track to Stardom*, N.Y. TIMES, May 9, 2003, at F1.

¹¹James Barron, *Nostalgia Powers a Superhero’s Car Into Gotham*, N.Y. TIMES, Oct. 5, 2015, at A20.

the Batmobile is one of the most recognized and revered cars to have appeared on the small screen.”¹² In 2013, Barris sold the original vehicle from the television series for \$4.2 million at an auction.¹³

But that sale, of course, dealt only with a physical vehicle, not any potential intellectual property underlying it. Such intellectual property, of course, can be valuable. Indeed, at the time Barris sold his original Batmobile, knock-off design replicas were fetching anywhere from \$50,000 to \$150,000.¹⁴

In *Towle*, the enormously influential “Hollywood Circuit”¹⁵ reasoned that Batman’s ride was “sufficiently delineated and [displayed] consistent widely identifiable traits”¹⁶ such that the car deserved copyright protection at the same level as James Bond,¹⁷ Rocky Balboa,¹⁸ and other fictional characters. As a result, the Ninth Circuit affirmed a lower court’s summary judgment holding that a maker of Batmobile replicas infringed on DC Comic’s rights. The *Towle* court laced its opinion with such Batmanisms as “Holy copyright law, Batman”¹⁹ and “To the Batmobile,”²⁰ but the jovial tone of the opinion masks a darker reality.

Although *Towle* (which was denied review by the Supreme Court of the United States²¹ March 7, 2016) is not the first recognition of a nonhuman entity as a copyrightable “work” in and of itself, the authors believe the case is one more step down a slippery slope that is quite dangerous to both copyright doctrine and free expression values. The “character copyright,” which one astute commentator has called a “catastrophe,”²² is part of the proliferation of what intellectual property scholar Justin Hughes has referred to as “microworks.”²³ As Hughes puts it,

¹²Rob Sass, *Batman, Your Car is for Sale*, N.Y. TIMES, Jan. 20, 2013, at AU5.

¹³See Michael Beschloss, *The Concept Car That Became a Star*, N.Y. TIMES, Oct. 12, 2014, at BU5; David Schwartz, *Holy High Bid, Batman! \$4.2 Million for 1960s Car*, WASH. POST, Jan. 21, 2013, at C4.

¹⁴See Adam W. Kepler, *Batmobile is Sold*, N.Y. TIMES, Jan. 21, 2013, at C2.

¹⁵The Ninth Circuit includes California, arguably the most important content-creation state in the country, which makes the court’s copyright jurisprudence particularly significant. The circuit’s judges have themselves invoked the moniker “Hollywood Circuit.” See, e.g., *Garcia v. Google*, 786 F.3d 733, 749 (2015) (Kozinski, J., dissenting).

¹⁶802 F.3d 1012, 1019 (9th Cir. 2015).

¹⁷*Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296-97 (C.D. Cal. 1995).

¹⁸*Anderson v. Stallone*, 11 U.S.P.Q. 2d 1161, 1166 (C.D. Cal. 1989).

¹⁹802 F.3d at 1015.

²⁰*Id.* at 1018.

²¹*Towle v. DC Comics*, 2016 U.S. LEXIS 1717 (Mar. 7, 2016).

²²Francis M. Nevins Jr., *Copyright + Character = Catastrophe*, 39 J. COPYRIGHT SOC’Y 303 (1992).

²³Justin Hughes, *Market Regulation and Innovation: Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 576 (2005). Although Professor Hughes does not address character copyright in great depth in his article, the authors of this article believe copyright in characters should fall under the “microworks” rubric since it takes

“[C]ommentators have expressed concern about intellectual property law becoming too ‘finely grained’ – with claims of independent property protection being draped over smaller and smaller pieces of creativity, innovation, and expression.”²⁴ The issue in copyright, Hughes notes, “is not copyright protection per se; the issue is independent protection for very small pieces of creative expression.”²⁵ Hughes’ article analyses such microworks as URLs, short textual and musical phrases, and brief bits of software. As addressed later, granular copyright protection for microworks, including protection for nonhuman characters, is a disturbing innovation that not only makes little sense, but also threatens fair use rights and shrinks the public domain.

This article first explores the development of copyright protection for literary characters, beginning with a Learned Hand *dictum* that acquired a life of its own in copyright doctrine. Next, the article analyzes *Towle*, noting the myriad ways in which this extension of character copyright is both conceptually flawed and dangerous to free expression values. The article then explores how this development may affect other aspects of copyright doctrine, including fair use, statutory damages, and the *de minimis* doctrine. The article concludes by calling for a halt to this dangerous trend in copyright doctrine.

THE GNARLED ROOTS OF COPYRIGHTING CHARACTERS

A fundamental precondition of the growth of copyright in characters is the simple fact that the federal statutory framework offers no definition of what exactly might constitute a copyrighted “work.” As copyright scholar Michael J. Madison has pointed out, the 1976 Copyright Act – the current federal statute²⁶ – offers few clues as to what is precisely a “work of authorship”:

Section 101, the definitional section, does not include of definition of the work. Looking further, in the context of the statute as a whole, it quickly becomes clear that the Copyright Act has not accomplished and cannot accomplish the goal that it appears to set for itself: to identify and apply a consistent and straightforward meaning (if not definition) of the work.²⁷

what is often a relatively tiny portion of a copyrighted literary or artistic work and endows it with independent status as a “work,” with all the attendant difficulties discussed in this article.

