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## Inside Out, Upside Down: Circuit Court Confusion Over Character Copyrightability

Caitlin E. Oh

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## INSIDE OUT, UPSIDE DOWN: CIRCUIT COURT CONFUSION OVER CHARACTER COPYRIGHTABILITY

### ABSTRACT

*Enormous amounts of new content are posted on social media every day. Ordinarily, if a work is original and created by the author, the work is automatically protected under copyright without the need for registration. However, in recent years, copyright protection has become difficult to obtain for one type of expression: fictional characters.*

*Today, characters hold immense cultural significance. For some, characters provide an escape from reality, entertainment, and, in some cases, a blueprint to which one can aspire. For entertainment studios, characters hold immense economic value. If a character is popular—holding cultural significance—a studio might create a prequel or spin-off television series about the character to satiate fan bases.*

*Despite the cultural and economic significance of characters, the only characters which have been granted copyright protection possess long tenures in recognizable entertainment companies, such as James Bond, Godzilla, Superman, and the Batmobile. Sparse copyright protection for characters is a result of a circuit split where three jurisdictions apply divergent standards not based on originality. In 2020, *The Moodsters*, five anthropomorphic personifications of moods, were denied copyright protection in the Ninth Circuit, which has the highest standard for character copyrightability. This heightened standard ultimately allowed Disney to make billions off its animated film *Inside Out*. The decision—made in *Daniels v. Walt Disney Co.*—underscores the repercussions of a heightened standard for character copyrightability, which has allowed courts to grant copyright protection for famous characters alone.*

*This Comment proposes the following solution to this problem: adopting the Seventh Circuit’s “stock character” test for character copyrightability. To lay the foundation, it explores the disparate standards set by the Second, Seventh, and Ninth Circuits for character copyrightability. Particularly, it delves into the evolution of the doctrine in the Ninth Circuit, which has greatly expanded protection for character copyrights. It then analyzes the *Daniels v. Walt Disney Co.* decision and its flaws—noting specifically how its rationale raises the*

already-heightened standard. Finally, it analyzes the constitutional basis for copyright, the policy and economic considerations of copyright, and the Supreme Court's foundational copyright decision, *Feist Publications v. Rural Telephone Service Co.*

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## INTRODUCTION

Both the anticipation of seeing a loved one and the feeling of emptiness following a loss are experiences paired with emotions. The first—the anticipation—is related to excitement or happiness; the second—the emptiness—is accompanied by sadness. These are natural and universal. People experience emotions through the limbic system,<sup>1</sup> which processes basic feelings like happiness, sadness, anger, fear, love, and disgust.<sup>2</sup> In school, children are taught that they experience these emotions through chemical reactions, such as the release of dopamine through a positive experience.<sup>3</sup>

But “[d]o you ever look at someone and wonder, ‘what is going on inside their head?’”<sup>4</sup> Maybe instead of chemicals being released, it is a personified emotion where the color correlates with what they are feeling. If the individual is angry, an upset red character disgruntledly presses a button resulting in the subsequent response to anger—a stomp of the foot or an audible grunt. Disney’s movie, *Inside Out*, may provide a familiar visual.<sup>5</sup>

Most people assume the idea and subsequent expression of the emotions in *Inside Out* were developed by Disney, but they have a different beginning. Rather, these anthropomorphic characters personifying emotions were originally established by Denise Daniels, RN, MS.<sup>6</sup> Daniels is an expert in parent and child

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<sup>1</sup> The limbic system is part of the brain and is “responsible for behavioral and emotional responses.” Jill Seladi-Schulman, *What Part of the Brain Controls Emotions?*, HEALTHLINE, <https://www.healthline.com/health/what-part-of-the-brain-controls-emotions#happiness> (July 23, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *INSIDE OUT* (Walt Disney Pictures 2015).

<sup>5</sup> *Id.*

<sup>6</sup> *Our Story About Denise Daniels, RN, MS*, THE MOODSTERS (2022), <https://themoodsters.com/about-denise-daniels-rn-ms/>.

development, “specializ[ing] in the social and emotional development of young children.”<sup>7</sup> In an effort to improve children’s mental health outcomes and help children reach their full potential through managing their emotions, Daniels and her company, Moodsters Co., developed and copyrighted “five gendered anthropomorphic animated characters each paired with a core body color that lived together ‘inside a child,’ and which each included many other nuanced expressions.”<sup>8</sup>

To develop these characters, Daniels and her company, Moodsters Co., “raised over \$3 million in investment capital,”<sup>9</sup> “recruited industry-leading talent to help develop and express the characters,”<sup>10</sup> and implemented a diverse children’s focus group to test the efficacy of the characters at Yale University.<sup>11</sup> In 2005, Moodsters Co. released *The Moodsters Bible*,<sup>12</sup> which told the story of five personified, anthropomorphic emotions representing happiness, sadness, anger, fear, and love.<sup>13</sup> Two years later, in 2007, it released a pilot episode titled “The Amoodsment Mixup” for a proposed animated television show surrounding *The Moodsters*.<sup>14</sup> Further, in 2015, Moodsters Co. “developed a line of toys and books . . . that were sold at Target and other retailers,”<sup>15</sup> thus affording children both emotional support and the ability to play.<sup>16</sup>

With the development process and hope for a television show, Moodsters Co. used its 2005 bible and 2007 pilot to pitch the characters to potential collaborators.<sup>17</sup> From 2005 to 2009, Daniels and Moodsters Co. annually pitched *The Moodsters* to Disney executives.<sup>18</sup> Daniels asserted that over these years,

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<sup>7</sup> *Our Story About the Moodsters*, THE MOODSTERS (2022), <https://themoodsters.com/our-story/>.

<sup>8</sup> Petition for Writ of Certiorari at 6–7, *Moodsters Co. v. Walt Disney Co.*, 141 S. Ct. 1050 (2021) (No. 20-132) (mem.).

<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> First Amended Complaint Exhibit 3 at 68, *Daniels v. Walt Disney Co.*, No. 17-4527 PSG (SK), 2018 WL 4849700 (C.D. Cal. Jan. 31, 2018) [hereinafter Amended Complaint].

<sup>13</sup> James Kachmar, *InsideOut: The Ninth Circuit Holds the Moodsters are No Batman*, AM. BAR ASS’N (June 2, 2020), [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/06/moodsters/](https://www.americanbar.org/groups/business_law/publications/blt/2020/06/moodsters/) (stating each emotion had a corresponding color: happiness was yellow, sadness was blue, anger was red, fear was green, and love was pink).

<sup>14</sup> Petition for Writ of Certiorari, *supra* note 8, at 7; e.g., Tal Dickstein & Joel Ernst, *Daniels v. Walt Disney Company*, LOEB & LOEB LLP (Jan. 31, 2018), <https://www.loeb.com/en/insights/publications/2018/02/daniels-v-walt-disney-company>.

<sup>15</sup> Kachmar, *supra* note 13.

<sup>16</sup> See *Our Story About the Moodsters*, *supra* note 7.

<sup>17</sup> Petition for Writ of Certiorari, *supra* note 8, at 7 (noting Daniels’ pitch of *The Moodsters* to Disney was the company’s most extensive discussion).

<sup>18</sup> *Id.* (“Daniels and Moodsters Co. pitched *The Moodsters* to Disney Executives (and even Roy E. Disney—the son and nephew of the founders—had access every year from 2005 through 2009.”).

she was in contact with the CFO of the Walt Disney Company, who informed her he would communicate Moodsters Co.'s pitch to Roy E. Disney, Walt Disney's son.<sup>19</sup> Daniels also claimed she spoke with Pete Docter, *Inside Out*'s film director, about The Moodsters.<sup>20</sup>

In 2010, one year after Moodsters Co. stopped pitching The Moodsters, Disney began working on the movie *Inside Out*, which “features five color-coded, single-emotion characters”<sup>21</sup> in the mind of Riley, an eleven-year-old girl.<sup>22</sup> “The emotions represented [were] joy, fear, sadness, disgust, and anger.”<sup>23</sup> Pete Docter, whom Daniels claims to have been in contact with, cowrote and directed the screenplay, and claimed the idea for the film came from “the manner with which his 11-year-old daughter dealt with new emotions as she matured.”<sup>24</sup> *Inside Out* premiered in 2015.<sup>25</sup> Two years later, in 2017, Daniels and her company, Moodsters Co., sued Disney for breach of implied-in-fact contract<sup>26</sup> and copyright infringement of The Moodsters as a whole and as individual characters.<sup>27</sup>

Both the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit were faced with the issue of whether Walt Disney's personified emotion characters in its billion-dollar blockbuster, *Inside Out*, infringed on Moodsters Co.'s “anthropomorphized characters representing human emotions.”<sup>28</sup> The Central District of California granted Disney's motion to dismiss on the grounds that The Moodsters were not protectable by copyright.<sup>29</sup> Following the dismissal, Daniels appealed to the Ninth Circuit, which affirmed the district court's

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<sup>19</sup> Kachmar, *supra* note 13. Logically, both individuals would have a large amount of influence over Disney, its productions, and its employees.

<sup>20</sup> *Id.*

<sup>21</sup> Petition for Writ of Certiorari, *supra* note 8, at 7.

<sup>22</sup> Kachmar, *supra* note 13.

<sup>23</sup> *Id.* Notably, these are similar to The Moodsters emotions representing happiness, sadness, anger, fear, and love. *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> The district court dismissed the implied-in-fact contract claim and the Ninth Circuit affirmed. *Daniels v. Walt Disney Co.*, No. 17-CV-4527 PSG (SKx), 2018 U.S. Dist. LEXIS 117569, at \*3 (C.D. Cal. May 9, 2018), *aff'd*, 952 F.3d 1149, 1156–57 (9th Cir. 2020). However, this claim is beyond the scope of this Comment and therefore will not be discussed.

<sup>27</sup> *Daniels v. Walt Disney Co.*, 958 F.3d 767, 770 (9th Cir. 2020).

<sup>28</sup> *Daniels*, 952 F.3d at 1151; see Patrick Arenz, *Request for Amici: Tell SCOTUS to Incentivize Original Fictional Characters Through Copyright*, IPWATCHDOG (Aug. 3, 2020, 3:15 PM), <https://www.ipwatchdog.com/2020/08/03/request-amici-tell-scotus-incentivize-original-fictional-characters-copyright/id=123665/>.

<sup>29</sup> *Daniels*, 2018 U.S. Dist. LEXIS 117569, at \*19.

decision.<sup>30</sup> In so doing, the Ninth Circuit applied two separate tests for character copyrightability: (1) the “story being told” test;<sup>31</sup> and (2) a three-part test focusing on distinguishing literary and pictorial characters, the complexity of the character, and fame, as promulgated in *DC Comics v. Towle*.<sup>32</sup>

With hopes of the Supreme Court elucidating the convoluted jurisprudence surrounding character copyrights, Daniels and her company, Moodsters Co., filed a petition for writ of certiorari to address not only the Ninth Circuit’s fame-based application of *DC Comics*’ three-part test, but also the standards for character copyrightability set by the Second<sup>33</sup> and Seventh<sup>34</sup> Circuits. As more fully discussed below, each of these circuits has applied a distinct standard for character copyrightability—all of which diverge from the “originality” standard for copyrightability set forth by the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>35</sup>—leaving the jurisprudence of character copyrights fractured.<sup>36</sup> However, on January 11, 2021, the Supreme Court denied certiorari for *Moodsters Co. v. Walt Disney Co.*<sup>37</sup>

By denying certiorari, the Supreme Court has left the standard for character copyrightability fractured. Every day, new content is constantly uploaded. To stand out among the masses, creatives hope to distinguish themselves through the unique expression of ideas. Despite this effort, disparate and heightened

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<sup>30</sup> See *Daniels*, 952 F.3d at 1157.

<sup>31</sup> *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945, 950 (9th Cir. 1954). This test will be addressed later in the Comment. See *infra* Section I.C.4.

