

# ***DC COMICS V. TOWLE: PROTECTING FICTIONAL CHARACTERS THROUGH STEWARDSHIP***

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“Batman always must be Bruce Wayne. . . and he always must have a Batmobile and a butler. I can take them to the edge, but it always will come back to the basics. Unlike novel characters, comic book characters last an eternity.”<sup>1</sup>

Grant Morrison

Since 1954, the United States Court of Appeals for the Ninth Circuit has developed distinct rules for the protection of fictional characters. In 2015, the Ninth Circuit attempted to consolidate its doctrine in *DC Comics v. Towle*.<sup>2</sup> *Towle* synthesized a three-part test to determine whether a character is protected by copyright. The court then applied this test in its ruling that the Batmobile—Batman’s ubiquitous crime-fighting vehicle—was copyrightable.

The culmination of the copyrightable character doctrine in *Towle* creates an opportunity for more comprehensive assessments of the impact of the Ninth Circuit’s approach to character copyright. The framework *Towle* constructed seeks to protect a uniquely important aspect of creative works. Fictional characters serve as the guiding spirit of storytelling, and are increasingly important in the modern media landscape. *Towle* formulated individual protection of characters through an unorthodox and problematic evaluation that challenges several central tenets of copyright law. However, four notable justifications can be made for *Towle*’s unique framework. This Note classifies these underlying rationales as a privilege of stewardship for copyright owners.

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1. Cyriaque Lamar, *Grant Morrison’s Philosophy of Comics*, 109 (Apr. 14, 2010, 6:47 PM), <http://io9.gizmodo.com/5517352/grant-morrison-philosophy-of-comics> [<https://perma.cc/FSA7-KMU5>].

2. 802 F.3d 1012 (9th Cir. 2015).

Part I of this Note tracks the historical development of copyright in fictional characters leading up to *Towle*. Part II evaluates *Towle* itself, paying special attention to the roots of the test the court used to evaluate the Batmobile. Part III attempts to articulate an explanation for the development of the copyrightable character doctrine. This explanation explores stewardship as a set of rationales for *Towle*. Part IV then uses *Towle* to evaluate two contemporary characters in modern mediums. These assessments problematize not only the components of the *Towle* test but the stewardship principles which justify the court's fundamental departure from established precedent. The Note concludes by proposing several improvements to the *Towle* test and a brief meditation on the doctrine's future.

## I. THE HISTORICAL DEVELOPMENT OF COPYRIGHTABLE FICTIONAL CHARACTERS

The theories underlying the copyrightability of fictional characters have developed over nearly a century of jurisprudence. The Constitution authorized Congress to grant copyrights in order to promote the progress of knowledge.<sup>3</sup> To achieve this goal, copyright enables “authors to control the use of their intellectual creations.”<sup>4</sup> The Copyright Act of 1976 protects “original works of authorship fixed in any tangible medium of expression.”<sup>5</sup> Copyright grants owners a variety of rights, such as control over reproduction and the ability to create derivative works.<sup>6</sup> The Act contains a non-exhaustive list of protected categories of works, such as literary, musical, and audiovisual pieces.<sup>7</sup>

Taking only a portion of a copyrighted work—such as a character—can still infringe the underlying work. The Nimmer treatise states the dominant view that “[One should] view the subject novel, film, opera, etc. as subject to copyright protection considered as a whole—and infringed to the extent that a delineated character is copied therefrom.”<sup>8</sup> Courts have employed different frameworks to evaluate this type of infringement. The test the

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3. U.S. CONST. art. 1, § 8, cl. 8; see also Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505, 1507 (2013).

4. Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 439 (1986).

5. 17 U.S.C. § 102(a) (2012).

6. See *id.* § 106 (2012).

7. See *id.* § 102(a).

8. Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 2.12[A][2] n.17.1 (2016).

Ninth Circuit outlines in *Towle* combined theories of character copyrightability that originated in different circuits and in different eras.

Most commentators consider the origin of the copyrightability of fictional characters to be Judge Learned Hand's dicta in *Nichols v. Universal Pictures*.<sup>9</sup> Judge Hand stated that, to his knowledge, a case like it had never arisen, but:

If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress.<sup>10</sup>

From this passage, the theory originated that a character may so exactly mimic the character from a preexisting work as to infringe the copyright of the preexisting work. Modern commentators synthesized a two-part test for character infringement from *Nichols*: “(1) the infringed character must be sufficiently delineated; (2) the infringing character must ‘closely imitate’ the infringed character.”<sup>11</sup> Notably, *Nichols* held that the work ultimately infringed is the work containing the character. Hand reasoned that the infringed work would be the play, not Sir Toby Belch.<sup>12</sup> Thus, the character was not (yet) the basis of the infringement comparison.

*Nichols* recognized the value of characters, but the infringement analysis remained rooted in the original work as a whole and did not focus solely on the character. This would later change in the Ninth Circuit.

More than any other circuit court, the Ninth Circuit is responsible for the expansion of copyright in fictional characters.<sup>13</sup> Nevertheless, the court has had trouble articulating a concise standard, and many precedents the court relies on in later cases have different meanings in their original articulation. The evolution of the doctrine can be broadly clustered into

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9. See, e.g., *id.* at § 2.12[A][2].

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

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

12. See *Nichols*, 45 F.2d at 121 (introducing the character copyrightability discussion by stating “but we do not doubt that two plays may correspond in plot closely enough for infringement,” which suggests infringing a “subsection” infringes the whole).

13. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Warner Bros. Pictures v. CBS*, 216 F.2d 945 (9th Cir. 1954); see also NIMMER, *supra* note 8, § 2.12[3] (devoting an entire portion of the evaluation of fictional character doctrine to Ninth Circuit jurisprudence).

three parts: (1) post-*Sam Spade* confusion; (2) the evolution of the doctrine in the Central District of California; and (3) the modern doctrine.

A. SAM SPADE, MICKEY MOUSE AND THE A-TEAM (1954–1988)

*Warner Bros. Pictures v. CBS*, also called the *Sam Spade* case, has evoked myriad critical responses. One commentator described the case as “sphinxlike,”<sup>14</sup> and Richard Posner has bluntly called it “wrong.”<sup>15</sup> Most agree that *Sam Spade* resulted in “massive confusion.”<sup>16</sup> The case concerned the author Dashiell Hammett, who transferred motion picture, radio, and television rights for his book *The Maltese Falcon* to Warner Brothers.<sup>17</sup> Hammett subsequently used Sam Spade, the famous private detective character in the novel, in other works. When these sequels were licensed to CBS and adapted into a successful radio show, Warner filed suit claiming that the sequels infringed their rights to *The Maltese Falcon*.<sup>18</sup>

The Ninth Circuit held that even if all rights were assigned to a third party, it does not prevent the author from using the characters in the work because those characters are not protected by copyright.<sup>19</sup> The court provided a very narrow exception to this rule: “It is conceivable that 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 [protected by copyright].”<sup>20</sup> This evaluation became known as the *Sam Spade* or “story being told” test, and it left characters essentially unprotectable.<sup>21</sup> The Ninth Circuit’s holding allowed Hammett to continue to use the characters he created, but it did so by denying the characters any copyright protection, effectively placing them in the public domain.<sup>22</sup>

In *Walt Disney Productions v. Air Pirates*,<sup>23</sup> the Ninth Circuit reinterpreted the rules established in *Sam Spade*. Here, Disney filed suit against Air Pirates for their underground comic book that depicted well-

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14. See Francis M Nevins, Jr., *Character + Copyright = Catastrophe*, 39 J. COPYRIGHT SOC’Y U.S.A. 303, 315 (1992).

15. See *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004) (Posner, J.).

16. See E. Fulton Brylawski, *Protection of Characters—Sam Spade Revisited*, 22 BULL. COPYRIGHT SOC’Y U.S.A. 77, 87 (1974).

17. See *Warner Bros. Pictures v. CBS*, 216 F.2d 945, 947–48 (9th Cir. 1954).

18. See *id.*

19. See *id.* at 950.

20. See *id.*

21. See Marks, *supra* note 11, at 42.

22. The fact that Hammett himself reused the character clearly influenced the court, and the opinion emphasized the importance of familiar characters to subsequent works. See *Warner Bros. Pictures*, 216 F.2d at 949.

23. 581 F.2d 751 (9th Cir. 1978).

known Disney cartoon characters “as active members of a free thinking, promiscuous, drug ingesting counterculture.”<sup>24</sup> The court held that Disney’s characters were copyrightable and that *Air Pirates* infringed those rights.<sup>25</sup>

To reach its conclusion, *Air Pirates* made two notable interpretations. First, the court held that characters are protectable<sup>26</sup> but did not elaborate on whether they should be considered independently copyrightable. Interpreting the 1909 Copyright Act, the court described characters as a copyrightable “component part[.]” of the cartoons.<sup>27</sup> This assertion, coupled with a reference to *Detective Comics, Inc. v. Bruns Publications*,<sup>28</sup> suggests that the court believed the cartoons to be the infringed work, not the character Mickey Mouse. However, the court reasoned in its infringement evaluation that “a cartoon character’s image is intertwined with its personality and other traits, so that the ‘total concept and feel’ of even the component part cannot be limited to the image itself.”<sup>29</sup> Hence, an image of Mickey Mouse also inherently includes his character traits as depicted by the overarching work. This portion of the court’s language suggests that characters are in some ways independent from the work in which they are contained. *Air Pirates* also emphasized the “widespread public recognition” of Mickey Mouse and the other Disney characters used in the *Air Pirates* comics.<sup>30</sup> This separability arguably suggests that the court evaluated the characters as individual works. Thus, *Air Pirates* is at best unclear about whether the character itself is the infringed work.<sup>31</sup>

The court’s second noteworthy interpretation concerned the *Sam Spade* case. The *Air Pirates* court avoided the restrictions of *Sam Spade*’s “story being told test” by differentiating between literary characters and cartoon characters. “[A] comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of

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24. See *id.* at 753 (internal quotation marks omitted). For example, one comic graphically depicted Mickey Mouse violently assaulting a Disney fan that had a Mickey tattoo. See BOB LEVIN, *THE PIRATES AND THE MOUSE: DISNEY’S WAR AGAINST THE UNDERGROUND* 146–47 (2003).

