

CHARACTER COPYRIGHTABILITY IN CHAOS: HOW UNCLEAR CHARACTER COPYRIGHTABILITY TESTS LEAD TO IMPROPER RESULTS

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*Copyright law for fictional characters has been inconsistent since the first character copyright case in 1930. The lack of explicit statutory protection for fictional characters has led circuit courts to develop varying tests to determine character copyrightability. Several of these tests stray from the well-established constitutional principle that copyright protection is available for any work that exhibits a minimal level of originality and creativity. This Comment analyzes three different character copyright tests: (1) the “distinctly delineated” test, (2) the Towle test, and (3) the “stock character” test and argues that the “stock character” test is the appropriate test for courts to apply when evaluating character copyrightability. In light of this conclusion, this Comment further analyzes the recent Ninth Circuit case *Daniels v. Walt Disney* and concludes that *Daniels’s* characters, the *Moodsters*, are copyrightable under the appropriate “stock character” test.*

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INTRODUCTION

Walt Disney Studios developed the first organized system of character merchandising in the 1930s when it began selling small mass-market products, such as t-shirts and toys featuring images of its famous Mickey and Minnie Mouse characters.¹ The emergence of character merchandising altered the entertainment industry as characters at the center of large franchises, rather than specific actors or actresses, became the main attraction for movie and television audiences.² With this shift in the entertainment industry, the value of characters and

1. *Character Merchandising*, WORLD INTELL. PROP. ORG. 1, 6 (1994), https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/wo_inf_108.pdf [<https://perma.cc/EP6Q-QWPY>].

2. See Marc Bernardin, *Marvel, ‘Star Wars,’ ‘Harry Potter’ and More: Why the Movie Star No Longer Shines as Bright as the Franchise*, L.A. TIMES (June 17, 2016, 4:15 AM), <https://www.latimes.com/entertainment/movies/la-ca-mn-why-movie-stars-dont-matter-25-franchises-20160616-snap-story.html> [<https://perma.cc/2VQE-QV9R>] (“Hollywood has shifted from a star-based economy to a character-based economy.”); Gail Evans, *Character Merchandising*, in THE NEW OXFORD COMPANION TO LAW (Peter Cane & Joanne Conaghan eds., 2008) (explaining that character merchandising can bring in significant revenue).

character merchandising increased drastically.³ For example, the Mickey Mouse franchise is worth an estimated \$70.6 billion,⁴ the Harry Potter franchise is worth approximately \$25 billion,⁵ and the Star Wars franchise is valued at almost \$68.7 billion.⁶ In a series of strategic moves to acquire the *characters* at the center of successful franchises, Disney bought Pixar for \$7.4 billion,⁷ Lucasfilm for over \$4 billion,⁸ and Marvel for over \$4 billion⁹ at a time when its own character development and film departments were struggling.¹⁰

3. See Gregory S. Schienke, Comment, *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, 63–64 (2005) (“Fictional characters are the backbone of the multi-billion dollar entertainment industry . . .”).

4. Katie Jones, *The World’s 25 Most Successful Media Franchises, and How They Stay Relevant*, MKTS. INSIDER (Nov. 22, 2019, 1:31 PM), <https://markets.businessinsider.com/news/stocks/successful-media-franchises-1028712444> [<https://perma.cc/246U-VR5X>].

5. Oliver Gettell, *Harry Potter: Here’s How Much the Magical Franchise Is Worth*, ENT. WKLY. (Mar. 23, 2017, 4:12 PM), <https://ew.com/movies/2017/03/23/how-much-harry-potter-worth> [<https://perma.cc/59EV-52TG>].

6. A. Guttman, *Revenue of Selected Media Franchises Worldwide as of August 2021*, STATISTA (Aug. 18, 2021), <https://www.statista.com/statistics/1257650/media-franchises-revenue> [<https://perma.cc/F362-Z86V>].

7. Associated Press, *Disney to Buy Pixar for \$7.4 Billion*, N.Y. TIMES (Jan. 24, 2006), <https://www.nytimes.com/2006/01/24/business/disney-to-buy-pixar-for-74-billion.html> [<https://perma.cc/BVN6-JSNA>].

8. Thomas Barrabi, *How Did Disney Buy Star Wars?*, FOX BUS. (June 8, 2020), <https://www.foxbusiness.com/markets/how-did-disney-buy-star-wars> [<https://perma.cc/6GQN-WJ7A>].

9. See Sarah Whitten, *Disney Bought Marvel for \$4 Billion in 2009, a Decade Later It’s Made More Than \$18 Billion at the Global Box Office*, CNBC (July 22, 2019, 7:28 PM), <https://www.cnbc.com/2019/07/21/disney-has-made-more-than-18-billion-from-marvel-films-since-2012.html> [<https://perma.cc/6ZHV-FCWL>] (stating that Disney CEO Bob Iger bought Marvel to access the over 5,000 characters comprising the Marvel Universe).

10. See Bernardin, *supra* note 2 (“When Disney pays billions of dollars for Pixar or Lucasfilm or Marvel, it’s not for the infrastructure of the companies, or even the creative personnel, it’s for Buzz Lightyear, Luke Skywalker and Captain America.”); see also Ethan Anderton, *Steve Jobs Wanted Bob Iger to Shut Down Disney Animation After Pixar Acquisition*, SLASHFILM (Sept. 27, 2019, 11:30 AM), <https://www.slashfilm.com/569384/walt-disney-animation-almost-shut-down> [<https://perma.cc/HM2Y-LALP>] (“During the time of the Pixar Animation acquisition in 2006, Walt Disney Animation was floundering.”); Christopher Orr, *How Pixar Lost Its Way*, ATLANTIC (June 2017), <https://www.theatlantic.com/magazine/archive/2017/06/how-pixar-lost-its-way/524484> [<https://perma.cc/4UUY-ZV66>] (“[I]n a stunning reversal, Walt Disney Animation Studios—adrift at the time of its 2006 acquisition of the then-untouchable Pixar—has rebounded . . .”).

One reason that characters are central to the entertainment industry is that modern audiences connect more closely with individual characters than with the overall movie, television show, or book in which the character appears.¹¹ Individuals strongly identify with characters because they can imagine how those characters grow and develop outside of their original work.¹² Whether a character experiences a similar life situation, or a completely different social scenario, audience members identify with and see themselves in fictional characters.¹³ Additionally, characters can take on new and unforeseen roles in the public's imagination beyond the confines of the books or movies where they first appear.¹⁴ Fan fiction and spinoff stories regularly surround popular characters because audience members relate to the characters and want to continue those characters' stories through their own imaginations.¹⁵

The fact that fictional characters can be removed from an author's original creation makes copyright protection of fictional characters so important.¹⁶ However, courts struggle to apply traditional copyright principles to fictional characters because of the difficulty in determining when a character is defined and distinct enough outside the work in which it appears to warrant individual copyright

11. See Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769, 770–71 (2013) (explaining how characters exist autonomously, apart from their original works and creators, through their readers and audience).

12. See Jacqueline Lai Chung, Note, *Drawing Idea from Expression: Creating a Legal Space for Culturally Appropriated Literary Characters*, 49 WM. & MARY L. REV. 903, 905 (2007) (“A single storyline has the potential to explode into a multitude of different readings—each founded upon the reader's unique perspective when encountering the text.”).

13. See Jonathan Cohen, *Defining Identification: A Theoretical Look at the Identification of Audiences with Media Characters*, 4 MASS COMM'N & SOC'Y 245, 246–47 (2001) (exploring the identification theory that explains how and why audiences connect so closely with fictional characters).

14. See Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 434–37 (1986) (following Sherlock Holmes to show that a fictional character can take on roles outside of the original author's creations as the public connects with the character and develops spin-off and sequential works featuring that character).

15. See Chung, *supra* note 12, at 904–05 (exploring the prevalence of *Harry Potter* fan fiction across the globe by audience members who connected with Harry Potter as a character and who wanted “to take control of [Harry's] destiny, in some sense, by creating their own versions of the *Harry Potter* story”).

16. See Kurtz, *supra* note 14, at 430 (noting that creating legal protections for characters outside the work in which they appear “creates a baffling problem”).

protection.¹⁷ Characters are challenging to define, even within the context of the work in which they appear, because a character's identity can continuously evolve throughout a story.¹⁸ Whether this evolution occurs in one work, or across an extended period of time and multiple works, the histories, appearances, and character traits of fictional characters are far from static.¹⁹

In response to this elusiveness in defining characters for the purpose of copyright analysis, courts developed various tests for character copyrightability. However, courts inconsistently apply these tests, making it difficult for authors to know whether copyright law will protect their characters.²⁰ Although there are other character copyrightability tests, this Comment analyzes three of the most prominent tests: (1) the Second Circuit's "distinctly delineated" test; (2) the Ninth Circuit's *Towle* test; and (3) the Seventh Circuit's "stock character" test. Although each test is referred to by the specific circuit court which promulgated it, other circuits frequently use these tests, either explicitly or as part of other copyright tests. For example, the Third,²¹ Tenth,²² and Eleventh²³ Circuits, among others, have used the

17. See Dean D. Niro, *Protecting Characters Through Copyright Law: Paving a New Road upon Which Literary, Graphic, and Motion Picture Characters Can All Travel*, 41 DEPAUL L. REV. 359, 361 (1992) (explaining that different tests have developed for characters in literary, cartoon, and motion picture works, creating inconsistent results in this area of the law).

18. See Jasmina Zecevic, *Distinctly Delineated Fictional Characters that Constitute the Story Being Told: Who Are They and Do They Deserve Independent Copyright Protection?*, 8 VAND. J. ENT. & TECH. L. 365, 368–69 (2006) (“[A] character’s complete identity can be very difficult to grasp and clearly define.”).

19. See Kurtz, *supra* note 14, at 431–32 (following the changes in appearance and character traits of Mickey Mouse from his debut in 1928 to his current character, noting that he was initially a wild and ill-mannered character who evolved to have softer facial features and a more well-behaved, youthful personality).

