

INDEPENDENT CHARACTER COPYRIGHTABILITY AND THE IMPLICATIONS OF *DC COMICS V. TOWLE*: FORMULATING A FRAMEWORK BASED ON THE REALITIES OF CHARACTER CONSTRUCTION

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I. INTRODUCTION

Characters have conventionally been regarded as merely component parts of larger copyrightable works,¹ but the courts have gradually been carving out a doctrine of law aimed at attributing independent copyrightability to characters that meet key requirements.² Throughout the trajectory of this doctrine's formation, though, courts have struggled to establish a consistent and cohesive framework for character copyrightability, with many courts proffering different perspectives and analyses for determining a character's copyrightable status. The Ninth Circuit most recently sought to reconcile these varying analyses in the test it articulated in *DC Comics v. Towle*.³ However, this test presents multiple challenges and implications that undermine its effective application, arising from how the development of this doctrine has prioritized recognizability through its emphasis on visual depictions, consistent characterization, and distinctiveness dependent on cultural and economic significance.

This Comment seeks to explore the limitations and failings of the *Towle* test for character copyrightability and, in doing so, highlight the considerations required to formulate a workable framework for a doctrine

1. *See* *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754 (9th Cir. 1978) (classifying the characters as component parts of a copyrighted work rather than being separate subjects that merit independent copyrightability).

2. *See infra* Part II.A.

3. *See infra* Part II.B.

that recognizes the realities of what a character is. Part II traces the development of independent character copyrightability, establishing the pivotal cases that gave rise to the prongs of the *Towle* test while also noting the alternative analytical framework that emerged alongside those cases. Part III dives into the practical issues of the *Towle* test, explaining how each prong's emphasis on recognizability either severely narrows the conception of copyrightable characters or is poised to internally conflict with the requirements of the analysis. Part IV presents a prescriptive approach for evaluating character copyrightability that deemphasizes recognizability and instead acknowledges the deeper construction of the character beyond a snapshot in time and appearance. Finally, Part V reinforces the importance of adopting a more apt framework for evaluating independent character copyrightability, particularly in the modern media landscape where the regular reinvention of characters requires copyright law to be better equipped for dealing with malleable and dynamic characterizations.

II. BACKGROUND

The doctrine of character copyrightability has evolved throughout the past century, with the courts trying to formulate an appropriate approach for how to conceive and establish protections for fictional characters.⁴ The *Towle* test brought together many of the analytical principles that emerged through separate cases in an effort to weave together a cohesive and comprehensive framework for evaluating character copyrightability.⁵ Therefore, in order to understand the underlying legal basis for the *Towle* test, the pivotal cases leading up to the test's formation must be contemplated and contextualized in the broader development of the independent character copyrightability doctrine.

A. Prior Development of Character Copyrightability

The beginnings of character copyrightability can be traced back to *Nichols v. Universal Pictures*, where the Second Circuit noted that it is possible for a character to be so closely imitated as to infringe upon the original work.⁶ At this point, the court did not yet recognize that characters could be independently copyrighted, so the imitation would merely infringe upon the work containing the original character.⁷ Nevertheless, this case did

4. Michael Deamer, *DC Comics v. Towle: Protecting Fictional Characters Through Stewardship*, 32 BERKELEY TECH. L.J. 437, 438-39 (2017).

5. *See id.*

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

7. Deamer, *supra* note 4, at 439.

establish a foundation for assessing copyright infringement based on similarities between qualifying characters.

The *Nichols* test was derived from this case and is used for determining when character depictions may trigger copyright infringement. The two requirements for the tests are: “(1) the infringed character must be sufficiently delineated; [and] (2) the infringing character must ‘closely imitate’ the infringed character.”⁸ According to the court, “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.”⁹ However, the court in *Nichols* did little to articulate what would make a character and its attributes detailed and prominent enough to make the copying of said character qualify as infringement, but this would become a question that later cases would seek to address.