25. See *Air Pirates*, 581 F.2d at 754–58.

26. See *id.* at 754–55.

27. See *id.* at 754.

28. See *id.* In *Bruns*, the court’s infringement evaluation compared the two comics, rather than narrowing the analysis to the two characters contained therein: “[w]e have compared the alleged infringing magazine of Bruns with the issues of ‘Action Comics.’” *Detective Comics, Inc. v. Bruns Publ’ns*, 111 F.2d 432, 433 (2d Cir. 1940).

29. See *Air Pirates*, 581 F.2d at 757 (quotations omitted).

30. See *id.*

31. See Kurtz, *supra* note 4, at 447.

expression.”<sup>32</sup> Future courts have accepted this statement without question, although it is certainly arguable that this delineation unduly favors visual expression.<sup>33</sup> To buttress its reasoning, the court planted a seed of doubt with a footnote that stated the *Sam Spade* test could be dicta.<sup>34</sup> *Air Pirates* initiated the Ninth Circuit’s confusion as to the appropriate test for character copyrightability. *Olson v. NBC* ossified that confusion.

In *Olson v. NBC*,<sup>35</sup> Olson claimed NBC’s “The A-Team” infringed his copyrighted screenplay and treatment for a television series to be entitled “Cargo.”<sup>36</sup> Here, the Ninth Circuit unambiguously addressed independent character copyrightability, and declared that it would evaluate “copyright protection [of] a character taken alone.”<sup>37</sup> But the court stopped short of addressing how this particularized evaluation conformed with the 1976 Copyright Act’s categorical protection of the underlying work, such as literary and audiovisual works, rather than the characters described therein.

The *Olson* court found the “Cargo” characters not independently copyrightable but provided little clarity on what standard should be used to reach such a conclusion.<sup>38</sup> First, the court said an evaluation under the *Sam Spade* standard “doom[s]” the “Cargo” characters.<sup>39</sup> During this discussion, the court noted the theory that the *Sam Spade* test was dicta.<sup>40</sup> By not relegating the theory to a footnote like in *Air Pirates*, *Olson* suggests that the Ninth Circuit gradually gave more credence to the theory.

*Olson* then applied a second, “more lenient” standard that bestowed characters with protection when they are “especially distinctive.”<sup>41</sup> This evaluation is framed as an exception to *Sam Spade*, and expanded on the theory proffered in *Air Pirates*.<sup>42</sup> However, *Air Pirates* only noted a

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

33. It would take highly questionable reasoning to argue the cartoon cat “Garfield” has more expressive value than Jane Austen’s Elizabeth Bennet or John Milton’s Satan.

34. See *Air Pirates*, 581 F.2d at 755 n.10 (referencing the lower court’s opinion analysis of *Sam Spade*).

35. 855 F.2d 1446 (9th Cir. 1988).

36. *Id.*

37. *Id.* at 1452–53.

38. See *id.* at 1452.

39. See *id.*

40. See *id.* at 1451–52 (noting the story being told test “is arguably dicta,” but declining to make a final decision).

41. See *id.* at 1452.

42. See *id.* (acknowledging that “cases subsequent to *Warner Bros.* have allowed” protection for especially distinctive characters). All the cases cited in support of the second standard evaluated non-literary characters. See *id.* (citing *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (Mickey Mouse and other Disney characters); *Warner Bros., Inc. v. ABC*, 720 F.2d 231 (2d Cir. 1983) (Superman); *Silverman v. CBS*, 632 F. Supp.

distinction between literary and non-literary characters to avoid *Sam Spade*.<sup>43</sup> *Olson* used this language to craft an entirely different standard. Thus, by 1988, the Ninth Circuit followed two dramatically different tests for character copyrightability.

B. ROCKY, BOND, AND GODZILLA: THREE INFLUENTIAL DISTRICT COURT DECISIONS (1989–1998)

After *Olson*, the District Court for the Central District of California decided three influential copyrightable character cases regarding Rocky, James Bond, and Godzilla. Each adds an important principle to the evaluation of character copyrightability.

First, in *Anderson v. Stallone*, the court found the boxer Rocky Balboa from the Rocky film series to be a copyrightable character.<sup>44</sup> The district court here used both copyrightable character standards articulated in *Olson* but noted that *Air Pirates* limited the *Sam Spade* test to only literary characters.<sup>45</sup> Next, *MGM v. American Honda* recognized the British spy James Bond as a copyrightable fictional character.<sup>46</sup> Notably, the court supported its holding by reasoning that James Bond had consistent character traits over the sixteen films in which he had been depicted.<sup>47</sup>

Lastly, *Toho v. William Morrow & Co.* declared that Godzilla, the iconic Japanese movie monster, was copyrightable.<sup>48</sup> The Godzilla case cited *American Honda* for its holding that a character is copyrightable because of an “identifiable set of traits.”<sup>49</sup> *Toho* expanded on this concept by reasoning that a character may change dramatically in both visual depiction and characterization but can still be copyrightable if an “underlying set of attributes” remains constant.<sup>50</sup>

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1344 (S.D.N.Y. 1986) (Amos and Andy from the television show Amos ‘n’ Andy); *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Grp.*, 443 F. Supp. 291 (S.D.N.Y. 1977) (Star Wars Characters)).

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

44. See *Anderson v. Stallone*, 11 U.S.P.Q.2d 1161, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989).

45. See *id.* at \*6–7.

46. See *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995). Here, the court grouped the cases evaluating character copyrightability differently. It included *Olson* in the “story being told” test cluster, and not with *Air Pirates* and *Nichols* in the “character delineation” test cluster. *American Honda* is alone in this delineation, which made no difference in the results. See *id.* at 1296.

47. See *id.*

48. See *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206 (C.D. Cal. 1998).

49. See *id.* at 1216.

50. See *id.* at 1215–16.

C. THE MYSTERY MAGICIAN AND ELEANOR: THE NINTH CIRCUIT'S MODERN DOCTRINE (2003–2015)

The Ninth Circuit's modern doctrine has attempted to consolidate and simplify the myriad principles that courts have used to define and evaluate the copyrightability of fictional characters. However, as *Olson's* use of *Air Pirates* exemplifies,<sup>51</sup> reinterpretation can misstate supporting precedent.

In *Rice v. Fox Broadcasting Co.*,<sup>52</sup> Robert Rice sued Fox for allegedly copying his “Mystery Magician” character, who explained popular magic tricks in a home video feature.<sup>53</sup> The Ninth Circuit articulated a multi-step analysis of character copyrightability, and ultimately found the Mystery Magician uncopyrightable.<sup>54</sup> First, the *Rice* court cited *Sam Spade* and declared that characters are ordinarily not afforded copyright protection.<sup>55</sup> Second, the court articulated two evaluation standards: the *Sam Spade* “story being told” test and the *Olson* “especially distinctive” test.<sup>56</sup> The court amplified *Olson's* “especially distinctive” standard by treating it as an alternative test rather than a special exception to *Sam Spade*.<sup>57</sup> Additionally, *Rice* required an especially distinctive character to be “sufficiently delineated.”<sup>58</sup> The sum of these two standards appears to address the significance of the character.<sup>59</sup> This standard's origins are rooted in *Nichols*.<sup>60</sup> However, *Rice* articulated it as a reframing of the “consistent, widely identifiable traits” principle developed by *Anderson*, *American Honda*, and *Toho*.<sup>61</sup> Therefore, although *Rice* used prior case law, it muddled precedents that originally spoke to different concepts. Sufficient delineation in *Nichols* addressed the depth of complexity of a character. In contrast, the “consistent traits” concept evaluated whether a character expressed a stable, recognizable persona.

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51. *See supra* Section I.A.

52. 330 F.3d 1170 (9th Cir. 2003).

53. *See id.* at 1173.

54. *See id.* at 1175–76.

55. *See id.* at 1175.

56. *Id.*

57. *See id.* at 1175–76; *supra* Section I.A.

58. *Rice*, 330 F.3d at 1175.

59. *Id.* (noting that the magician was not widely disseminated nor did he have any unique visual features).

60. *See supra* Part I.

61. *Rice*, 330 F.3d at 1175; *see supra* Section I.B.



In 2008 the Ninth Circuit decided *Halicki Films v. Sanderson*.<sup>62</sup> In 1974, H.B. Halicki released the “heist” film *Gone in 60 Seconds*.<sup>63</sup> The movie depicts the theft of multiple classic cars, including “Eleanor,” a 1971 Fastback Ford Mustang.<sup>64</sup> After Disney purchased a license and remade the film in 2000, Halicki’s widow filed suit regarding merchandising rights for Eleanor.<sup>65</sup>

The court used a slightly modified version of the *Rice* evaluation to conclude that Eleanor could be a copyrightable character. Like *Rice*, the court made a distinction between the *Sam Spade* test and a secondary test. *Halicki* interpreted this other, more lenient test as an amalgam of principles from *Air Pirates* and *Olson*.<sup>66</sup> Characters, the court reasoned, are either literary or pictorial; *Sam Spade* set limits for literary characters, while *Air Pirates* controlled for pictorial characters.<sup>67</sup>

*Halicki* held that Eleanor is more like a “comic book character” from *Air Pirates* “than a literary character” from *Sam Spade*.<sup>68</sup> The court then noted that the lower court’s subsequent evaluation should consider *Olson*’s “especially distinctive” principles and the California Central District’s “consistent traits” evaluation.<sup>69</sup> Before sending the question back down to the district court, the Ninth Circuit noted the importance of “unique elements of expression,” which the *Air Pirates* court stressed.<sup>70</sup> Just as in *Rice*, *Halicki* conflated past precedents without establishing how the concepts would operate in practice. The theories pulled from *Air Pirates*, *Olson*, and the California Central District all evaluate essentially the same issue: whether a character is Sir Toby Belch, or just another riotous knight.<sup>71</sup>

In sum, the Ninth Circuit is responsible for the expansion of fictional character copyrightability. Other circuit courts recognize the Ninth Circuit’s cases on characters but do not expressly follow them and generally compare the infringing work to the original work as a whole.<sup>72</sup> Since 2003, the Ninth

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62. *See Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213 (9th Cir. 2008).