²⁴*Id.* at 575.

²⁵*Id.* at 576.

²⁶17 U.S.C. § 101 *et seq.* (2000).

²⁷Michael J. Madison, *The End of the Work as We Know It*, 19 J. INTELL. PROP. L. 325, 329 (2012).

In the same vein, famed copyright expert Paul Goldstein has pointed out that statutory copyright law “nowhere in fact delimits the metes and bounds of a copyrighted work, or even prescribes a methodology for locating a work’s boundaries.”²⁸ As one very highly regarded treatise on copyright notes, this elision may well be by design: “All that can be said by way of summary is that the concept ‘works of authorship’ is intentionally left vague under the Act.”²⁹

In this definitional void, microworks, including copyrighted faux cars, thrive, despite the fact that the Supreme Court never has expressly approved the notion of independent copyright protection for characters. It is critical, however, to distinguish copyright for pictorial or graphic characters, which have a clear and immediately perceptible instantiation in image-based artifacts such as comic books, from copyright for literary characters, whose existence is bounded by the written word. As one commentator noted: “Literary characters – those depicted by portraits drawn in words – have presented more difficulties and complications. They exist as abstract mental images, seen not by the eyes but with the mind. The author’s words convey different images to different minds.”³⁰ As will be discussed later, the *Towle* court, which granted character status to the Batmobile, was operating from a hybrid of pictorial and literary types.

The doctrine of copyrightable characters is quite murky. As Professor Rebecca Tushnet recently pointed out, “[T]he nature of copyright in characters has puzzled courts and commentators for so long.”³¹ The usual starting point for examining the growth of character copyright in literary works is the famous Learned Hand *dictum* in 1930 from *Nichols v. Universal Pictures Corp.*,³² in which the judge appeared to sanction the notion of a copyrighted literary character:

If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no

²⁸Paul Goldstein, Melville B. Nimmer Memorial Lecture: *What is a Copyrighted Work? Does it Matter?*, 58 UCLA L. REV. 1175, 1175 (2011). See also, Hughes, *supra* note 23, at 576 (writing that “American copyright law is an enormous legal structure, full of defined terms, all built on one completely undefined term: the ‘work’”).

²⁹MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.03 [A] (2015).

³⁰Leslie A. Kurtz, *Fictional Characters and Real People*, 51 U. LOUISVILLE L. REV. 435, 442 (2013).

³¹Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 750 (2012).

³²45 F.2d 119 (2d Cir. 1930).

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.³³

While this language, which had no direct bearing on the resolution of the case before Judge Hand, may seem to be advocating independent copyright status for literary characters as individual "works," a better reading of Hand's aside is that it actually addresses infringement of the entire play through overly extensive borrowing from the particularities of characters. As one thoughtful analysis put it: "Hand's comments, however, are properly read as an observation about the appropriate limits of a test for infringement of the literary work *Twelfth Night* – not a statement about the independent copyrightability of the characters in a play."³⁴

Judge Hand's dictum, poorly interpreted, thus became the genesis of an independent copyright in literary characters. Not only that, but as one commentator noted, some "scholars have taken this aside to be the alpha and omega of character copyright thinking."³⁵ From these confused beginnings, lower courts gradually began to devise tests that allegedly defined when exactly a character was eligible for copyright protection.

In the early going, at least one court set a nearly impossibly high bar for literary character protection. In *Warner Brothers Pictures, Inc. v. Columbia Broadcasting System*,³⁶ sometimes known as the "Sam Spade" case, the Ninth Circuit suggested that a character could achieve independent copyright protection only if "the character really *constitutes the story being told*."³⁷ However, "[I]f the character is only a chessman in the game of telling the story, he is not within the area of protection afforded by the copyright."³⁸ Sam Spade in *The Maltese Falcon*, the court concluded, was a mere chessman – or "vehicle" – for the telling of the tale.³⁹ Although *Warner Brothers* has never been formally overruled by

³³*Id.* at 121.

³⁴Brief of Amicus Curiae Public Citizen, Inc., at 6, *Salinger v. Coulting*, No. 09-2878-cv (2d Cir. 2009).

³⁵Nevins, *supra* note 22, at 307.

³⁶216 F. 2d 945 (9th Cir. 1954).

³⁷*Id.* at 950 (emphasis added).

³⁸*Id.*

³⁹*Id.*

the Ninth Circuit, it nonetheless has been distinguished in later cases and limited in its precedential force.⁴⁰

It appears that most courts considering the issue have drawn from Hand's language in *Nichols* to make the *distinctly delineated* test the standard of copyrightability.⁴¹ This is particularly true in decisions involving pictorial or visually depicted characters.