<sup>32</sup> 802 F.3d 1012, 1021 (9th Cir. 2015). Despite the district court’s determination that the standard set in *DC Comics* governs the test for copyrightability, “*Warner Brothers* and [*DC Comics*] are two different tests for character copyrightability.” *Daniels*, 952 F.3d at 1155 (“[C]haracters that are ‘especially distinctive’ or the ‘story being told’ receive protection apart from the copyrighted work.” (quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003))). The test promulgated in *DC Comics* contains a three-part test for a character to obtain copyright. Specifically, a character must: (1) have “physical as well as conceptual qualities”; (2) “be ‘sufficiently delineated’ to be recognizable as the same character whenever it appears”; and (3) be “‘especially distinctive’ and ‘contain some unique elements of expression.’” *DC Comics*, 802 F.3d at 1021 (first quoting *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978); then quoting *Rice*, 330 F.3d at 1175; and then quoting *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008)).

<sup>33</sup> The Second Circuit’s standard flows from Judge Learned Hand’s statement: “the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.” *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). This Comment refers to this test as the “sufficiently delineated” test.

<sup>34</sup> The Seventh Circuit established a low standard, holding the characters must be distinct from a stock character with “enough expressive content for copyrightability.” *Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004).

<sup>35</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991).

<sup>36</sup> The “originality” standard for copyrights was first defined by the Supreme Court in *Feist. Id.* at 345. Each of these tests will be further discussed later in this Comment. See *infra* Part I.

<sup>37</sup> *Moodsters Co. v. Walt Disney Co.*, 141 S. Ct. 1050 (2021) (mem.).

standards for an author to achieve copyright protection may leave an immense amount of work unprotected.<sup>38</sup> This Comment argues for a uniform standard to determine character copyrightability. As a facet of that argument, it proposes the Seventh Circuit’s “stock character” test, the closest test to the Supreme Court’s “originality” standard set forth in *Feist*,<sup>39</sup> as the solution.

To reach this solution, Part I of this Comment examines the circuit split which has developed over the years in the Second, Seventh, and Ninth Circuits. Specifically, Part I explores the Ninth Circuit’s expansion of copyright protection for characters through significant decisions that ultimately led to a heightened standard, which is nothing more than an enumerated list. Part II discusses the interpretation and application of the heightened Ninth Circuit standard to *Daniels v. Walt Disney Co.*<sup>40</sup> Part III analyzes the constitutional basis for copyright, the Copyright Protection Act, *Feist*, and originality. Part IV justifies the Seventh Circuit’s “stock character” test and applies it to *Daniels v. Walt Disney Co.*

#### I. CIRCUIT COURT CONFUSION OVER CHARACTER COPYRIGHTABILITY

While the Supreme Court has held originality to be the “touchstone” of copyright,<sup>41</sup> a lack of uniformity exists regarding the standard to determine whether literary or animated characters are afforded copyright protection.<sup>42</sup> The Copyright Act of 1976 does not independently protect literary or animated characters.<sup>43</sup> However, within the Seventh, Second, and Ninth Circuits, four different tests were established with varying levels of rigor to obtain copyright

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<sup>38</sup> Such as *The Moodsters*.

<sup>39</sup> See *Feist*, 499 U.S. at 345.

<sup>40</sup> 958 F.3d 767, 774–75 (9th Cir. 2020).

<sup>41</sup> *Feist*, 499 U.S. at 347 (citing *Goldstein v. California*, 412 U.S. 546, 561–62 (1973)).

<sup>42</sup> See *DC Comics v. Towle*, 802 F.3d 1012, 1020–21 (9th Cir. 2015) (establishing a heightened three-part test for a character to obtain copyright); *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004) (establishing a low standard for a character to obtain copyright); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930) (establishing a vague “sufficiently delineated” standard for a character to obtain copyright).

<sup>43</sup> See 17 U.S.C. § 102(a)(1)–(8) (“Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”).



protection for animated characters.<sup>44</sup> These inconsistent approaches have not gone unnoticed by the copyright community.<sup>45</sup>

This Part explains in detail the distinct approaches of the Seventh, Second, and Ninth Circuits and their corresponding rationales. Section A addresses the Seventh Circuit test from *Gaiman v. McFarlane* and explains how it is most akin to the constitutionally mandated requirement of originality. Section B addresses the Second Circuit test from *Nichols v. Universal Pictures Corp.* and the implications of its ambiguous standard. Section C details the major cases underlying the expansion of character copyrightability in the Ninth Circuit. Specifically, it explains how courts within the Ninth Circuit continue to conflate distinct legal standards eventually leading to two different tests in the Ninth Circuit: (1) the “story being told” test; and (2) the three-part *DC Comics v. Towle* test.

A. *Staying Close to Constitutional Roots: The Seventh Circuit’s “Stock Character” Test*

In 2004, the Seventh Circuit was faced with the question of character copyrightability in *Gaiman v. McFarlane*. The case involved a dispute between two comic book authors regarding the ownership of characters.<sup>46</sup> The Seventh Circuit held that the characters could obtain copyright protection, explaining that for a character to merit copyright protection, it must not be a stock character.<sup>47</sup> In deciding whether the characters were more than stock characters, the Seventh Circuit established a low threshold, holding the characters must be distinct with “enough expressive content for copyrightability.”<sup>48</sup>

The Seventh Circuit gave many examples of stock characters that would not receive copyright protection.<sup>49</sup> These characters included “a drunken old bum[,] . . . a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels, [and] a masked magician.”<sup>50</sup> The Seventh Circuit noted, “such stereotyped

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<sup>44</sup> See *DC Comics*, 802 F.3d at 1020–21 (establishing a heightened three-part test for a character to obtain copyright); *Gaiman*, 360 F.3d at 660 (establishing a low standard for a character to obtain copyright); *Nichols*, 45 F.2d at 122 (establishing a vague “sufficiently delineated” standard for a character to obtain copyright).

<sup>45</sup> See Petition for Writ of Certiorari, *supra* note 7, at 14–15 (listing law review articles discussing the dissonance of the standard for character copyrightability).

<sup>46</sup> *Gaiman*, 360 F.3d at 648.

<sup>47</sup> Petition for Writ of Certiorari, *supra* note 7, at 15 (quoting *Gaiman*, 360 F.3d at 659–61).

<sup>48</sup> *Gaiman*, 360 F.3d at 661.

<sup>49</sup> *Id.* at 660 (citing *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175–76 (9th Cir. 2003)).

<sup>50</sup> *Id.* (citing *Rice*, 330 F.3d at 1175–76).

[stock] characters are the products not of the creative imagination but of simple observation of the human comedy.”<sup>51</sup> Further, it noted the difficulties that would plague the creative field if stock characters were copyrightable:

If standard features could be used to prove infringement, not only would there be great confusion because it would be hard to know whether the alleged infringer had copied the feature from a copyrighted work or from the public domain, but the net of liability would be cast too wide; authors would find it impossible to write without obtaining a myriad of copyright permissions.<sup>52</sup>

Thus, copyright permissions, such as licenses for mere stock characters, would hinder an author’s creative process.<sup>53</sup> However, the Seventh Circuit held that the two disputed characters merited copyright protection because they contained enough expressive content, and therefore were sufficiently distinct from stock characters.<sup>54</sup>

The first character, Count Cogliostro, was afforded copyright protection because of his “age, obviously phony title (‘Count’), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character.”<sup>55</sup> Because Count Cogliostro had “enough expressive content,” nothing more was required to merit character copyright protection,<sup>56</sup> as “once [Count Cogliostro] was drawn and named and given speech he became sufficiently distinctive to be copyrightable.”<sup>57</sup>

Further underscoring the Seventh Circuit’s low standard for character copyrightability, the court held that the second character, Medieval Spawn,

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 659.

<sup>53</sup> *Id.* at 660 (“It would be difficult to write successful works of fiction without negotiating for dozens or hundreds of copyright licenses . . .”).

<sup>54</sup> *Id.* at 661.

<sup>55</sup> *Id.* at 660.

<sup>56</sup> *Id.* at 661.

<sup>57</sup> *Id.* The court noted that there is a difference in a character that is literary and one that is graphic. *See id.* at 660 (“The reason is the difference between literary and graphic expression.”). When a character is described in a literary work, even if there is a lengthy and detailed description, much of the appearance of the character is up to the reader’s imagination. *Id.* at 661 (“A reader of unillustrated fiction completes the work in his mind; the reader of a comic book or the viewer of a movie is passive.”); *see* Gael Fashingbauer Cooper, *J.K. Rowling on the Reaction to a Black Hermione: ‘Idiots Were Going to Idiot’*, CNET (June 6, 2016, 1:20 PM), <https://www.cnet.com/news/j-k-rowling-on-reaction-to-a-black-hermione-idiots-were-going-to-idiot/> (“Hermione’s skin color was never mentioned in the books, even though some readers have debated even the most minuscule mentions of the character’s appearance for signs that might identify her race.”). Further, the Seventh Circuit admitted the “verbal description of Cogliostro may well have been a stock character,” but the author’s “contribution had expressive content without which Cogliostro wouldn’t have been a character at all, but merely a drawing.” *Gaiman*, 360 F.3d at 661.

should be afforded copyright protection despite lacking a specific name and “differ[ing] from other characters only through ‘his costume and manner of speech, together with the medieval background.’”<sup>58</sup> Medieval Spawn could merit copyright protection under the Seventh Circuit’s standard because he had “enough expressive content for copyrightability.”<sup>59</sup>

The Seventh Circuit considered these minimal distinctions from stock characters “enough expressive content” for both characters to obtain copyright protection, which underscores its low standard for character copyrightability. Of the three circuits, the Seventh Circuit’s standard is the closest to the originality requirement set out in *Feist*.<sup>60</sup> The Supreme Court’s decision in *Feist* was predicated on copyright’s constitutional roots, which set a low bar to obtain copyright protection in the interest of incentivizing authors to advance the useful arts and sciences.<sup>61</sup> Unlike the heightened standards in the Second and Ninth Circuits, which are discussed more fully below, the Seventh Circuit’s test for character copyrightability would permit the broadest protection for authors regardless of whether they are independent or affiliated with an entertainment conglomerate.

*B. Learning from Judge Learned Hand: The Second Circuit’s “Sufficient Delineation” Test*

The Second Circuit first addressed the issue of character copyrights in *Nichols v. Universal Pictures Corp.*<sup>62</sup> There, Judge Learned Hand examined several characters to determine whether each could hypothetically qualify for copyright protection.<sup>63</sup> Further, he promulgated a standard for character copyrightability by considering Shakespeare’s *Twelfth Night*:

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. These would be no more than Shakespeare’s “ideas” in the play, as little capable of monopoly as Einstein’s Doctrine of Relativity,

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<sup>58</sup> Petition for Writ of Certiorari, *supra* note 8, at 16 (quoting *Gaiman*, 360 F.3d at 661).

<sup>59</sup> *Gaiman*, 360 F.3d at 661.

<sup>60</sup> See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>61</sup> See U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”); *infra* Sections III.A, III.B.

<sup>62</sup> 45 F.2d 119, 122 (2d Cir. 1930).

<sup>63</sup> *Id.* at 122–23.

or Darwin's theory of the Origin of Species. It follows that *the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.*<sup>64</sup>

Judge Hand's vague standard has become known to courts, commentators, and creators as the "sufficient delineation" test.<sup>65</sup> Notably, Judge Hand failed to provide any factors or elements to evaluate whether a character is sufficiently delineated, which may lead courts to make arbitrary and inconsistent decisions about when to afford copyright protection.<sup>66</sup>

The Second Circuit applied this ambiguous standard for character copyrightability in *Detective Comics, Inc. v. Brun Publications, Inc.*<sup>67</sup> There, the court affirmed the lower court's holding that "the *Wonderwoman* comic infringed the character copyright in *Superman*."<sup>68</sup> Specifically, the Second Circuit noted Superman was afforded copyright protection because "the pictorial representations and verbal descriptions of 'Superman' are *not a mere delineation* of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author."<sup>69</sup> By this reasoning, the "sufficient delineation" test speaks more to measuring the "depth of complexity of a character."<sup>70</sup> *Detective Comics, Inc.* marks the circuit courts' initial divergence from copyright's constitutional roots: the low standard of originality.<sup>71</sup> The Ninth Circuit would continue to stray farther from this principle.

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<sup>64</sup> *Id.* at 121 (emphasis added).

<sup>65</sup> This name has been coined throughout the years by commentators and courts referring to the test as such. Petition for Writ of Certiorari, *supra* note 8, at 17.