20. See *id.* at 437 (noting that it is unclear what rationales are upheld by the doctrines applied by courts).

21. *Tanksley v. Daniels*, 902 F.3d 165, 175–76 (3d Cir. 2018) (finding that the main character, an “African-American, male record executive,” is not copyrightable because this concept is not distinct enough to warrant copyright protection).

22. *Fisher v. United Feature Syndicate*, 2000 U.S. App. LEXIS 1749, No. 99-1162, *1, *13–14 (10th Cir. Feb. 7, 2000) (finding the “idea of a detective dog” is not copyrightable because of the lack of distinctiveness).

23. *Herzog v. Castle Rock Ent.*, 193 F.3d 1241, 1247–48 (11th Cir. 1999) (holding that a law enforcement officer whose father was a sheriff is not a copyrightable character because “the broader outlines of the characters are not copyrightable”).

“distinctly delineated” test. Additionally, the First,²⁴ Second,²⁵ and Ninth²⁶ Circuits have used the “stock character” test in character copyrightability determinations. The use of different tests within and between circuit courts further highlights the unpredictability of character copyright law and supports the need for a clear and unified test so authors can know when their characters are protected under copyright law.²⁷

Each of the tests that this Comment analyzes apply different factors to evaluate whether copyright law protects a character. Under the “distinctly delineated” test, a character earns copyright protection if the character is developed enough to be more than a basic idea.²⁸ Under the three-part *Towle* test a character secures copyright protection when the character has (1) particularly unique (2) physical and conceptual traits, which are (3) distinct from other characters’ physical and conceptual traits.²⁹ Finally, under the “stock character” test, a character is copyrightable when it is more developed than a stereotypical stock character through the addition of some creative element.³⁰ The numerous and highly variable tests for character copyrightability are evidence of the confusion courts face in determining when and what types of characters deserve copyright protection.³¹ In the face of this confusion, however, the economic and

24. See *TMTV, Corp. v. Mass Prods., Inc.*, 645 F.3d 464, 469 (1st Cir. 2011) (noting that stock characters are not subject to copyright protection).

25. See e.g., *Warner Bros. Inc. v. Am. Broad. Cos.*, 654 F.2d 204, 211 (2d Cir. 1981) (discussing how characters that are sufficiently delineated from another party’s character do not infringe); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (noting that “stock themes” are not protected by copyright law).

26. See *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003), *overruled by* *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1079 (9th Cir. 2020) (en banc) (describing how only especially distinct characters can be protected by copyright law).

27. See Kurtz, *supra* note 14, at 437 (“The courts have applied these doctrines inconsistently and have seldom attempted to distinguish the nature of what is protected by each . . .”).

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

29. *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015) (first quoting *Walt Disney Prods. v. Air Pirates*, 518 F.2d 751, 755 (9th Cir. 1978); then quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003); and then quoting *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008)).

30. *Gaiman v. McFarlane*, 360 F.3d 644, 659–60 (7th Cir. 2004).

31. See Kurtz, *supra* note 14, at 437 (explaining that the variety of tests used by courts makes it “difficult to predict what elements of a character will be protected, under what circumstances, or for how long”).

societal value of fictional characters makes it crucial for courts to define character copyrightability under a unified copyrightability test.

This Comment argues that the Seventh Circuit’s “stock character” test provides the appropriate level of copyright protection for fictional characters. Part I provides a background of the purposes and goals of copyright law and the history of copyright law as related to the copyrighting of fictional characters. Part II examines three tests used by circuit courts to evaluate the benefits and limitations of each test in light of the purposes and goals of copyright law. Part III analyzes the Ninth Circuit’s recent decision in *Daniels v. Walt Disney Co.*³² to determine if the court’s use of the *Towle* test to find Daniels’s character, the Moodsters, uncopyrightable led to the correct conclusion. Part III also argues that the court would have found the Moodsters copyrightable if it had used the more appropriate Seventh Circuit “stock character” test. Part IV concludes that the Seventh Circuit “stock character” test best meets the purposes and goals of copyright law for copyrighting fictional characters and that this test would properly protect Daniels’s characters under copyright law.

I. BACKGROUND

This Part discusses the purposes and goals of copyright law to lay a foundation for analyzing which character copyrightability test best meets those goals. This Part then explores the backgrounds of three different character copyrightability tests: (1) the “distinctly delineated” test; (2) the *Towle* test; and (3) the “stock character” test. Subsections examine the cases that articulated each test, as well as how subsequent courts applied the tests to other types of fictional characters.

A. *Purposes and Goals of Copyright Law*

Copyright protection originates in the U.S. Constitution, which states that Congress shall have the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³³ In line with this authority, Congress passed the Copyright Act,³⁴ which protects “original works of authorship fixed in

32. 958 F.3d 767 (9th Cir. 2020).

33. U.S. CONST. art. 1, § 8, cl. 8.

34. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 102–810).

any tangible medium of expression.”³⁵ The United States automatically grants copyright protection to a work, without any requirement that the work first be registered or published.³⁶ The Copyright Act grants authors an exclusive right to reproduce, distribute, perform, display, and create derivatives of the copyrighted work for the life of the author plus an additional seventy years.³⁷ To obtain a copyright, a work need only be original, which requires independent creation by the author and a minimum level of creativity.³⁸ A work is original, despite being similar or even identical to another work, so long as those similarities occurred unintentionally during the independent creation of the work.³⁹ Statutory limitations deny copyright protection to “any idea, procedure, process, system, method of operation, concept, principle, or discovery.”⁴⁰

The constitutional goal of copyright law is to promote creativity for the benefit of the public, which is accomplished by allowing time-limited monopolies for the author of the creative work.⁴¹ The limited monopoly over copyrighted works establishes an economic incentive and encourages creativity.⁴² However, economic reward for the author is only secondary to the primary goal of providing benefit to the public through the creation and dissemination of creative works.⁴³ The

35. 17 U.S.C. § 102(a).

36. *Id.*

37. *See id.* §§ 106, 302(a).

38. *Luck’s Music Libr., Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 118 (D.D.C. 2004); *see also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“[T]he requisite level of creativity is extremely low; even a slight amount will suffice.”); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (noting that originality “means little more than a prohibition of actual copying” and does not require novelty or uniqueness in the work (quoting *Hoague-Sprague Corp. v. Franck C. Meyer Co.*, 31 F.2d 583, 586 (E.D.N.Y. 1929))).

39. *Feist Publ’ns, Inc.*, 499 U.S. at 345 (“Originality does not signify novelty . . .”).

40. 17 U.S.C. § 102(b); *see also Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1196 (2020) (explaining that unlike patent law, which protects novel ideas, copyright law protects “expression,” but not the underlying “ideas” behind the expression).

41. *See Feist Publ’ns, Inc.*, 499 U.S. at 349 (noting that the primary goal of copyright law is to encourage development of creative works while the secondary goal is to reward authors).

42. *See Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the [Copyright] clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talent of authors and inventors . . .”).

43. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1984) (explaining that copyright privileges are “intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public

copyright system also ensures that the public can access and expand upon copyrighted creative works after the period of copyrightability expires.⁴⁴ Striking a balance between promoting the arts and overprotecting works is imperative to meeting both goals.⁴⁵ Overprotection can frustrate the purpose of copyright law by removing elements of copyrighted works from the public domain, thereby preventing the public from using those elements until the copyright period ends.⁴⁶

Several doctrines, including the merger doctrine, the fair use exception, and the idea/expression dichotomy, support the balance between maintaining a low bar for copyright protection and preventing overprotection in creative works.⁴⁷ The merger doctrine denies copyright protection when the expression of the work “merge[s] with,” or is inseparable from, the ideas underlying the expression.⁴⁸ The fair use exception, established in 17 U.S.C. § 107, allows for the use of otherwise copyrightable works if the use is “for purposes such as criticism, comment, news reporting, teaching . . .

access to the products of their genius after the limited period of exclusive control has expired.” (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984))).

44. 17 U.S.C. § 102.

45. See Tze Ping Lim, *Beyond Copyright: Applying a Radical Idea-Expression Dichotomy to the Ownership of Fictional Characters*, 21 VAND. J. ENT. & TECH. L. 95, 100 (2018) (“[O]verprotection strangles access, whilst underprotection jeopardizes incentives to create.”).

46. See Deborah Kemp, *Copyright on Steroids: In Search of an End to Overprotection*, 41 MCGEORGE L. REV. 795, 797 (2010) (noting that overprotection in copyright law “reduces availability to those in society who would benefit from access and would make productive uses of the copyrighted work”).

47. *Limitations and Exceptions*, WORLD INTEL. PROP. ORG., <https://www.wipo.int/copyright/en/limitations> [<https://perma.cc/RT6B-7PWK>]; Norman Siebrasse, *A Property Rights Theory of the Limits of Copyright*, 51 U. TORONTO L.J. 1, 1 (2001) (explaining various copyright law doctrines as attempts to balance protection and overprotection).

48. See *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 838 (10th Cir. 1993) (“The merger doctrine is applied as a prophylactic device to ensure that courts do not unwittingly grant protection to an idea by granting exclusive rights to the only, or one of only a few, means of expressing that idea.”); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967) (denying copyright protection for the wording of a sweepstakes rule under the merger doctrine because there were only limited ways to write that type of rule; therefore, the idea of the rule itself merged with the expression of the rule in the specific language used).

scholarship, or research.”⁴⁹ This exception addresses the balance between an original author’s monopolistic rights over the use of his or her work with the overall purpose of copyright law, which is to benefit the public through exposure to that author’s creation.⁵⁰ The idea/expression dichotomy prohibits the copyrighting of a high-level, conceptual idea while still allowing copyright protection for an author’s specific expression of that idea.⁵¹ This dichotomy is the most applicable limiting doctrine for the protection of fictional characters because the analysis of the copyrightability of fictional characters frequently turns on whether the character is a conceptual idea or an author’s expression of an idea.⁵²

B. History of Character Copyright Law

Copyright law explicitly protects categories of works such as “literary works,” “musical works,” “dramatic works,” “motion pictures,” and “sound recordings,” but does not clearly protect fictional characters as

49. 17 U.S.C. § 107 (setting out a four factor test to determine if the fair use exception is applicable: “(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 or value of the copyrighted work”).

50. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212–14, 229 (2d Cir. 2015) (applying the fair use exception in denying copyright infringement when Google scanned full books for its “Google Library” without the permission of the authors because Google provided the books for educational and research purposes).

51. See *Baker v. Selden*, 101 U.S. 99, 102–04 (1879) (employing the idea/expression dichotomy to find that a specific accounting system could not be copyrighted because it was an idea, while an author’s description of the accounting system in a book could be copyrighted because it was an expression of that idea); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work’s “Total Concept and Feel,”* 38 EMORY L.J. 393, 400 (1989) (“[E]ven if the plaintiff proves that certain similarities between two works arose from the defendant’s copying, the plaintiff loses if those similarities are only similarities of idea, and not similarities of expression.”); see also *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1037 (9th Cir. 2015) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1984) (explaining that the idea/expression dichotomy balances the First Amendment’s freedom of speech with the Copyright Act’s goals by protecting the author’s expressions while still allowing conceptual ideas to remain in the public domain); *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) (“The ‘marketplace of ideas’ is not limited by copyright because copyright is limited to protection of expression.”).

52. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (“[W]e are rather concerned with the line between expression and what is expressed.”).

a category.⁵³ In early character copyrightability cases, courts found that fictional characters could not be individually copyrighted outside of the work in which they originally appeared.⁵⁴ Despite the lack of explicit statutory protection for fictional characters and cases denying fictional characters copyright protection, courts eventually developed several tests to determine when a fictional character is protectable under copyright law.⁵⁵ However, many of these tests including the “distinctly delineated” test and *Towle* test, employ more stringent standards than the Constitution requires for originality and creativity.⁵⁶

1. *The “distinctly delineated” test*

Judge Learned Hand articulated the first fictional character copyrightability test, known as the “distinctly delineated” test, in *Nichols v. Universal Pictures Corp.*⁵⁷ In this case, playwright Anne Nichols alleged that the Universal Pictures movie *The Cohens and Kellys* infringed upon her play, *Abie’s Irish Rose*.⁵⁸ Nichols’s play revolved around a Jewish boy and a Catholic girl who secretly marry, despite having zealous parents who desire each child to marry within their respective faiths.⁵⁹ Each set of parents disavows their child when they learn of the secret marriage.⁶⁰ However, when the married couple has twins at the end of the play, the families reunite over their mutual love for the children.⁶¹ The Universal Pictures movie follows a Jewish girl who marries a Catholic boy in secret against the wishes of her parents.⁶² The Jewish girl’s father learns he has come into a large inheritance and disowns his daughter

53. 17 U.S.C. § 102.

54. *See, e.g.,* Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc., 216 F.2d 945, 949–50 (9th Cir. 1954) (denying copyright protection for a fictional character under the reasoning that if Congress intended for characters to be copyrighted independently of the work in which they appeared, it would have created specific protections for them).

55. *See* Olson v. Nat’l Broad. Co., 855 F.2d 1446, 1452 (9th Cir. 1988) (stating that distinct characters can obtain copyright protection separate from the work in which they appear even though previous cases held that characters are not ordinarily copyrightable).

56. *See* Kurtz, *supra* note 14, at 440 (arguing that courts have blurred the line between copyrightability and copyright infringement and these various tests force judges to become artistic critics of stories and characters).

57. 45 F.2d 119 (2d Cir. 1930).

58. *Id.* at 120.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

when he learns of her secret marriage.⁶³ Eventually, the Jewish father learns that the inheritance really belongs to the Catholic boy's father, and the families reconcile when the father of the Jewish girl tells the father of the Catholic boy that the inheritance belongs to him.⁶⁴

Nichols argued that the characters in the Universal Pictures movie infringed on the characters in her play because both stories involved Catholic and Jewish families with children who secretly married against the wishes of their parents.⁶⁵ The court found that Universal Pictures did not infringe on Nichols's characters because Universal "took no more . . . than the law allowed."⁶⁶ The court held that the characters Nichols sought to protect under copyright law were no more than unoriginal ideas that did not solely belong to her.⁶⁷ In reaching this result, the court articulated the "distinctly delineated" test, which states "the less developed the characters, the less they can be copyrighted."⁶⁸ The court subsequently found that the characters' minimal level of development in Nichols's play did not warrant copyright protection.⁶⁹

Under the "distinctly delineated" test, a fictional character earns copyright protection if the character is well-developed; however, Judge Learned Hand never defined what constitutes a well-developed character.⁷⁰ Instead, the "distinctly delineated" test is guided by the idea/expression dichotomy, in which a more delineated character that represents an author's expression is copyrightable, while a less delineated character is uncopyrightable because it is too close to an unprotectable idea.⁷¹ This test has been used to support the

63. *Id.*

64. *Id.* at 120–21.

65. *Id.* at 120, 122.

66. *Id.* at 121.

67. *See id.* at 122 ("The defendant has not taken from her more than their prototypes have contained for many decades. If so, obviously so to generalize her copyright, would allow her to cover what was not original with her.").

68. *Id.* at 121.

69. *Id.* at 122.

70. *See Niro, supra* note 17, at 364 (explaining that *Nichols* did not create any "hard and fast rule" to guide courts in determining when a character is sufficiently delineated to obtain copyright protection).

71. *Zecevic, supra* note 18, at 371.

copyrightability of characters such as Tarzan,⁷² Superman,⁷³ James Bond,⁷⁴ and E.T.,⁷⁵ because these characters have distinct and recognizable character traits, idiosyncrasies, and appearances.

2. *The Towle test*

Following the development of the “distinctly delineated” test in *Nichols*, the Ninth Circuit developed several new tests in an apparent attempt to clarify and define character copyrightability standards, but instead it created a web of confusion.⁷⁶ In its first attempt to clarify the copyrightability standard for a fictional character, the Ninth Circuit developed the “story being told” test in the case *Warner Bros. Pictures v. Columbia Broadcasting System, Inc.*⁷⁷ Under this test, a character can obtain copyright protection outside the work in which it appears if “the character really constitutes the story being told,” but it cannot obtain copyright protection if it “is only the chessman in the game of telling the story.”⁷⁸

After receiving criticism for the restrictiveness of the “story being told” test,⁷⁹ the Ninth Circuit reinterpreted its holding in the case *Walt*

72. See *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981) (“Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle and strong. He is Tarzan [T]he character Tarzan is copyrightable . . .”).

73. See *Detective Comics, Inc. v. Bruns Publ'ns, Inc.*, 111 F.2d 432, 433 (2d Cir. 1940) (“[Superman] at times conceals his strength beneath ordinary clothing but after removing his cloak stands revealed in full panoply in a skintight acrobatic costume . . . is termed the champion of the oppressed . . . [and] is described as being the strongest man in the world . . .”).

74. See *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (exploring James Bond’s unique characteristics, including “his cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his marksmanship; his ‘license to kill’ and use of guns; his physical strength; [and] his sophistication”).

75. See *Universal City Studios, Inc. v. Kamar Indus.*, No. H-82-2377, 1982 WL 1278, at *3 (S.D. Tex. Sept. 20, 1982) (finding the alien character E.T. to be copyrightable because he “is a unique and distinctive character about whom the movie revolves” . . . and “[t]he name ‘E.T.’ itself is highly distinctive and is inseparable from the identity of the character”).

76. See Niro, *supra* note 17, at 364 (explaining the Ninth Circuit’s attempts to clarify the copyright doctrine laid out by Judge Learned Hand).

77. 216 F.2d 945, 950 (9th Cir. 1954).

78. *Id.*

79. See Michael Deamer, *DC Comics v. Towle: Protecting Fictional Characters Through Stewardship*, 32 BERKLEY TECH L.J. 437, 442 (2017) (explaining that commentators have

*Disney Productions v. Air Pirates*⁸⁰ by differentiating between literary and visually depicted characters.⁸¹ The court found that the “story being told” test does not apply to visually depicted characters because, unlike literary characters, visually depicted characters are “more likely to contain some unique element of expression.”⁸² This case established two separate paths for character copyrightability with literary characters being analyzed under the “story being told” test and visually depicted characters being examined under the more lenient “especially distinctive” test articulated in *Olson v. National Broadcasting Co.*⁸³ The court added a further variation to its character copyrightability evaluations in *Halicki Films, LLC v. Sanderson Sales & Marketing*⁸⁴ when it stated that the consistency of character traits in a fictional character should be considered in determining character copyrightability.⁸⁵

widely criticized the “story being told” test as too restrictive and later courts have held it to be mere dicta); Niro, *supra* note 17, at 365 (providing that the “story being told” test “would lead to a result of excluding virtually all characters from copyright protection”); I MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12 (2021) (noting that the “story being told” test was so restrictive that it effectively prevented all character copyrights unless there is a “‘story’ devoid of plot, wherein character study constitutes all, or substantially all, of the work”); Leslie A. Kurtz, *Fictional Characters and Real People*, 51 U. LOUISVILLE L. REV. 435, 444 (2013) (explaining that the “story being told” test would prevent virtually every literary character from obtaining protection under copyright law and that even fifty years after the case promulgating the test, courts are unsure if the “story being told” test is a holding or dicta).

80. 581 F.2d 751 (9th Cir. 1978).

81. *Id.* at 755.

82. *Id.*

83. 855 F.2d 1446, 1452 (9th Cir. 1988) (creating a more lenient character copyrightability test for characters in cartoons, movies, and television series as an exception to the “story being told” test).

84. 547 F.3d 1213 (9th Cir. 2008).