For example, in *Walt Disney Productions v. Air Pirates*,⁴² the Ninth Circuit held in 1978 that cartoon characters are more easily granted independent copyright status than purely literary characters. The court reasoned that "while many literary characters may embody little more than an unprotected idea, a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression."⁴³ The court used this doctrine to protect Disney characters Mickey Mouse and Donald Duck from parodists who portrayed them "as active members of a free thinking, promiscuous, drug ingesting counterculture."⁴⁴ The *Air Pirates* court was clear that it was not simply protecting the pictorial elements of the characters, but also their personalities and other traits.

There is, however, little precision or legal certainty when determining if a particular character is sufficiently delineated. One scholarly analysis of the problem pointed out that "what makes a fictional character worthy of protection seems to require Justice [Potter] Stewart's 'I know it when I see it' test."⁴⁵ Another scholar put it this way: "Courts have been vague or mistaken in their decisions to adopt certain thresholds for character protectability, and conclusory in their determinations that characters are – or are not – copyrightable."⁴⁶

At a minimum, a character must transcend "stock character" status to be copyrightable. As one commentator recently wrote:

This is in line with the principle that "scenes a faire," or stock scenes that are common in many works, are not subject to copyright protection. . . . In the same vein, "hackneyed character types," or stock characters that

⁴⁰See, e.g., *Olson v. NBC*, 855 F.2d 1446, 1451 (9th Cir. 1988) (expressing the view that the *Warner Bros.* standard was either *dicta* or an alternate holding). See also *Towle*, 802 F.3d 1012, 1019 n.5 (9th Cir. 2015) (same).

⁴¹See NIMMER, *supra* note 29, at § 2.12 (2015).

⁴²581 F.2d 751 (9th Cir. 1978).

⁴³*Id.* at 755.

⁴⁴*Id.* at 753 (citation omitted).

⁴⁵Gregory S. Schienke, *The Spawn of Learned Hand – A Reexamination of Copyright Protection and Fictional Characters: How Distinctly Delineated Must the Story be Told?*, 9 MARQ. INTELL. PROP. L. REV. 63, 80 (2005).

⁴⁶Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769, 772-73 (2013).

appear in many works, such as a bartender who is a good listener or a bumbling police officer, are likewise not protectable.⁴⁷

Elaborating on the concept of stock characters, Professor Clay Calvert notes that:

[I]n the context of storylines regarding the trials and tribulations of teaching in vocational schools, a federal court determined that stock characters include “idealistic teachers, cynical teachers, stupid students, intelligent students and unruly students.” These characters “are inherent in [use of] the school as a background and are not copyrightable.”⁴⁸

The bottom line is that whether the legal standard deployed is either “distinctly delineated” or “the story being told,” character copyright clearly creates serious problems. The “distinctly delineated” test seems to be the dominant approach, although it has a number of well-recognized flaws. As noted earlier, many opinions offer little guidance as to how the necessary degree of delineation is to be recognized, thus casting judges into the dubious role of literary critics.

THE NINTH CIRCUIT’S OPINION IN *TOWLE*: DRIVING THE BATMOBILE TO THE LAND OF COPYRIGHT

As noted previously, DC Comics sued Mark Towle after he manufactured and sold Batmobile replicas based on the 1996 television show *Batman* (a derivative work owned by ABC) and the 1989 film *Batman* (a derivative work owned by Batman Productions, Inc.).⁴⁹ Towle “owned Gotham Garage in Temecula, California, which made replicas based on the Batmobile’s appearances in the 1960s live action television show and its 1989 appearance in the *Batman* movie.”⁵⁰

⁴⁷Jenna Skoller, *Sherlock Holmes and Newt Scamander: Incorporating Protected Non-linear Character Delineation into Derivative Works*, 38 COLUM. J. L. & ARTS 577, 580 (2015) (citations omitted).

⁴⁸Clay Calvert, *Legal Lessons in On-Stage Character Development: Comedians, Characters, Cable Guy & Copyright Convolutions*, 4 BERKELEY J. ENT. & SPORTS L. 12, 18 (2015) (quoting *Burnett v. Lambino*, 204 F. Supp. 327, 331 (S.D.N.Y. 1962)).

⁴⁹*Towle*, 802 F.3d 1012, 1016 (9th Cir. 2015).

⁵⁰Oren J. Warshavsky, *Ninth Circuit: “Holy Copyright Law, Batman!” The Batmobile Is Copyrightable*, IT INTELLIGENCE, Sept. 28, 2015, <http://www.ipintelligencereport.com/2015/09/28/ninth-circuit-holy-copyright-law-batman-the-batmobile-is-copyrightable> (last visited Nov. 15, 2015).