The next major contribution in character copyrightability came from the Ninth Circuit in *Warner Bros. Pictures v. CBS*, otherwise widely known as the Sam Spade case. Author Dashiell Hammett had transferred to Warner Brothers the film, television, and radio rights for his book *The Maltese Falcon*, but then he proceeded to use the book’s character, Sam Spade, in sequels that had their radio rights transferred to CBS.¹⁰ Warner Brothers contended that CBS’s use of the character Sam Spade violated its copyright because the radio rights to *The Maltese Falcon* and its creative contents were transferred to the studio.¹¹ The court, resisting the notion of character copyrightability, held that the transfer of the rights in a work containing Sam Spade did not bar Hammett from transferring the rights to other works with the same character, since possessing rights to the work did not extend to having exclusive rights in the character.¹² In the court’s view, Sam Spade was little more than a “chessman in the game of telling the story,” a component part in the broader copyrighted work that did not merit individual copyrightability.¹³

The court noted, however, that there may be occasions in which the character constitutes the story being told.¹⁴ During such instances, the copying of the character could itself incur copyright infringement upon the broader work itself.¹⁵ Though the court framed this exception as being an

8. Michael V.P. Marks, *The Legal Rights of Fictional Characters*, 25 COPYRIGHT L. SYMP. 35, 41 (1975).

9. *Nichols*, 45 F.2d at 121.

10. *Warner Bros. Pictures v. CBS*, 216 F.2d 945, 948 (9th Cir. 1954).

11. *Id.* at 948-49.

12. *Id.* at 950.

13. *Id.*

14. *Id.*

15. *See id.*

infringement of the work rather than the character, this opinion implicitly acknowledged that the copyrightable essence of a story could be so deeply interwoven into the composition of a character that copying the character would intrinsically infringe the copyright of the work. This established that the character traits could be expanded and expressed through various aspects of a work such as its narrative, and subsequent cases would likewise explore how abstract attributes could manifest in forms meriting protectability.

In *Walt Disney Productions v. Air Pirates*, the Ninth Circuit discussed the way in which character traits could manifest through the physical and conceptual qualities of a character, such that these characters would merit protectability as component parts of the broader copyrighted work.¹⁶ The court remarked on the distinction between literary characters and comic book characters, stating that the former was more difficult to distinctively delineate, often embodying little more than an unprotected idea.¹⁷ Conversely, comic book characters, or rather visually represented characters in general, possessed physical and conceptual qualities that are more likely to contain unique elements of expression.¹⁸ In this same opinion, the court noted how a “character’s image is intertwined with its personality and other traits, so that the ‘total concept and feel’” go beyond the mere image itself.¹⁹ Though this case regarded visually depicted characters as protectable component parts of a broader copyrighted work, the Ninth Circuit later went on to broaden this ruling to attribute copyrightability to the visually depicted character itself.

Olson v. NBC played a crucial role in establishing character copyrightability because it both embraced and employed an analysis focused on determining whether characters were especially distinctive enough to qualify for copyright protection.²⁰ This case revolved around whether characters from *The A-Team* infringed upon the characters contained in the treatment and screenplay for the *Cargo* television series.²¹ Though the Ninth Circuit found that the *Cargo* characters did not meet the standard to merit copyright protections when taken alone, the fact that the court entertained this analysis, coupled with the court’s interpretation of prior cases, signified the court’s acknowledgment of independent copyrightability for characters.²²

16. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754-55 (9th Cir. 1978).

17. *Id.* at 755.

18. *Id.*

19. *Id.* at 757 (quoting *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970)).

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

21. *Id.* at 1447-48.

22. *See id.* at 1451-53.

When addressing characters reinterpreted across multiple works, the court in *MGM v. American Honda* introduced a framework that assessed the character's qualities that persisted across various iterations.²³ This case concerned whether the filmic depiction of James Bond merited character copyrightability, despite the role being played by different actors with different interpretations of the character.²⁴ The defendants argued that James Bond had changed enormously across its numerous filmic depictions and thus lacked sustained delineation for independent copyrightability.²⁵ The court, however, held James Bond to be worthy of copyright protections, reasoning that:

James Bond has certain character traits that have been developed over time through the sixteen films in which he appears. Contrary to Defendants' assertions, because many actors can play Bond is a testament to the fact that Bond is a unique character whose specific qualities remain constant despite the change in actors.²⁶

In this opinion, the Ninth Circuit prioritized the traits that persist across each interpretation.²⁷ Therefore, when it comes to assessing what constitutes a copyrightable character, the scope of protection extends no further beyond the traits that have remained so intrinsic to the recognizable character that they appear in every interpretation. This emphasis on consistent traits would later become the most pivotal principle in shaping the modern test of character copyrightability.

