

COPYRIGHT IN A GLOBAL INFORMATION ECONOMY

2016 Case Supplement

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Chapter 5. The Reproduction Right and the Right to Prepare Derivative Works

C. Fictional Characters and the Reproduction and Derivative Work Rights

Page 335. *The following case may be used as a supplement or as an alternative to Warner Brothers Entertainment v. X One X Productions.*

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

IKUTA, C.J.: DC Comics (DC) is the publisher and copyright owner of comic books featuring the story of the world-famous character, Batman. Since his first comic book appearance in 1939, the Caped Crusader has protected Gotham City from villains with the help of his sidekick Robin the Boy Wonder, his utility belt, and of course, the Batmobile.

. . . [T]he Batmobile is a fictional, high-tech automobile that Batman employs as his primary mode of transportation. The Batmobile has varied in appearance over the years, but its name and key characteristics as Batman’s personal crime-fighting vehicle have remained consistent. Over the past eight decades, the comic books have continually depicted the Batmobile as possessing bat-like external features, ready to leap into action to assist Batman in his fight against Gotham’s most dangerous villains, and equipped with futuristic weaponry and technology

Since its creation in the comic books, the Batmobile has also been depicted in numerous television programs and motion pictures. Two of these depictions are relevant to this case: the 1966 television series *Batman*, starring Adam West, and the 1989 motion picture *BATMAN*, starring Michael Keaton.

The 1966 *Batman* television series was the product of a licensing agreement between DC’s predecessor, National Periodical Publications, Inc. (National Periodical) and the American Broadcasting Company (ABC). . . . Under this agreement, ABC . . . produced the 1966 television show In addition to Batman, Robin, and the use of visual onomatopoeia that flashed on screen during fight scenes . . . the television series featured the Batmobile. The design of the Batmobile did not directly copy any iterations of the Batmobile as it appeared in the comic books. As in the comic books, however, the Batmobile in the 1966 television show maintained a bat-like appearance and was equipped with state-of-the-art weaponry and technology.

In 1979, DC again licensed its rights in the Batman literary property . . . to Batman Productions, Inc. (BPI). . . .

BPI subsequently sub-licensed its rights to Warner Bros., Inc., who eventually . . . produced the 1989 motion picture *BATMAN*. . . . Like the 1966 television series, the 1989 motion picture featured a Batmobile that was physically distinct from the Batmobile portrayed in the comic books and the 1966 television series. Nonetheless, the Batmobile as portrayed in the motion picture retained a bat-like physical appearance and was again equipped with futuristic technology and crime-fighting weaponry.

Defendant Mark Towle produces replicas of the Batmobile as it appeared in both the 1966 television show and 1989 motion picture as part of his business at Gotham Garage, where he manufactures and sells replicas of automobiles featured in motion pictures or television programs. Towle concedes that these replicas copy the designs of the Batmobile as depicted on television and in the motion picture, though they do not copy every feature. Towle then sells these vehicles for approximately \$90,000 to “avid car collectors” who “know the entire history of the Batmobile.” Towle also sells kits that allow customers to modify their cars to look like the Batmobile, as it appeared in the 1966 television show and the 1989 motion picture. . . .

In May 2011, DC filed this action against Towle, alleging, among other things . . . copyright infringement . . . arising from Towle’s manufacture and sale of the Batmobile replicas. Towle . . . claimed that the Batmobile as it appeared in the 1966 television show and 1989 motion picture was not subject to copyright protection. . . . The parties subsequently filed cross motions for partial summary judgment

. . . [T]he district court granted in part and denied in part DC’s motion for summary judgment, and denied Towle’s cross motion for summary judgment. *DC Comics v. Towle*, 989 F.Supp.2d 948 (C.D.Cal.2013). . . .

After the district court issued its decision, the parties entered into a joint stipulation in which they agreed that the district court would enter a judgment against Towle on DC’s copyright infringement and other claims. . . . The district court entered a judgment consistent with this stipulation on February 22, 2013, and Towle timely appealed. . . .

II. A

We begin with the question whether the Batmobile, as it appears in the comic books, television series, and motion picture, is entitled to copyright protection. . . .

Courts have recognized that copyright protection extends not only to an original work as a whole, but also to “sufficiently distinctive” elements, like comic book characters, contained within the work. *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir.2008). Although comic book characters are not listed in the Copyright Act, we have long held that such characters are afforded copyright protection. *See Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir.1978). . . .