Towle's replicas, which are pictured in Appendix A of the Ninth Circuit's opinion,⁵¹ unquestionably bear a strong resemblance to the originals. Towle, in fact, conceded that he intended to copy the television and movie Batmobiles.⁵²

The Ninth Circuit's opinion accepted as a given that characters are independently copyrightable, with an autonomous copyrightable existence from the works in which they were created. To achieve that status, the court wrote, characters must be "especially distinctive," which in turn means that they are "sufficiently delineated' and display 'consistent, widely identifiable traits.'"⁵³

The Ninth Circuit observed that it had previously found an automotive character to be potentially eligible for copyright protection in *Halicki Films v. Sanderson Sales & Marketing*.⁵⁴ In that case, the car "Eleanor" from the original and remake of the film *Gone in 60 Seconds*, despite being a different model of car in different films, nonetheless, had distinctive traits, the *Towle* court suggested, because it was difficult to steal.

Turning to the Batmobile, the Ninth Circuit panel concluded that prior character cases established a three-part test for "determining whether a character in a comic book, television program, or motion picture is entitled to copyright protection."⁵⁵ That test is:

First, the character must generally have "physical as well as conceptual qualities." Second, the character must be "sufficiently delineated" to be recognizable as the same character whenever it appears. Considering the character as it has appeared in different productions, it must display consistent, identifiable character traits and attributes, although the character need not have a consistent appearance. Third, the character must be "especially distinctive" and "contain some unique elements of expression." It cannot be a stock character such as a magician in standard magician garb. Even when a character lacks sentient attributes and does not speak (like a car), it can be a protectable character if it meets this standard.⁵⁶

One interesting issue that arises immediately from this formulation is precisely how the second prong – sufficient delineation – differs from the third prong's requirement of distinctiveness. Moreover, despite the more elaborated version, the test is clearly the direct descendant of

⁵¹802 F.3d at 1027-28.

⁵²*Id.* at 1017.

⁵³*Id.* at 1019.

⁵⁴547 F.3d 1213, 1225 (9th Cir. 2008).

⁵⁵*Towle*, 802 F.3d at 1021.

⁵⁶*Id.*

Judge Hand's dictum in *Nichols*. Most notable, perhaps, is the almost limitless discretion granted to judges based on their idiosyncratic, aesthetic evaluation of a particular character.

The *Towle* court next applied its test to the Batmobile. The court quickly determined that the first prong was satisfied – the Batmobile had appeared visually in comic books, television shows, and movies, and thus had both physical and conceptual qualities. Next, the Batmobile was “sufficiently delineated” to retain these qualities in various media because in all its incarnations the car was both a “highly interactive vehicle equipped with high-tech gadgets and weaponry.”⁵⁷

Furthermore, the Batmobile was “almost always bat-like in appearance, with a bat-themed front end, bat wings extending from the top or the back of the car, exaggerated fenders, a curved windshield, and bat emblems on the vehicle.”⁵⁸ The Batmobile also exhibited “consistent character traits and attributes,” including being a “crime-fighting” car with sleek and powerful characteristics.⁵⁹ The court quoted one overheated comic book description of the car as, “Like an impatient steed straining at the reins – shiver[ing] as its super-charged motor throbs with energy.”⁶⁰ Additionally, the court described the vehicle as possessing jet engines and extraordinary maneuverability, and being fitted with high-tech features such as a mobile crime lab, machine guns, and “spherical bombs.”⁶¹

The extent to which the consistent features across the various Batmobiles deal with ideas, rather than expression, is not something the court chose to explore. This failure to grapple with the shifting physical nature of the two Batmobiles at issue in *Towle* – one from the 1966 television show described earlier⁶² and the thoroughly modernized version from the 1989 Michael Keaton-starring movie, *Batman*⁶³ – is highly problematic, as this article explains later when it discusses the idea-expression dichotomy in copyright law.⁶⁴

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.* at 1022.

⁶²See *supra* notes 11-15 and accompanying text.

⁶³The Ninth Circuit noted that:

Towle denied that he had infringed upon DC's copyright. He claimed that the Batmobile as it appeared in the 1966 television show and 1989 motion picture was not subject to copyright protection. Alternatively, Towle argued that DC did not own the copyright in the Batmobile as it appeared in either production.

802 F.3d at 1017.

⁶⁴See *infra* notes 75-77 and accompanying text.

In fact, the Batmobile's appearance has been positively protean since the car's genesis. As pleadings in *Towle* clearly demonstrate, the Batmobile has been represented at various times in comic books as, among other things, a red convertible with no bat motif and no fins, a "1940's Packard style car" that was not a convertible featuring a bat face on the front hood, a "large tractor-looking vehicle" with tractor tires, and a "1960's Corvette style car" with "two severe looking bat fins at the car's rear."⁶⁵ Thus, it seems difficult to accept the Ninth Circuit's claim of particular distinctive features over the entire life of the Batmobile.