63. *See id.* at 1217

64. *Id.*

65. *Id.* at 1217–19.

66. *See id.* at 1224.

67. *See id.*

68. *Id.* at 1225.

69. *See id.*

70. *See id.*

71. *See discussion of Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), *supra* Section I.

72. *See, e.g., Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 500–01 (7th Cir. 2014) (holding that Sherlock Holmes was in the public domain, that the publisher was free

Circuit has attempted to consolidate the various principles it has used to evaluate and justify the doctrine. However, up until *Towle* no case had fully covered the breadth of the doctrine.

## II. DC COMICS V. TOWLE

Seven years after *Halicki*, the Ninth Circuit again directly addressed the question of whether a fictional character is copyrightable. In *DC Comics v. Towle*,<sup>73</sup> the court reviewed another vehicle—this time the Batmobile.<sup>74</sup> Employing a three-part test, the court ruled that the Batmobile was a copyrightable character.<sup>75</sup> This Part analyzes *Towle* by contextualizing the significance of the case, examining the district court’s decision, and scrutinizing the Ninth Circuit’s “new” test for the copyrightability of fictional characters.

### A. THE BATMOBILE: A QUICK PRIMER

Although DC Comics filed its action against Mark Towle in 2011,<sup>76</sup> the roots of the case stretch back three quarters of a century. On March 30, 1939, National Comics (which later rebranded to become DC Comics) published Detective Comics #27, “The Case of the Chemical Syndicate.”<sup>77</sup> Written by Bill Finger and drawn by Bob Kane, the story introduced the superhero Batman.<sup>78</sup>

Batman’s primary vehicle in his fight against crime evolved into the Batmobile.<sup>79</sup> The earliest Batman comics depict the Caped Crusader using “an ordinary red sedan, but in Batman #5 (Spring 1941) the new Batmobile roared into action sporting its own bat-headed battering ram.”<sup>80</sup> Batman and

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to use him as a character, and that only the original elements in Sherlock Holmes stories still protected by copyright cannot be used); Warner Bros. Entm’t, Inc. v. X One X Prods., 644 F.3d 584, 597 (11th Cir. 2011) (holding that, despite Ninth Circuit jurisprudence, protection of characters from “Gone With the Wind,” “The Wizard of Oz,” and “Tom and Jerry” extended from the works the characters appeared in, not from the characters themselves); see also NIMMER, *supra* note 8, § 2.12.

73. 802 F.3d 1012 (9th Cir. 2015).

74. *Id.* at 1015.

75. *Id.* at 1022.

76. DC Comics v. Towle, 989 F. Supp. 2d 948 (C.D. Cal. 2013).

77. *Batman at 75: Highlights in the Life of the Caped Crusader*, DC COMICS (July 22, 2014), <http://www.dccomics.com/blog/2014/07/22/batman-at-75-highlights-in-the-life-of-the-caped-crusader> [<https://perma.cc/C8LL-NDRZ>].

78. *Id.*

79. However, the first bat-vehicle that Batman used was the Batplane, which premiered in Detective Comics #31 (September 1939). *Id.*

80. *See id.*

the Batmobile were both redesigned in 1964, and the car has evolved to fit the Caped Crusader's needs ever since.<sup>81</sup> The car's features have included disc launchers, jet engines, and a mobile crime lab.<sup>82</sup> The Batmobile's description oscillates between high-tech tool and a more nuanced persona. In Frank Miller's seminal work "The Dark Knight Returns," Batman described the Batmobile as an instrument of war.<sup>83</sup> However, in *Batman #98* the Batmobile is described as "[a] black thunderbolt on wheels, a swift nemesis to lawbreakers, a mighty machine of justice."<sup>84</sup> Thus, descriptions of the car often fit the tone of the narrative.

The Batmobile has attained a distinct cultural and economic significance. The car is seemingly ubiquitous in every Batman comic book, television show, and blockbuster movie.<sup>85</sup> The original Batmobile from the 1966 television series sold at auction for \$4.6 million.<sup>86</sup> In 2012, all six physical iterations of the Batmobile were displayed together for the first time at Comic Con International in San Diego, where tens of thousands of visitors viewed the exhibit.<sup>87</sup> This significance likely incentivized the behavior that triggered DC's lawsuit.

#### B. *TOWLE* IN THE DISTRICT COURT

In May 2011, DC Comics filed a lawsuit against Mark Towle in the United State District Court for the Central District of California for copyright infringement, trademark violations, and common law unfair competition.<sup>88</sup> Towle owned, operated, and managed a "business producing

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81. *See id.*

82. *See* DC Comics v. Towle, 802 F.3d 1012, 1021–22 (9th Cir. 2015).

83. *See* Frank Miller, *The Dark Knight Returns* 74–75 (1986).

84. Arnold Drake & Bill Finger, *The Return of Mister Future*, *BATMAN*, no. 98, 1956 at 1.

85. *See Towle*, 989 F. Supp. 2d at 967.

86. Jake Lingeman, *Original Batmobile Sells for \$4.6 Million at Barrett-Jackson*, *AUTOWEEK* (Jan. 20, 2013), <http://autoweek.com/article/car-life/original-batmobile-sells-46-million-barrett-jackson> [<https://perma.cc/DVT7-U55E>].

87. *See* Jason Debord, *San Diego Comic Con 2012: Batmobiles from Six Different Batman Movies on Display*, *ORIGINAL PROP* (July 16, 2012), <http://www.originalprop.com/blog/2012/07/16/san-diego-comic-con-2012-batmobiles-from-six-different-movies-on-display/> [<https://perma.cc/5MKS-4NLS>]; *More Women than Ever at San Diego's Comic-Con*, *NPR* (July 13, 2012, 3:00 PM), <http://www.npr.org/2012/07/13/156747555/more-women-than-ever-at-san-diegos-comic-con> (noting that Comic Con's 2012 attendance was above 130,000 people) [<https://perma.cc/2K9M-US5T>]; Kofi Outlaw, *Comic-Con 2012: Batmobile Image Gallery*, *SCREEN RANT* (July 12, 2012), <http://screenrant.com/batman-batmobiles-image-gallery-comic-con-2012/> [<https://perma.cc/VK87-QCYS>].

88. DC Comics v. Towle, 989 F. Supp. 2d 948, 954 (C.D. Cal. 2013). The trademark and unfair competition aspects of *Towle* will not be discussed in this Note. The District Court granted DC Comics' motion for summary judgment as to trademark infringement

custom cars modeled after vehicles found in various television shows and movies.”<sup>89</sup> Two of the vehicles Towle produced were based on Batmobiles, one from the 1966 television show and the other from the 1989 motion picture.<sup>90</sup> Towle also sold car kits that allowed purchasers to customize their vehicles to look like the Batmobile and had multiple websites advertising his services.<sup>91</sup>

In the district court the defendant’s principal argument asserted that DC did not own the copyright registrations to the 1966 *Batman* television show and the 1989 *Batman* film.<sup>92</sup> The district court held that DC had contractually reserved its right to the Batmobile.<sup>93</sup> The court further supported its reasoning by stating that even if DC Comics did not expressly reserve rights to the Batmobile, it “owns copyrights to the original comic book series in which the Batmobile originally appeared.”<sup>94</sup> In reaching this conclusion, the court declared both Batmobiles derivative of the “Batmobile character that appeared in the comic book series.”<sup>95</sup> After this assertion, the court then evaluated the copyrightability of the Batmobile as a character.

The district court held that the Batmobile was a copyrightable character under the “character delineation” test articulated in *Rice*.<sup>96</sup> The court summarized its reasoning by stating, “The comic books portray the Batmobile as a superhero.”<sup>97</sup> Towle appealed this ruling.

### C. THE NINTH CIRCUIT APPEAL AND THE *TOWLE* TEST

The Ninth Circuit’s opinion in *Towle* affirmed the lower court’s ruling that the Batmobile was a copyrightable fictional character. Like *Halicki* and *Rice* before it, *Towle* attempted to clarify and consolidate the various principles of character copyrightability doctrine that had previously sprouted from the circuit court.

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and unfair competition, and the Ninth Circuit affirmed the district court’s ruling that Towle did not have a laches defense against the trademark infringement action. *See* DC Comics v. Towle, 802 F.3d 1012, 1017–18, 1027 (9th Cir. 2015); *Towle*, 989 F. Supp. 2d at 960–61.

89. *Towle*, 989 F. Supp. 2d at 953.

90. *Id.*

91. *Id.* These websites also used DC Comics’ registered trademarks.

92. *See id.* at 962.

93. *See id.* at 963–64.

94. *See id.* at 964.

95. *Id.* at 964–65.

96. *See id.* at 966–67.

97. *See id.* at 967.

### 1. *Towle Clarifies the State of the Doctrine*

In *Towle*, the Ninth Circuit attempted to clarify two lingering issues in the copyrightable character doctrine. First, *Towle* ended any remaining debate over whether the Ninth Circuit’s doctrine aligns with the convention that characters are only protected in conjunction with the work they appear in. The answer was a definitive no: “Although comic book characters are not listed in the Copyright Act, we have long held that such characters are afforded copyright protection.”<sup>98</sup> Thus, the Ninth Circuit concluded that characters are a separate category of copyrightable work.

Second, the court relegated the *Sam Spade* “story being told” test to an alternative holding or dicta.<sup>99</sup> Previously, the Ninth Circuit had only conceded that the test was “arguably” dicta.<sup>100</sup> Thus, *Sam Spade* still has some effect, but *Towle* further distances the court from its earlier, controversial ruling. After these two substantive clarifications, the *Towle* court attempted to synthesize the doctrine into a concise, three-part test.