85. *See id.* at 1225 (finding the character may be copyrightable because she was “more akin to a comic book character than a literary character, she had consistent and identifiable character traits, and she was ‘especially distinctive’”). In *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, the court evaluated character copyrightability based on the consistency of character traits throughout the works in which the character appeared. 900 F. Supp. 1287, 1296 (C.D. Cal. 1995). Similarly, in *Toho Co. v. William Morrow & Co.*, the court evaluated character copyrightability based on the consistency of underlying attributes of the character despite the character’s appearance dramatically changing over time. 33 F. Supp. 2d 1206, 1216 (C.D. Cal. 1998). After these varying, sometimes contradictory cases, were decided, the Ninth Circuit tried to rein in its character copyright doctrine in *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1174–75 (9th Cir. 2003), *overruled by* *Skidmore v. Led Zeppelin*, 952

Recently, in an attempt to untangle this web of confusion, the Ninth Circuit consolidated its past character copyrightability tests into the three-part *Towle* test in *DC Comics v. Towle*.⁸⁶ In this case, the Ninth Circuit considered whether the Batmobile, owned by the comic book company DC Comics, was a copyrightable character outside of the works in which it appeared.⁸⁷ DC Comics claimed that Mark Towle infringed its copyright of the Batmobile when he created and sold replicas of the Batmobile without a licensing agreement with DC Comics.⁸⁸ The Ninth Circuit looked to precedent cases⁸⁹ to create a three-part test to analyze when fictional characters could be protected under copyright law.⁹⁰ Unlike the highly restrictive “story being told” test⁹¹ previously used by the Ninth Circuit to evaluate character copyrightability, the *Towle* test takes a more expansive view of character copyrightability and allows for broader protection of fictional characters.⁹²

To satisfy the *Towle* test: (1) the character must have physical as well as conceptual qualities; (2) the character must be sufficiently delineated and have consistent and identifiable character traits; and (3) the character must be especially distinctive and have some unique

F.3d 1051, 1079 (9th Cir. 2020) (en banc), in which it stated the court can use two copyrightability tests, the “story being told” test from *Warner Bros. Pictures*, 216 F.2d at 950, and the “especially distinctive” test from *Olson*, 855 F.2d at 1452.

86. 802 F.3d 1012, 1021 (9th Cir. 2015).

87. *Id.* at 1017.

88. *Id.*

89. See *Halicki Films*, 547 F.3d at 1224 (noting that vehicles can be protected under copyright as characters if the vehicle has sufficiently delineated and consistent characteristics); *Rice*, 330 F.3d at 1175 (finding that characters depicted in comic books, movies, or television shows are copyrightable if the character is especially distinctive with consistent character traits); *Metro-Goldwyn-Mayer, Inc.*, 900 F. Supp. at 1296 (holding that characters can be protected under copyright even if their appearances change over time, as long as the general appearance and characteristics remain recognizable).

90. *Towle*, 802 F.3d at 1021; see also Missy G. Brenner, Comment, *Shadow of the Bat[Mobile]: Character Copyright after DC Comics v. Towle*, 57 SANTA CLARA L. REV. 481, 483 (2017) (“Unfortunately, the result is an unsatisfying scattershot of case law that creates unpredictable results for authors.”).

91. See *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945, 950 (9th Cir. 1954) (defining the “story being told” test and stating that a character can obtain copyright protection if “the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of protection afforded by the copyright”).

92. *Towle*, 802 F.3d at 1022–23; Brenner, *supra* note 90, at 483.

expression and characteristics.⁹³ To satisfy the first prong of the *Towle* test, the character must be represented visually, rather than merely described in literary works, because a visually depicted character is easier to define while a literary character is subject to each reader's imaginative interpretation based on the literary description of the character.⁹⁴ A character satisfies the second prong of the *Towle* test if it is (1) distinct from a standard stock character and (2) consistently recognized in each of the works in which it appears.⁹⁵ Finally, the character satisfies the third prong of the *Towle* test if it has unique character traits that make it easily distinguishable from other characters.⁹⁶

In applying the *Towle* test to the Batmobile, the Ninth Circuit determined that the Batmobile was copyrightable because it met all three elements of the test.⁹⁷ The Batmobile satisfied the first element of the *Towle* test because it was visually depicted in comic books, movies, and television shows, thus giving it physical and conceptual qualities.⁹⁸ The Batmobile met the second element because it maintained consistent character traits since its conception in 1941.⁹⁹ The consistent characteristics include the vehicle's bat-themed wings, fenders, and windshield, its high-tech gadgetry, and its ability to help Batman fight crime by maneuvering through dangerous situations.¹⁰⁰ Finally, the Batmobile met the third element because it had distinctive characteristics, including its position as Batman's "loyal bat-themed sidekick" and its unique and recognizable name.¹⁰¹ Based on this analysis, the Ninth Circuit found that the Batmobile deserved copyright protection as a character outside of the stories in which it originally appeared.¹⁰²

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

94. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978) (explaining that the visual depiction of a character provides further levels of distinction that make a character more easily distinguishable for the purpose of copyright protection).

95. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003), *overruled by Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1079 (9th Cir. 2020) (en banc).

96. *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988).

97. *Towle*, 802 F.3d at 1022.

98. *Id.* at 1021.

99. *Id.*

100. *Id.*

101. *Id.* at 1022.

102. *Id.*

3. The “stock character” test

The Seventh Circuit developed the “stock character” test in *Gaiman v. McFarlane*.¹⁰³ In this case, Neil Gaiman alleged that he jointly owned a copyright with Todd McFarlane in the comic book character Count Cogliostro.¹⁰⁴ This case turned on whether Count Cogliostro could be protected under copyright law as a fictional character outside of the comic books in which he appeared.¹⁰⁵ In evaluating whether Count Cogliostro deserved copyright protection, the Seventh Circuit articulated the “stock character” test, which states that an author cannot obtain copyright protection for portions of a work that “are so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another.”¹⁰⁶ Under this test, a character deserves copyright protection if there is some amount of creative element added to the character to distinguish it from a stereotypical stock character.¹⁰⁷ The court determined that Count Cogliostro was more than an unoriginal stock character because his “obviously phony title (‘Count’), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character.”¹⁰⁸

This test incorporates the commonly used *scènes à faire* copyright doctrine, which states that “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the

103. 360 F.3d 644 (7th Cir. 2004); see also Leslie A. Kurtz, *Copyright: The Scenes a Faire Doctrine*, 41 FLA. L. REV. 79, 86 (1989) (explaining that many courts have developed doctrines about stock characters to evaluate whether a character is copyrightable, primarily under the *scènes à faire* doctrine, which states that copyright does “not protect stock situations, plot elements and incidents that existed in the common stock before the plaintiff’s story was written”).

104. *Gaiman*, 360 F.3d at 648.

105. *Id.* at 650.

106. *Id.* at 659 (quoting *Bucklew v. Hawkins, Ash, Baptie, & Co.*, 329 F.3d 923, 929 (7th Cir. 2003)).

107. *Id.* For a definition of “stock character,” see *Tanksley v. Daniels*, F. Supp. 3d 271, 290 (2018), which describes a “stock character” as one “who display[s] generic traits.” For a more detailed definition, see *Stock Character*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100533855> [<https://perma.cc/HC32-G28X>], which defines a “stock character” as “[a] stereotyped character easily recognized by readers or audiences from recurrent appearances in literary or folk tradition, usually within a specific genre such as comedy or fairy tale.”

108. See *Gaiman*, 360 F.3d at 660–61 (“Although Gaiman’s verbal description of Cogliostro may well have been of a stock character, once he was drawn and named and given speech he became sufficiently distinctive to be copyrightable.”).

treatment of a given topic” do not deserve copyright protection because those elements are no more than ideas.¹⁰⁹ The Seventh Circuit’s “stock character” test, which expanded on the *scènes à faire* doctrine and the idea/expression dichotomy, recognized that authors would be unable to produce a work of fiction without “negotiating for dozens or hundreds of copyright licenses” if courts granted stock characters copyright protection.¹¹⁰ However, the “stock character” test notes that nothing more than a small element of creativity is necessary for a character to be distinguished from a stock character.¹¹¹ Character types that are considered stereotypical stock characters under the “stock character” test include: a masked magician,¹¹² a drunken old bum,¹¹³ a gesticulating Frenchman,¹¹⁴ a fire-breathing dragon,¹¹⁵ superheroes that battle wealthy villains and lead double lives,¹¹⁶ Irish

109. *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978).

110. *Gaiman*, 360 F.3d at 660.

111. *Id.*

112. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) *overruled by* *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1079 (9th Cir. 2020) (en banc) (“[T]he [masked] magician is dressed in standard magician garb—black tuxedo with tails, a white tuxedo shirt, a black bow tie, and a black cape with red lining—and his role is limited to performing and revealing the magic tricks Thus, we must reject Rice’s claim that the magician . . . differ[s] from an ordinary magician in a manner that warrants copyright protection.” (citation omitted)).

113. *See Gaiman*, 360 F.3d at 660 (“[A] drunken old bum is a stock character. If a drunken old bum were a copyrightable character, so would be a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels” (citation omitted)).

114. *Id.*

115. *Id.*

116. *See Warner Bros., Inc. v. Am. Broad. Cos.*, 654 F.2d 204, 209 (2d Cir. 1981) (“[P]erform[ing] feats of miraculous strength [] is too common and general a characteristic or theme to even approach the degree of concreteness and particularity deserving of copyright protection.”).

police officers,¹¹⁷ illustrations of children from different countries,¹¹⁸ and an anthropomorphic moon character in a children's book.¹¹⁹

C. Daniels v. Walt Disney Co.

In a recent fictional character copyright case, *Daniels v. Walt Disney Co.*,¹²⁰ the Ninth Circuit considered whether a set of anthropomorphic characters representing human emotions deserved copyright protection.¹²¹ Denise Daniels—a child emotional development expert—created *The Moodsters*, a pilot television show and picture book series that personified five emotions (love, happiness, sadness, anger, and fear) into color-coded characters and followed how those emotional characters affected a child's mood.¹²² Daniels pitched her idea to Disney several times between 2006 and 2009, but Disney eventually rejected the idea.¹²³ In 2010, Disney began production of the movie *Inside Out*, which personified five emotions (joy, fear, sadness, disgust, and anger) in a girl's brain that guided her through the challenges of growing up.¹²⁴

In 2017, Daniels filed a copyright infringement suit against Disney in the Central District of California.¹²⁵ Disney filed a motion to dismiss on the basis that Daniels's characters did not meet the statutory standards for copyrightability.¹²⁶ The district court granted summary

117. See *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (“Foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop, are venerable and often-recurring themes of police fiction. As such, they are not copyrightable except to the extent they are given unique—and therefore protectible—expression in an original creation.”).