On the third and final prong, the Ninth Circuit found the Batmobile is especially distinctive and contains unique elements of expression for the following reason: "In addition to its status as Batman's loyal bat-themed sidekick complete with the character traits and physical characteristics described above, the Batmobile also has a unique and highly recognizable name. It is not merely a stock character."⁶⁶ Thus, since the Batmobile passed all three prongs of the test, it was, the *Towle* court declared, a copyrightable character.⁶⁷

There are clearly serious problems with this analysis. Initially, it is a highly subjective approach that is easily manipulable, depending upon the level of generality with which a court chooses to apply it. Many fictional superheroes and secret agents have special vehicles to which many of the court's statements about the traits of the Batmobile would apply equally well, including:

- The Green Hornet's Black Beauty;⁶⁸
- James Bond's Aston Martin;⁶⁹ and
- The Fantastic Four's Fantastigar.⁷⁰

The very notion of a superhero's vehicle tends to automatically elicit such traits. Indeed, how could such a vehicle *not* be high-powered and amazingly maneuverable, possess special high-tech weapons and the like? Professor Francis Nevins has cleverly referred to this problem (by analogy to the *scenes a faire* doctrine) as that of "*traites a faire*,

⁶⁵Petition for Writ of Certiorari, *Towle v. DC Comics*, 2016 U.S. S. Ct. Briefs LEXIS 464, *7-*10 (2016).

⁶⁶802 F.3d at 1022.

⁶⁷*Id* at 1023.

⁶⁸See Green Hornet: Black Beauty, http://greenhornet.wikia.com/wiki/Black_Beauty (last visited Mar. 15, 2006) (describing the Black Beauty and setting forth several images of it).

⁶⁹See 007 & Aston Martin, <https://www.astonmartin.com/en/heritage/james-bond> (last visited Mar. 15, 2006) (describing the Aston Martins driven by the James Bond character).

⁷⁰See Fantastigar, Wikipedia, <https://en.wikipedia.org/wiki/Fantastigar> (last visited Mar. 15, 2006) (describing this fictional vehicle).

i.e., aspects of a characterization necessitated by the concept of that character, and therefore likewise not the property of any particular author who employs them.”⁷¹ He further suggests that courts’ “decisions in this realm will be as predictable as a day at the racetrack and are certain to entangle them in aesthetic disputes which by and large they are ill equipped to rule on as a matter of law.”⁷²

Furthermore, the range of fictional *accoutrement* beyond cars that now may potentially constitute autonomous copyrightable works is staggering. Harry Potter’s wand, Thor’s mystical hammer, or even places such as Buffy the Vampire Slayer’s Sunnydale may now be independently copyrightable. The potential for vast multiplication of copyrightable entities is in some ways reminiscent of claims recently rejected by the Ninth Circuit that an individual actor’s performance in a film was not a separately copyrightable work in 2015’s *Garcia v. Google, Inc.*⁷³

In *Garcia*, the Ninth Circuit’s *en banc* decision turned away Cindy Lee Garcia’s claims that her performance in the film *Innocence of Muslims* – a highly controversial and blasphemous work that she was tricked into filming – gave her an independent copyright in her performance that would have allowed her to suppress the film online.⁷⁴ Garcia’s theory, the Ninth Circuit reasoned, would result in a “legal morass. . . splintering a movie into many different ‘works’. . . . Simply put, as Google claimed, it ‘makes Swiss Cheese of copyrights.’”⁷⁵ Although the proliferation of copyrighted cars and related fictional objects may not produce results as extreme as Garcia’s theory would have, it certainly sends the law down a similar road.

Additionally, the *Towle* court’s reasoning at times conflates unprotectable ideas with protectable expression in a disturbing way.⁷⁶ When the Ninth Circuit writes about the persistent characteristics of the Batmobile throughout its various incarnations – including high-tech gadgets, great maneuverability, machine guns, and bombs – it is hard to escape the conclusion that the court is invoking the *idea* of a superhero’s car rather than any particular expression of one. This, of course,

⁷¹Nevins, *supra* note 22, at 342.

⁷²*Id.*

⁷³786 F.3d 733 (9th Cir. 2015).

⁷⁴*Id.* at 744.

⁷⁵*Id.* at 742.

⁷⁶See Marc D. Ostrow, *Did the Joker Write the Ninth Circuit’s Batmobile Decision?*, LEXOLOGY, Oct. 2, 2015, <http://www.lexology.com/library/detail.aspx?g=af5fc80f-bbae-4a17-97a0-fd3971df07ea> (last visited Nov. 15, 2015) (arguing that what the Ninth Circuit in *Towle* was describing “sounds more like the ‘idea’ of the Batmobile rather than any particular expression of it. The Court’s justification for copyrightable status seems to fly in the face of idea/expression dichotomy, codified in Section 102(b) of the Copyright Act in that ideas can’t be copyrighted”).

runs afoul of the federal statute's non-protection of ideas.⁷⁷ The third prong is breezily assessed with a mere conclusory statement rather than any serious analysis. And the court's conclusion that the fact that the Batmobile character has a *name* is of great legal import for the third prong seems to let the cat (or bat?) out of the bag. The legal theory that seemingly should be operative here is not that of copyrighted microworks at all, but rather trademark or unfair competition law.⁷⁸

At the end of the legal day, however, the shape of the exact test a court applies is not the most disturbing feature of Judge Hand's progeny – instead, it is the very notion of character copyright itself, with inanimate characters being only the most extreme example of the species.