<sup>66</sup> Despite laying out this test, in *Nichols*, the Second Circuit decided the infringed work would be the work itself rather than the character. Michael Deamer, *DC Comics v. Towle: Protecting Fictional Characters Through Stewardship*, 32 BERKELEY TECH. L.J. 437, 439 (2017). In the context of *Twelfth Night*, the play itself would be the subject of infringement and not Sir Toby Belch. *Id.* Through its statement that "the infringement analysis remained rooted in the original work as a whole," the Second Circuit recognized the importance of characters as a potential source of copyright infringement by setting an (albeit vague) standard to determine whether a character itself is copyrightable. *Id.* Even though the character was not the focus of infringement comparison in the Second Circuit, this would soon change in the Ninth Circuit. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978).

<sup>67</sup> 111 F.2d 432, 433 (2d Cir. 1940).

<sup>68</sup> Petition for Writ of Certiorari, *supra* note 8, at 17 (citing *Detective Comics, Inc.*, 111 F.2d at 433–44).

<sup>69</sup> *Detective Comics, Inc.*, 111 F.2d at 433–34 (emphasis added) (reasoning the pictorial representations and verbal descriptions "are proper subjects of copyright and susceptible of infringement because of the monopoly afforded by the act").

<sup>70</sup> Deamer, *supra* note 65, at 444.

<sup>71</sup> In *Feist*, the Supreme Court declared originality to be a low standard, as even a "slight amount" of creativity meets the burden to satisfy the requisite level of creativity required. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

C. *The Ninth Circuit Expands Copyright for Fictional Characters: The Development of Two Distinct and Heightened Standards for Character Copyrightability*

In comparison to other circuits, the Ninth Circuit has greatly expanded the rights afforded to authors of fictional characters through copyright.<sup>72</sup> At first glance, the prospect of increased rights may make creators hopeful. However, upon further inspection, the Ninth Circuit standards leave many independent creators<sup>73</sup> with no protection or compensation for their work and instead protect only the most lucrative characters.<sup>74</sup> This section examines the evolution of the standards currently employed by the Ninth Circuit in four parts: (1) the “story being told” test, its implications, and the subsequent confusion it caused; (2) the United States District Court for the Central District of California’s grappling with the Ninth Circuit’s “story being told” test and its first foray into validating fame; (3) the development of the modern doctrine; and (4) the modern doctrine in *DC Comics v. Towle*.

1. *The “Story Being Told” Test: Implications and Confusion (1954–1988)*

The Ninth Circuit first recognized character copyrightability in 1954.<sup>75</sup> The case, *Warner Brothers Pictures, Inc. v. Columbia Broadcasting Systems, Inc.*, involved the character Sam Spade from Dashiell Hammett’s novel, *The Maltese Falcon*.<sup>76</sup> Hammett transferred the radio, television, and motion picture rights to the novel to Warner Brothers.<sup>77</sup> After transferring the rights, Hammett used the character Sam Spade in a series of sequels he licensed to CBS, which adapted the sequels into a popular radio show.<sup>78</sup> Warner then filed suit, claiming CBS infringed on its rights to *The Maltese Falcon*.<sup>79</sup> The Ninth Circuit determined that the fact that all rights had been assigned to a third party was irrelevant because characters in a work are not independently copyrightable.<sup>80</sup> Thus,

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<sup>72</sup> Deamer, *supra* note 65, at 439.

<sup>73</sup> In this sense, “independent” means the creator was not previously affiliated with a large entertainment studio such as Disney.

<sup>74</sup> Deamer, *supra* note 65, at 439 (“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.”).

<sup>75</sup> *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945, 950 (9th Cir. 1954).

<sup>76</sup> *Id.* at 946, 948. As such, this case will be referred to as “*Sam Spade*.”

<sup>77</sup> *Id.* at 947–48.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 947–49.

<sup>80</sup> Deamer, *supra* note 65, at 440 (“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.”).

Hammett could continue using his characters because the Ninth Circuit denied any copyright protection and “effectively plac[ed] them in the public domain.”<sup>81</sup>

However, the Ninth Circuit provided an exception allowing characters to obtain copyright protection if they are the “story being told” rather than a mere “chessman in the game of telling the story.”<sup>82</sup> More specifically, a character must dominate the story enough to “essentially [become] a character study”—such as a main character—and not just a pawn or side character that serves a minimal purpose to move the plot of the story forward.<sup>83</sup> Because the “story being told” test serves as a narrow exception to the Ninth Circuit’s pronouncement that characters within works are not independently copyrightable, it is a high standard, essentially leaving characters unprotectable.<sup>84</sup>

*Sam Spade* inspired mixed reviews. For example, Judge Richard Posner remarked the decision was “wrong”<sup>85</sup> and an overall understanding of the case caused “massive confusion.”<sup>86</sup> Over a decade later, in 1978, the Ninth Circuit reinterpreted the decision with *Walt Disney Productions v. Air Pirates*.<sup>87</sup> In *Air Pirates*, Disney sued Air Pirates, alleging Air Pirates infringed on Disney’s cartoon characters by portraying them “as active members of a free thinking, promiscuous, drug ingesting counterculture” in an underground comic book.<sup>88</sup> The Ninth Circuit held Disney’s characters to be copyrightable.<sup>89</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *Warner Bros.*, 216 F.2d at 950.

<sup>83</sup> *Daniels v. Walt Disney Co.*, 952 F.3d 1149, 1155 (9th Cir. 2020).

<sup>84</sup> Deamer, *supra* note 65, at 440.

<sup>85</sup> *See Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004) (Posner, J.).

<sup>86</sup> *See E. Fulton Brylawski, Protection of Characters—Sam Spade Revisited*, 22 BULL. COPYRIGHT SOC’Y U.S.A. 77, 87 (1974).

<sup>87</sup> *See* 581 F.2d 751, 755 (9th Cir. 1978).

<sup>88</sup> *Id.* at 753 (quoting Kevin W. Wheelwright, Note, *Parody, Copyrights and the First Amendment*, 10 U. S. FLA. L. REV. 564, 571, 582 (1976)). “For example, one comic graphically depicted Mickey Mouse violently assaulting a Disney fan that had a Mickey tattoo.” Deamer, *supra* note 65, at 441 n.24.

<sup>89</sup> *Air Pirates*, 581 F.2d at 753. While the Ninth Circuit held Disney’s characters to be copyrightable, it failed to establish whether the characters themselves were independently copyrightable. On one hand, the Ninth Circuit implied the characters were copyrightable only as a “component part[]” of the cartoons by interpreting the 1909 Copyright Act. *Id.* at 754. On the other hand, the Ninth Circuit reasoned 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.” *Id.* at 757 (internal quotation marks omitted). Under this reasoning, “an image of Mickey Mouse also inherently includes his character traits as depicted by the overarching work.” Deamer, *supra* note 65, at 441. Here, the Ninth Circuit also noted the “widespread public recognition” of some of the Disney characters Air Pirates employed in its comic, such as Mickey Mouse. *Air Pirates*, 581 F.2d at 757. Unlike the interpretation of the 1909 Copyright Act, this reasoning implies characters may be independently copyrightable and separate from the work they originate from. This implication is notably distinct from the Second Circuit’s determination. *See supra* note 65 and accompanying text.

To reach this conclusion, the Ninth Circuit distinguished the case from *Sam Spade*, where the court promulgated the “story being told” test. The character Sam Spade, which the Ninth Circuit deemed not copyrightable,<sup>90</sup> was a literary character. Therefore, to find Disney’s characters copyrightable, the Ninth Circuit differentiated between literary characters, like Sam Spade, and cartoon characters, like the ones in *Air Pirates*.<sup>91</sup> The Ninth Circuit explained comic book characters have “physical as well as conceptual qualities” and thus are “more likely to contain some unique elements of expression.”<sup>92</sup> When making this distinction, the Ninth Circuit suggested the “story being told” test might be dicta, helping it find Disney’s characters copyrightable.<sup>93</sup>

By limiting the *Sam Spade* “story being told” test to only literary characters, the Ninth Circuit unintentionally exacerbated the post-*Sam Spade* confusion by creating the beginnings of a second test for character copyrightability.<sup>94</sup> Thus, *Air Pirates* marked the beginning of the confusion within the Ninth Circuit of which test is appropriate to determine character copyrightability.<sup>95</sup>

Ten years later, in 1988, the Ninth Circuit failed to elucidate a precise standard in *Olson v. National Broadcasting Co.*<sup>96</sup> Olson, the author of a copyrighted treatment<sup>97</sup> and screenplay for a potential television series entitled *Cargo*, sued NBC for infringement through its show *The A-Team*.<sup>98</sup> Without much clarity, the Ninth Circuit determined Olson’s characters were not independently copyrightable.<sup>99</sup>

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<sup>90</sup> Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc., 216 F.2d 945, 950 (9th Cir. 1954).

<sup>91</sup> *Air Pirates*, 581 F.2d at 755.

<sup>92</sup> *Id.* Under this distinction, the Ninth Circuit “affirmed copyright protection for twenty-one Disney characters, ranging from well-known characters like Mickey Mouse to obscure characters like Toby Tortoise and Max Hare.” Petition for Writ of Certiorari, *supra* note 8, at 19 (citing *Air Pirates*, 581 F.2d at 753 n.5).

<sup>93</sup> *Air Pirates*, 581 F.2d at 755 n.10.

<sup>94</sup> Semblances of this initial test appear later in the Ninth Circuit’s modern doctrine. See *infra* Section I.C.4.

<sup>95</sup> Deamer, *supra* note 65, at 442.

<sup>96</sup> 855 F.2d 1446, 1452–53 (9th Cir. 1988).

<sup>97</sup> “A film treatment is a summary of a film or television show. It should communicate all of the essential scenes, themes, and tone of the project to entice or pitch to buyers and producers into reading, developing, or even purchasing your idea.” Kyle Deguzman, *What is a Film Treatment? Examples From E.T. and The Shining*, STUDIOBINDER (Dec. 6, 2020), <https://www.studiobinder.com/blog/what-is-a-film-treatment-definition/>.

<sup>98</sup> *Olson*, 855 F.2d at 1446.

<sup>99</sup> *Id.* at 1452. Unlike in *Air Pirates*, the Ninth Circuit unambiguously asserted it would evaluate the characters independent of the work. *Id.* at 1452–53 (stating it would evaluate “copyright protection [of] a character taken alone” (citing Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc., 216 F.2d 945, 950–51 (9th Cir. 1954))). While the Ninth Circuit stated characters were independently copyrightable, it failed to state how evaluating characters solely fit within the statutory scheme of the 1976 Copyright Act, which does not independently protect literary or animated characters. See 17 U.S.C. § 102(a)(1)–(8) (“Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial,

In reaching its decision, *Olson* alluded to a theory first proposed in *Air Pirates* that the “story being told” test was “arguably dicta,” but it failed to make a final ruling concerning the test.<sup>100</sup> Unlike *Air Pirates*, which suggested the “story being told” test may be dicta and distinguished literary characters from non-literary characters, *Olson* created a “more lenient” standard that allowed a character to be independently copyrighted when they are “especially distinctive.”<sup>101</sup> Despite suggesting the “story being told” test was mere dicta, the Ninth Circuit in *Olson* framed its new “especially distinctive” standard as an exception to *Sam Spade*, which expanded on the original theory in *Air Pirates*.<sup>102</sup> The unclear differentiation of whether the *Sam Spade* “story being told” test was dicta and what appeared to be the inception of a second standard to evaluate character copyrightability ossified the lack of clarity within the Ninth Circuit of which test is appropriate to determine character copyrightability.<sup>103</sup>

## 2. *The District Court Validates Fame with Three Significant Decisions (1989–1998)*

Following the *Sam Spade* case, *Air Pirates*, and *Olson*, the United States District Court for the Central District of California used the standards developed by the Ninth Circuit to make three significant decisions validating fame. Each case concerned an iconic character, which the Central District of California found to be copyrightable.<sup>104</sup> Notably, each decision ensured a large film company’s character was copyrightable.

In 1989, in *Anderson v. Stallone*, Timothy Anderson, an author of a treatment<sup>105</sup> for *Rocky IV*, sued Sylvester Stallone and Metro-Goldwyn-Mayer, Inc. (“MGM”) for copyright infringement.<sup>106</sup> Here, the Central District of

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graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”).