### 2. *The Consolidated Towle Test*

The *Towle* test attempted to consolidate the analytical process the Ninth Circuit had developed since *Sam Spade*. Before reaching the test, the court implicitly articulated a “step zero” to delineate when *Towle* applies. *Towle* “determin[es] whether a character in a comic book, television program, or motion picture is entitled to copyright protection.”<sup>101</sup> The court remained silent as to whether *Towle* only applies to the three qualifying mediums, or if close analogues can also be evaluated. This ambiguity is particularly problematic for literary characters. The Ninth Circuit had previously established that literary characters fall under the purview of the *Sam Spade* test.<sup>102</sup> However, now that *Towle* asserted that *Sam Spade* is either dicta or an alternative holding, the state of literary character copyrightability may be in flux.

If review under *Towle* is appropriate, the first step of the test requires that “the character must generally have ‘physical as well as conceptual qualities.’”<sup>103</sup> Arguably, the plain language of step one does not preclude literary characters. Few could sincerely argue that Oscar Wilde’s muse

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

99. *Id.* at 1019 n.5 (citing *Olson v. NBC*, 855 F.2d 1446 (9th Cir. 1988); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978)).

100. *Olson*, 855 F.2d at 1451–52.

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

102. *See supra* Section I.C.

103. *Towle*, 802 F.3d at 1021 (quoting *Air Pirates*, 581 F.2d at 755).

Dorian Gray or John Kennedy Toole's buffoonish Ignatius J. Reilly do not have an overabundance of physical and conceptual qualities.<sup>104</sup> Nevertheless, *Towle* step one is derived from the *Air Pirates* principle that a character must be pictorial to acquire protection.<sup>105</sup> The original purpose of this assessment was to avoid triggering a *Sam Spade* analysis. To an extent, the opaque limits on *Towle*'s application present in step zero already achieved this demarcation. Step one explicitly reinforces this delineation while arguably overextending the *Air Pirates* rule.

The second step requires a character to be “‘sufficiently delineated’ to be recognizable as the same whenever it appears.”<sup>106</sup> This part appears to address whether a character has the requisite complexity to be protected.<sup>107</sup> *Rice* established the mandate for “sufficient delineation” in the Ninth Circuit, but the language can be traced back to Judge Hand's opinion in *Nichols*.<sup>108</sup> The second step also requires that, if a character appears in “different productions, it must display consistent, indefinable character traits and attributes, although the character need not have a consistent appearance.”<sup>109</sup> Although the court cited *Halicki* for this principle, it first appeared in the Ninth Circuit in *Rice* and was developed in the Central District of California in *Toho, American Honda, and Anderson*.<sup>110</sup>

The third and final step of *Towle* requires a character to be “‘especially distinctive’ and ‘contain some unique elements of expression.’”<sup>111</sup> Thus, the third step appears to evaluate the significance of a character.<sup>112</sup> The “especially distinctive” requirement originated in *Olson*, where it had the original purpose of, again, delineating between pictorial and nonpictorial characters.<sup>113</sup> Despite this, *Rice* and *Halicki* augmented the especially distinctive standard to act as part of an appraisal of the value of the

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104. See JOHN KENNEDY TOOLE, *A CONFEDERACY OF DUNCES 1* (1980); OSCAR WILDE, *THE PICTURE OF DORIAN GRAY: AN ANNOTATED, UNCENSORED EDITION 90* (Nichols Frankel, ed., Belknap Press 2011); see also *supra* note 33; discussion *infra* Section II.C.3.

105. See *Towle*, 802 F.3d at 1021 (reasoning that because the Batmobile has “appeared graphically” in the comics it passed the first step).

106. *Id.* (quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003)).

107. See also *infra* Section II.C.3.

108. See *supra* Part I.

109. *Towle*, 802 F.3d at 1021 (citing *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008)).

110. See *supra* Sections I.B, I.C.

111. *Towle*, 802 F.3d at 1021 (quoting *Halicki*, 547 F.3d at 1224).

112. See also *infra* Section II.C.3.

113. See *supra* Section I.A.

character.<sup>114</sup> The “unique elements of expression” condition stemmed from *Air Pirates* and helps guide this evaluation.<sup>115</sup> It also emphasizes the importance of a character’s significance for a finding of copyrightability.

In sum, *Towle* did not reinvent the Ninth Circuit’s copyrightable character doctrine, but merely restated and condensed it. Rather than a radical shift, *Towle* should be viewed as a modest progression of the doctrine. Notably, the Ninth Circuit has gradually detached the principles used in *Towle* from their original purposes.<sup>116</sup> This leads to two results. First, the court, despite a plethora of precedent at its disposal, is not very restricted by these rules in its analysis of characters. Second, the way the Ninth Circuit applied its three-part test to the Batmobile is more significant in evaluating character copyrightability than the rhetoric of the rules themselves.

### 3. *According to the Towle Test, the Batmobile is a Copyrightable Character*

The Ninth Circuit’s evaluation of the Batmobile using a new three-part test illuminates the nuances of the evaluation. Although not explicitly addressed, the Batmobile passed what this Note has called *Towle* step zero because the vehicle appeared in all three qualifying mediums.<sup>117</sup> The court first reasoned that the Batmobile passed step one—which requires “physical as well as conceptual qualities”<sup>118</sup>—because it is a pictorial and not a literary character. “[T]he Batmobile has appeared graphically in comic books, and as a three-dimensional car in television series and motion pictures.”<sup>119</sup> The court’s reasoning emphasizes that the purpose of the first step is to protect pictorial characters and to exclude “mere literary character[s].”<sup>120</sup>

The second step of the *Towle* test requires the character to be “sufficiently delineated” with consistent traits.<sup>121</sup> The court reasoned that the Batmobile passed this step because it is a “highly-interactive” vehicle

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114. *See supra* Section I.C.

115. *See Towle*, 802 F.3d at 1021 (citing *Halicki*, 547 F.3d at 1224). The court added additional context to the third step by stating that a stock character cannot attain protection—citing *Rice*’s magician—and that speech is not required—citing *Halicki*’s Eleanor. *See Towle*, 802 F.3d at 1021 (citing *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003)).

116. *See supra* Part I.

117. *See Towle*, 802 F.3d at 1016; *supra* Section II.C.2.

118. *See Towle*, 802 F.3d at 1021.

119. *Id.* at 1021.

120. *See id.*

121. *See id.*

that also has a “consistent,” “bat-like” appearance.<sup>122</sup> The opinion also cited the personification of the Batmobile in *Batman #5* that the lower court referenced: “the Batmobile is described as waiting ‘[l]ike an impatient steed straining on the reins . . . shiver[ing] as its supercharged motor throbs with energy.’”<sup>123</sup> The court further emphasized the car’s consistent traits: “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.”<sup>124</sup> Thus, step two addresses whether a character has a suitably complex personality and is not simply generic or a stock character.

The third and final step for copyrightability required the Batmobile to be “‘especially distinctive’ and contain[] unique elements of expression.”<sup>125</sup> The court performed little analysis here and referenced its reasoning in step two to support its conclusion that the Batmobile also passed the third step.<sup>126</sup> The court only added that the Batmobile has a “unique and highly recognizable name” as proof that “[i]t is not merely a stock character.”<sup>127</sup> This lack of distinct analysis blurs the line between steps two and three. Step three only adds a further consideration of whether a character is easily identifiable. This analysis—usually restricted to trademark evaluations—arguably focuses on character recognition and its level of value. This reading is supported by the Ninth’s Circuits reinterpretation of the “especially distinctive” requirement in its recent decisions to analyze the significance of a character.<sup>128</sup> Therefore, step three can be articulated as addressing whether a character has a sufficient level of cultural or economic significance.<sup>129</sup>

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122. *Id.*

123. *Id.* (citing *Towle*, 989 F. Supp. 2d 948, 967 (C.D. Cal. 2013)).

124. *Towle*, 802 F.3d at 1021. The Court also described various features of the car, including the “bat-phone” and a “mobile crime lab.” *Id.* at 1022.

125. *Id.* at 1022.

126. *See id.*

127. *Id.*

128. *See supra* Section I.C.

129. The opinion is ripe with references to the Batman story, such as a summary of the history of the Batmobile, and brief interjections, such as, “Holy copyright law, Batman!” This exemplifies the cultural impact of the Batmobile on the decision. *See Towle*, 802 F.3d at 1015.



Consequently, the Batmobile was held to be a copyrightable fictional character.<sup>130</sup> The finding of copyrightability barred Towle from continuing to sell his car kits and custom Batmobiles.<sup>131</sup>

### III. ARTICULATING AN UNDERLYING PURPOSE OF *TOWLE*

The *Towle* decision reaffirmed the Ninth Circuit's approval of the doctrine of copyrightable fictional characters. Part II described how *Towle* strengthened the theory of copyrightable characters by summarizing its precedents and simplifying its application. However, the doctrine the court developed has deviated from orthodox copyright doctrine.

This Part attempts to explain the Ninth Circuit's divergence from convention. Under this analysis, *Towle* departed from traditional copyright norms to establish a framework that extracts and enhances protection for valuable fictional characters. Four primary rationales exist for this nonconformity. This Note labels these justifications as stewardship.

#### A. *TOWLE* DECLINED TO USE TRADITIONAL COPYRIGHT DOCTRINE TO PROTECT MICROWORKS

Copyright law protects “original works of authorship”<sup>132</sup> but is “silent” on what can be considered a “work.”<sup>133</sup> Fundamentally, works must correspond with the “writings” requirement of the Intellectual Property Clause.<sup>134</sup> As mentioned previously, section 102(a) of the Copyright Act enumerated a non-exhaustive list of eight protected categories of works.<sup>135</sup> The House report suggests that two types of new works could gain protection: (1) new forms of creative expression made possible by new technology; and (2) works that have existed for “centuries” but have

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130. *See id.* at 1026.

131. The fact that Towle created car replicas rather than other fictional works does not affect the analysis that the court makes. Although none of the major Ninth Circuit character cases deal with physical replicas, a long line of cases have found models of characters to infringe copyright while using a traditional infringement analysis. *See, e.g.,* King Features Syndicate v. Fleischer, 299 F. 533, 534, 538 (2d Cir. 1934) (finding that a toy horse mimicking “Spark Plug” from the “Benny Google and Spark Plug” cartoons infringed copyright); Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 333, 350–51 (S.D.N.Y. 1968) (holding that a publisher that bought the copyright to a cartoon from Dr. Seuss has the right to make dolls out of the characters).