B. DC Comics v. Towle and the Formation of the Three-Part Test

After decades of court opinions carving out the amorphous apparatus for analyzing character copyrightability, the Ninth Circuit used *DC Comics v. Towle* to articulate a definitive test that synthesized many of the prior decisions to form a unified doctrine.²⁸ The first prong requires the character to possess "physical as well as conceptual qualities," emphasizing the visual qualities of the characters as seen in *Air Pirates*.²⁹ The second prong requires the character to be "sufficiently delineated" as to be recognizable whenever

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

24. *Id.* at 1296.

25. *Id.*

26. *Id.*

27. *See id.*

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

29. *Id.* at 1019, 1021.

it appears, displaying consistent, identifiable character traits and attributes.³⁰ Here, the distinctive delineation language can be traced back to *Nichols*, whereas the focus on consistent traits can be observed in the *Bond* case. The third and final prong requires the character to be “especially distinctive” and “contain some unique elements of expression,” which was the standard discussed in *Olson*.³¹ In this way, this decision sought to reconcile the previous tests so that this comprehensive framework could be applied to the broadest spectrum of creative elements that qualified as characters.

Towle also controversially expanded the legal conception of characters, since the Ninth Circuit applied this test to the Batmobile and deemed that this inanimate narrative element qualified as a copyrightable character.³² As the court explained, though the Batmobile has taken many different forms across different works, it had physical qualities and was sufficiently delineated with consistent traits, serving as Batman’s crime-fighting vehicle and possessing the conceptual significance and identifiability required to make it especially distinctive as to merit character copyrightability.³³ The Ninth Circuit has faced some criticism for broadening character copyrightability to include narrative elements that are not conventionally classified as characters.³⁴ However, in applying this new test to the Batmobile, the Ninth Circuit made it clear that it believed copyrightable characters went beyond mere persons and instead consisted of more expansive qualities and formulations. Therefore, any system for assessing independently copyrightable characters must take into account what truly constitutes a character. Rather than questioning if *Towle* had gone too far, it might be more appropriate to ask if the case had gone far enough in articulating an inclusive and internally consistent framework for identifying character copyrightability.

III. THE ISSUES OF THE *TOWLE* TEST

The limitations of the *Towle* test largely arise from the prominence placed on recognizability. The distinctiveness requirement in the third prong is more evocative of a trademark analysis predicated on recognizability rather than a copyright analysis based on original fixed expression of minimal

30. *Id.* at 1021.

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

32. *Towle*, 802 F.3d at 1021-22.

33. *Id.*

34. See Missy G. Brenner, Comment, *Shadow of the Bat[Mobile]: Character Copyright After DC Comics v. Towle*, 57 SANTA CLARA L. REV. 481, 506-07 (2017); see 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. L. & POL’Y 281, 283-84 (2016).

creativity.³⁵ This focus on recognizability also materializes in the second prong, with its requirement for consistent depictions so as to make the character recognizable across each work.³⁶ Even the first prong's insistence on physical qualities echoes *Air Pirates* and its discussion of how a character's recognizable image conjures up the impression of the character.³⁷ This importation of trademark principles into this realm of law, though, severely confines and confuses what qualifies as a copyrightable character.

A. Misplaced Emphasis on Physical Traits

The first prong of the *Towle* test establishes a requirement for physical and conceptual qualities to address the distinction between graphic and literary characters discussed in *Air Pirates*, but the Ninth Circuit went beyond the principles articulated in *Air Pirates* by expanding the importance of physical qualities for establishing character copyrightability. The court in *Air Pirates* does note how the visual component of graphic characters distinguishes them from literary characters when it comes to their ease of qualifying for character copyrightability, but the phrasing of the opinion does not fully foreclose the possibility of literary characters meeting those qualifications.³⁸ Rather, *Air Pirates* merely notes that it is more difficult to distinctively delineate a literary character, claiming that many embody little more than an unprotected idea.³⁹ Implicit in this non-limiting language, though, is that some literary characters can qualify for copyrightability if sufficiently delineated even if meeting such a standard is more challenging. The *Towle* test, however, ignores this language and instead invokes *Air Pirates* to assert a rigid requirement for both physical and conceptual qualities.⁴⁰

In requiring both physical and conceptual qualities, the test fails to acknowledge how a character could become sufficiently delineated through conceptual qualities alone, even in the absence of physical traits. In its discussion of graphic characters, *Air Pirates* notes that a character's image can be so intertwined with its personality and other traits as to express the concept and feel of that character.⁴¹ If a character's image, however, is only pertinent because of its ability to convey conceptual qualities, then it stands

35. Brenner, *supra* note 34, at 509.

36. *Id.*

37. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757-58 (9th Cir. 1978).