<sup>100</sup> *Olson*, 855 F.2d at 1451–52. Unlike in *Air Pirates*, the Ninth Circuit placed this theory in the main text rather than a footnote, “suggest[ing] that the Ninth Circuit gradually gave more credence to the theory.” Deamer, *supra* note 64, at 442.

<sup>101</sup> *Olson*, 855 F.2d at 1452. The Ninth Circuit also noted cases following *Sam Spade* have determined characters copyrightable if they are especially distinctive. *Id.* Each character has been non-literary. *See id.*

<sup>102</sup> Deamer, *supra* note 64, at 442.

<sup>103</sup> *Id.*

<sup>104</sup> The characters were Rocky, James Bond, and Godzilla. *See Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at \*6 (C.D. Cal. Apr. 25, 1989) (finding Rocky Balboa copyrightable); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (finding James Bond copyrightable); *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1216 (C.D. Cal. 1998) (finding Godzilla copyrightable).

<sup>105</sup> *See supra* note 97.

<sup>106</sup> *Stallone*, 1989 WL 206431, at \*1–2.



California found Rocky Balboa, the boxer in the *Rocky* film series, to be copyrightable in Stallone and MGM's favor.<sup>107</sup> To reach this decision, the court utilized both the "story being told"<sup>108</sup> test and Judge Learned Hand's "sufficiently delineated" standard from the Second Circuit.<sup>109</sup>

Six years later in 1995, in *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, the Central District of California held James Bond was an independently copyrightable fictional character.<sup>110</sup> To reach this decision, the court acknowledged two different groups of tests: the "*Sam Spade/Olson/Ninth Circuit 'story being told'* test,"<sup>111</sup> and the "*Air Pirates/Second Circuit 'character delineation'* test."<sup>112</sup> The court reasoned, "[l]ike Rocky, Sherlock Holmes, Tarzan, and Superman, James Bond has certain character traits that have been developed over time through *sixteen films* in which he appears," and found James Bond to be copyrightable under both tests.<sup>113</sup>

In 1998, the Central District of California ruled Godzilla, "the iconic Japanese movie monster,"<sup>114</sup> was copyrightable in *Toho v. William Morrow & Co.*<sup>115</sup> To determine Godzilla was copyrightable, the court cited both *Air Pirates*—specifically that a "character is *sufficiently delineated* to receive copyright protection"<sup>116</sup>—and the James Bond case, *American Honda*.<sup>117</sup> Further, the court drew similarities between the James Bond and Godzilla characters, stating that "Godzilla has likewise developed a constant set of traits that distinguish him/her/it from other fictional characters," and even though the character has changed in both characterization and visual depiction, "there remains an underlying set of attributes that remain in every film."<sup>118</sup> Notably, at

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<sup>107</sup> Because Rocky is a copyrightable character, the district court determined Anderson's treatment to be nothing more than a derivative work incorporating Rocky, Stallone's character, without permission. *Id.* at \*6.

<sup>108</sup> The district court initially dismissed the "story being told" test as "inapplicable to the facts of this case," but, "out of an abundance of caution," used both this test and Learned Hand's standard to determine the protectability of Rocky characters. *Id.* at \*7.

<sup>109</sup> *Id.* ("The Rocky characters are one of the most highly delineated group of characters in modern American cinema.").

<sup>110</sup> *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (holding in favor of MGM).

<sup>111</sup> *Id.* at 1296.

<sup>112</sup> *Id.* This case is the only one which groups the tests like this. However, the grouping did not affect the outcome.

<sup>113</sup> *Id.* (emphasis added).

<sup>114</sup> Deamer, *supra* note 65, at 443.

<sup>115</sup> 33 F. Supp. 2d 1206, 1216 (C.D. Cal. 1998) (holding in favor of Toho, a Japanese film studio).

<sup>116</sup> *Id.* (emphasis added) (citing *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978)). This is a nod to the Second Circuit standard. *See supra* Section I.B.

<sup>117</sup> *Toho*, 33 F. Supp. 2d at 1216.

<sup>118</sup> *Id.*

the time of their respective lawsuits, both James Bond and Godzilla were established characters.<sup>119</sup> Therefore, the fact they had a specific set of developed traits that stays constant between films<sup>120</sup> can partially be attributed to the amount of time they have had in the entertainment industry and exposure through their respective large entertainment studios' already-captive audiences.

By finding parallels between James Bond and Godzilla, the Central District of California seemed to primarily rely on *American Honda* as its controlling authority.<sup>121</sup> However, it held “Toho’s Godzilla is a well-defined character with *highly delineated* consistent traits,”<sup>122</sup> which suggests the court additionally relied on the Second Circuit’s “sufficiently delineated” standard from Judge Learned Hand. While both standards can separately determine if a character is independently copyrightable, the Second Circuit’s test focuses more on the depth of complexity of the character, while “consistent traits” focus more on “whether a character expressed a stable, recognizable persona.”<sup>123</sup> *Toho* thus marks the initial conflation of precedents concerning character copyrightability.

Overall, these three Central District of California decisions had two negative implications. First, they afforded three iconic characters copyright protection through noting their longstanding characteristics rather than their original attributes. Second, they began merging prior precedents to ensure large entertainment studios’ characters obtained copyright protection.

### 3. *The Road to the Modern Doctrine: The Mystery Magician to Eleanor (2003–2008)*

After the notable Central District of California decisions, the Ninth Circuit “attempted to consolidate and simplify the myriad principles that courts have used to define and evaluate the copyrightability of fictional characters.”<sup>124</sup>

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<sup>119</sup> At the time of the lawsuit, James Bond had been around for thirty-two years, as the first Bond movie premiered in 1962. Robert Brian Taylor, *How to Watch the James Bond Movies in Order (Chronologically and by Release Date)*, COLLIDER, <https://collider.com/how-to-watch-james-bond-movies-in-order-no-time-to-die/> (June 10, 2022). At the time of the lawsuit, Godzilla had been around for forty-four years, as the first Godzilla movie premiered in 1954. *Godzilla*, IMDB, <https://www.imdb.com/title/tt0047034/> (last visited Feb. 7, 2022).

<sup>120</sup> At the time, there had been numerous films centering both characters. James Bond had sixteen at the time of the lawsuit. *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995). Godzilla had twenty-two. See Tom Reimann, *How to Watch Godzilla Movies in Order, Chronologically and by Release Date*, COLLIDER (Mar. 31, 2021), <https://collider.com/how-to-watch-godzilla-movies-in-order/>.

<sup>121</sup> See *Toho*, 33 F. Supp. 2d at 1216.

<sup>122</sup> *Id.* (emphasis added).

<sup>123</sup> Deamer, *supra* note 65, at 444.

<sup>124</sup> *Id.*

However, as *Olson's* interpretation of *Air Pirates* exemplifies,<sup>125</sup> “reinterpretation can misstate supporting precedent.”<sup>126</sup>

The Ninth Circuit’s first attempt to consolidate the fractured jurisprudence surrounding character copyrightability was in 2003 with *Rice v. Fox Broadcasting Co.*<sup>127</sup> Rice, owner of the copyright for *The Mystery Magician*, a home video in which the Mystery Magician character explained the ins and outs of popular illusions and magic tricks, sued Fox for copyright infringement of his Mystery Magician character.<sup>128</sup> The Ninth Circuit found the Mystery Magician character ultimately uncopyrightable, recognizing two separate tests to determine the character’s copyrightability: (1) the “story being told” test; and (2) the “especially distinctive” test.<sup>129</sup> Notably, the Ninth Circuit framed the *Olson* “especially distinctive” test, which was originally framed as a special exception to the *Sam Spade* “story being told” test, as a full-blown alternative test.<sup>130</sup>

When evaluating the “especially distinctive” test, *Rice* stated “[w]e are not persuaded, however, that the magician revealing the tricks in *The Mystery Magician* is somehow *sufficiently delineated* to warrant copyright protection.”<sup>131</sup> While the “sufficiently delineated” standard originates from the Second Circuit’s *Nichols* decision and focuses on the complexity and depth of the character,<sup>132</sup> *Rice* proceeded to compare the Mystery Magician to Godzilla, James Bond, and Rocky, which the court considered to be characters that received copyright protection because they “displayed consistent, widely identifiable traits.”<sup>133</sup> Like *Toho*, *Rice* conflated “precedents that originally spoke to different concepts.”<sup>134</sup>

Five years later, the Ninth Circuit continued to muddle precedents in *Halicki Films v. Sanderson*.<sup>135</sup> Though litigated in 2008, the case began in 1974 when

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<sup>125</sup> See *supra* Section I.C.1.

<sup>126</sup> Deamer, *supra* note 65, at 444.

<sup>127</sup> See 330 F.3d 1170, 1175–76 (9th Cir. 2003).

<sup>128</sup> *Id.* at 1173.

<sup>129</sup> *Id.* at 1175 (first citing Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc., 216 F.2d 945, 950 (9th Cir. 1954); then citing *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988); and then citing *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1295–96 (C.D. Cal. 1995)).

<sup>130</sup> Deamer, *supra* note 65, at 444.

<sup>131</sup> *Rice*, 330 F.3d at 1175 (emphasis added) (citing *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998)).

<sup>132</sup> Deamer, *supra* note 65, at 444.

<sup>133</sup> *Rice*, 330 F.3d at 1175 (citing *Toho*, 33 F. Supp. 2d at 1215).

<sup>134</sup> Deamer, *supra* note 65, at 444.

<sup>135</sup> See *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224–25 (9th Cir. 2008).

H.B. Halicki released *Gone in 60 Seconds*, a film depicting heists of many classic cars and featuring a 1971 Fastback Ford Mustang called “Eleanor.”<sup>136</sup> In 2000, Disney, which had purchased a license, released a remake of the film, and “Halicki’s widow filed suit regarding merchandising rights for Eleanor.”<sup>137</sup> To determine whether Eleanor was a copyrightable character,<sup>138</sup> Halicki followed a similar process to *Rice*.<sup>139</sup> The Ninth Circuit first reiterated the holding of *Sam Spade*, which limited the copyrightability of literary characters, and then compared the case to *Air Pirates*, which delineated the standard for pictorial characters.<sup>140</sup>

After reasoning Eleanor was more akin to a “comic book character” in *Air Pirates* rather than a “literary character” in *Sam Spade*,<sup>141</sup> the Ninth Circuit determined Eleanor “displayed consistent, widely identifiable traits”<sup>142</sup> and was “especially distinctive.”<sup>143</sup> While the Ninth Circuit addressed the standards together, both are distinct and originate from two different cases. The first, which focuses on identifiable traits, was from *Rice*, where the Ninth Circuit grouped the Central District of California decisions for *Toho*, *American Honda*, and *Stallone* under one umbrella.<sup>144</sup> The second, which focuses on how “especially distinctive” a character is, was from *Olson*, expanding on a theory from *Air Pirates*.<sup>145</sup> Additionally, the Ninth Circuit encouraged the lower court to examine the “unique elements of expression,” which was an aspect of evaluation utilized in *Air Pirates* to determine whether a character was

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<sup>136</sup> *Id.* at 1217.

<sup>137</sup> Deamer, *supra* note 65, at 445.

<sup>138</sup> The Ninth Circuit ultimately remanded the question of whether Eleanor was entitled to copyright protection to the District Court. *Halicki*, 547 F.3d at 1225.

<sup>139</sup> Deamer, *supra* note 64, at 445.

<sup>140</sup> See *Halicki*, 547 F.3d at 1224 (“[C]onsistent with *Air Pirates*, . . . copyright protection ‘may be afforded to characters visually depicted in a television series or a movie . . . .’” (quoting *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988))).

<sup>141</sup> *Id.* at 1225 (first quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003); and then quoting *Olson*, 855 F.2d at 1452).

<sup>142</sup> *Rice*, 330 F.3d at 1175. In *Rice*, this referred to the line of District Court cases which found *Godzilla*, *James Bond*, and *Rocky Balboa* to be copyrightable characters. *Id.*

<sup>143</sup> *Halicki*, 547 F.3d at 1225 (first quoting *Rice*, 330 F.3d at 1175; and then quoting *Olson*, 855 F.2d at 1452).

<sup>144</sup> *Rice*, 330 F.3d at 1175 (referring to line of district court cases which found *Godzilla*, *James Bond*, and *Rocky Balboa* to be copyrightable characters); see *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1216 (C.D. Cal. 1998) (finding *Godzilla* copyrightable); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (finding *James Bond* copyrightable); *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at \*6 (C.D. Cal. Apr. 25, 1989) (finding *Rocky Balboa* copyrightable).