132. 17 U.S.C. § 102(a) (2012).

133. *See* Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575, 576 (2005).

134. U.S. CONST. art. 1, § 8, cl. 8; *see also* NIMMER, *supra* note 8, § 2.03.

135. 17 U.S.C. § 102(a).

recently come to be recognized as worthy of protection.<sup>136</sup> “The House Report seems to imply that works of the second type should not be protected unless explicitly described either in the eight categories of Section 102(a), or by further statutory amendment.”<sup>137</sup> One example of such a category is architectural works, added to Title Seventeen in 1990.<sup>138</sup>

Legal scholars follow this legislative history and agree that conventional copyright does not protect fictional characters independently of the works where they are featured. Characters appear in various types of works but are not themselves a recognized category of work. As Leslie Kurtz explains: “Like the plot, setting or dramatic action, a character is a part of a work that is protected by copyright, but is not itself the subject of copyright. A character as such has no tangible existence outside the specific work or works in which it appears.”<sup>139</sup> As mentioned in Part I, the Nimmer treatise supports this view as well.<sup>140</sup> *Towle* explicitly rejected conventional copyright doctrine by deeming fictional characters a category of works.

The *Towle* court could have taken a conventional view of infringement and reached the same conclusion. Other courts using standard copyright evaluations have determined that three-dimensional replicas of pictorial characters infringed the original work.<sup>141</sup> For example, in *Universal City Studios v. J.A.R. Sales*, the court held that a doll based on the titular alien from the film “E.T.—The Extra-Terrestrial” infringed the *film’s* copyright.<sup>142</sup> *Towle* could have followed this wealth of precedent to similarly hold that *Towle’s* replica infringed the underlying Batman stories owned by DC.<sup>143</sup> Even if DC could not claim every stylistic decision made

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136. See H.R. Rep. No. 2222, at 51 (1909); NIMMER, *supra* note 8, § 2.03.

137. See NIMMER, *supra* note 8, § 2.03.

138. See Architectural Works Protection Copyright Act of 1990, Pub. L. No. 101-650104 Stat. 5133 (1990); NIMMER, *supra* note 8, § 2A.09[A][1][a] n.10.

139. Kurtz, *supra* note 4, at 440.

140. See NIMMER, *supra* note 8, § 2.12 n.17.1; *supra* Part I.

141. See cases cited *supra* note 131.

142. See *Universal City Studios, Inc. v. J.A.R. Sales, Inc.*, 216 U.S.P.Q. 679, 1982 WL 1279, at \*3 (C.D. Cal. Oct. 20, 1982) (holding that “the total concept and feel of defendants’ dolls is the same as the character “E.T.” in the copyrighted motion picture and as the copyrighted Kamar dolls”). This case is in the Central District of California and does reference *Walt Disney Products v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978). However, cases involving medium changes have generally aligned closer to conventional copyright. The court did not address independent character copyright in its holding. See Kurtz, *supra* note 4, at 469–72.

143. The licensing agreements DC entered that eventually produced the Batmobiles at issue complicates, but does not hinder, this evaluation. The Batmobiles at issue in *Towle*—the 1966 television version and the 1989 film version—were developed by ABC and Warner Brothers, respectively. The court reasoned that because these two versions of the

by its licensees, a sufficient amount of material existed to find infringement. Towle's replicas included many design elements that matched versions of the Batmobile that appeared in works for which DC held exclusive rights.<sup>144</sup>

However, *Towle* rejected the conventional infringement evaluation and explicitly changed the math of infringement by changing the denominator: "Although comic book characters are not listed in the Copyright Act, we have long held that such characters are afforded copyright protection."<sup>145</sup> Instead of comparing Towle's replicas with DC's comics, the court found the replicas to infringe a much smaller "work"—the Batmobile itself.<sup>146</sup>

Justin Hughes has termed vanishingly small pieces of creativity afforded copyright protection as "microworks."<sup>147</sup> Courts have previously supported protection of microworks, such as "the sampling of three words and a short keyboard riff" used in a musical remix<sup>148</sup> and the short phrase "weasels ripped my flesh."<sup>149</sup> Hughes used these and other examples to show how copyright protection has become more "'finely grained'—with claims of independent property protection being draped over smaller and smaller pieces of creativity."<sup>150</sup>

The Batmobile fits within Hughes's definition of a microwork. The world portrayed in Batman comics, movies, and television has a rich array of characters, locales, and stories. The Batmobile is only one small aspect of that milieu. Just like a short keyboard riff, the Batmobile is only a piece of a larger creative framework. Yet *Towle* granted independent protection to the Batmobile.

As Hughes noted, the "more finely grained protection" of microworks, such as the Batmobile, causes several problems in copyright doctrine.<sup>151</sup> For instance, microwork protection acutely distorts fair use and the *de minimis*

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Batmobile were derivative works DC still had a copyright interest: "[T]he author of an underlying work is entitled to sue a third party who makes an unauthorized copy of an authorized derivative work to the extent that the material copied derived from the underlying work." *DC Comics v. Towle*, 802 F.3d 1012, 1024 (9th Cir. 2015).

144. *See Towle*, 802 F.3d at 1017 (describing the DC Batmobiles and the Towle replicas as having the same bat-motifs).

145. *Id.* at 1019.

146. *Id.* at 1026.

147. *See Hughes*, *supra* note 133, at 576.

148. *Id.* at 579 n.15 (quoting *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991)).

149. Hughes, *supra* note 133, at 585 (quoting *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989)).

150. Hughes, *supra* note 133, at 575.

151. *Id.* at 576.

doctrine.<sup>152</sup> First, microworks affect several fair use factors.<sup>153</sup> The first fair use factor now primarily considers transformativeness.<sup>154</sup> Transformativeness considers whether a new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>155</sup> Microworks limit the ability of a new work to be transformative. Protection of the Batmobile removes much of the surrounding milieu of the comic, which makes it more difficult for the borrower to instill a new meaning or message. Next, the third fair use factor evaluates the amount the secondary work takes from the original.<sup>156</sup> Microworks artificially inflate this evaluation. Instead of evaluating a Batman comic holistically, individual protection of the Batmobile means that a borrower of the Batmobile takes the entirety of a protected work.

Second, microworks limit application of the *de minimis* doctrine. The *de minimis* rule allows for the copying of small pieces of a copyrighted work, which directly conflicts with the protection of small microworks.<sup>157</sup> This “recalibration” of the *de minimis* doctrine subverts free expression and the public domain by further limiting the borrowing that all creativity requires.<sup>158</sup>

In sum, *Towle* reaffirmed the Ninth Circuit’s protection of fictional characters as independently protectable works. Although not expressly forbidden by the Copyright Act,<sup>159</sup> the decision certainly runs counter to the weight of scholarly opinion about the nature of copyrightable subject matter. Moreover, fundamental problems arise when small “microworks” like the Batmobile are protected by copyright. The next section considers the justifications that exist for this unorthodox approach.

#### B. TOWLE GRANTS COPYRIGHT OWNERS THE ABILITY TO “STEWARD” VALUABLE MICROWORKS

*Towle* crafted a test to protect fictional characters, which are a uniquely valuable aspect of creative works. This protection of characters is more

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152. See generally Matthew D. Bunker & Clay Calvert, Copyright in Inanimate Characters: The Disturbing Proliferation of Microworks and the Negative Effects on Copyright and Free Expression, 21 COMM. L. & POL’Y 281 (2016).

153. See *id.* at 295–97.

154. See 17 U.S.C. § 107(1) (2012); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994).

155. *Campbell*, 510 U.S. at 579.

156. See 17 U.S.C. § 107(3).

157. Hughes, *supra* note 133, at 577.

158. See *Campbell*, 510 U.S. at 575; Bunker & Calvert, *supra* note 152, at 298.

159. See 17 U.S.C. § 102(a) (2012) (stating that works of authorship “include,” but are not explicitly limited to, the enumerated categories in the section).

“finely grained” and gives copyright owners a greater level of control than standard copyright doctrine. Four principles justify the potent protection granted in *Towle*. This Note labels these rationales “stewardship.” The term stewardship is used because it connotes the meticulous supervision that independent copyright of characters enables. Moreover, the term stewardship is generally associated with the management of valuable resources.<sup>160</sup> This section analyzes four aspects of stewardship that are the *raison d’être* of *Towle*’s doctrine.

*Towle* and its lineage recognized that characters play a special role in fictional creative works.<sup>161</sup> From Sam Spade to the Batmobile, the Ninth Circuit has recognized that characters have a unique economic and cultural value. Modern examples of characters’ economic value abound. The Marvel Cinematic Universe, which has placed Marvel Comics’ biggest superheroes in theaters, has earned over \$21 billion.<sup>162</sup> *Fortune* estimated the James Bond franchise to be worth \$8 billion.<sup>163</sup> For these representative franchises, the appeal of the characters is the primary draw of the larger works.<sup>164</sup> “The actor at the top of the credit block has come to matter less than the name of the character or the franchise in the title.”<sup>165</sup>

Characters can also attain a rich cultural significance. To some extent, economic profit signifies cultural value. As Judge Kenyon stated in *American Honda*, “[A] James Bond film without James Bond is *not* a James

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160. *Stewardship*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003).

161. At the very least, the Ninth Circuit in *Towle* recognizes that fictional characters are valuable enough to deserve independent protection. See *DC Comics v. Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015) (declaring “we have long held that such characters are afforded copyright protection”).

162. Tom Gerencer, *How Much Money Has Every Marvel Movie Made?*, MONEY NATION, (June 1, 2016), <http://moneynation.com/much-money-every-marvel-movie-made> [<https://perma.cc/XQ27-P6R4>].