118. See *Lewinson v. Henry Holt & Co.*, 659 F. Supp. 2d 547, 574 (S.D.N.Y. 2009) (“[T]he characters that appear in the Registered Work are stock examples of children from different countries. None of the characters is discussed on more than one page of the work, and the characters' personality traits are undeveloped.”).

119. See *Cavalier v. Random House, Inc.*, 297 F.3d 815, 821–22 (9th Cir. 2002) (“The Cavaliers' general story line in which anthropomorphic moon and stars ease children's fears of sleeping in the dark, and the depiction of related scenes and stock characters ('scènes à faire'), are not protectible by copyright . . .”).

120. 958 F.3d 767 (9th Cir. 2020).

121. *Id.* at 769.

122. *Id.* at 770.

123. *Id.*

124. *Id.*; see also *Daniels v. Walt Disney Co.*, No. 17-CV-4527 PSG, 2018 U.S. Dist. LEXIS 117569, at *3 (C.D. Cal. May 9, 2018) (noting that *Inside Out* earned over \$350,000,000 in the United States and over \$850,000,000 internationally).

125. *Daniels*, 2018 U.S. Dist. LEXIS 117569, at *3.

126. *Daniels*, 958 F.3d at 771.

judgment in favor of Disney because it found that Daniels's characters were neither sufficiently delineated nor especially distinctive and therefore did not meet all elements of the *Towle* test.¹²⁷

The Ninth Circuit affirmed the district court's ruling in favor of Disney because the Moodsters did not meet the second and third elements of the *Towle* test.¹²⁸ The Ninth Circuit found that the Moodsters met the first element of the *Towle* test because they were physically depicted in a television pilot show and picture books.¹²⁹ In analyzing the second element of the *Towle* test, the court noted that the first books and television show depicted the Moodsters as insect-like in appearance, with long, skinny bodies and antennas, whereas by the second generation of toys, the Moodsters were depicted as small, cuddly bears.¹³⁰ The court found that the characters did not meet the second element because the only consistently identifiable character traits between each iteration of the characters were the color and emotion that each character represented, which are uncopyrightable elements.¹³¹ The court found that the characters' various iterations created inconsistent and unrecognizable characters because they lacked sufficiently consistent character traits and attributes.¹³² Finally, the characters failed the third element of the *Towle* test because the only distinctive traits that they maintained were the emotions that each character represented, and the court deemed emotions too ordinary to be the sole basis for a copyright without additional distinctions.¹³³

127. *Daniels*, 2018 U.S. Dist. LEXIS 117569, at *5–6.

128. *Daniels*, 958 F.3d at 771.

129. *Id.*

130. *Id.* at 772.

131. *Id.*; see also *Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (stating that “color by itself is not subject to copyright protection”); 37 C.F.R. § 202.1 (coloring is not subject to copyright protection).

132. See *Daniels*, 958 F.3d at 772–73 (comparing the Moodsters to the Batmobile as discussed in *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015)). The court noted that although the Batmobile may have changed appearance throughout its many movies and television shows, it had consistently identifiable characteristics as being Batman's “crime-fighting car” that always had the most up-to-date technology. *Id.* The Moodsters, on the other hand, changed appearances through various iterations but did not have any copyrightable character elements that made each character recognizable throughout their various changes in appearance. *Id.*

133. *Id.* at 773.

II. ANALYSIS

This Part analyzes three different character copyright tests, the “distinctly delineated” test, the *Towle* test, and the “stock character” test. This analysis examines how each test accomplishes, or fails to accomplish, the purposes and goals of copyright law, namely providing a low bar for copyrightability based on originality and a minimal level of creativity.

A. *The “Distinctly Delineated” Test Is Vague and Leads to Overprotection*

Despite its widespread use over the last century, the “distinctly delineated” test does not effectively meet the purposes and goals of copyright law. Judge Learned Hand did not provide any guiding principles in the articulation of this test as to what types of characters are “distinctly delineated” enough to warrant protection under copyright law.¹³⁴ Without specific guiding principles, courts defaulted to using “I know it when I see it” logic when determining if a character is copyrightable.¹³⁵

For example, in *Burroughs v. Metro-Goldwyn-Mayer, Inc.*,¹³⁶ the Southern District of New York held that Tarzan was a copyrightable character because he was distinctly delineated.¹³⁷ The court found that Tarzan was distinctly delineated because he is an ape-man, closely connected to the jungle and animals, who still expresses human emotions.¹³⁸ However, this description could fit similar characters, such as Mowgli from *The Jungle Book*, which makes Tarzan seem more like a conceptual idea, rather than a specific expression of a distinct

134. See *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F.2d 533, 538 (2d Cir. 1938) (L. Hand, J., concurring) (“The [distinctly delineated] test is necessarily vague and nothing more definite can be said about it.”); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (“Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be *ad hoc*.”).

135. Schienke, *supra* note 3, at 80; see also Zecevic, *supra* note 18, at 373 (“Judges are left to act as literary critics and decide on their own which fictional characters deserve protection and which lack sufficient development.”); Niro, *supra* note 17, at 364 (“The test proposed by Judge Hand in *Nichols* did not produce any hard and fast rule as to how developed a character must be in order to be considered copyrightable.”); see also *Anderson v. Stallone*, 11 U.S.P.Q.2d (BNA) *1161, *1165 (C.D. Cal. 1989) (“Judge Hand set forth a test, simple in theory, but elusive in application . . .”).

136. 519 F. Supp. 388 (S.D.N.Y. 1981).

137. *Id.* at 391.

138. *Id.*

character.¹³⁹ *Burroughs* illustrates that courts use general character traits to define a character for the purpose of determining whether it is “distinctly delineated,” which makes the protected character seem more like a high level, conceptual idea that other authors should be able to use without infringing on the protected character.¹⁴⁰

The inherent vagueness of the “distinctly delineated” test has also led courts to overprotect characters because courts only consider whether the character is copyrightable without examining whether infringement has actually occurred.¹⁴¹ For example, in *Universal City Studios, Inc. v. Kamar Industries*,¹⁴² the court found that the alien character E.T. was copyrightable because he is “a unique and distinctive character.”¹⁴³ After finding E.T. copyrightable, the court determined that the defendant infringed the copyright by using the name “E.T.” on its drinking mug products.¹⁴⁴ In the court’s focus on E.T.’s copyrightability, it overlooked the fact that it based its finding of copyright infringement on the use of E.T.’s *name* on infringing products, even though names are explicitly excluded from copyright protection.¹⁴⁵

Additionally, this test is skewed to protect “flatter” characters over more well-developed, “round” characters.¹⁴⁶ A flat character is centered around a single idea or quality, while a round character is more fully-developed and evolves over the course of the work in which

139. Kurtz, *supra* note 14, at 458 (noting that the description “is of little more than a type” and “seems to fit Kipling’s Mowgli as well as Tarzan”).

140. Zecevic, *supra* note 18, at 373–74 (detailing the difficulties in attempting to apply the test to individual characters).

141. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (“To establish [copyright] infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”); Zecevic, *supra* note 18, at 374; see also Kurtz, *supra* note 14, at 440, 472 (recognizing that “once a character has been found worthy of protection, some courts find infringement when there is any recognizable use of a character, without discussing whether the similarity is sufficient to justify such a finding,” and that this tendency is “cause for concern”).

142. 217 U.S.P.Q. (BNA) 1162 (S.D. Tex. 1982).

143. *Id.* at 1165–66.

144. *Id.*

145. See *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1352 (Fed. Cir. 2014) (“[N]ames and short phrases cannot be copyrighted.”); *What Does Copyright Protect?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-protect.html> [<https://perma.cc/EK62-H2NC>] (“Names are not protected by copyright law.”).

146. Zecevic, *supra* note 18, at 376 (explaining how flatter characters like Sherlock Holmes receive greater protection).

it appears.¹⁴⁷ A flat character is more easily recognizable when taken out of the specific work in which it originally appears because its character traits are more consistent and defined.¹⁴⁸ A round character is more difficult to define outside the work in which it appears because the character's development is intertwined with the specific scenes and occurrences of the work.¹⁴⁹ Because a round character develops throughout the work in which it appears, the character is less predictable, recognizable, and definable to readers.¹⁵⁰

These aspects of the “distinctly delineated” test oppose the goals of copyright law in several ways. Under traditional copyright principles, a work merely needs to be an original creation with a minimal level of creativity in order to earn copyright protection.¹⁵¹ However, the “distinctly delineated” test creates a higher standard for fictional characters to earn copyright protection than the standard that is used for copyrighting traditional works.¹⁵² Although “distinctly delineated” is not specifically defined by courts, this is not the same as creating an original character with a minimum level of creativity.¹⁵³ In determining whether a character is distinctly delineated, courts have examined a character's traits,¹⁵⁴ personality,¹⁵⁵ and general descriptions of the character¹⁵⁶ without analyzing whether any of those factors are original

147. See Kurtz, *supra* note 14, at 464 (detailing the differences in protection afforded to each type of character).

148. *Id.*

149. *Id.* at 465.

150. See Said, *supra* note 11, at 789–90 (“Unlike flat characters, which appeal to the emotions, round characters appeal to the intellect.”).

151. See *supra* Section I.A (detailing how traditional copyright principles attempt to strike a balance between promoting creativity and overprotecting works).

152. See Jani McCutcheon, *Works of Fiction: The Misconception of Literary Characters as Copyright Works*, 66 J. COPYRIGHT SOC'Y U.S.A. *115, *119 (2019) (explaining that the “distinctly delineated” test requires judges to make aesthetic judgments of the work to determine copyrightability and that this judgment “is very rare, if not anathema, in the context of determining copyright *subsistence*” (emphasis in original)).

153. See *id.* (noting that the “distinctly delineated” test is too ambiguous and undefined to be well applied in copyrightability analyses).

154. See *Filmvideo Releasing Corp. v. Hastings*, 509 F. Supp. 60, 65 (S.D.N.Y. 1981), *aff'd in part, rev'd in part*, 668 F.2d 91 (2d Cir. 1981) (examining Hopalong Cassidy's character traits such as his quick temper and proclivity for cursing).