38. *See id.* at 755.

39. *Id.*

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

41. 581 F.2d at 757.

to reason that a fully formed and copyrightable character could be conceived and descriptively fixed without the need to identify the physical traits that are but one avenue for expressing conceptual qualities.

In *Towle*, the way that the Ninth Circuit addresses the physical and conceptual traits of the Batmobile illustrates why both requirements would not need to be met to ascribe independent character copyrightability. First, in applying the first prong, the analysis begins and ends with the court noting that the depiction of the car in visual mediums is enough to establish its possession of physical and conceptual qualities.⁴² Later in the opinion, though, the Ninth Circuit recognizes that the Batmobile has been physically depicted in many different ways and even its common traits can only be attributed to most Batmobiles rather than all iterations.⁴³ The court acknowledges that a persistent visual appearance need not be maintained across each depiction so long as other distinctive traits are kept consistent.⁴⁴ The Ninth Circuit finds more success in identifying the conceptual aspects of the Batmobile consistently found in each version, describing the iconic car as Batman's high-tech and highly maneuverable crime-fighting vehicle.⁴⁵ It is conceivable, though, that a creative work could convey these qualities without resorting to visual depictions or descriptions, so if these attributes are enough to portray a consistent character across widely different designs, then the prong's demand for physical traits would appear unnecessary.

B. Character Consistency and its Erosive Effect on Sufficient Delineation

The second prong requiring consistent character traits across each depiction further complicates character copyrightability by limiting the scope of what merits copyrightability to only characteristics portrayed invariably across each portrayal of the character. This suggests that copyright protection only extends to the component parts maintained in each appearance of the character. Therefore, if an iteration of a character deviates from the original characterization by omitting or changing certain traits, then this departure risks shrinking the scope of copyrightable protection and eroding what constitutes the intrinsic qualities of the character. Though this prong requires sufficient delineation, it is possible that loosely reinterpreting one's own character could diminish consistent traits enough that the characteristics that remain might no longer meet the delineation threshold.

42. *Towle*, 802 F.3d at 1021.

43. *Id.*

44. *See id.* at 1022.

45. *Id.* at 1021-22.

This framework means that the creator of a character may jeopardize copyright protectability each time an iteration makes a key change to the character. This could be observed in *Daniels v. Walt Disney Company* (hereinafter referred to as the “Moodsters case”), which used the *Towle* test to assess whether copyright protection applied to the Moodsters, a set of characters based on human emotions reminiscent of the characters from Pixar’s *Inside Out* (2014).⁴⁶ The Ninth Circuit refused to even conduct a copyright infringement analysis because the Moodsters failed the second prong due to the characters evolving so much across the various mediums that depicted them, including a cartoon pilot, illustrated storybook, and toy line.⁴⁷ Most egregiously, the Ninth Circuit even used the pitchbook for the Moodsters against their character copyrightability qualifications,⁴⁸ despite such materials being a common component in the creative development process in which the characters in a pitchbook may differ greatly from the characters depicted in finalized commercial content.

The application of this prong makes it apparent that the test places too high a burden on creators to get their characters right the first time and strictly conform to that depiction thereafter, because each instance of deviation could be used to narrow copyrightability to negate protections altogether. Even if the emotion-based characters in the Pixar film were exact copies of the Moodsters, the *Towle* test may yet prevent the creators of the Moodsters from enforcing character copyrightability against Disney had the Moodsters’ creators dared to drastically reinterpret their characters at any juncture in an effort to develop them further. This is because such changes may undermine the characterization consistency and thus foreclose independent protectability for the characters.