163. Jonathan Chew, *Star Wars Worth More than Harry Potter and James Bond, Combined*, FORTUNE, Dec. 24, 2015, 8:00 AM, <http://fortune.com/2015/12/24/star-wars-value-worth> [<https://perma.cc/CCV9-5FMC>].

164. *The Simpsons* is a pertinent example outside of film. Through a record twenty-three seasons, the television show has earned Fox an estimated \$1 billion dollars and will likely earn a total of \$2.8 billion. See Tim Molloy, *Study: ‘The Simpsons’ Has Made \$1B in Profits*, TODAY TELEVISION (Oct. 5, 2011, 8:15 PM), [http://www.today.com/id/44794519/ns/today-today\\_entertainment/t/study-simpsons-has-made-b-profits](http://www.today.com/id/44794519/ns/today-today_entertainment/t/study-simpsons-has-made-b-profits) [<https://perma.cc/S655-XAX3>].

165. 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), <http://www.latimes.com/entertainment/movies/la-ca-mn-why-movie-stars-dont-matter-25-franchises-20160616-snap-story.html> [<https://perma.cc/4PQA-XHYE>].

Bond film.”<sup>166</sup> More importantly, characters “may embody the ideals of culture to which we aspire and with which we identify; they may be a vehicle through which we express ourselves . . . . At the very least, we are entertained.”<sup>167</sup> We name our children after protagonists that inspire us,<sup>168</sup> we marry using the fictional customs of our heroes,<sup>169</sup> and when we die we choose to be interred like our favorite dramatis personae.<sup>170</sup> The cultural significance and economic impact of fictional characters elicited the Ninth Circuit’s grant of greater protection.<sup>171</sup>

The first stewardship rationale for independent character protection is the prevention of what William Landes and Richard Posner term “congestion externalities.”<sup>172</sup> Intellectual property is traditionally considered immune to the tragedy of the commons:<sup>173</sup> “There can be no overgrazing of intellectual property. . . because intellectual property is not destroyed or even diminished by consumption. Once a work is created, its intellectual content is infinitely multipliable.”<sup>174</sup> However, Landes and Posner believe this understanding oversimplifies the issue. The authors

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

167. Geoffrey R. Scott & Karen E. Maull, *Kryptonite, Duff Beer and the Protection of Fictional Characters and Products in the Global Community*, 38 *MONASH U. L. REV.* 228, 230–31 (2012); see also Julian Sanction, *Why America Worships Superheroes*, *VANITY FAIR*, July 2008, <http://www.vanityfair.com/news/2008/07/why-america-worships-superheroes> [<https://perma.cc/G6AY-LEGH>].

168. See Katie O’Malley, *The World Is Going to Be Full of Babies Named After ‘Stranger Things’ Characters*, *ELLE*, Dec. 5, 2016, <http://www.elleuk.com/life-and-culture/culture/news/a32905/baby-names-stranger-things-2016> [<https://perma.cc/PKF5-59MJ>].

169. See Myles Burke, *UK’s First Star Trek Klingon Wedding Takes Place at Convention*, *THE TELEGRAPH* (Oct. 19, 2012, 10:35 PM), <http://www.telegraph.co.uk/culture/star-trek/9621881/UKs-first-Star-Trek-Klingon-wedding-takes-place-at-convention.html> [<https://perma.cc/32MH-4HKG>].

170. See Brian Lam, *Star Trek Coffin Warps Your Corpse to the Final Nerd Frontier*, *GIZMODO* (Oct. 31, 2007, 2:33 PM), <http://gizmodo.com/317341/star-trek-coffin-warps-your-corpse-to-the-final-nerd-frontier> [<https://perma.cc/ERV5-RCW3>].

171. See *supra* Sections I, II.C.2, II.C.3.

172. William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 222–23 (2003).

173. See Margaret E. Banyan, *Tragedy of the Commons*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/science/tragedy-of-the-commons> [<https://perma.cc/F57S-7US7>].

174. LANDES & POSNER, *supra* note 172, at 223 (quoting Denis S. Karjala, Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, and S. 505, “The Copyright Term Extension Act,” Submitted to the Joint Committees of the Judiciary, Jan. 28, 1998, <http://www.public.asu.edu/~dkarjala/legmats/1998Statement.html> [<https://perma.cc/8HXB-KY9G>]).

argue that trademark and right-of-publicity rights inherently “recognize that intellectual property *can* be diminished by consumption.”<sup>175</sup> This overgrazing also implicates copyright concerns. “[T]he total utility [of the copyright] might decline if the lack of excludability and resulting proliferation . . . led to confusion, the tarnishing of the image, or sheer boredom.”<sup>176</sup>

The authors argue that a concern about overconsumption has persuaded Disney to practice good “husbandry” of their characters, extending the life of the characters and brand by preventing overgrazing by derivative uses.<sup>177</sup> “If because copyright had expired anyone were free to incorporate the Mickey Mouse character in a book, movie, song, etc., the value of the character might plummet.”<sup>178</sup> *Towle* stewardship promotes copyright husbandry. *Towle* allows DC to avert the devaluation of the Batmobile by preventing other uses, which could generate “boredom” in the character. Character “fatigue” is a common explanation for the poor performance of blockbuster films.<sup>179</sup> This aspect of stewardship prevents fatigue due to sources outside the copyright owner’s control. Additionally, even when copyright owners do facilitate fan creations, terms of use are often put in place to ensure the copyright holder maintains control.<sup>180</sup> The husbandry rationale of stewardship provides an additional degree of security to copyright owners that participate in their fan communities in this way.

The second justification of *Towle* stewardship is that it permits rightsholders to recoup investment and production costs.<sup>181</sup> *Towle* protected the lucrative Batmobile merchandise market, which contributes to Warner

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175. LANDES & POSNER, *supra* note 174, at 223–24.

176. *Id.* at 224.

177. *See id.* (quoting Bill Britt, *International Marketing: Disney’s Global Goals*, MARKETING, May 17, 1990, at 22, 26).

178. LANDES & POSNER, *supra* note 174, at 225.

179. *See, e.g.*, Tasha Robinson, *X-Men: Apocalypse Has a Bad Case of Batman v. Superman Disease*, THE VERGE (May 11, 2016, 3:26 PM) <http://www.theverge.com/2016/5/11/11653190/x-men-apocalypse-review-marvel-fox> (stating that the film’s lackluster tone may be due to the audience and the director’s fatigue with the X-Men) [<https://perma.cc/83MP-MUG>].

; Tatiana Siegel, *‘Spider-Man’ Fatigue*, THE HOLLYWOOD REP. (July 23, 2014, 6:23 PM) <http://www.hollywoodreporter.com/news/spider-man-fatigue-whats-behind-720365> (reporting on fan fatigue with the character Spiderman after lackluster results at the box office) [<https://perma.cc/EBC2-PFHM>].

180. *See* Lawrence Lessig, *Lucasfilm’s Phantom Menace*, WASH. POST, July 12, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/11/AR2007071101996.html> [<https://perma.cc/4D5Z-V3W5>]. Lessig is very critical of this practice, terming it “sharecrop[ping].” *Id.*

181. *See* Samuelson, *supra* note 3, at 1527.

Brothers' \$6 billion annual toy revenue.<sup>182</sup> More generally, many forms of entertainment, such as films and television, are increasingly costly and complicated to make.<sup>183</sup> Consequently, derivative markets have become increasingly important in the recovery of investment. For some films, merchandising revenue surpasses box-office revenue<sup>184</sup> and can arguably incentivize subpar films with profitable merchandising opportunities.<sup>185</sup> *Towle* stewardship allows copyright owners greater control over these revenue streams.

The third justification of *Towle* stewardship is the prevention of unjust enrichment by unauthorized exploiters.<sup>186</sup> *Towle* represents a textbook example of preventing unjust enrichment. Mark Towle conceded that his replicas copied two versions of the Batmobile and that he advertised the replicas as the Batmobile to market his business.<sup>187</sup> Moreover, Towle attempted to appropriate a foreseeable market that DC had already entered with its own replicas.<sup>188</sup> Even if DC had not yet created working replicas, that market is closely related to the models that DC had already made. By granting DC the ability to steward the Batmobile, the Ninth Circuit prevented Towle from exploiting DC's copyright for his own financial gain.

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182. The toy market is an incredibly lucrative market for DC Comics and its parent, Warner Brothers. Warner Brothers has generated around \$6 billion annually from licensing. See Marc Graser, *Mattel Signs New Toy Deal Around DC Comics Superheroes*, VARIETY (June 11, 2014, 6:00 PM), <http://variety.com/2014/biz/news/mattel-signs-new-toy-deal-around-dc-comics-superheroes-exclusive-1201218302/> [<https://perma.cc/QH8Y-PRFM>].

183. See e.g., Pamela McClintock, *\$200 Million and Rising: Hollywood Struggles with Soaring Marketing Costs*, THE HOLLYWOOD REP. (July 31, 2014, 5:00 AM), <http://www.hollywoodreporter.com/news/200-million-rising-hollywood-struggles-721818> [<https://perma.cc/LX3G-RY5M>]; Eric Buchman, *Why Are Movies More Expensive than Ever when Tech Makes Them Easier to Make?*, DIGITAL TRENDS (Dec. 10, 2014 11:00 AM), <http://www.digitaltrends.com/movies/why-hollywood-movies-are-more-expensive-to-make-than-ever> [<https://perma.cc/LLK8-WWQN>].

184. See Natalie Robehmed, *For Disney, Biggest Payday on Star Wars Won't be at the Box Office*, FORBES (Dec. 16, 2015, 10:30 AM), <http://www.forbes.com/sites/natalierobehmed/2015/12/16/how-disneys-star-wars-merchandise-is-set-to-make-billions> [<https://perma.cc/LX7Z-V7R2>].

185. See Brooks Barnes, *It Wasn't a Wreck, Not Really*, N.Y. TIMES, Oct. 17, 2011, <http://www.nytimes.com/2011/10/18/movies/john-lasseter-of-pixar-defends-cars-2.html> (discussing how critics believed Disney forced Pixar to release the film *Cars 2* primarily for its merchandising revenue) [<https://perma.cc/AEP4-VCED>].