Not every comic book, television, or motion picture character is entitled to copyright protection. We have held that copyright protection is available only “for characters that are especially distinctive.” *Halicki*, 547 F.3d at 1224. To meet this standard, a character must be “sufficiently delineated” and display “consistent, widely identifiable traits.” *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170 (9th Cir.2003) (citing

Toho Co., Ltd. v. William Morrow & Co., Inc., 33 F.Supp.2d 1206, 1215 (C.D.Cal.1998) (Godzilla)). . . .

We have previously determined that an automotive character can be copyrightable. *See Halicki*, 547 F.3d at 1224. . . .

As indicated in *Halicki*, a character may be protectable if it has distinctive character traits and attributes, even if the character does not maintain the same physical appearance in every context. As the Eighth Circuit has recognized, “the presence of distinctive qualities apart from visual appearance can diminish or even negate the need for consistent visual appearance.” *Warner Bros. Entm’t, Inc. v. X One X Prods.*, 644 F.3d 584, 599 n. 8 (8th Cir.2011). . . .

Similarly, district courts have determined that James Bond, Batman, and Godzilla are characters protected by copyright, despite their changes in appearance. In each instance, courts have deemed the persistence of a character’s traits and attributes to be key to determining whether the character qualifies for copyright protection. The character “James Bond” qualifies for copyright protection because, no matter what the actor who portrays this character looks like, James Bond always maintains 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.” *Metro–Goldwyn–Mayer [v. Am. Honda Motor Co.]*, 900 F.Supp. [1287] at 1296. Similarly, while the character “Godzilla” may have a different appearance from time to time, it is entitled to copyright protection because it “is always a pre-historic, fire-breathing, gigantic dinosaur alive and well in the modern world.” *Toho Co.*, 33 F.Supp.2d at 1216. In short, although James Bond’s, Godzilla’s, and Batman’s “costume and character have evolved over the years, [they have] retained unique, protectable characteristics” and are therefore entitled to copyright protection as characters. *Sapon [v. DC Comics]*, 2002 WL 485730, at *3–4.

We read these precedents as establishing a three-part test for determining whether a character in a comic book, television program, or motion picture is entitled to copyright protection. First, the character must generally have “physical as well as conceptual qualities.” *Air Pirates*, 581 F.2d at 755. Second, the character must be “sufficiently delineated” to be recognizable as the same character whenever it appears. *See Rice*, 330 F.3d at 1175. Considering the character as it has appeared in different productions, it must display consistent, identifiable character traits and attributes, although the character need not have a consistent appearance. *See Halicki*, 547 F.3d at 1224. Third, the character must be “especially distinctive” and “contain some unique elements of expression.” *Halicki*, 547 F.3d at 1224. It cannot be a stock character such as a magician in standard magician garb. *Rice [v. Fox Broadcasting Co.]*, 330 F.3d 1170] at 1175 [9th Cir. 2003]. Even when a character lacks sentient attributes and does not speak (like a car), it can be a protectable character if it meets this standard. *Halicki*, 547 F.3d at 1224.

We now apply this framework to this case. . . . First, because the Batmobile has appeared graphically in comic books, and as a three-dimensional car in television series and motion pictures, it has “physical as well as conceptual qualities,” and is thus not a mere literary character. *Air Pirates*, 581 F.2d at 755.

Second, the Batmobile is “sufficiently delineated” to be recognizable as the same character whenever it appears. *See Rice*, 330 F.3d at 1175. As the district court

determined, the Batmobile has maintained distinct physical and conceptual qualities since its first appearance in the comic books in 1941. In addition to its status as “a highly-interactive vehicle, equipped with high-tech gadgets and weaponry used to aid Batman in fighting crime,” the Batmobile is almost always bat-like in appearance, with a bat-themed front end, bat wings extending from the top or back of the car, exaggerated fenders, a curved windshield, and bat emblems on the vehicle. This bat-like appearance has been a consistent theme throughout the comic books, television series, and motion picture, even though the precise nature of the bat-like characteristics have changed from time to time.

The Batmobile also has consistent character traits and attributes. No matter its specific physical appearance, the Batmobile is a “crime-fighting” car with sleek and powerful characteristics that allow Batman to maneuver quickly while he fights villains. In the comic books, the Batmobile is described as waiting “[l]ike an impatient steed straining at the reins ... shiver[ing] as its super-charged motor throbs with energy” before it “tears after the fleeing hoodlums” an instant later. Elsewhere, the Batmobile “leaps away and tears up the street like a cyclone,” and at one point “twin jets of flame flash out with thunderclap force, and the miracle car of the dynamic duo literally flies through the air!” Like its comic book counterpart, the Batmobile depicted in both the 1966 television series and the 1989 motion picture possesses “jet engine[s]” and flame-shooting tubes that undoubtedly give the Batmobile far more power than an ordinary car. Furthermore, the Batmobile has an ability to maneuver that far exceeds that of an ordinary car. In the 1966 television series, the Batmobile can perform an “emergency bat turn” via reverse thrust rockets. Likewise, in the 1989 motion picture, the Batmobile can enter “Batmissile” mode, in which the Batmobile sheds “all material outside [the] central fuselage” and reconfigures its “wheels and axles to fit through narrow openings.”

