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PERSPECTIVE

## Batmobile captures copyright protection

By Ashley R. Yeargan and Edward A. Klein

In *DC Comics v. Towel*, 2015 DJDAR 10757 (Sept. 23, 2015), the 9th U.S. Circuit Court of Appeals held that Batman's Batmobile was a distinctive character and was therefore entitled to protection under U.S. Copyright law. The Caped Crusader's ride now joins a short list of characters (such as Bond, James Bond) that have been held to be sufficiently distinctive to warrant copyright protection independent of the film, book or television show of which they were a part. The opinion further opens the door for other non-traditional "characters" to claim protection under copyright law.

Mark Towel built driveable cars based on the Batmobile featured in the 1966 "Batman" television series and the 1989 "Batman" film, which he sold for almost \$100,000. He also made and sold kits that enabled customers to transform their own cars into Batmobile replicas. Towel advertised his cars and kits as "batmobiles" and marketed them through his "batmobilereplicas.com" website. DC Comics, which published and owned the rights to the "Batman" comic books, sued him for copyright infringement, trademark infringement and unfair competition.

Towel admitted that he had copied the Batmobile from the film and earlier television series, and that his cars were "substantially similar" to the character in those works. He argued, however, that the Batmobile was not independently copyrightable and that he could avoid liability because the 1966 and 1989 Batmobiles differed from each other in their physical appearance. He also alleged that DC Comics lacked standing to sue for copyright infringement because it had not created either the television series or film from which he copied. The 9th Circuit crushed those arguments faster than the Batmobile flies through Gotham.

Few cases have addressed whether characters in entertainment works are protectable under copyright law independent of the work in which they appear. Most of those decisions have held that the character at issue was simply a general idea and thus not entitled to the creative monopoly granted by copyright protection. For example, in *Rice v. Fox Broadcasting*, the 9th Circuit had held that the magician was a "stock" character that was not sufficiently delineated to warrant copyright protection. On the other hand, a handful of district courts have granted protection to characters, such as James Bond, Godzilla and Batman, on the ground that they were expressed in sufficient detail and distinction to be independently copyrightable. See *Metro-Goldwyn-Mayer Inc. v. Am. Hon-*



The New York Times

The original Batmobile used in the 1966 television series at an auction in 2013.

*da Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995) (James Bond); *Toho Co. Ltd. v. William Morrow & Co. Inc.*, 33 F. Supp. 2d 1206 (C.D. Cal. 1998) (Godzilla); *Sapon v. DC Comics*, 2002 WL 485730 (S.D.N.Y. 2002) (Batman); see also *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (Mickey and Minnie Mouse). In addition, in 2008, the 9th Circuit found that the car used in the motion picture "Gone in 60 Seconds" was a copyrightable character. *Halicki Films LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213.

In *Towel*, the 9th Circuit articulated the following test to determine whether a particular character is protectable in copyright: (1) "the character must have 'physical as well as conceptual qualities'" (courts had previously ruled that literary characters were not sufficiently delineated to warrant copyright protection); (2) "the character must be 'sufficiently delineated' to be recognizable as the same character whenever it appears"; and (3) "the character must be 'especially distinctive' and 'contain certain unique elements of expression.'" The opinion makes it clear that "characters" are not limited to people — they can include animals, other beings, cars and other inanimate objects. The court emphasized that the critical factor is not, as one might imagine, how a character looks; instead, "consistent character traits and attributes" impact whether a character will be deemed sufficiently distinctive to warrant protection independent of the work in which it appears.

Applying this test, the 9th Circuit held that various distinct traits and attributes of the Batmobile remained constant over time, even though certain physical characteristics changed from the comic books, to the television series, to the film. For example, the Batmobile always has a "bat-like appearance, with a bat-themed front end, bat wings extending from the top or back of the car, exaggerated fenders, a curved windshield, and bat

emblems on the vehicle"; it consistently serves as a "crime fighting" car with sleek and powerful characteristics that allow Batman to maneuver quickly while he fights villains"; it "possesses 'jet engine[s]' and flame shooting tubes" that facilitate power and "an ability to maneuver that far exceeds that of an ordinary car"; and it "always contains the most up-to-date weaponry and technology." Thus, the court concluded that the Batmobile is protectable because it has physical traits, is sufficiently delineated to be recognized in works in which it appears (even if those physical traits are somewhat modified from work to work), and contains unique elements of expression.

In addition, the *Towel* opinion made it clear that DC Comics — the original creator of the Batmobile character — had standing to sue *Towel*, even though the infringement was based on derivative works created by DC's licensees: "if a third party copies a derivative work without authorization, it infringes the original copyright owner's copyright in the underlying work to the extent the unauthorized copy of the derivative work also copies the underlying work." Thus, because *Towel's* replicas contained elements of the Batmobile that originated with DC Comics' original works, DC Comics could sue him.

The *Towel* ruling should help creators of entertainment properties secure copyright protection in their characters. Over time, "characters" will be read more broadly. What started with James Bond has now evolved into an automobile with distinctive characteristics, and might one day be a building or another object that has distinctive traits and plays a part in the narrative of an entertainment property. With copyright protection, creators will be better able to create and monetize character-based derivative works and control potentially limitless merchandise opportunities (who would have thought that there was a viable market for \$100,000 Batmobiles?). Particularly on the heels of the ruling that Warner/Chappell music does not have a valid copyright interest in the song "Happy Birthday to You," the *Towel* decision is a nice birthday present to owners of entertainment properties.

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