<sup>145</sup> See *supra* Section I.C.1.

copyrightable.<sup>146</sup> Similar to “*Rice, Halicki* conflated past precedents without establishing how the concepts would operate in practice.”<sup>147</sup>

#### 4. *The Modern Doctrine: The Batmobile and the Dangers of the DC Comics v. Towle Standard*

Seven years after deciding *Halicki*, the Ninth Circuit was confronted with the issue “of whether a fictional character is copyrightable”<sup>148</sup> in *DC Comics v. Towle*.<sup>149</sup> Here, the character in question was the Batmobile.<sup>150</sup>

Batman has dominated the superhero world since his introduction in the 1939<sup>151</sup> comic “The Case of the Chemical Syndicate.”<sup>152</sup> When Batman premiered, his primary mode of transportation, the Batmobile, was “an ordinary red sedan.”<sup>153</sup> However, as the comic continued, the Batmobile changed appearances and functions. In 1941, just two years after its introduction, the Batmobile was outfitted with “its own bat-headed battering ram.”<sup>154</sup> And in 1964, both Batman and the Batmobile underwent a redesign.<sup>155</sup> Since then, the Batmobile evolved to fit the superhero’s needs.<sup>156</sup> One commentator noted “[t]he Batmobile’s description oscillates between high-tech tool and a more nuanced persona.”<sup>157</sup> For example, in “The Dark Knight Returns” comic, the Batmobile is described as “an instrument of war.”<sup>158</sup> But then, “in *Batman #98*[,] the Batmobile is described as ‘[a] black thunderbolt on wheels, a swift nemesis to lawbreakers, [and] a mighty machine of justice.’”<sup>159</sup> As displayed, the Batmobile’s design and function is adapted to the narrative at hand.

<sup>146</sup> *Halicki*, 547 F.3d at 1225 (“[T]he court should examine whether Eleanor’s ‘physical as well as conceptual qualities [and] . . . unique elements of expression’ qualify Eleanor for copyright protection.” (alterations in original) (quoting *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978))).

<sup>147</sup> Deamer, *supra* note 65, at 445.

<sup>148</sup> *Id.* at 446.

<sup>149</sup> *DC Comics v. Towle*, 802 F.3d 1012, 1015 (9th Cir. 2015).

<sup>150</sup> *Id.*

<sup>151</sup> In its decision, the Ninth Circuit described Batman as a “world-famous character.” *Id.*

<sup>152</sup> DC, *Batman, a History of Heroics: The Beginning*, DC COMICS (Mar. 19, 2019), <https://www.dc.com/blog/2019/03/19/batman-a-history-of-heroics-the-beginning>; *see also DC Comics*, 802 F.3d at 1015.

<sup>153</sup> *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>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* (“Changes included a yellow oval around the bat on the hero’s chest, a new Batmobile, and a hotline to police headquarters.”).

<sup>156</sup> Deamer, *supra* note 65, at 447.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* (quoting Arnold Drake & Bill Finger, *The Return of Mister Future*, *BATMAN*, no. 98, 1956, at 1).

In 2011, DC Comics sued Mark Towle for copyright infringement in the United States District Court for the Central District of California.<sup>160</sup> Towle owned and operated a “business producing custom cars modeled after vehicles found in various television shows and movies.”<sup>161</sup> Two of the cars Towle made were based on two different Batmobile iterations: the 1966 television show and the 1989 movie.<sup>162</sup> In addition to manufacturing cars, Towle also sold car kits allowing customers to make their current cars look like the Batmobile.<sup>163</sup>

In addressing DC Comics’ claim, the Ninth Circuit analyzed “whether a character in a comic book, television program, or motion picture is entitled to copyright protection.”<sup>164</sup> To resolve this issue, the Ninth Circuit developed a three-part test requiring that a character: (1) have “physical as well as conceptual qualities”; (2) “be ‘sufficiently delineated’ to be recognizable as the same character whenever it appears”; and (3) be “‘especially distinctive’ and ‘contain some unique elements of expression.’”<sup>165</sup> In doing so, the Ninth Circuit acknowledged its past decision in *Air Pirates* that the *Sam Spade* “story being told” test should be viewed as an alternative holding or dicta.<sup>166</sup> Under this test, the Ninth Circuit found the Batmobile—“Batman’s ubiquitous crime-fighting vehicle”—to be a copyrightable character.<sup>167</sup>

The first prong of the test, which states a character must have “physical as well as conceptual qualities,”<sup>168</sup> has roots in the *Air Pirates* principle “that a character must be pictorial to acquire protection.”<sup>169</sup> The preference given to visual characters was originally to avoid triggering the *Sam Spade* “story being told” test, which would have prevented *Air Pirates* from bestowing copyright

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<sup>160</sup> *DC Comics v. Towle*, 989 F. Supp. 2d 948, 954 (C.D. Cal. 2013). DC Comics also sued Towle for unfair competition and trademark violations, *id.* at 955–61, but these will not be discussed in this Comment, as they are outside of its scope.

<sup>161</sup> *Id.* at 953.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015). One commentator suggested this as a “step zero” to determine whether the three-part test applies. Deamer, *supra* note 65, at 449.

<sup>165</sup> *DC Comics*, 802 F.3d at 1020–21 (first quoting *Walt Disney Prod. v. Air Pirates*, 581 F.2d 751, 755; then citing *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003); and then quoting *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008)).

<sup>166</sup> *Id.* at 1019 n.5 (first citing *Air Pirates*, 581 F.2d at 755 n.10; and then citing *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1452 n.6 (9th Cir. 1988)).

<sup>167</sup> Deamer, *supra* note 65, at 437; see *DC Comics*, 802 F.3d at 1022. Additionally, the Ninth Circuit clarified that characters can be independently copyrightable stating: “[a]lthough comic book characters are not listed in the Copyright Act, we have long held that such characters are afforded copyright protection.” *DC Comics*, 802 F.3d at 1019 (citing *Air Pirates*, 581 F.2d 751).

<sup>168</sup> *DC Comics*, 802 F.3d at 1020–21 (quoting *Air Pirates*, 581 F.2d at 755).

<sup>169</sup> Deamer, *supra* note 65, at 450. This could prove problematic for literary characters.

protection upon some of Disney's most famous characters, such as Mickey Mouse.<sup>170</sup> One commentator suggests this step only reiterates the Ninth Circuit's previously stated limits when addressing *Sam Spade*<sup>171</sup> and "arguably overextend[s] the *Air Pirates* rule."<sup>172</sup> For the Batmobile, the Ninth Circuit noted the car had "appeared graphically" throughout the comics "and as a three-dimensional car in television series and motion pictures,"<sup>173</sup> and thus passed the first step of the test.<sup>174</sup> Additionally, this reasoning confirms that the purpose of the first step of the test is to prevent copyright protection for "mere literary characters" while protecting pictorial characters.<sup>175</sup>

The second prong of the test, which states a character must be "'sufficiently delineated' to be recognizable as the same character whenever it appears,"<sup>176</sup> first originated in the Second Circuit in Judge Learned Hand's opinion in *Nichols*, but found its home in the Ninth Circuit in *Rice*.<sup>177</sup> In relation to the Batmobile, the Ninth Circuit found many physical and conceptual qualities that stay constant, such as the "highly-interactive" nature of the vehicle, which gives easy access to the latest weaponry and gadgets to assist Batman with battling crime, and the "consistent," "bat-like" appearance.<sup>178</sup>

The Ninth Circuit further required that if the character "has appeared in different productions, it must display consistent, identifiable character traits and attributes, although the character need not have a consistent appearance."<sup>179</sup> While the Ninth Circuit cited *Halicki*, this principle was originally developed in the Central District of California in its *Stallone*, *American Honda*, and *Toho* decisions, and first appeared in the Ninth Circuit in *Rice*.<sup>180</sup> Notably, when promulgating this prong, the Ninth Circuit added that "the character need not have a consistent appearance,"<sup>181</sup> as none of the Central District of California cases mention such an exception.<sup>182</sup> Moreover, the Ninth Circuit reasoned that

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<sup>170</sup> *Air Pirates*, 581 F.2d at 755; see *supra* Section I.C.1. This is an example of courts initially delineating exceptions from previous precedent to ensure famous characters were afforded character copyrightability.

<sup>171</sup> The Ninth Circuit stated *DC Comics* "determin[es] whether a character in a comic book, television program, or motion picture is entitled to copyright protection." *DC Comics*, 802 F.3d at 1021.

<sup>172</sup> Deamer, *supra* note 65, at 450 (emphasis added).

<sup>173</sup> *DC Comics*, 802 F.3d at 1021.

<sup>174</sup> *Id.* (quoting *Air Pirates*, 581 F.2d at 755).

<sup>175</sup> *Id.* (quoting *Air Pirates*, 581 F.2d at 755).

<sup>176</sup> *Id.* at 1020–21 (citing *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003)).

<sup>177</sup> See *supra* Sections I.B, I.C.3.

<sup>178</sup> *DC Comics*, 802 F.3d at 1021.

<sup>179</sup> *Id.* (citing *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008)).

<sup>180</sup> See *supra* Section I.C.3.

<sup>181</sup> *DC Comics*, 802 F.3d at 1021 (citing *Halicki*, 547 F.3d at 1224).

<sup>182</sup> See *supra* Section I.C.2.

despite the Batmobile's everchanging appearance, "[n]o 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>183</sup> Overall, the second prong of the test speaks to the complexity of the character the author is seeking protection.<sup>184</sup>

The third prong of the test states a character must be "'especially distinctive' and 'contain some unique elements of expression.'"<sup>185</sup> The "especially distinctive" requirement of this prong stems from *Olson*, which distinguished between nonpictorial and pictorial characters.<sup>186</sup> Despite the original purpose in *Olson*, subsequent cases such as *Rice* and *Halicki* expanded upon the standard and repurposed it to evaluate the value and significance of a character.<sup>187</sup> The "unique elements of expression" requirement of this prong was originally proposed in *Air Pirates* for the purpose of valuing a character.<sup>188</sup>

Additionally, the Ninth Circuit stated that for a character to meet the third prong, character dialogue or speech is not a necessary prerequisite,<sup>189</sup> but it cannot be a stock character.<sup>190</sup> Contrary to the compound nature of this prong, the Ninth Circuit failed to give an adequate analysis as to why the Batmobile met this requirement. Rather, it simply pointed out the Batmobile's "unique and highly recognizable name" as sufficient proof that "[i]t is not merely a stock character."<sup>191</sup> As a result of the minimal analysis, the second and third prongs run together, with the third prong further considering "whether a character has a sufficient level of cultural or economic significance."<sup>192</sup> In this regard, much like James Bond and Godzilla, the character aspects of the Batmobile in relation to the second and third prongs may be attributed to its seventy-four-year tenure in comics and movies to DC Comics' already captive audience.<sup>193</sup>

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<sup>183</sup> *DC Comics*, 802 F.3d at 1021.

<sup>184</sup> Notably, at the time of the lawsuit, the Batmobile had been around for almost three-quarters of a century, allowing it time to have the specific "consistent, identifiable traits and attributes" that the test requires to afford copyright protection. *Id.* at 1015, 1022.

<sup>185</sup> *Id.* at 1020–21 (quoting *Halicki*, 547 F.3d at 1224).

<sup>186</sup> *See supra* Section I.C.1.

<sup>187</sup> *See supra* Section I.C.3.

<sup>188</sup> *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978).

<sup>189</sup> *DC Comics*, 802 F.3d at 1021 (citing *Halicki*, 547 F.3d at 1224).

<sup>190</sup> *Id.* ("It cannot be a stock character such as a magician in standard magician garb." (citing *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003))).

<sup>191</sup> *Id.* at 1022.

<sup>192</sup> Deamer, *supra* note 65, at 452.

<sup>193</sup> *See supra* Section I.C.4.



In *DC Comics*, the Ninth Circuit attempted to synthesize its past significant decisions concerning character copyrightability, as well as the decisions of the Central District Court of California, into one comprehensive standard. As displayed above, however, it did no more than organize conflated precedents into a list. The Ninth Circuit's failure to synthesize these diverging precedents into a new standard—rather than an itemized list—allows courts unchecked discretion when analyzing characters, which could potentially harm creators in subsequent decisions.