186. Samuelson, *supra* note 3, at 1528.

187. DC Comics v. Towle, 802 F. 3d 1012, 1017–18 (9th Cir. 2015).

188. See e.g., Graser, *supra* note 182; *Hot Wheels Batmobiles*, BATMOBILE COLLECTOR, <http://www.batmobilecollector.com/gallery-hotwheels.html> (last visited Nov. 8, 2017) [<https://perma.cc/X7TZ-FA56>].



These first three rationales for *Towle* stewardship gain further support by their connection with the derivative work right. Although the unauthorized use of fictional characters could trigger many exclusive rights, it fits most comfortably within the derivative work right. Protection for fictional characters developed contemporaneously with the emergence of an earlier analogue of the derivative work right in courts.<sup>189</sup> The derivative work right, as established in the Copyright Act of 1976, confers on authors the right to control “work[s] based upon one or more preexisting works.”<sup>190</sup> The Ninth Circuit’s copyrightable character cases mimic this language.<sup>191</sup> Thus, because copyrightable characters and the derivative work right are so closely connected, any justification for derivative works to some extent rationalizes *Towle* stewardship as well. Both the investment recoupment and unjust enrichment rationales for *Towle* stewardship were originally justifications for a separate derivative work right.<sup>192</sup> Additionally, congestion externalities and husbandry also originally complimented the derivative work right.<sup>193</sup>

The first *Towle* stewardship rationales should not be considered purely utilitarian, economic justifications. *Towle* stewardship protects value beyond the ledger sheet.<sup>194</sup> As discussed previously, *Towle* sought to protect characters that had in some way captured the public imagination.<sup>195</sup> Similarly, good husbandry prevents the public from becoming “bored[]” with a character.<sup>196</sup> Investment recoupment and prevention of unjust enrichment can also implicitly prevent the degradation of non-pecuniary value. The protection of the Batmobile certainly protects DC’s profits, but

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189. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930); Samuelson, *supra* note 3, at 1511–17. Although many of the early copyrightable character cases mentioned in Part I could not explicitly cite a derivative work right in the 1909 Copyright Act, the type of protection afforded closely resembles what the derivative work right became.

190. See 17 U.S.C. §§ 101, 106(2) (2012).

191. See *e.g.*, *Towle*, 802 F.3d at 1026 (holding that *Towle* “infringed DC’s exclusive right to product derivative works of [the Batmobile]”); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757–58 (9th Cir. 1978) (holding that a parody of Mickey Mouse, which is inherently based on a preexisting work, was infringing).

192. See Samuelson, *supra* note 3, at 1527–28.

193. See LANDES & POSNER, *supra* note 172, at 226.

194. When Congress passed the 1976 Copyright Act, many commentators believed that the derivative work right could protect moral integrity rights. This theory did not come to fruition, but stewardship arguably has elements of the integrity right. See Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9, 9 (2001).

195. See *supra* Section II.C.3.

196. LANDES & POSNER, *supra* note 172, at 224.

it also prevents misuse that could degrade a character's cultural value. Thus, although protecting characters protects economic ventures, *Towle* stewardship can also be seen as protecting cultural value as well.

The fourth and final *Towle* stewardship rationale is that characters that pass the *Towle* test, although they may be microworks, arguably meet the minimum size threshold for a copyrightable work. Hughes asserted three possible ideas for the minimum size of a work: "independent economic value, 'compositional' nature, and copyright owners' understanding."<sup>197</sup> The types of characters that pass the *Towle* test certainly qualify under copyright owners' understanding because of the amount of characterization required in step two—sufficient delineation. Next, cases that *Towle* used to build its test recognized that characters have independent economic value.<sup>198</sup>

It is debatable whether characters have an independent compositional nature. However, the Ninth Circuit has reasoned that "a cartoon character's image is intertwined with its personality and other traits."<sup>199</sup> If this is accepted,<sup>200</sup> a character may have an independent compositional nature. Therefore, although characters may be considered small pieces of creativity, they are arguably suitably substantial to be considered works. Thus, *Towle* stewardship, because it protects characters that meet a minimum size threshold, may not trigger the problems inherent in protecting microworks.

In sum, *Towle* can be viewed as protecting a copyright owner's ability to steward certain characters. This specialized evaluation is unorthodox, but not unknown. Other works with contentious copyrightability have specialized examinations.<sup>201</sup> *Towle* stewardship comprises four primary rationales for character copyrightability. First, stewardship enables good "husbandry" by preventing "congestion externalities." Second, stewardship allows copyright owners to recoup their investments. Third, stewardship prevents unjust enrichment. Fourth, *Towle* stewardship protects microworks that still meet a minimum size threshold for copyrightability. *Towle* stewardship advances utilitarian concerns and also protects the cultural value of fictional characters. The final part of this Note will analyze how well the *Towle* test works for other fictional characters.

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197. Hughes, *supra* note 133, at 634.

198. See *Walt Disney Co. v. Powell*, 897 F.2d 565, 570 (D.C. Cir. 1990) (concluding that only two copyrights, for Mickey and Minnie Mouse, rather than six, the number of episodes infringed, were at issue when the court considered appropriate damages).

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

200. See *infra* Section IV.B for a rejection of this concept.

201. See *Comput. Assoc. Int'l v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992) (creating an "abstraction-filtration-comparison" test for evaluating copyright infringement of computer programs).

#### IV. EVALUATING THE PURPOSE OF COPYRIGHTABLE FICITONAL CHARACTERS: TESTING THE *TOWLE* TEST

Stewardship is the most compelling set of justifications for *Towle's* unconventional protection of fictional characters. Part IV evaluates how well the *Towle* test fulfills these rationales by evaluating two modern fictional characters: Cecil from the *Welcome to Night Vale* podcast, and Pepe the Frog.<sup>202</sup> Ultimately, the characters problematize both *Towle's* three-part test and the stewardship framework that attempts to justify *Towle's* deviation from copyright norms.

##### A. THE PICTORIAL CHARACTER REQUIREMENT: CECIL FROM *WELCOME TO NIGHT VALE*

*Welcome to Night Vale* is a digital podcast where each audio episode relays a fictional public radio broadcast from a small desert town called Night Vale.<sup>203</sup> The dull format is cleverly subverted by bizarre content, such as government conspiracies and supernatural forces.<sup>204</sup> The instrument of each episode is Cecil, the host of Night Vale's public radio program. Virtually every program relies solely on Cecil's narration. As the series developed, Cecil attained more personality: he has spoken of his childhood and family, his pride in the Night Vale community, and his relationship with his love interest, Carlos.<sup>205</sup>

*Welcome to Night Vale* is immensely popular and competes with shows with much higher production value, such as *This American Life* from NPR, to be the most popular podcast in the country.<sup>206</sup> The first *Welcome to Night Vale* book quickly became a bestseller.<sup>207</sup> Accordingly, Cecil has arguably

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202. The decision to evaluate these two characters was based on three factors. First, and most importantly, both characters exist in popular, contemporary mediums. Second, both characters are popular enough to warrant consideration of independent copyright protection. Third, both characters have unusual facets that test the limits of the *Towle* doctrine. The Author also notes that many, many other "characters" were considered for evaluation, including the Millennium Falcon from Star Wars, the One Ring from The Lord of the Rings, and Stephen Colbert's persona from his show The Colbert Report.

203. WELCOME TO NIGHT VALE, <http://www.welcometonightvale.com> (last visited Nov. 8, 2017) [<https://perma.cc/R2V9-9BUW>].

204. See Adam Carlson, *America's Most Popular Podcast: What the Internet Did to "Welcome to Nightvale,"* THE AWL (July 24, 2013), <https://theawl.com/americas-most-popular-podcast-what-the-internet-did-to-welcome-to-night-vale-ba78f910fe2> [<https://perma.cc/K2UU-M2LS>].

205. See *id.*

206. See *id.*

207. See Soraya Nadia McDonald, *How "Welcome to Night Vale" Creators Turned a Podcast Experiment into an Industry,* WASH. POST, Nov. 12, 2015, <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/11/12/welcome->

attained the characterization and the cultural and economic value required to pass *Towle* steps two and three. However, it is unclear whether Cecil, as a purely audio character, could pass *Towle* step one, which states that a character “must generally have ‘physical as well as conceptual qualities.’”<sup>208</sup> The first step seeks to filter out “mere literary character[s].”<sup>209</sup>

*Towle* step one does qualify its requirement with “generally.”<sup>210</sup> A podcast cannot depict the physical qualities of a character like height and hair color, but it does provide more than a “mere” textual description through vocal inflection. Additionally, Cecil’s characterization is debatably connected with his voice in the same way the Ninth Circuit held that Mickey Mouse’s traits were connected to his image in *Air Pirates*.<sup>211</sup> The *Halicki* court reasoned that the car Eleanor could be copyrightable because it was “more akin to a comic book character than a literary character.”<sup>212</sup> A court evaluating Cecil could reasonably make the same comparison because Cecil is not simply words on a page. He has an additional sensory element, sound, just as comic book characters have a supplementary visual aspect.

This examination demonstrates how the *Towle* test cannot properly evaluate Cecil without bending its own guidelines. Additionally, podcasts are not listed in *Towle*’s implicit step zero. Thus, it seems very possible that Cecil may fall into the *Sam Spade* category of characters. Yet if *Towle* is meant to allow copyright owners to steward their especially valuable works, Cecil seems to be a prime target. Cecil is a popular character in a novel medium,<sup>213</sup> developed by small, independent creators. Yet the *Towle* test remains rooted in old, medium-specific distinctions. Cecil will be unlikely to pass the first step of the *Towle* test because he is not a pictorial character. This shortcoming runs counter to the stewardship principles that justify *Towle*.

Cecil and *Welcome to Night Vale* also have a vibrant fan community, which prompts another issue with *Towle* stewardship. Any simple Google search for Cecil surfaces thousands of fan-made depictions of the radio

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to-night-vale-creators-chart-the-podcast-path-to-popularity [https://perma.cc/GFT4-AKFT].