The second prong is also paired with a sufficient delineation requirement regarding the consistent use of widely identifiable traits, but a character’s delineation could become gradually diluted each time a depiction omits previously consistent traits. If a character’s copyrightability protection only extends to the traits that are consistent, then enough depictions that deviate from core traits will consequently reduce the consistent conception of the character to mere amorphous abstractions vague enough to encompass each iteration of the character. As the list of consistent traits shrinks over the course of variable reinterpretations, creators could see their once copyrighted character fall beneath the sufficient delineation threshold, thus forfeiting the character’s copyrightable status. The existence of this internal conflict within this prong impedes the test’s ability to function in a practical manner,

46. *Daniels v. Walt Disney Co.*, 958 F.3d 767, 769 (9th Cir. 2020).

47. *Id.* at 772-73.

48. *Id.*

particularly in the current creative climate featuring plentiful reimaginings of classic characters that would jeopardize the scope of protection due to deviating from original portrayals of the character.

Another critical issue with the *Towle* test is that it seeks multiple consistent depictions of a character before even entertaining independent character copyrightability. This too was demonstrated in the *Moodsters* case, where the court, in an effort to identify a collection of works with the requisite repeated uses of the characters, looked at the *Moodsters* across vastly different mediums, going so far as to include the pitchbook.⁴⁹ Even if a sufficiently delineated and especially distinctive character with defined physical and conceptual attributes is fixed through a singular creative work, the consistent depiction prong requires subsequent works to establish the character's independent copyrightability. This requirement for multiple fixed depictions stands contrary to the principles of copyright; instead, it borrows from trademark by emphasizing repeated and recognizable use rather than basing copyrightability upon a single fixation.

The focus on consistent characterization also ignores how change itself is broadly built into the construction of characters, with many being subjected to changes both outside and within a text. Characters are often reinterpreted, tailored to suit the needs of the period, audience, medium, or creative goals of a given work. More importantly, though, characters undergo personal changes throughout many works, with character arcs being a common component in storytelling. Screenwriting conventions even encourage drastic transformative shifts to occur during a protagonist's journey. It is these types of dynamic characters that tend to be the most delineated, whereas static side characters receive less development. Therefore, requiring character consistency is at complete odds with how sufficiently delineated characters often function in narrative works.

C. Distinctiveness Importing a Requirement for Cultural and Economic Significance

The third prong requires that the character be especially distinctive and contain some unique elements of expression, but this again materializes by prioritizing recognizability from audiences, which is inconsistent with copyright principles. Some parts of the *Towle* test import principles from a trademark analysis, but this perhaps is most apparent in the third prong that invokes that body of law through the demand for distinctiveness.⁵⁰ This prong has been viewed as requiring the character to attain some level of

49. *Id.*

50. Brenner, *supra* note 34, at 509.

cultural and economic significance so as to become distinctive enough to be identifiable by audiences.⁵¹ This requirement again places another obstacle between the character's fixation and copyrightable status. Under this prong, character copyrightability will only be granted after a long enough duration of repeated use for the character to become culturally prominent and recognizable.

This prong blurs the lines between copyright and trademark by requiring this level of distinctiveness and identifiability. Under a conventional copyright framework though, mere fixation of unique elements of expression would be enough to satisfy copyright requirements so long as the character met the minimal standard of originality and creativity. To import trademark principles muddles the character copyrightability analysis and renders the prong unworkable for practical application.

IV. PRESCRIPTIVE APPROACH FOR ASSESSING CHARACTER COPYRIGHTABILITY

Due to the deficiencies of the *Towle* test, the courts would benefit from embracing a framework that deemphasizes recognizability and consistency in favor of examining the comprehensive construction of each individual character depiction. Though the courts have long grappled with trying to articulate a standard for character copyrightability, the sufficient delineation threshold that courts have derived from *Nichols*, the earliest of the character copyrightability cases, still provides the best benchmark, albeit inceptively nebulous in measurement. The Ninth Circuit sought to flesh out additional guidelines in conducting a character copyrightability analysis that would complement the goals of the sufficient delineation requirement, even referring to that standard in one of the prongs. However, as noted, the additional constraints inserted into the *Towle* test narrowed the analysis too much and were at risk of clashing with the sufficient delineation requirement. Rather than countering the ambiguity of sufficient delineation standard by implementing a rigid multi-prong test, the courts would be better served by recognizing the various avenues in which that sufficient delineation can be achieved in a manner consistent with principles of copyright, past cases, and prior development of the doctrine.