## II. THE *DANIELS V. WALT DISNEY CO.* DECISION

The Moodsters case, *Daniels v. Walt Disney Co.*, is the latest case addressing character copyrightability. The Ninth Circuit held that The Moodsters could not obtain copyright protection under *DC Comics*' three-part test.<sup>194</sup> When applying the test, the Ninth Circuit ignored fundamental principles underlying copyright protection,<sup>195</sup> instead focusing on persistent traits over time and implicitly creating a fame-based standard for character copyrightability. *Daniels*' further departure from copyright's constitutional basis, originality, shows the need for a clear and uniform standard.

In 2020, the Ninth Circuit was confronted with the issue of character copyrightability after Denise Daniels, RN, MS, and her company, Moodsters Co., sued Walt Disney Co. for “copyright infringement of both the individual Moodsters characters and the ensemble of characters as a whole”<sup>196</sup> in Disney's billion-dollar blockbuster, *Inside Out*.<sup>197</sup> The case controversy surrounded “five personified emotions battling for the mind of a young girl,”<sup>198</sup> which Daniels alleged infringed on her copyright for The Moodsters.<sup>199</sup>

Development of The Moodsters required significant transaction costs, such as hiring top creatives in the industry to assist in shaping the characters, raising \$3 million in investment capital, and creating initial materials with the characters such as a pilot episode.<sup>200</sup> Once The Moodsters were established, Moodsters Co. pitched to important Disney executives, such as the director of *Inside Out*, Pete

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<sup>194</sup> *Daniels v. Walt Disney Co.*, 958 F.3d 767, 773 (9th Cir. 2020).

<sup>195</sup> See *supra* Section I.C.4.

<sup>196</sup> *Daniels*, 958 F.3d at 770.

<sup>197</sup> *Daniels v. Walt Disney Co.*, No. 17-4527 PSG (SK), 2018 WL 4849700, at \*1 (C.D. Cal. Jan. 31, 2018).

<sup>198</sup> Ann Potter Gleason, *Is the Law of Character Copyrights in Chaos?*, NAT'L L. REV. (Dec. 23, 2020), <https://www.natlawreview.com/article/law-character-copyright-chaos>.

<sup>199</sup> *Daniels*, 958 F.3d at 770.

<sup>200</sup> Petition for Writ of Certiorari, *supra* note 8, at 7.

Docter, for four years.<sup>201</sup> One year after Moodsters Co. stopped pitching to Disney, the conglomerate media and entertainment company started producing *Inside Out*, which showcases “five color-coded, single-emotion characters”<sup>202</sup> in the mind of a child.<sup>203</sup> *Inside Out* premiered in 2015 as the “second-highest-grossing animated film” of the year.<sup>204</sup>

In 2017, two years after the premiere, Daniels and her company, Moodsters Co., sued Disney for copyright infringement of The Moodsters as a whole and as individual characters<sup>205</sup> and breach of implied-in-fact contract.<sup>206</sup> Disney moved to dismiss the complaint, arguing Moodsters Co.’s “characters are not protectable in the first instance, either independently or as an ensemble,”<sup>207</sup> under the “rigorous”<sup>208</sup> Ninth Circuit *DC Comics* test. The Central District of California granted the motion to dismiss, and Daniels and Moodsters Co. appealed to the Ninth Circuit.<sup>209</sup>

On appeal, “[t]he Ninth Circuit affirmed the district court’s dismissal of Moodsters Co.’s copyright infringement claims by holding The Moodsters did not qualify for copyright protection.”<sup>210</sup> To come to this conclusion, the Ninth Circuit turned to the most recent standard for character copyrightability, the *DC Comics* three-part test.<sup>211</sup> Under *DC Comics*, the Ninth Circuit explained The Moodsters could not be afforded copyright protection because the characters were “lightly sketched” and lacked “consistent, identifiable character traits and attributes,” and therefore failed to meet the requirements of the test.<sup>212</sup>

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<sup>201</sup> Kachmar, *supra* note 13.

<sup>202</sup> Petition for Writ of Certiorari, *supra* note 8, at 7.

<sup>203</sup> *Id.*

<sup>204</sup> Mike Fleming Jr., *No. 6 ‘Inside Out’—2015 Most Valuable Movie Blockbuster Tournament*, DEADLINE (Mar. 23, 2016, 3:55 PM), <https://deadline.com/2016/03/inside-out-profit-box-office-2015-pixar-disney-1201724894/>. *Inside Out* grossed \$856 million in the box office alone. *Id.*

<sup>205</sup> *Daniels*, 958 F.3d at 770.

<sup>206</sup> The district court dismissed the implied-in-fact contract claim and the Ninth Circuit affirmed. *Daniels v. Walt Disney Co.*, 2018 U.S. Dist. LEXIS 117569, at \*4 (C.D. Cal. May 9, 2018), *aff’d*, 952 F.3d 1149 (9th Cir. 2020). However, the contract claim is outside the scope of this Comment and, therefore, will not be discussed.

<sup>207</sup> *Daniels*, 2018 WL 4849700, at \*4.

<sup>208</sup> *Id.* at \*6.

<sup>209</sup> *See Daniels*, 958 F.3d at 771.

<sup>210</sup> Petition for Writ of Certiorari, *supra* note 8, at 10.

<sup>211</sup> *Daniels*, 958 F.3d at 769.

<sup>212</sup> *Id.* (quoting *DC Comics v. Towle*, 802 F.3d 1012, 1019, 1021 (9th Cir. 2015)).

As to the first prong, which requires a character to have “physical as well as conceptual qualities,”<sup>213</sup> the Ninth Circuit reasoned “[b]ecause [The Moodsters] have physical qualities, [they] are not mere literary characters.”<sup>214</sup>

With respect to the second prong, which states that a character “be ‘sufficiently delineated’ to be recognizable as the same character whenever it appears,”<sup>215</sup> the Ninth Circuit compared the physical traits of The Moodsters’ first generation—which served as the basis for infringement—to The Moodsters’ derivative second generation.<sup>216</sup> Moreover, the Ninth Circuit compared the Batmobile, which “maintained distinct physical and conceptual qualities since its first appearance in the comic books”<sup>217</sup> and was afforded copyright protection, and The Moodsters, whose “physical appearance . . . changed significantly over time.”<sup>218</sup>

In applying the second prong, the Ninth Circuit also evaluated whether The Moodsters “ha[d] appeared in different productions, [and if so, they had to] display consistent, identifiable character traits and attributes, although the character need not have a consistent appearance.”<sup>219</sup> First, the Ninth Circuit noted The Moodsters have consistently been the same five emotions, but then remarked that “other than the idea of color and emotions, there are few other identifiable character traits and attributes that are consistent over the various iterations.”<sup>220</sup> In particular, the Ninth Circuit detailed the “lack [of] consistent characteristics and attributes” between the 2005 Moodsters Bible descriptions and the 2007 pilot, and stated: “‘Lightly sketched’ characters of this kind, without identifiable character traits, are not copyrightable under the second prong of [DC Comics].”<sup>221</sup> In contrast, the Ninth Circuit noted that, for over twenty years, the Batmobile has possessed “numerous identifiable and consistent character traits and attributes”—such as the newest weaponry, jet

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<sup>213</sup> *DC Comics*, 802 F.3d at 1020–21 (quoting *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978)).

<sup>214</sup> *Daniels*, 958 F.3d at 771.

<sup>215</sup> *DC Comics*, 802 F.3d at 1020–21 (quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003)).

<sup>216</sup> *Daniels*, 958 F.3d at 772.

<sup>217</sup> *DC Comics*, 802 F.3d at 1021.

<sup>218</sup> *Daniels*, 958 F.3d at 772 (comparing the first generation Moodsters who had “an insect-like appearance, with skinny bodies, long ears, and tall antennas that act as ‘emotional barometers’ to form a distinctive shape when an emotion is strongly felt” with the second generation Moodsters, who “look like small, loveable bears . . . [that] are round and cuddly, have small ears, and each dons a detective’s hat and small cape”).

<sup>219</sup> *DC Comics*, 802 F.3d at 1020–21.

<sup>220</sup> *Daniels*, 958 F.3d at 772.

<sup>221</sup> *Id.*

engines, and superior navigator ability—and “was always a ‘crime-fighting car’ that allowed Batman to defeat his enemies.”<sup>222</sup>

Even if The Moodsters met the second prong of the *DC Comics* test, the Ninth Circuit determined the characters would fail the third prong, as “they are not ‘especially distinctive’ and do not ‘contain some unique elements of expression.’”<sup>223</sup> While the Ninth Circuit recognized The Moodsters uniquely represent a single emotion, it reasoned that this alone was not enough to make the characters “especially distinctive” particularly in conjunction with “otherwise generic attributes and character traits.”<sup>224</sup>

Lastly, dissimilar to previous decisions within the Ninth Circuit and the Central District of California,<sup>225</sup> the Ninth Circuit reaffirmed the *Sam Spade* “story being told” test as an alternative test.<sup>226</sup> The Ninth Circuit noted the *Sam Spade* test was “a high bar” for protection and, while available, “affords no protection to the Moodsters.”<sup>227</sup>

There are two significant takeaways from *Daniels v. Walt Disney Co.* First, the Ninth Circuit manipulated *DC Comics* to tacitly create a fame-based standard for character copyrightability when it compared the Batmobile, originally appearing in 1939, to The Moodsters, which Daniels created in 2005. Second, the lack of consistency regarding the “story being told” test emphasizes the lack of precision surrounding the standard for character copyrightability within the circuit. Following the Ninth Circuit’s decision, Daniels and Moodsters Co. filed a petition for writ of certiorari to the Supreme Court to resolve the differing standards utilized by circuit courts for character copyrightability.<sup>228</sup>

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<sup>222</sup> *Id.* at 773 (quoting *DC Comics*, 802 F.3d at 1021).

<sup>223</sup> *Id.* (quoting *DC Comics*, 802 F.3d at 1021–22).

<sup>224</sup> *Id.* (“Developing a character as an anthropomorphized version of a specific emotion is not sufficient, in itself, to establish a copyrightable character.”). The Ninth Circuit then compared The Moodsters to the Mystery Magician in *Rice*, which was denied copyright protection because “the magician [was] . . . dressed in standard magician garb—black tuxedo with tails, a white [sic] tuxedo shirt, a black bow tie, and a black cape with red lining’ whose role is ‘limited to performing and revealing magic tricks,” thus underscoring that the character was not “especially distinctive.” *Id.* (quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003)).

<sup>225</sup> See *supra* Sections I.C.1, I.C.2, I.C.3.

<sup>226</sup> *Daniels*, 958 F.3d at 774 (“[*Sam Spade*] and [*DC Comics*] are two different tests for character copyrightability.”).

<sup>227</sup> *Id.*

<sup>228</sup> Petition for Writ of Certiorari, *supra* note 8, at 12.

## III. RATIONALE FOR A UNIFORM STANDARD

On January 11, 2021, the Supreme Court denied certiorari for *Moodsters Co. v. Walt Disney Company*.<sup>229</sup> By denying certiorari, the Supreme Court failed to resolve the convoluted jurisprudence concerning character copyrightability. As underscored by the previous Parts, conflicting standards exist between the Second, Seventh, and Ninth Circuits for evaluating character copyrightability.<sup>230</sup> Between the three tests, each sets the bar for obtaining copyright protection for a character at a different level. Further, the Ninth Circuit's application of the *DC Comics* three-part test to *The Moodsters* highlights how muddled and undefined standards can raise an already-heightened bar to attain copyright protection.

By denying certiorari and failing to resolve the problem by creating a uniform standard, the Supreme Court exacerbated the issue. Therefore, the Supreme Court's refusal is allowing each divergent circuit to continue developing its own doctrine and further cement the fractured jurisprudence of the standard for character copyrightability.

Further, characters and microworks<sup>231</sup> are becoming increasingly important today. In a society where more people than ever are creating original characters,<sup>232</sup> these disparate and heightened standards, which authors must meet to ensure their works are afforded copyright protection, may leave an immense amount of works unprotected. Thus, it is essential to settle on a uniform standard to evaluate character copyrightability. This Comment elucidates such a standard: the Seventh Circuit's "stock character" test.