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

209. *Id.*

210. *See id.*

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

212. *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1225 (9th Cir. 2008).

213. *See* Kevin Roose, *What’s Behind the Great Podcast Renaissance*, N.Y. MAG. (Oct. 30, 2014, 1:56 PM) <http://nymag.com/daily/intelligencer/2014/10/whats-behind-the-great-podcast-renaissance.html> [https://perma.cc/6DU2-2FCY].

host.<sup>214</sup> While the Cecil created by the copyright owners has remained a faceless voice, fans have given him a wealth of physical and conceptual qualities. Rebecca Tushnet asks whether copyright owners should have complete control over these types of derivatives.<sup>215</sup> The *Welcome to Night Vale* creators are also its copyright owners and tend to encourage fan engagement. Protectionists would argue that these fan derivatives “blur the definitions of [fans’] favorite characters”<sup>216</sup>—and in doing so would make them, as Posner and Landes decried, boring. Proponents of fan participation argue protectionist sentiment “misdescribes copyright ownership as ensuring coherence, and misdescribes unauthorized creations as rewriting the originals rather than adding to them.”<sup>217</sup>

While Tushnet’s concerns may not be as prevalent for Cecil, they are rampant where the author is not the copyright owner, like in the world of comics. “Although DC Comics may be willing to pimp Batman out to make millions, hard core fans may be outraged. . . . Fans’ [right to prevent distortion] may be even stronger than those . . . made by corporations.”<sup>218</sup> This theory challenges the basic premise in *Towle* that copyright owners deserve the ability to steward characters. Perhaps stewardship should instead only vest in authors or fans.

B. THE LACK OF AN UNDERLYING WORK AND CROWDSOURCING: PEPE THE FROG

Few characters have captured the American zeitgeist quite like Pepe the Frog. Created by Matt Furie for the 2005 comic *Boy’s Club*, Pepe, or the “sad frog,” was a generic character before becoming an internet meme.<sup>219</sup> The meme portrayed Pepe in various gloomy situations, but the image was eventually co-opted by the “alt-right,” a loosely affiliated group with far-right political ideologies.<sup>220</sup> Pepe proliferated online in the run-up to the

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214. See Google Image Search for Cecil, GOOGLE IMAGES, <http://google.com/images> (last visited Nov. 8, 2017) (search “Cecil Welcome to Night Vale”); see also, e.g., littleulvar, *Spam Vale*, DEVIANTART, <http://littleulvar.deviantart.com/art/spam-vale-396296332> (last visited Nov. 8, 2017) [<https://perma.cc/HX2V-K8S4>].

215. See Rebecca Tushnet, Payment in Credit: Copyright Law and Subcultural Creativity, 70 L. & CONTEMP. PROBS. 135 (2007).

216. See *id.* at 165.

217. See *id.*

218. See *id.* at 165–66.

219. See Sarah Begley, *Anti-Defamation League Declares Pepe the Frog a Hate Symbol*, TIME, Sep. 27, 2016, <http://time.com/4510849/pepe-the-frog-adl-hate-symbol> [<https://perma.cc/WQB6-FNXL>].

220. See *id.*

2016 presidential election<sup>221</sup> and was often portrayed as anti-Semitic and racist.<sup>222</sup> In September 2016, the Anti-Defamation League added Pepe to its list of hate symbols.<sup>223</sup> In December 2016, Time Magazine listed Pepe as the most influential character of 2016.<sup>224</sup> Evaluating Pepe with *Towle* raises two distinct problems with the test.

First, although *Towle* claimed to protect characters independently of an underlying work, the existence of an underlying work seems critical to passing the *Towle* test. Debatably, Pepe could not have passed *Towle* steps two and three until internet users imbued him with additional characteristics. Internet users fleshed out Pepe's delineation and cultural significance, but these additional memes would not likely be considered copyrightable works because, individually, they added only *de minimis* contributions to the character.<sup>225</sup> Even if Matt Furie had created all of the memes himself,<sup>226</sup> *Towle* gives no basis to review step two and three without a copyrightable narrative to analyze.

*Towle* used complete compositions to support its finding of the Batmobile's independent copyrightability.<sup>227</sup> It seems at best unclear whether the court could make the same finding using an assortment of *de minimis*, uncollected internet memes. Moreover, due to Pepe's amalgamated nature, he arguably does not have the independent compositional nature Hughes articulated as a minimum threshold to be considered a copyrightable work. Hence, Pepe runs counter to the fourth *Towle* stewardship justification—that characters under *Towle* meet a minimum size threshold for a copyrightable work. Yet, the delineation and unique elements of expression present in the Pepe character appear

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221. Jesse Singal, *How the Internet Trolls Won the 2016 Presidential Election*, N.Y. MAG. (Sept. 16, 2016, 9:00 AM), <http://nymag.com/selectall/2016/09/how-internet-trolls-won-the-2016-presidential-election.html> [<https://perma.cc/F6MY-SFLE>].

222. Press Release, Anti-Defamation League, ADL Adds “Pepe the Frog” Meme, Used by Anti-Semites and Racists, to Online Hate Symbols Database, ANTI-DEFAMATION LEAGUE (Sept. 27, 2016), <http://www.adl.org/press-center/press-releases/extremism/adl-adds-pepe-the-frog-online-hate-symbols-database.html> [<https://perma.cc/8MKE-7YZ6>].

223. *Id.*

224. Daniel D’Addario, *The 10 Most Influential Fictional Characters of 2016*, TIME, Dec. 13, 2016, <http://time.com/4598518/influential-characters-2016/> [<https://perma.cc/46BW-KBCC>].

225. *See, e.g.*, Pepe the Frog, KNOW YOUR MEME <http://knowyourmeme.com/memes/pepe-the-frog> (last visited Dec. 23, 2016) [<https://perma.cc/H3DE-C7EZ>].

226. This would thus amass all copyright ownership in one creator, rather than dealing with the problem of a work created collectively.

227. *See* DC Comics v. Towle, 802 F.3d 1012, 1021–22 (9th Cir. 2015).

undeniable. Pepe is clearly an incredibly significant and influential character.

The second problem with the *Towle* analysis of Pepe is the treatment of the copyright owner when the masses have reappropriated the character. Furie has stated that Pepe should not be used as a symbol of hate.<sup>228</sup> Does *Towle* give Furie the ability to control his character when its delineation and significance were developed by the masses? The answer is arguably no. Pepe as Furie created him could not pass the *Towle* test, even if Pepe as the Internet refashioned him could. Pepe thus raises a question originally considered by *Sam Spade*<sup>229</sup> but in a distinctly modern context: How should character stewardship work when the copyright owner has no meaningful control over the character? *Towle* has not answered this question. It seems doubtful, due to the breadth of the online dissemination of Pepe, that Furie could use *Towle* to prevent racist iterations of the character, even if a court held that Furie could steward the work.

After considering these issues, it seems that *Towle* may not be adequate to analyze modern characters that do not appear in a traditional copyrightable work. Furthermore, Pepe acquired influence through the internet's mass-appropriation of his image. This way of gaining prominence, which is becoming ever more common in the digital era, seems fundamentally incompatible with *Towle* stewardship. Stewardship describes the benefits of particularized, protectionist controls. But those controls are meaningless with Pepe's version of notoriety.

Characters like Pepe will only become more important as internet culture gains more mainstream attention. If *Towle* cannot address character stewardship in this context, it is unclear how effective or long-lasting the test can be.

## V. CONCLUSION

The *Towle* evaluation is, if anything, still a work in progress. *Towle* condensed and summarized over sixty years of Ninth Circuit jurisprudence on copyrightable fictional characters. Formatting this doctrine into a three-part test, the Ninth Circuit held that the Batmobile was an independently copyrightable work.

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228. See Matt Furie, *Pepe the Frog's Creator: I'm Reclaiming Him. He Was Never About Hate*, TIME, Oct. 13, 2016, <http://time.com/4530128/pepe-the-frog-creator-hate-symbol> [<https://perma.cc/KX6D-5KJH>].

229. See *Warner Bros. Pictures v. CBS*, 216 F.2d 945, 949–50 (9th Cir. 1954) (addressing how copyright claims against the original author should be decided).

*Towle* deviated from copyright norms to grant copyright owners greater ability to control fictional characters with high economic and cultural worth. This Note labeled the justifications for *Towle*'s enhanced protection as stewardship. Stewardship encompasses four rationales. The first stewardship justification is that *Towle* facilitates good husbandry by limiting congestion externalities. Second, *Towle* allows copyright owners to recoup their investment costs. Third, *Towle* prevents the unjust enrichment of illicit borrowers. The fourth justification of stewardship is that characters that pass the *Towle* test are sufficient to be considered copyrightable works under minimum size principles.

However, when *Towle* is used to evaluate innovative characters in contemporary mediums, it becomes clear that the test is not an adequate guide for copyright decisions. In fact, characters like Cecil from *Welcome to Night Vale* and Pepe the frog challenge not only *Towle*'s specific formulation of a copyrightable character test, but stewardship as well, the primary justifications for *Towle*'s deviation from copyright norms.

Despite these problems, *Towle* may show the benefits of having a flexible copyright doctrine that can evolve to fit new situations. Independent character copyrightability could be beneficial if the Ninth Circuit made certain changes. First, the court should eliminate its medium-specific requirements. The distinction between mediums rendered in *Air Pirates* made the already nebulous *Sam Spade* principles worse. A medium-neutral *Towle* test would increase the test's flexibility. Second, the Ninth Circuit should provide greater clarity on what *Towle* steps two and three require. Step two appears to require sufficient characterization and depth, while step three seems to necessitate some level of cultural or economic significance. The court must elucidate on its limited explanations. Lastly, the court should narrow the copyrightable character doctrine to only apply in special cases, and should apply conventional doctrine for most cases. This would prevent confusion of when *Towle* applies, and would reinforce the robustness of the stewardship justifications.

Grant Morrison has said that comic book characters last forever.<sup>230</sup> But, like case precedent, they can go through many changes before dying—only to be resurrected again.

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230. See Lamar, *supra* note 1.