155. See *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981) (describing Tarzan's personality as “athletic, innocent, youthful, gentle, and strong”).

156. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930) (noting that the characters in question are fertile lovers and fathers who are obsessed with religion).

to that specific character.¹⁵⁷ By creating a test that looks at the delineation of the character, Judge Learned Hand drew attention away from the main hallmark of copyrightability, which is originality.

However, despite creating a higher standard for copyrightability, the vagueness of the “distinctly delineated” test has led judges to err on the side of overprotection of characters.¹⁵⁸ The main goal of copyright law is to promote the creation of new works for the benefit of the public; providing financial rewards to authors is only a secondary goal.¹⁵⁹ Overprotection of characters undermines this goal because it removes elements from the public domain that other authors would otherwise be able to use in their own creative works.¹⁶⁰ By allowing undeserving characters to earn copyright protection, courts allow authors to monopolize high level ideas, preventing later authors from building creatively off those ideas in new works.¹⁶¹

Finally, the trend caused by the “distinctly delineated” test of allowing less developed characters to earn copyright protection also contradicts the main purpose of copyright law to promote new and creative works.¹⁶² Authors are encouraged to produce less creative characters as a result of this trend because flat characters are more memorable for readers.¹⁶³ As an example, Sherlock Holmes is considered to be a flat, predictable character, even by his original author Sir Arthur Conan Doyle.¹⁶⁴ Because of his predictability and

157. See *supra* notes 154–56 and accompanying text (evaluating the holistic character as affected by the presence of these traits rather than whether any of these traits were original to the character).

158. See Kurtz, *supra* note 14, at 457–58 (explaining that a lack of guidance in how to apply the “distinctly delineated” test has led courts to make “questionable decision[s]”).

159. See *supra* Section I.A (explaining the goals of copyright law).

160. See Kemp, *supra* note 46, at 804–05 (“If the creator of those earlier works utilizes extreme protection, a new creator will not be able to use the earlier work to derive new works . . . The creator needs access to prior art in order to build creatively.”).

161. See *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004) (identifying that if overprotection of characters is allowed in copyright cases, authors would be unable to produce creative works unless they negotiated hundreds of copyright licenses for conceptual and stereotypical characters).

162. U.S. CONST. art. I, § 8, cl. 8.

163. Zecevic, *supra* note 18, at 376 (highlighting Sherlock Holmes as an exemplar of the flat character type).

164. See Arthur Conan Doyle, *Sidelights on Sherlock Holmes*, in *THE BAKER STREET READER: CORNERSTONE WRITINGS ABOUT SHERLOCK HOLMES* 12, 14 (Philip A. Shreffler ed., 1984) (noting that the Sherlock Holmes character “admits of no light or shade”).

limited character development, readers can easily recognize Sherlock Holmes outside of Doyle's works, making him more deserving of protection under the "distinctly delineated" test.¹⁶⁵ In contrast, a character like Rodion Raskolnikov from *Crime and Punishment* may not be considered deserving of copyright protection because his development as a character throughout the book makes him less identifiable in other works.¹⁶⁶ This trend defeats the goal of copyright law to promote *new* and *creative* works because it incentivizes authors to create flat and undeveloped characters that are more recognizable over more developed, well-rounded characters that may not be as identifiable in other contexts.¹⁶⁷

B. The Towle Test Discourages Creation of Original Characters and Improperly Mixes Trademark Doctrine with Copyright Law

The *Towle* test is the result of the Ninth Circuit's attempt to simplify its character copyrightability doctrine, rather than a radical shift from its previous tests; however, many of the negative aspects of the previous tests can still be found in the *Towle* test.¹⁶⁸ The first prong of the test, which states that the character must have physical as well as conceptual qualities, leaves courts confused as to whether this test only applies to visually depicted characters, or if purely literary characters can receive protection under this framework.¹⁶⁹ Courts have traditionally used the restrictive "story being told" test¹⁷⁰ to determine copyrightability of purely literary characters, and the first prong of the *Towle* test seems to suggest that it only applies to visually depicted characters.¹⁷¹ The

165. See Kurtz, *supra* note 14, at 464–65, 465 n.201–02 (detailing how Holmes has been described as being "both limited and defined").

166. See Zecevic, *supra* note 18, at 375 (expressing doubt that a reader would recognize Rodion Raskolnikov in a new context, despite CRIME AND PUNISHMENT'S central focus on his character).

167. Kurtz, *supra* note 14, at 465 (noting that "[w]ithdrawing aspects that are most recognizably human would take too much from the public domain, from the common pool of that which is needed to create").

168. Deamer, *supra* note 79, at 451; see also Katherine Alphonso, Note, *DC Comics v. Towle: To The Batmobile!: Which Fictional Characters Deserve Protection Under Copyright Law*, 47 GOLDEN GATE UNIV. L. REV. 5, 17 (2017) ("[T]his three-part test is not enough to yield predictable and fair decisions in every similar claim.").

169. Brenner, *supra* note 90, at 508; see also Lim, *supra* note 45, at 99 ("[C]ase law has been inconsistent as to whether and to what extent the story being told test can still be applied—especially in relation to characters portrayed textually.").

170. See *supra* note 79 (describing the criticisms of the "story being told" test).

171. *DC Comics v. Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015).

second prong of the test, which states that the character must be sufficiently delineated with consistent and identifiable character traits, is as vague and problematic as the “distinctly delineated” test.¹⁷² As with the “distinctly delineated” test, courts struggle to determine what types of characters are considered sufficiently delineated enough to warrant copyright protection because there is little specific guidance in applying this standard.¹⁷³ Finally, the third prong of the *Towle* test uses the term “distinctive,” which is a term traditionally used in trademark law.¹⁷⁴ The use of a trademark-specific term in a copyrightability test blurs the line between trademark and copyright law without providing specific guidance to courts on how to apply the term in the copyright context.¹⁷⁵

The confusion as to copyrightability of literary characters caused by the first prong of the *Towle* test goes against the goal of copyright law to promote the development of new, creative works. Since the beginning of character copyrightability, courts awarded visually depicted characters copyright protection more frequently than purely literary characters because visual characters have more details to provide a high level of distinction.¹⁷⁶ However, this difference in how visual and literary characters are defined and depicted does not justify two separate standards for characters depicted in different mediums.¹⁷⁷ Prior to the *Towle* test, courts decided cases by evaluating character copyrightability under both the “distinctly delineated” and “story being told” tests because courts did not know which test applied to which

172. See Alphonso, *supra* note 168, at 17 (noting that the *Towle* test “offers little clarification of what constitutes ‘especially distinctive’ and ‘sufficiently delineated.’”).

173. See, e.g., *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (relying on the lack of “consistent, widely identifiable traits” in rejecting a claim that a particular magician was “especially distinct” from an ordinary magician), *overruled by* *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1079 (9th Cir. 2020) (en banc).

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

175. Brenner, *supra* 90, at 509.

176. See *Anderson v. Stallone*, 11 U.S.P.Q.2d (BNA) at *1161, *1166 (C.D. Cal. 1989) (“As a practical matter, a graphically depicted character is much more likely than a literary character to be fleshed out in sufficient detail so as to warrant copyright protection.”); *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 772 F. Supp. 2d 1135, 1144 (C.D. Cal. 2008), *aff’d*, 654 F.3d 958 (9th Cir. 2011) (“Generally, literary characters are entitled to somewhat limited copyright protection; however, far greater protection has been afforded cartoon characters.”).

177. See *Anderson*, 11 U.S.P.Q.2d (BNA) at *1166 (“But this fact [that graphically depicted characters are more easily distinctive than literary characters] does not warrant the creation of separate analytical paradigms for protection of characters in two mediums.”).

types of characters.¹⁷⁸ Despite the need for clarification on whether literary and visually depicted characters should be evaluated under the same standard, the *Towle* test did not address this issue.¹⁷⁹ In fact, the language of the first prong of the test seems to indicate that the test only applies to visually depicted characters, which would leave the restrictive and highly criticized “story being told” test to apply to literary characters.¹⁸⁰ This uncertainty goes against the purposes of copyright law because it does not promote the creation of new and creative works and creates uncertainty for authors about whether their characters will obtain copyright protection.¹⁸¹

The second prong of the test does not provide guidance for courts as to what types of characters are considered “sufficiently delineated” to deserve copyright protection. This prong of the test can be traced through Ninth Circuit copyright doctrine,¹⁸² and courts have traditionally had problems in applying this test.¹⁸³ Courts have frequently relied on non-copyrightable aspects of a fictional character, such as the character’s name, to determine that it is “sufficiently delineated.”¹⁸⁴ Additionally, courts tend to define a character for the

178. *Id.* (“[O]ut of an abundance of caution this Court will determine the protectability of the Rocky characters under both tests.”); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (applying both standards), *overruled by* *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1079 (9th Cir. 2020) (en banc); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (same).

179. *See* Alphonso, *supra* note 168, at 14–15 (explaining that the first prong of the *Towle* test derives from the Ninth Circuit case *Walt Disney Productions v. Air Pirates* in which the court held that visually depicted characters are easier to see as distinctly delineated because they have a physical appearance, while literary characters are more difficult for authors to distinctly delineate because readers visualize literary characters differently in their imaginations); *see also* *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978) (explaining that characters with physical qualities are more likely to contain unique elements).

180. *See* *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015) (“[T]he character must generally have ‘physical as well as conceptual qualities.’” (quoting *Air Pirates*, 581 F.2d at 755)).

181. *See* Brenner, *supra* note 90, at 508 (noting that “[l]ower courts are left to wonder” which test should apply to which type of character).

182. Deamer, *supra* note 79, at 440–46 (explaining the origin of the “sufficiently delineated” prong).

183. Alphonso, *supra* note 168, at 10–11 (explaining that the “sufficiently delineated” test lacks adequate structure, which has led to inconsistent application).