To understand the underpinnings of this standard, this Part will detail (A) the policy behind copyright and the idea/expression dichotomy and (B) the Supreme Court's seminal copyright decision and originality.

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<sup>229</sup> *Moodsters Co. v. Walt Disney Co.*, 141 S. Ct. 1050 (2021) (mem.).

<sup>230</sup> *See supra* Part I.

<sup>231</sup> While many commentators criticize the prospect of "intellectual property law becoming too 'finely grained'—with claims of independent property protection being draped over smaller and smaller pieces of creativity, innovation, and expression," one commentator suggests "[t]he issue is not copyright protection per se: the issue is *independent* protection of very small pieces of creative expression." Justin Hughes, *Size Matters (Or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575, 575–76 (2005). While traditionally, copyright protection has been denied for small works on the basis of originality, Hughes suggests it is not originality which is the issue, but rather size. *Id.* at 578. Moreover, he reasons "[m]any very small expressions positively leap over the low threshold of originality we have established in copyright law." *Id.*

<sup>232</sup> *Cf.* Sarah Min, *86% of Young Americans Want to Become a Social Media Influencer*, CBS NEWS (Nov. 8, 2019, 4:49 PM), <https://www.cbsnews.com/news/social-media-influencers-86-of-young-americans-want-to-become-one/> (increasing social media use results in an increase of young individuals wanting to become influencers and, thus, increases the creation of original characters).

### A. *The Policy Behind Copyright*

The basis for copyright protection originates in the United States Constitution.<sup>233</sup> From this constitutional basis, Congress passed the Copyright Act of 1790.<sup>234</sup> Today, the current act that governs copyright, the Copyright Act of 1976, is much broader in scope because it affords copyright protection to more categories of works.<sup>235</sup> This section will detail (1) the constitutional basis for copyright protection; (2) the Copyright Act of 1976 to underscore the policy behind copyright; and (3) the idea/expression dichotomy.

#### 1. *The Constitutional Basis for Copyright*

The concept of copyright protection begins with the Constitution itself, which states: “Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”<sup>236</sup> This is known as the “intellectual property clause,”<sup>237</sup> which Congress brought to life through the Copyright Act of 1790.<sup>238</sup> The original Act was extremely limited, “protecting only books, maps, and charts for fourteen years with a renewal period of another fourteen years.”<sup>239</sup> In the spirit of the Constitution’s intellectual property clause, the Copyright Act of 1790 was meant to incentivize scientists, artists, and authors to create original works and provide them with a limited monopoly “to stimulate creativity and the advancement of ‘science and the useful arts’ through wide public access to works in the ‘public domain.’”<sup>240</sup> Notably, the monopoly the statute provides is limited as to increase the number and types of copyrightable works in the public domain.<sup>241</sup> With a rich public domain, individuals, other than the author of the copyrightable work, are able to use the ideas underlying the work and transform it into separate and distinct

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<sup>233</sup> U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”).

<sup>234</sup> *U.S. Copyright Beginnings*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/history/copyright-exhibit/beginnings/> (last visited Feb. 7, 2022).

<sup>235</sup> See 17 U.S.C. § 102(a)(1)–(8).

<sup>236</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>237</sup> *U.S. Copyright Beginnings*, *supra* note 234.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Copyright Timeline: A History of Copyright in the United States*, ASS’N RSCH. LIBRS., <https://www.arl.org/copyright-timeline/> (last visited Feb. 7, 2022).

<sup>241</sup> See JAMES CHARLES SMITH, EDWARD J. LARSON & JOHN COPELAND NAGLE, *PROPERTY: CASES AND MATERIALS* 233 (Rachel E. Barkow et al. eds., 4th ed. 2018).

expressions worthy of their own copyright protection.<sup>242</sup> This incentivizes authors, scientists, and artists to advance useful arts and science.<sup>243</sup> Further, to motivate authors, copyright is one of the easiest protections to obtain.<sup>244</sup>

## 2. *The Copyright Act of 1976*

For an author's work to be afforded copyright protection, it must meet the requirements of the Copyright Act of 1976.<sup>245</sup> While the text of the statute is seemingly esoteric,<sup>246</sup> three basic elements exist for a work to obtain copyright protection: (1) it must be a tangible, original work from an author, (2) which the public can look at, and (3) can be reproduced on its original medium or through a device or machine.<sup>247</sup> In addition to these elements, the work must fall within one of eight categories: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."<sup>248</sup>

If the author's original work fits under the statutory definition, copyright protection vests automatically without filing or registration and endures for an author's life plus seventy years.<sup>249</sup> The time limit imposed on copyright protection speaks to the constitutional basis of copyright, which is to facilitate a rich public domain and promote the progress of arts and sciences,<sup>250</sup> and therefore does not give complete rights to just one person or entity.<sup>251</sup> Notably,

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<sup>242</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) ("To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."); Gleason, *supra* note 198 ("[I]t accords with the objective of copyright (as expressed in the Constitution) which is not to reward the labor of creators but to promote the progress of science and useful arts."). This is known as the idea/expression dichotomy and will be further discussed below. *See infra* Section III.A.3.

<sup>243</sup> U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts . . .").

<sup>244</sup> *See SMITH ET AL.*, *supra* note 241, at 233.

<sup>245</sup> 17 U.S.C. § 102.

<sup>246</sup> "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

<sup>247</sup> 17 U.S.C. § 102(a); *see* *Petition for Writ of Certiorari*, *supra* note 8, at 13 ("Thus, an artist may obtain a valid copyright when [they] express[] [their] original work of authorship in a fixed medium."); 17 U.S.C. § 302(a).

<sup>248</sup> 17 U.S.C. § 102(a).

<sup>249</sup> *See SMITH ET AL.*, *supra* note 241, at 233. While copyright does not require any affirmative steps from the author in order to vest, registration can be advantageous. *Id.*

<sup>250</sup> *See supra* Section III.A.1.

<sup>251</sup> *See supra* note 224 for discussion.

the Copyright Act of 1976 does not explicitly mention literary or animated characters.<sup>252</sup> Even though the statute itself does not include literary or animated characters, there is a long history of courts<sup>253</sup> affording graphically depicted characters copyright protection under the Act's "literary works" or "motion pictures and other audiovisual works" categories.<sup>254</sup>

### 3. *The Idea/Expression Dichotomy*

One reason literary or animated characters are not specifically delineated in the Copyright Act of 1976, and, therefore, are not independently protectable under the statute, is the idea/expression dichotomy.<sup>255</sup> This concept is acknowledged in the second clause of the Copyright Act of 1976, which states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."<sup>256</sup> This clause describes the principle "known as the idea/expression . . . dichotomy," which conveys the expressions of an idea may be copyrighted, but not the idea itself.<sup>257</sup>

While the idea/expression dichotomy denies protection—allowing "the fruit of the compiler's labor [to] be used by others without compensation"<sup>258</sup>—and may seem unfair, the principle is not the result of an "unforeseen byproduct of a statutory scheme."<sup>259</sup> Rather, it is constitutionally mandated and "the essence of copyright."<sup>260</sup> As described above,<sup>261</sup> while the statute does provide copyright protection to incentivize authors with a limited monopoly for their work, the primary objective is "to promote the Progress of Science and useful Arts"<sup>262</sup>

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<sup>252</sup> See 17 U.S.C. § 102(a).

<sup>253</sup> These courts include the Second, Eighth, and Ninth Circuits. See *Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240–41 (2d Cir. 1983) (discussing cases in Second and Ninth Circuits upholding copyrightability of literary characters who are "sufficiently delineated" to support a claim, as well as the totality of co-option of a cartoon character's traits constituting infringement); *Petition for Writ of Certiorari*, *supra* note 8, at 12–13 (discussing court decisions recognizing characters as independently copyrightable).

<sup>254</sup> *Petition for Writ of Certiorari*, *supra* note 8, at 12; see 17 U.S.C. § 102(a)(1), (6).

<sup>255</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991).

<sup>256</sup> 17 U.S.C. § 102(b).

<sup>257</sup> See *Feist*, 499 U.S. at 350.

<sup>258</sup> *Id.* at 349.

<sup>259</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589 (1985) (Brennan, J., dissenting).

<sup>260</sup> *Id.*

<sup>261</sup> See *supra* Section III.A.1.

<sup>262</sup> U.S. CONST. art. I, § 8, cl. 8; accord *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).



rather than to reward authors' efforts and labor.<sup>263</sup> This focus ensures authors retain the "right[s] to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."<sup>264</sup>

This idea/expression dichotomy applies to all authored works.<sup>265</sup> However, only the sections of the work which are original to the author may be afforded copyright protection.<sup>266</sup> For example, when applied to a factual compilation, if no original writing exists, the raw facts which are compiled may be copied by anyone, and "only the compiler's selection and arrangement may be protected."<sup>267</sup> Allowing the facts to be copied at will by those other than the author is not unfortunate nor unfair—instead, "[i]t is the means by which copyright advances the progress of science and art."<sup>268</sup>

Moreover, the idea/expression dichotomy is prevalent in the context of character copyrights.<sup>269</sup> The principle often appears because whether the author of the character is granted copyright protection turns on if the character is an expression of an idea, in which case it will be afforded copyright protection, or if it is simply an idea in which case no copyright protection will be afforded.<sup>270</sup>

#### B. Feist and Originality

The Supreme Court held in its 1991 decision *Feist Publications, Inc. v. Rural Telephone Service Co.* that there is a singular standard to obtain copyright protection: originality.<sup>271</sup> The Court wrote originality is the sine qua non<sup>272</sup> of copyright and "remains the touchstone of copyright protection."<sup>273</sup> The Court declared originality to be a low standard—stating even a "slight amount" of creativity would meet the burden to satisfy the requisite level of creativity

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<sup>263</sup> *Feist*, 499 U.S. at 349 (first quoting U.S. CONST. art. I, § 8, cl. 8; and then citing *Twentieth Century*, 422 U.S. at 156); see also ROBERT A. GORMAN, JANE C. GINSBURG & R. ANTHONY REESE, COPYRIGHT: CASES AND MATERIALS 30 (Robert C. Clark et al., eds., 9th ed. 2017).

<sup>264</sup> *Feist*, 499 U.S. at 349–50.

<sup>265</sup> *Id.* at 350.

<sup>266</sup> See L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 800–02 (1989); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 & n.12 (1990) (comparing implications of works that are copyrightable with works that lack originality).

<sup>267</sup> *Feist*, 499 U.S. at 350.

<sup>268</sup> *Id.*

<sup>269</sup> See *id.* at 349–50 ("[T]he idea/expression . . . dichotomy[] applies to all works of authorship.").

<sup>270</sup> See *infra* Section IV.C.1.

<sup>271</sup> *Feist*, 499 U.S. at 345.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 346–47.

required.<sup>274</sup> Thus, copyright is one of the easiest protections to obtain. Notably, “[t]he vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”<sup>275</sup> Such an easy standard to satisfy speaks to the core policy of copyright law: “to stimulate artistic creativity for the general public good.”<sup>276</sup> Therefore, when an author’s work is an original work and expressed in the form of a fixed medium, it may obtain copyright protection.<sup>277</sup> Because the Court in *Feist* reaffirmed originality as the foundational basis for copyright protection, it is essential to understand the reasoning and implications of the holding. Accordingly, this section will discuss (1) the facts and holding of the case and (2) how originality is constitutionally mandated.

### 1. *The Feist Case*

Rural Telephone Service Co., a telephone service company serving several communities in northwest Kansas,<sup>278</sup> sued Feist Publications, Inc., a publishing company specializing in “area-wide telephone directories,” for copyright infringement concerning over 1,000 listings containing customer names in alphabetical order, towns, and telephone numbers in a telephone directory.<sup>279</sup> The Supreme Court held Rural’s copyright did not extend to its directory<sup>280</sup> because facts and ideas are not copyrightable.<sup>281</sup> The concept that facts and ideas are not copyrightable has long been recognized as the idea/expression or fact/expression dichotomy.<sup>282</sup> Facts are not copyrightable because they are not original, and an author’s work must be original in order to obtain copyright protection.<sup>283</sup>

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<sup>274</sup> *Id.* at 345.

<sup>275</sup> *Id.* (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08[C][1] (Matthew Bender rev. ed. 1990)).