PERNICIOUS EFFECTS OF COPYRIGHTABLE CHARACTERS: ENCROACHING INTO THE PUBLIC DOMAIN AND FREE EXPRESSION

Microworks, including copyrightable characters, can throw off the balance of other copyright doctrines that act to protect free speech interests within copyright law. Fair use, statutory damages, and the *de minimis* doctrine⁷⁹ as applied to substantial similarity can all be skewed by the increasingly granular approach to what is recognized as a work, as the following analysis illustrates.

Fair Use

The proliferation of microworks, such as copyrightable characters – human and inanimate – creates unforeseen pressures on the fair use doctrine, one of the most important internal copyright proxies for free expression interests. Fair use, as the Supreme Court has pointed out, is one of copyright's key internal free speech safeguards that

⁷⁷17 U.S.C. § 102(b) (2015) (providing that “[i]n no case does copyright protection for an original work of authorship extend to any *idea*, procedure, process, system, method of operation, concept, principle, discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work”) (emphasis added).

⁷⁸See Mark S. Lee & Alison Spear Ullendorf, *Many Weapons in the Intellectual Property Law Arsenal Can be Used to Maintain Ownership Rights in Fictional Characters*, 20 L.A. LAW. 43, 45-46 (1997).

⁷⁹See Hughes, *supra* note 23, at 618-19 (writing that “microwork protection simply makes a hash of [the fair use and *de minimis*] defenses which, in different forms, consider whether enough was copied to constitute actionable copying.”)

obviates the need for direct First Amendment⁸⁰ intervention into copyright doctrine.⁸¹ Fair use allows certain unconsented uses of copyrighted expression so that authors do not have complete strangleholds on works and thereby prevent uses that contribute to the public good.⁸²

The fair use section of the Copyright Act limits the exclusive rights of copyright owners for purposes “such as criticism, comment, news reporting, teaching (including multiple copies for classroom use) scholarship, or research.”⁸³ It provides four factors courts can deploy to determine if a particular use is fair:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for the copyrighted work.⁸⁴

In addition to the four statutory factors, the Supreme Court created what might be termed a “super” factor in *Campbell v. Acuff-Rose Music, Inc.* in 1994.⁸⁵ *Campbell* articulated the “transformative use” doctrine (technically part of the first statutory factor, but in practice exceedingly influential in nearly all aspects of the fair use analysis) that has assumed a dominant position in fair use doctrine and results in the ensuing years.⁸⁶ Transformative use was defined in *Campbell* as when a putative fair user borrowed something from a copyrighted work and added “new expression, meaning or message.”⁸⁷ *Campbell’s* progeny in

⁸⁰The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law. . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁸¹*See Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *Harper & Row Publishers, Inc. v. Nation Enters.* 471 U.S. 539, 560 (1985).

⁸²For an excellent book-length treatment of fair use in all its permutations, see WILLIAM F. PATRY, *PATRY ON FAIR USE* (2014).

⁸³17 U.S.C. § 107 (2015).

⁸⁴*Id.*

⁸⁵510 U.S. 569 (1994).

⁸⁶*See, e.g.,* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 736 (2011) (writing that “fair use doctrine today is overwhelmingly dominated by the *Leval-Campbell* transformative use doctrine”). *See also* Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012).

⁸⁷510 U.S. at 579.

the federal courts of appeal has devised a number of competing conceptions of exactly when a transformative use has occurred.⁸⁸

How does the rise of character copyright affect the fair use determination? The most obvious point of tension is the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole. As the “copyrighted work” in question becomes more granular – not an entire book, for example, but one character in the book – the right to borrow under fair use shrinks in accordance with the conception of the work. What might have been a relatively modest borrowing from an entire work can suddenly become nearly “everything” when the “work” is redefined from the literary or graphic creation in its entirety to one character within it. Once Batman’s car is a work in and of itself, any putative fair use that touches on the Batmobile in any significant way almost certainly runs afoul of the third factor.

Microworks, by their very existence, distort the “amount and substantiality” inquiry almost beyond recognition – and, in so doing, reduce the scope of free expression under fair use. And, as Professor Paul Goldstein has pointed out, allowing the author to decide what precisely the “work” consists of is problematic: The fair use advantage just mentioned, as well as other advantages:

[C]reate an incentive for the copyright owner to skew the calibration of his work toward a size more granular than principle, law, or practice might reasonably condone. So long as it contains the required quantum of original expression, why should an author not identify a chapter of his novel – or a page, or even a paragraph, for that matter – as the relevant work?⁸⁹

Microworks also have the potential to distort the extremely important transformative use inquiry in fair use cases. Transformative use requires, as noted above, that the borrower add new expression, meaning or message to the borrowed work. In at least some fair use cases, transformation requires some sort of aesthetic reconfiguration of the borrowed work. In *Campbell*, the seminal transformative use case, defendant Luther Campbell of the group 2 Live Crew took a single lyric line and one musical phrase from the original song Roy Orbison song, “Oh,

⁸⁸See Matthew D. Bunker & Clay Calvert, *The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years After Campbell v. Acuff-Rose Music*, 12 DUKE L. & TECH. REV. 92 (2014) (surveying and critiquing the protean transformative doctrine).