184. *See* *What Does Copyright Protect?*, *supra* note 145 (“Names are not protected by copyright law.”); *Air Pirates*, 345 F. Supp at 110 (“[I]n the names given those characters, the respective works are the same.”); Brenner, *supra* note 90, at 499 (noting that names

purpose of evaluating the test in short sentences that reduce the character to no more than an idea, which is also not copyrightable.¹⁸⁵ Although this prong of the test alludes to the originality requirement for copyrightability, it does not meet the goals of copyright law because courts consistently use non-copyrightable aspects of characters as justification for their copyrightability.¹⁸⁶ This use of non-copyrightable aspects of a character in the character copyright analysis leads to the overprotection of characters and reduces the availability of those same character elements in the public domain.¹⁸⁷ This goes against the purposes of copyright law because it prevents the promotion of new and creative arts by taking uncreative character elements out of the public domain.¹⁸⁸ Without acknowledging the ambiguity in the sufficiently delineated test, the Ninth Circuit included this older copyright test in the new *Towle* test and did not provide any guidelines for courts on how to apply the test, thus perpetuating the problems associated with the test itself.

By using the language “especially distinctive,” the third prong of the *Towle* test blurs the line between trademark and copyright law, which negatively impacts the *Towle* test’s effectiveness in analyzing character copyrightability.¹⁸⁹ Trademark law protects “any word, name, symbol, or device, or any combination thereof” used by a person or company to distinguish their goods or services in the marketplace from goods or services offered by others.¹⁹⁰ In trademark law, a distinctive mark that is arbitrary, fanciful, or suggestive earns trademark protection, while a generic mark cannot obtain protection.¹⁹¹ Outside of copyright law,

cannot be copyrighted so it is an odd aspect of the character for courts to point out as a reason for the character being considered sufficiently delineated).

185. See e.g., *Daniels v. Walt Disney Co.*, 952 F.3d 1149, 1154 (9th Cir. 2020), *aff’d*, 958 F.3d 767 (9th Cir. 2020) (“The Moodsters look like small, loveable bears. They are round and cuddly, have small ears, and each dons a detective’s hat and small cape.”).

186. See Brenner, *supra* note 90, at 499 (arguing that misapplication of the sufficiently delineated test can lead to overprotection of characters).

187. *Id.*

188. *Id.*

189. 15 U.S.C. § 1052(f); Brenner, *supra* note 90, at 509; *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015).

190. *Id.* § 1127.

191. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976) (describing the classes of trademark eligibility and their respective degrees of protection); see also *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 210 (2000) (providing examples of each distinctiveness category: “‘arbitrary’ (‘Camel’ cigarettes), ‘fanciful’, (‘Kodak’ film), or ‘suggestive’ (‘Tide’ laundry detergent)”); *U.S. Pat. & Trademark Off. v. Booking.com*, 140 S. Ct. 2298, 2303 (2020) (noting that a generic

trademark law protects aspects of a character such as its name¹⁹² and well-known phrases.¹⁹³ Additionally, the trademark dilution doctrine protects famous marks when there is a likelihood of confusion between the famous mark and an infringing mark.¹⁹⁴

By introducing the element of distinctiveness into the copyright analysis, courts may begin blurring the line between trademark and copyright law, which could lead to overprotection in character copyrightability.¹⁹⁵ Trademark protection extends to aspects of a character that are unprotectable by copyright because trademark law analyzes characteristics such as how-well known a character is to the public.¹⁹⁶ If these trademark elements are brought into the copyright protection analysis, it will likely lead to overprotection of fictional characters under copyright law.¹⁹⁷ As seen in other aspects of this test, overprotection of characters prevents authors from using similar character types in new works, even though the copyrighted character is not original and does not display a minimum level of creativity.¹⁹⁸ Although creating a sliding-scale evaluation of character copyrightability based on similar trademark principles may be useful, the courts should make such merges in intellectual property doctrines explicitly and carefully rather than casually pulling language from one doctrine and inserting it into another.¹⁹⁹

mark for the name of a good or service does not distinguish a company's product from other similar products in the minds of consumers and therefore it cannot obtain trademark protection).

192. See *Premier-Pabst Corp. v. Elm City Brewing Co.*, 9 F. Supp. 754, 760 (D. Conn. 1935) (finding trademark protection for the "Old Maestro" character).

193. See *Lone Ranger, Inc. v. Cox*, 124 F.2d 650, 652 (4th Cir. 1942) (granting protection for the phrase "Hi, yo, Silver, away!").

194. 15 U.S.C. § 1125(c)(2)(A).

195. Brenner, *supra* note 90, at 509 (explaining how the Ninth Circuit used the element of distinctiveness in its copyright analysis, blurring the distinction between trademark and copyright law).

196. See Deamer, *supra* note 79, at 452 (explaining that this prong of the *Towle* test focuses on "character recognition and its level of value," an analysis that is typically restricted to trademark cases and requires a court to look at a character's cultural and economic value rather than its originality).

197. *Id.* (explaining that this step of the *Towle* test "focuses on character recognition and its level of value" which is traditionally a trademark analysis).

198. See *supra* notes 160–61 and accompanying text.

199. Brenner, *supra* note 90, at 510 (suggesting that combinations of doctrines should be explicit and clarified).

C. *The “Stock Character” Test Sets the Appropriately Low Bar of Originality*

Although the “stock character” test does not explicitly use the word “original,” this test most closely reflects the low standard of originality that is necessary for copyrightability. Unlike the “distinctly delineated” test and *Towle* test, the “stock character” test only requires that the character be slightly more developed than a stock character: in other words, the character must be original to obtain copyright protection.²⁰⁰ A character earns copyright protection under the “stock character” test if it is even slightly more creative than a standard stock character.²⁰¹

For example, in *Gaiman v. McFarlane*, the court found the character at the center of the case, Count Cogliostro, was copyrightable merely because he had an accent, Mosaic facial features, and a phony title.²⁰² The court was not concerned with whether Count Cogliostro was “sufficiently delineated,” “especially distinctive,” or had consistent character traits throughout the comics in which he appeared; rather, the court focused on the originality of the character’s attributes.²⁰³ Because this test looks merely at the originality of the characters, courts have not encountered the same confusion in applying the test as they have with the “distinctly delineated” test and *Towle* test.²⁰⁴ Rather than creating a new test with ambiguous standards, the “stock character” test properly reflects the well-established and understood copyright originality standard.²⁰⁵

Additionally, as in other areas of copyrightability, the idea/expression dichotomy prevents judges from overprotecting characters under the “stock character” test. In applying the “distinctly delineated” and *Towle* tests, judges have fallen into a pattern of overprotecting characters in part because they do not know how to

200. *Gaiman v. McFarlane*, 360 F.3d 644, 659–60 (7th Cir. 2004).

201. *Id.* at 660.

202. *Id.*

203. *See id.* (“No more is required for a character copyright.”).

204. *See id.* (“If a drunken old bum were a copyrightable character, so would be a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels, a masked magician . . .”).

205. *See Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978) (explaining that the *scènes à faire* doctrine denies copyright protections to “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic”); *Wavelength Film Co. v. Columbia Pictures Indus. Inc.*, 631 F. Supp. 305, 306 (N.D. Ill. 1986) (articulating how the *scènes à faire* doctrine denies copyrightability to “characters, settings, or events which necessarily follow from a certain theme or plot situation”).

properly apply each test.²⁰⁶ Applying the idea/expression dichotomy can prevent overprotection under the “stock character” test because the elements of this doctrine reflect the same principles as the “stock character” test itself; both doctrines reflect that a conceptual idea cannot obtain copyright protection, while a unique expression of that idea can.²⁰⁷ The “stock character” test most appropriately provides authors the ability to copyright truly unique characters without having to meet a myriad of various interrelated, yet undefined, elements of different tests. This simple standard is closest to the underlying goals of copyright law.

D. The Moodsters

This Section analyzes the copyrightability of Daniels’s characters, the Moodsters, under the appropriate “stock character” test. By comparing the Moodsters to other stock characters, this Section demonstrates that the Moodsters are more developed than a stock character, thus deserving of copyright protection. Further, this Section argues that the idea/expression dichotomy would not limit copyrightability of the characters in this case.

1. The Moodsters are copyrightable under the “stock character” test

The Ninth Circuit utilized the *Towle* test in *Daniels v. Walt Disney* to analyze the copyrightability of Daniels’s characters, the Moodsters. The Ninth Circuit determined that the Moodsters were not copyrightable because they lacked distinct character elements outside of the color of each character and the emotion each character represented, and because they were not consistently identifiable

206. See *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981) (finding Tarzan to be copyrightable because he is in tune with the jungle, communicates with animals, and is innocent and athletic, which is no more than a generic character type); *Filmvideo Releasing Corp. v. Hastings*, 509 F. Supp. 60, 65 (S.D.N.Y. 1981) (holding that the character, Hopalong Cassidy, was copyrightable because he was quick tempered and cursed frequently, but also had a sentimental side).

207. See *Gaiman*, 360 F.3d at 659–60 (noting that the stock character test denies protection to “rudimentary, commonplace, standard, or unavoidable” ideas, while providing protection to characters that have some distinction above the “stock character out of which it may have been built”); *Bikram’s Yoga Coll. Of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1037 (9th Cir. 2015) (explaining that the idea/expression dichotomy prohibits the protection of ideas, while letting specific expressions of those ideas obtain copyright protection).

between various character design iterations.²⁰⁸ However, had the court used the more lenient and appropriate “stock character” test, it is likely that the court would have found the characters protectable under copyright law.

The Moodsters have unique elements that make them more distinct than a rudimentary and commonplace stock character. Each character is depicted as a fluffy bear with a specific color and a personality that skews towards the expression of the emotion the character represents.²⁰⁹ The pink colored bear represents love, the yellow colored bear represents happiness, the blue colored bear represents sadness, the red colored bear represents anger, and the green colored bear represents fear.²¹⁰ It is indisputable that emotions and colors are abstract ideas that do not warrant copyright protection under any copyrightability test or doctrine.²¹¹ Additionally, as the Ninth Circuit observed, the combination of colors and emotions is a common technique used by authors in children’s books.²¹² However, Daniels did not seek copyright protection for the *idea* of an emotion or a color, she sought copyright protection for the *expression* of those conceptual ideas in her specifically designed characters.²¹³

Courts have denied protection for several types of stock characters found in children’s books. For example, in *Cavalier v. Random House, Inc.*,²¹⁴ the court found that Nicky Moonbeam, an anthropomorphic moon character in a child’s book, was a stock character because it “directly flows from the idea of a journey in the night sky.”²¹⁵ Nicky Moonbeam taught children to conquer their fear of the dark and follow their dreams, but did not have any other unique characteristics.²¹⁶ The court found that authors commonly use moon

208. See *supra* Section I.C (discussing the Ninth Circuit’s holding that the Moodsters were not copyrightable).

209. *Daniels v. Walt Disney Co.*, 952 F.3d 1149, 1154 (9th Cir. 2020), *aff’d*, 958 F.3d 767 (9th Cir. 2020).