A. Physical and Conceptual Qualities Required Alternatively

A character copyrightability framework should acknowledge that sufficient delineation can be achieved through either physical qualities or

51. Deamer, *supra* note 4, at 452.

conceptual qualities. As the court in *Air Pirates* explained, visual depictions offer avenues for establishing a character because physical traits convey personality and conceptual attributes.⁵² Therefore, it stands to reason that a character could be sufficiently delineated without relying on physical traits to convey conceptual qualities. If a character was established only through the fixation of a single visual representation, like a static image, then it would only merit character copyrightability if its physical traits conveyed enough conceptual attributes to cement sufficient delineation. In the absence or deficiency of conceptual qualities, a character, even if fixed in visual form, would not merit protection as a character and could only hope to achieve copyrightability as a creative work specifically for whatever medium to which it has been affixed.

Additionally, any prescriptive approach for evaluating physical and conceptual qualities should alternatively recognize the different ways to establish physical traits without needing to resort to visual representation. Though the *Towle* test specifies a requirement for physical qualities, application of this prong by the Ninth Circuit only examines whether those physical qualities have been established through a visual depiction, thus maintaining a distinction between graphic and literary characters.⁵³ However, the physical traits of a character can also be conveyed descriptively through literary mediums, despite the courts having not yet acknowledged this fact. The Ninth Circuit has resisted relying on descriptions of literary characters for establishing physical traits because it generally regards literary characters as mere unprotected ideas formed within the minds of readers rather than comprising unique elements of protection.⁵⁴ However, the Ninth Circuit's view again overlooks that the value of physical traits is predicated on conveying the conceptual attributes. The fact that a literary work partly relies on the reader's imagination to visually conceptualize the character should not discount physical descriptions from a copyrightable analysis, nor should it disqualify literary characters from meeting the sufficient delineation threshold.

B. Regarding Character as the Embodiment of the Work

The court in *Towle* embraced a conception of character that was too restrictive, in part because it failed to recognize how the broader work itself is often built into a character's very construction. In emphasizing characterization consistency, the Ninth Circuit overlooked how the most

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

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

54. *See Air Pirates*, 581 F.2d at 755.

delineated characters tend to be those that evolve throughout a single work or across multiple depictions. This is because many characters have a story interwoven into their existence so as to make that character and their context within the work inseparable. In *Towle*, the Ninth Circuit unwittingly stumbles upon this reality when it strives to identify the Batmobile by describing its narrative role as a crime-fighting vehicle and its relationship to other characters such as the vehicle belonging to Batman himself.⁵⁵ This analysis implicitly reinforces a crucial truth, in that characters, as part of their very design, often serve as an intersection of narrative, relationships, themes, and other defining aspects of the creative works that feature them.

This intrinsic intersection of character and narrative has also been partly recognized by the courts through the embrace of the Sam Spade test. Though the Ninth Circuit articulated the *Towle* test with the intent of combining and reconciling different analytical frameworks for determining character copyrightability, the Sam Spade test persisted as an alternative approach for attributing character copyrightability when the character constitutes the story being told by the work itself, rendering both story and character so inseparable that to copyright the story functionally copyrights the character.⁵⁶ Here, the courts recognize that a story can simply be its character, where describing the character essentially describes the entirety of the story. However, the reverse can be true as well, where, even if a story is not just its character, a character can nonetheless be its story, in which describing the character's story captures the entire essence of the character. As a result, a character should not be viewed merely in terms of its appearance and personality but also in contemplation of its broader role and journey that forms its identity.

The *Towle* test, in focusing on character consistency, falls into a perspective that views character as a fixed static thing, defined in a snapshot in time for each work that contains it, but this again ignores the dynamic transformations that characters undergo. In the same way that a film is not a just single still frame nor a book consisting of a solitary page, so too is a character not just a person at a singular juncture of the creative work. Rather, a character is also its arc and the continuum of its depictions throughout its journey in a given work. An analysis of character copyrightability that prioritizes character consistency and precludes dynamic developments from consideration ultimately has an incomplete conception of character. Therefore, when it comes to evaluating a character's delineation, the analytical approach should borrow from the Sam Spade test in recognizing

55. See *Towle*, 802 F.3d at 1021-22.

56. See *Warner Bros. Pictures v. CBS*, 216 F.2d 945, 950 (9th Cir. 1954).

that the character's defining features can be closely intertwined with the narrative elements of the work that it inhabits.