⁸⁹Goldstein, *supra* note 28, at 1176.

Pretty Woman.” To this, Campbell added other parodic and transformative elements that the Court regarded as critiquing or commenting on the worldview of the original song.

Imagine, however, if the plaintiff had characterized that one borrowed lyric line as the “work” in question. Suddenly, transformative use is called into question because the borrowed portion is not *itself* altered or “transformed” in any way. The size of the “work” clearly matters under the transformativeness inquiry.

Similarly, if the work in question is the Batmobile standing alone rather than an entire comic book or movie, a court might evaluate transformativeness in a very different way. If the car itself was not subject to some aesthetic reconfiguration – rather than being imported into the new work relatively intact and surrounded by other transformative, expressive elements – a judge might very well decline to find the use transformative. A useful analogue to this problem can be found in right of publicity cases in which the transformative use analysis has been applied as a First Amendment proxy.

For example, in *Keller v. Electronic Arts, Inc.*,⁹⁰ decided in 2013, the Ninth Circuit was called upon to apply the transformative use inquiry to a video game that created digital avatars of college football players – the avatar and biographical data of a digital player closely resembled his real-world counterpart. The majority in *Keller* rejected EA’s transformative use claim because the plaintiff’s persona was not *itself* transformed. The majority chose to completely ignore other transformative elements in the entire video game, finding that the “use of Keller’s likeness does not contain significant transformative elements.”⁹¹ The *Keller* court made a conscious decision to look at the borrowed persona in isolation and demand that any transformation take place *there* rather than consider the highly transformative nature of the borrowing work as a whole into which the borrowed persona had been imported.

This is exactly the sort of reductive analysis that microworks, such as crime-fighting cars, may generate. While it is true that not all transformative uses require aesthetic alteration,⁹² actual transformation of some sort is still called for in many fair use decisions. And because transformative use plays such an important part in contemporary fair

⁹⁰724 F.3d 1278 (9th Cir. 2013).

⁹¹*Id.* at 1276. See also *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (providing a very similar analysis).

⁹²Some fair use cases label changes in the “purpose” of the new work as transformative, even when the borrowed work is used entirely unchanged. See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (images used for internet search purpose); *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18 (1st Cir. 2000) (modeling photos used for news purpose).

use determinations, this poses a real danger to the viability of successful borrowings in cases in which microworks are recognized. Professor Hughes has also noted that microworks may negatively affect the market harm factor in fair use analysis: “As smaller and smaller creations are recognized as the work, the logic of the system will tend to push courts to see new markets for these very small works, creating an adverse effect on the perceived ‘potential market’ under the fourth factor.”⁹³

Statutory Damages

Copyrightable characters and other microworks may also skew the calculation of statutory damages under the Copyright Act. Under section 504 (c) (1) of the act, plaintiffs may, instead of actual damages, choose to recover statutory damages that range from \$750 to \$30,000 for each infringement “with respect to any one work.”⁹⁴

As the recognized work becomes more granular, plaintiffs can strategize to increase their damage awards under this provision. As Professor Michael J. Madison pointed out, “American copyright law awards statutory damages on the basis of the number of works infringed, giving copyright owners a substantial incentive to multiply the number of works they identify in their creations.”⁹⁵ For example, courts have held that television episodes (rather than the series itself) are separate works for purposes of statutory damage computation, as long as the individual episodes had independent economic value, or “can live their own copyright life.”⁹⁶ Thus, to the extent a smaller work has viability, it is thereby entitled to statutory damages in its own right.

However, some courts have recognized limiting doctrines that may be helpful in this area. For example, in *Walt Disney Co. v. Powell*, the D.C. Circuit held that the owner of Mickey and Minnie Mouse was not entitled to damages for each of the images infringed, but only a single damage award for each character.⁹⁷ Moreover, the court reasoned that although some of the poses were from the iconic film *Steamboat Willie*, the infringement of the characters was the only element taken from the film. “Thus, [the] infringement on the characters completely overlaps any infringement of the movie,”⁹⁸ the court wrote. While this is

⁹³Hughes, *supra* note 23, at 619.

⁹⁴17 U.S.C. § 504 (c) (1) (2015).

⁹⁵Madison, *supra* note 27, at 327.

⁹⁶*Columbia Pictures TV v. Krypton Broad. Birmingham, Inc.*, 106 F.3d 284, 295 (9th Cir. 1997) (citation omitted). For a thoughtful analysis of this kind of doctrinal move, see Hughes, *supra* note 23, at 622-627.

⁹⁷897 F.2d 595 (D.C. Cir. 1990).

⁹⁸*Id.* at 570 n.10.

an encouraging analysis that avoided proliferating works in this case, it is not clear that all courts would follow a similar rule. Moreover, the quoted statement suggests that if the plaintiff could make a plausible argument that both the film and the characters within it were infringed, statutory damages on all elements would be available.