210. *Id.* at 1151.

211. *Id.* at 1153.

212. *Id.*

213. See Second Amended Complaint at 29, *Daniels v. Walt Disney Co.*, No. 2:17-cv-04527-PSG-SK, 2018 WL 3533363 (C.D. Cal. May 9, 2018) (“The characters in *The Moodsters* express the idea of using single emotions as characters in an entertainment program.”).

214. 297 F.3d 815 (9th Cir. 2002).

215. *Id.* at 825.

216. *Id.*

characters in children's books.²¹⁷ Accordingly, the court held that Nicky Moonbeam was an uncopyrightable stock character, because he lacked additional character traits to make him more distinguished from a standard stock moon character.²¹⁸

Similarly, in *Lewinson v. Henry Holt & Co.*,²¹⁹ the court examined whether the characters in a children's book that displayed children from various countries using a pacifier deserved copyright protection.²²⁰ The court noted that the characters were not displayed on more than one page of the book and each character had undeveloped personalities.²²¹ The lack of distinguishing character traits and the stereotypical depictions of each character as a part of their native country did not make the characters more developed than a standard stock character.²²² Based on this analysis, the court found that "[t]he use of such indistinct stock characters does not warrant copyright protection."²²³

Comparatively, the Moodsters have more developed character traits and personalities, which render them more developed than a mere stock character. Though Nicky Moonbeam gave life to the moon as a character, there are few ways to depict the preexisting physical object of the moon, limiting its originality and corresponding copyrightability. Conversely, the Moodsters are physical representations of non-physical emotions and there are numerous ways to depict the abstract concept of an emotion, lending further credence to its copyrightability.²²⁴ Additionally, the Moodsters are distinguishable from the children of various countries in Lewinson's book because the Moodsters have more character development through the television and book series in which they star.²²⁵ Furthermore, there is no stereotypical or common way to depict emotions whereas there is a stereotypical or common way to depict

217. *Id.* at 824.

218. *Id.* at 825.

219. 659 F. Supp. 2d 547 (S.D.N.Y. 2009).

220. *Id.* at 574.

221. *Id.*

222. *Id.*

223. *Id.*

224. See Petition for Writ of Certiorari at 5, *Moodsters Co. v. Walt Disney Co.*, 141 S. Ct. 1050 (2021) (No. 20-132) (explaining that the development of the Moodsters involved "many expressive choices selected and arranged to create characters unlike any others seen in any prior work").

225. *Daniels v. Walt Disney Co.*, 952 F.3d 1149, 1151 (9th Cir. 2020), *aff'd*, 958 F.3d 767 (9th Cir. 2020).

children from various countries. Daniels made deliberate choices in how to depict the characters, how the characters would interact, and the emotions each character would represent throughout the television and book series, making these characters far more developed than standard stock characters.²²⁶

Because emotions are an abstract concept, the expression of emotions as characters can be copyrightable under the “stock character” test. Daniels notes that no movies, television shows, or books have visually depicted characters that are anthropomorphic expressions of a singular emotion.²²⁷ By choosing the specific emotions to characterize and the form in which to represent those emotions, the Moodsters meet the minimum level of creativity and originality necessary to distinguish them from a stock character. Therefore, under the more lenient “stock character” test, the Moodsters would be considered copyrightable.

2. The Moodsters meet the limitations of the idea/expression dichotomy necessary to obtain copyright protection

Additionally, the idea/expression dichotomy does not prevent the Moodsters from obtaining copyright protection. The line between idea and expression can be difficult to draw,²²⁸ but this case contains a clear distinction between an idea and the expression of that idea.²²⁹ The idea/expression dichotomy is used to determine the specific aspects of

226. See Petition for Writ of Certiorari at 6, *Moodsters Co.*, 141 S. Ct. 1050 (No. 20-132) (explaining that “numerous creative choices were available in how to express the idea of characters representing emotions, including, for example, choices in general physical form, number, and types of emotions for the character ensemble”).

227. See Second Amended Complaint at 18, *Daniels v. Walt Disney Co.*, No. 2:17-cv-04527-PSG-SK, 2018 WL 3533363 (C.D. Cal. May 9, 2018) (referencing a statement from a Pixar creator, Peter Docter, on expressing the characters for the movie *Inside Out* by stating “[t]he idea [for *Inside Out*] was rather abstract, but in my enthusiasm I didn’t realize just how difficult it would be to make it concrete But what do emotions look like? Or abstract thought? Or the subconscious? Here we had *nothing to measure against, nothing concrete* to tell us when we’d got it right”).

228. See *Bikram’s Yoga Coll. of India L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1040 (9th Cir. 2015) (“In drawing the ‘difficult’ line between idea and expression in this case, we are mindful of the ‘guiding consideration’ of the idea/expression dichotomy . . .”).

229. This Comment does not analyze whether Disney’s *Inside Out* characters infringed Daniels’s copyright in the Moodsters, it only analyzes whether the Moodsters can be protected under copyright law at all.

a work that are protected in an infringement case.²³⁰ An author may have a copyright in a specific aspect of expression in their work while not having a copyright in other high level conceptual ideas behind that expression.²³¹ In this case, Daniels's argument that Disney infringed her copyright in the Moodsters may not succeed under the idea/expression dichotomy because she may be trying to enforce the uncopyrightable idea of representing emotions as color-coded characters against Disney's *Inside Out* characters.²³² As dictated by the idea/expression dichotomy, her specific expression of color-coded fluffy bears representing specific emotions is copyrightable, but her idea of creating anthropomorphic representations of emotions in physical characters is not.²³³ The similarities between Disney's *Inside Out* characters and Daniels's Moodsters characters for the purposes of infringement may end at the idea that each set of characters are color-coded anthropomorphic representations of human emotions.

However, the court in *Daniels v. Walt Disney Co.* did not even begin the infringement analysis because it found that the characters could not obtain copyright protection because of their lack of distinctive characteristics.²³⁴ The court, using a heightened copyrightability standard rather than the originality and creativity standard used in other areas of copyright law, found that the Moodsters were not sufficiently delineated, consistent in appearance, or especially distinctive.²³⁵ Although the court's determination that the Moodsters did not deserve copyright protection under the *Towle* test may have been correct, the court utilized the wrong test because the copyrightability standard set forth by the *Towle* test is too stringent.²³⁶ Under the more appropriate "stock character" test, the Moodsters deserve copyright protection because they represent more than a stereotypical stock character based on the expressive choices made by

230. Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 551 (1990) (stating when the idea/expression dichotomy test is used).

231. See *Baker v. Selden*, 101 U.S. 99, 101–03 (1879) (holding that the author of a book explaining a form of bookkeeping had a copyright in the specific way in which he expressed the form of bookkeeping in his book but that he did not have a copyright in the idea of the bookkeeping method itself).

232. *Id.* at 102.

233. See *id.* (explaining how copyright protects only the expression of an idea, not the idea itself).

234. *Daniels*, 952 F.3d at 1155 (9th Cir. 2020).

235. *Id.*

236. See *supra* Section II.A.2 (analyzing the *Towle* test).

Daniels in developing the characters. Even considering the idea/expression dichotomy, the Moodsters constitute an expression of the idea of creating color-coded representations of specific emotions.²³⁷ Such creative expression deserves copyright protection.

CONCLUSION

The goal of copyright law is to promote creativity for the benefit of society, which is accomplished by granting limited monopolies to the authors of creative works to reproduce, distribute, perform, display, and create derivatives of the copyrighted work. A minimum level of creativity and originality is all that is needed for a work to obtain copyright protection. However, this low bar for copyrightability is not used in most courts' copyrightability tests for fictional characters. The "distinctly delineated" test and *Towle* test require more than a minimum level of creativity for a character to obtain copyright protection. These two tests set forth elusive standards, such as requiring the character to be "distinctly delineated" or "sufficiently distinctive," to earn protection under copyright law. In contrast, the "stock character test," first articulated by the Seventh Circuit, most closely adheres to the goal of copyright protection, setting an appropriately low bar for the copyrightability of characters. This test requires *only* that a character be slightly distinguished from a commonplace stock character to be copyrightable. Without creating undefined standards for copyrightability as the other tests do, the "stock character" test most closely reflects the minimum level of creativity standard that is required in other areas of copyright law. Therefore, courts should adopt the "stock character" test to more closely align with the purpose and goal of copyright law.

Had the Ninth Circuit used the more appropriate "stock character" test, rather than the *Towle* test, it likely would have found the Moodsters copyrightable. Daniels's characters are physical representations of emotions in the form of color-coded bears. Emotions do not have a stereotypical way of being depicted in other

237. See *Warner Bros. Inc. v. Am. Broad. Co.*, 720 F.2d 231, 243 (2d Cir. 1983) (explaining that the court rejects the defendant's argument that every similarity between the plaintiff's and defendant's characters are unprotectable ideas because "[t]hat approach risks elimination of any copyright protection for a character, unless the allegedly infringing character looks and behaves exactly like the original . . . [t]hat each one [character trait] may be an idea does not diminish the expressive aspect of the combination [of many character traits]").

works, therefore, there is no real stock character for an emotion. Further, the idea/expression dichotomy does not prevent the Moodsters from obtaining copyright protection because Daniels created an *expression* of the idea of representing emotions as physical characters. Daniels could have chosen innumerable ways to depict the emotions that she chose to characterize, thus, her characters are an expression rather than an uncopyrightable idea. For these reasons, the Moodsters should have earned copyright protection.