C. Embracing an Individual Iteration Analysis

Another way to improve upon the character copyrightability framework is to examine each interpretation of a character individually in the respective work, rather than regarding character as a unified immutable thing that must be consistently maintained across all portrayals. This analytical approach would insulate each depiction of a character so that deviating subsequent uses would not risk eroding copyright protections for the original portrayal. This would bring the character copyrightability doctrine closer in line with how copyright law is applied to works. A film studio does not risk shrinking the scope of a film's copyright protection just because it creates a remake that substantially changes the story, so neither should reinterpretations of characters jeopardize its independent copyrightability. Rather, each depiction of a character should be separately evaluated within the context of the work where it appears.

This shift would also be consistent with the notion of viewing a character as an embodiment of a work because it subjects the characters to the types of analyses typically afforded to the works that they exist within. Rather than subjecting characters to a pseudo-trademark analysis predicated on recognizability maintained through consistent representation, each depiction is assessed on its own terms as an independent work. This allows basic copyright principles to more directly shape the doctrine that governs characters, thus avoiding the peculiar implications that emerge when trademark analyses seep into copyright evaluations.

Under this proposed approach, a character that becomes sufficiently delineated gains independent copyrightable status much like an original work. Future iterations are subjected to the same legal framework that governs derivative works, with each new version gaining copyright protection for its configuration of incremental additions to the creative property so long as the threshold of originality is sufficiently satisfied. The Second Circuit, which originally conceived copyright protections for characters based on the sufficient delineation standard, abides by this fundamental principle of copyright law, in which copyright protection is afforded "only for original works of authorship and, consequently, copyrights in derivative works secure protection only for the incremental additions of originality contributed by the authors of the derivative works."⁵⁷ The Second Circuit even states that "[t]his principle is fully applicable to

57. *Silverman v. CBS*, 870 F.2d 40, 49 (2d Cir. 1989).

works that provide further delineation of characters already sufficiently delineated to warrant copyright protection.”⁵⁸ The Second Circuit’s approach differs from the Ninth Circuit because the latter court regards a character as a singular unified concept that all iterations collectively shape, whereas the Second Circuit looks at each character representation individually to determine whether a given portrayal merits protectability insofar that a derivative depiction contributes incremental innovations upon a sufficiently delineated character. Adopting the Second Circuit’s approach for this aspect of the prescriptive doctrine, therefore, enables each character depiction to be examined much like an independent work, with sufficient delineation being determined on an individual basis upon fixation.

This framework would also forgo the requirement for the character to exist across multiple depictions before qualifying for independent copyrightability. Rather, so long as the sufficient delineation standard has been met, the character as an independent creative work would gain copyright protections from the moment of fixation. This bypasses the requirement for cultural or economic significance while also eliminating the conflicting issues present in evaluating a character’s consistent traits across multiple works. This prescriptive approach would also allow creators to feel more secure in their copyright protections for their characters, cementing the scope upon fixation, rather than protection being withheld until the cultural or economic significance was attained through repeated consistent use. Furthermore, creators would not need to feel concerned about later inconsistent depictions shrinking the scope of protectable traits until the dilution of the delineation destroys the copyright altogether.

V. CONCLUSION

The *Towle* test is simply not equipped for meeting the needs of the modern media landscape, due to its narrow conception of copyrightable characters. Though the Ninth Circuit used the test to broaden the classification of character to include non-person narrative elements such as the Batmobile, the test nonetheless limits its applicability by imposing requirements for physical traits and consistent characterization that excludes a bevy of characters that may otherwise meet the sufficient delineation standard. In the current mediamaking paradigm, where reimaginings and derivative works predicated on reinterpreting familiar characters are on the rise, the character copyrightability realm of law requires a test that will assess the merits of each iteration rather than jeopardize protectability merely because creators sought to explore new avenues with their intellectual

58. *Id.* at 50.

property. To impose such a test would stifle creative works in fear that deviating depictions or further refinement of the characters could erode the scope of copyrightability.

The test that the Ninth Circuit crafted for assessing character copyrightability proves to be insufficient because its preoccupation with recognizability prevents it from recognizing the deeper and dynamic aspects that make up a character. Fictional characters are more than their physical appearances, immutable traits, snapshotted depictions, or the consistent qualities spanning across every iteration. Therefore, any legal framework for assessing their copyrightability must go beyond this narrow conception to embrace a nuanced and comprehensive understanding of what constitutes a character.