De Minimis Use

Copyrighted characters and other microworks also have implications for the copyright concept of *de minimis* use,⁹⁹ which operates in copyright doctrine to, among other things, protect small uses. The *de minimis* concept comes from the legal maxim *de minimis non curat lex* (“the law does not concern itself with trifles”).¹⁰⁰ The purpose of the *de minimis* doctrine is to place “outside the scope of legal relief the sorts of intangible injuries, normally small and invariably difficult to measure, that must be accepted as the price of living in society.”¹⁰¹

The *de minimis* doctrine functions in different modes in copyright doctrine, including situations in which “copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.”¹⁰² In this context, it becomes clear how protecting smaller bits of expression as independent works can thwart the doctrine. What is a trivial portion of a film, for example, may not be so trivial when the frame of reference is a particular character within that film. As more granular aspects of films, books, television shows, and other literary and artistic works achieve their own independent copyright life, the *de minimis* standard requires substantial recalibration to account for the shrunken size of the work at issue. This development can only have ill effects for free expression interests connected to copyright law. As attorney Marc Ostrow queries, “[I]f the Batmobile is now a copyrightable character, will Wonder Woman’s bracelets and Thor’s hammer be appearing as characters in cases at a courthouse near you?”¹⁰³

⁹⁹See Hughes, *supra* note 23, at 618.

¹⁰⁰Ringgold v. Black Entm’t Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997).

¹⁰¹Jeff Nemerofsky, *What is a “Trifle” Anyway?*, 37 GONZ. L. REV. 315, 323 (2001/2002) (citation omitted).

¹⁰²Ringgold v. Black Entm’t Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997). For a thoughtful survey of the *de minimis* doctrine across copyright law, see Julie D. Cromer, *Harry Potter and the Three-Second Crime: Are We Vanishing the De Minimis Defense from Copyright Law?*, 36 N.M. L. REV. 261 (2006).

¹⁰³Ostrow, *supra* note 76.

CONCLUSION

This article argued that recognizing independent copyrightability in inanimate objects is simply one more step toward an intellectual property future that creates numerous difficulties from a free expression perspective. From its dubious roots in Judge Learned Hand's *Nichols* opinion, character copyright continues a trend toward microworks that skew the copyright system.

Larry Zerner, the attorney for Mark Towle, bluntly summed up the problems with stretching this already contentious turf to the replica Batmobile's produced by his client: "Characters exist in comic books and movies and TV shows. They don't exist in the real world. In the real world, it's just a car."¹⁰⁴ A video of Zerner's complete oral argument before the Ninth Circuit, in fact, is available on YouTube.¹⁰⁵

Attorney Teri Nguyen, however, wrote in October 2015 that "[t]here seems to be no question, in the starry eyes of the Ninth Circuit panel, that the Batmobile and incarnations of the Batman's ride enjoys copyright protection."¹⁰⁶ But perhaps due to those same stars interfering with the appellate judges' vision, *Towle* represents a kind of *reductio ad absurdum* of the entire copyright-in-inanimate-character approach – although, in all probability, it is likely just the beginning rather than any sort of end point. Rather than recognize a work as a product of its artistic context (a book, a film script, a graphic novel), the law's view of the copyrightable work has shifted, as Professor Madison aptly puts it, "to a more abstract, universalized approach that foregrounds content alone."¹⁰⁷ This shift has ominous implications for those who value free expression and the public domain.

Although the more standard conception of the public domain is those works that have passed out of copyright through the course of time, another, more holistic, conception of the public domain includes those portions of works that, while still under copyright, are available for others to use. In the second conception, ideas, facts, portions of works that are usable fairly or considered *de minimis*, all fall into the public

¹⁰⁴*Holy Court Order! Batmobile Entitled to Copyright Protection, Judges Rule*, L.A. TIMES, Sept. 23, 2015, available at <http://www.latimes.com/local/lanow/la-me-ln-batmobile-copyright-20150923-story.html>.

¹⁰⁵No. 13-55484 DC Comics v. Towle, <https://www.youtube.com/watch?v=wZvhYGP8c0o> (last visited Nov. 15, 2015).

¹⁰⁶Teri H.P. Nguyen, *Holy Copyright Batman; the Batmobile Still Protected by Copyright Despite "Costume Changes"*, NAT'L L. REV., Oct. 30, 2015, available at <http://www.natlawreview.com/article/holy-copyright-batman-batmobile-still-protected-copyright-despite-costume-changes> (last visited Nov. 20, 2015).

¹⁰⁷Madison, *supra* note 27, at 353.

domain. Professor James Boyle of Duke University refers to the latter conception as one that focuses “not only on complete works but on the reserved spaces of freedom inside intellectual property.”¹⁰⁸ As the previous discussion suggests, it is these reserved spaces that are threatened by the continuing push toward smaller and smaller slivers of independently copyrighted expression. The sort of fragmentation these microworks necessarily entail is potentially exceedingly harmful to maintaining balance in the copyright system.

¹⁰⁸JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 38 (2008). *See also* Hughes, *supra* note 23, at 614 (writing that “sub-copyrightable bits and pieces of protected works are arguably as or more important to discourse and continued creativity than the unprotected works”).