Equally important, the Batmobile always contains the most up-to-date weaponry and technology. At various points in the comic book, the Batmobile contains a “hot-line phone ... directly to Commissioner Gordon’s office” maintained within the dashboard compartment, a “special alarm” that foils the Joker’s attempt to steal the Batmobile, and even a complete “mobile crime lab” within the vehicle. Likewise, the Batmobile in the 1966 television series possesses a “Bing–Bong warning bell,” a mobile Bat-phone, a “Batscope, complete with [a] TV-like viewing screen on the dash,” and a “Bat-ray.” Similarly, the Batmobile in the 1989 motion picture is equipped with a “pair of forward-facing Browning machine guns,” “spherical bombs,” “chassis-mounted shinbreakers,” and “side-mounted disc launchers.”

Because the Batmobile, as it appears in the comic books as well as in the 1966 television show and 1989 motion picture, displays “consistent, identifiable character traits and attributes,” the second prong of the character analysis is met here.

Third, the Batmobile is “especially distinctive” and contains unique elements of expression. In addition to its status as Batman’s loyal bat-themed sidekick complete with the character traits and physical characteristics described above, the Batmobile also has its unique and highly recognizable name. It is not merely a stock character.

Accordingly, applying our three-part test, we conclude that the Batmobile is a character that qualifies for copyright protection.

Towle raises two arguments against this conclusion. First, he points out that the Batmobile has at times appeared without its signature sleek “bat-like” features. He notes that in a 1988 comic book rendition, the Batmobile appears as a heavily armored tank

with large tires and a rocket launcher. The Batmobile portrayed in the 1989 motion picture could also transform into a Batmissile. As we have noted, however, a consistent appearance is not as significant in our analysis as consistent character traits and attributes. The changes in appearance cited by Towle resemble costume changes that do not alter the Batmobile's innate characteristics, any more than James Bond's change from blue swimming trunks (in *Casino Royale*) to his classic tuxedo affects his iconic character. In context, the depictions of the Batmobile as a tank or missile promote its character as Batman's crime-fighting super car that can adapt to new situations as may be necessary to help Batman vanquish Gotham City's most notorious evildoers. See *Halicki*, 547 F.3d at 1224–25.

Second, Towle argues that a jury should decide the question whether the Batmobile displayed unique elements of expression and consistent, widely identifiable traits. We disagree. We have previously recognized that “[w]hether a particular work is subject to copyright protection is a mixed question of fact and law subject to de novo review.” *Societe Civile Succession Guino v. Renoir*, 549 F.3d 1182, 1185 (9th Cir.2008). Neither party disputes the relevant facts regarding the Batmobile here. Accordingly, we are well-equipped to determine whether, as a matter of law, these undisputed facts establish that the Batmobile is an “especially distinctive” character entitled to copyright protection. . . .

IV

As Batman so sagely told Robin, “In our well-ordered society, protection of private property is essential.” *Batman: The Penguin Goes Straight*, (Greenway Productions television broadcast March 23, 1966). Here, we conclude that the Batmobile character is the property of DC, and Towle infringed upon DC's property rights when he produced unauthorized derivative works of the Batmobile as it appeared in the 1966 television show and the 1989 motion picture. Accordingly, we affirm the district court.

NOTES AND QUESTIONS

1. Under what §102 category of work is the Batmobile copyrightable? Is it a literary work? A pictorial or graphic work? Does it matter? What arguments would you make to counter the court's assertion that the Batmobile is copyrightable “as a matter of law”? In *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc), the court endorsed the Copyright Office's longstanding practice of denying copyright to an actor or actress for his or her performance embodied in a motion picture, reasoning that the copyright subsists in the motion picture as a single integrated work. If a performance in a motion picture is ineligible for separate copyright, why is the Batmobile eligible?

2. Do you agree with the court that the Batmobile is a character just as much as James Bond? Review the characteristics of the Batmobile that the court identifies as consistent and sufficiently distinctive. How different is the Batmobile from modes of transportation used by other super heroes? Is the “especially distinctive” standard a higher threshold than that of originality? Is it a different standard altogether?

3. As you learned in Chapter 4, copyright protection for useful articles, architectural works and computer software is subject to certain limits. Should copyright protection for characters be subject to any limits and, if so, what should those limits be?