<sup>276</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

<sup>277</sup> Petition for Writ of Certiorari, *supra* note 8, at 13; *see* 17 U.S.C. §§ 102(a), 302(a).

<sup>278</sup> *Feist*, 499 U.S. at 342.

<sup>279</sup> *Id.* at 342–44.

<sup>280</sup> *See* Gleason, *supra* note 185.

<sup>281</sup> *Feist*, 499 U.S. at 344–45 (“[N]o author may copyright his ideas or the facts he narrates.” (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985))).

<sup>282</sup> *See supra* Section III.A.3.

<sup>283</sup> *Harper & Row*, 471 U.S. at 547–48 (differentiating an entire work consisting of a compilation of facts, which requires original thoughts and ideas, and the individual facts themselves).

More so, the Court explained originality is copyright's sine qua non<sup>284</sup>—which directly translates to “without which, not.”<sup>285</sup> While “without which, not” might seem vague and somewhat incomprehensible, in essence, it indicates originality is an essential element and an indispensable or necessary requirement.<sup>286</sup> Because the facts *Rural* aimed to protect through copyright—including names, towns, and telephone numbers, which were alphabetically listed in the directory—were not original, the Court could not extend copyright protection to *Rural*.<sup>287</sup>

## 2. *How the Originality Requirement is Constitutionally Mandated*

The foundation of the Supreme Court's decision in *Feist* is the Constitution itself.<sup>288</sup> “Originality is a constitutional requirement,”<sup>289</sup> as the intellectual property clause of the Constitution expressly gives Congress the power to “secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings.”<sup>290</sup> Indeed, commentators have described “[t]he originality requirement [a]s constitutionally mandated for all works.”<sup>291</sup> Simply meaning, because copyright protection stems from the Constitution, its subsequent requirements are constitutional prerequisites for copyrightability.<sup>292</sup>

Through its copyright jurisprudence, the Supreme Court has defined the terms “writings” and “author” within the intellectual property clause as elements to determine originality.<sup>293</sup> In *The Trade-Mark Cases*, the Supreme Court expounded that originality “requires independent creation plus a modicum of creativity.”<sup>294</sup> Regarding “writings,” *The Trade-Mark Cases* stated that to obtain copyright protection, there must be more than a fact or idea—there must be

<sup>284</sup> *Feist*, 499 U.S. at 345.

<sup>285</sup> *Sine Qua Non*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sine%20qua%20non> (last visited Feb. 7, 2022).

<sup>286</sup> *Sine Qua Non*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/sine\\_qua\\_non](https://www.law.cornell.edu/wex/sine_qua_non) (last visited Feb. 7, 2022).

<sup>287</sup> *Feist*, 499 U.S. at 362.

<sup>288</sup> See U.S. CONST. art. I, § 8, cl. 8 (giving Congress the power to “secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings”).

<sup>289</sup> *Feist*, 499 U.S. at 346.

<sup>290</sup> U.S. CONST. art. I, § 8, cl. 8; accord *Feist*, 499 U.S. at 346.

<sup>291</sup> See Patterson & Joyce, *supra* note 249, at 763 n.155; see also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.06[A] (Matthew Bender rev. ed. 1990) (“[O]riginality is a statutory, as well as a constitutional, requirement . . . .”); *id.* § 1.08[C][1] (“[A] modicum of intellectual labor . . . clearly constitutes an essential constitutional element.”).

<sup>292</sup> See *Mandate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/mandate> (last visited Feb. 7, 2022).

<sup>293</sup> U.S. CONST. art. I, § 8, cl. 8; accord *Feist*, 499 U.S. at 346.

<sup>294</sup> *Feist*, 499 U.S. at 346.

added original elements which are “the fruits of intellectual labor.”<sup>295</sup> Regarding “authors,” *The Trade-Mark Cases* “stressed the importance of requiring an author who accuses another of infringement to prove ‘the existence of those facts of originality, of intellectual production, thought, and conception.’”<sup>296</sup> In *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court further defined “author” as a person “to whom anything owes its origin; originator; maker.”<sup>297</sup> Thus, under the constitutional mandate, to obtain copyright protection, an author must meet two requirements: (1) show a modicum of originality in the object they are seeking protection; and (2) prove they are the one with whom it originated.<sup>298</sup>

#### IV. A UNIFORM STANDARD

A uniform standard to evaluate character copyrightability is essential to return to the “touchstone” and sine qua non of copyright: originality.<sup>299</sup> To create a rich public domain, copyright protection is deliberately structured to ensure its bundle of rights is easy to obtain. As stated by the Supreme Court, “[t]he vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”<sup>300</sup> However, as discussed throughout this Comment, the Second, Seventh, and Ninth Circuits apply distinct standards of varying requirements for a character to attain copyright protection.<sup>301</sup> To ensure characters are given equal opportunity to obtain copyright protection, it is essential to establish a uniform standard for character copyrightability. This Part elucidates why the Seventh Circuit’s “stock character” test should be adopted as the uniform standard for character copyrightability.

Section A critiques each circuit’s method for determining character copyrightability. Section B discusses policy and economic considerations relevant in determining the uniform standard. Section C justifies the Seventh

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<sup>295</sup> *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (emphasis omitted).

<sup>296</sup> *Feist*, 499 U.S. at 346–47 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58–60 (1884)).

<sup>297</sup> *Burrow-Giles*, 111 U.S. at 57–58.

<sup>298</sup> These two steps are part of the first basic element to obtain copyright protection. See *supra* Section III.A.2 (“[F]or a work to obtain copyright protection: (1) it must be a tangible, original work from an author, (2) which the public can look at, and (3) can be reproduced on its original medium or through a device or machine.”).

<sup>299</sup> See *Feist*, 499 U.S. at 345 (“The *sine qua non* of copyright is originality.”).

<sup>300</sup> *Id.* (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08[C][1] (Matthew Bender rev. ed 1990)).

<sup>301</sup> See *supra* Part I.

Circuit’s “stock character” test as the uniform standard and applies it to *The Moodsters*.

A. *Where’s Waldo? Geographic Location Determines Character Copyrightability*

One common theme between the varying circuit standards is that none of the standards directly follow the foundational doctrine of copyright law articulated in *Feist*.<sup>302</sup> Because some circuit tests are more lenient than others, outcomes may be predicated on geography rather than creativity.<sup>303</sup> Notably, while the Seventh Circuit did not adopt nor mention the Supreme Court’s *Feist* standard, its “stock character” test remains closest to the constitutional roots of originality.<sup>304</sup> The test, which explains that character copyright protection requires a character to be “sufficiently distinct” from a stock character<sup>305</sup> to have “enough expressive content for copyrightability,”<sup>306</sup> sets a low bar to obtain copyright protection.<sup>307</sup> Such a standard allows authors with original characters to obtain copyright protection based on their creativity.

The Seventh Circuit’s test is the broadest among the circuits. However, the Second and Ninth Circuits utilize heightened standards for character copyrightability. As such, this section will discuss (1) the ambiguity of the Second Circuit’s “sufficiently delineated” test and (2) the implications of the Ninth Circuit’s creation of an augmented, fame-based standard following *Daniels v. Walt Disney Co.*

1. *Ambiguity Among Us: The Second Circuit’s Failure to Provide Clarity*

When Judge Learned Hand promulgated the Second Circuit’s “sufficiently delineated” test, he simply stated “the less developed the characters, the less they can be copyrighted,”<sup>308</sup> failing to provide additional guidance to evaluate characters. While, at first glance, the Second and Seventh Circuits’ standards

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<sup>302</sup> Petition for Writ of Certiorari, *supra* note 8, at 19 (“[T]he panel decision [in the Ninth Circuit’s *Daniels v. Walt Disney Co.*] avoided this foundational doctrine at all costs.”). See generally *Daniels v. Walt Disney Co.*, 958 F.3d 767 (9th Cir. 2020).

<sup>303</sup> See *supra* Part I, for discussion the varying circuit court standards.

<sup>304</sup> See *supra* Section III.B.2, for discussion of how the originality requirement is constitutionally mandated.

<sup>305</sup> *Gaiman v. McFarlane*, 360 F.3d 644, 660–61 (7th Cir. 2004).

<sup>306</sup> *Id.* at 661.

<sup>307</sup> A low bar to establish copyright protection is essential to incentivize authors to advance the useful arts and sciences. See U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”); *supra* Section I.A.

<sup>308</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

may seem similar, the Second Circuit's focus on the conceptual aspects of the character, such as "an arrangement of incidents,"<sup>309</sup> rather than the Seventh Circuit's focus on physical aspects, such as costume, speech patterns, and age of the character,<sup>310</sup> creates a heightened standard.

For example, in *Detective Comics, Inc.*, the Second Circuit compared Superman to Hercules and held Superman was a copyrightable character based on "pictorial representations and verbal descriptions."<sup>311</sup> If the author had one less original verbal description or pictorial representation to add to Superman's character, would the Second Circuit have decided Superman was copyrightable or determined he was a "mere delineation"? *Detective Comics, Inc.* displays the ambiguity and lack of guidance Judge Learned Hand's "sufficient delineation" test creates.<sup>312</sup>

In contrast, while one fewer original verbal description or pictorial representation of Superman's character would potentially determine Superman's copyrightability in the Second Circuit, under the Seventh Circuit's "stock character" test, Superman would easily have "enough expressive content" to be distinct from a stock character.<sup>313</sup>

## 2. *Down the Rabbit Hole: Perverse Implications of the Ninth Circuit's Decision*

Unlike the Second and Seventh Circuits, the Ninth Circuit has two "rigorous"<sup>314</sup> and distinct standards to determine character copyrightability. In developing these standards over the years, the Ninth Circuit has struggled to create a uniform understanding of its precedents.<sup>315</sup> The first standard, the "story being told" test, asks whether a character is a mere "chessman in the game of telling the story"—like a pawn to advance the plot—or rather the "story being told"<sup>316</sup>—the main character. However, before the Ninth Circuit established this

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<sup>309</sup> *Detective Comics, Inc. v. Bruns Publ'ns, Inc.*, 111 F.2d 432, 433–34 (2d Cir. 1940).

<sup>310</sup> *Gaiman*, 360 F.3d at 660–61.

<sup>311</sup> *Detective Comics*, 111 F.2d at 433–34 ("[T]he pictorial representations and verbal descriptions of 'Superman' are *not a mere delineation* of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author." (emphasis added)).

<sup>312</sup> The petitioner's brief to the Supreme Court for writ of certiorari noted that even though the Second Circuit "recognizes and protects characters with copyrights, . . . [it] fails to provide clear guidance as to when copyright attaches to a character." Petition for Writ of Certiorari, *supra* note 8, at 18.

<sup>313</sup> *Cf. Gaiman*, 360 F.3d at 660–61.

<sup>314</sup> *Daniels v. Walt Disney Co.*, No. 17-4527 PSG (SK), 2018 WL 4849700, at \*6 (C.D. Cal. Jan. 31, 2018).

<sup>315</sup> *See supra* Section I.C.

<sup>316</sup> *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945, 950 (9th Cir. 1954).

test as a distinct test,<sup>317</sup> there was uncertainty within the circuit as to whether the “story being told” test was dicta.<sup>318</sup> The second standard, *DC Comics*’ three-part test, requires a character to (1) have “physical as well as conceptual qualities”; (2) “be ‘sufficiently delineated’ to be recognizable as the same character whenever it appears”; and (3) be “‘especially distinctive’ and ‘contain some unique elements of expression.’”<sup>319</sup> While this test appears precise, it is a result of conflated precedents and muddled interpretations from previous decisions.<sup>320</sup> Further, in *Daniels v. Walt Disney Co.*, the Ninth Circuit’s most recent application of the *DC Comics* three-part test, the Ninth Circuit inherently created a fame-based standard for character copyrightability, disregarding the heart of copyright: originality.<sup>321</sup>

The Ninth Circuit’s determination that The Moodsters could not obtain copyright protection was primarily based on its application of the second prong of the *DC Comics* test: sufficient delineation.<sup>322</sup> Specifically, the Ninth Circuit compared The Moodsters’ first- and second-generation attributes, noting their “physical appearance . . . changed significantly over time”<sup>323</sup> and asserting The Moodsters “lack[ed] . . . consistent characteristics and attributes.”<sup>324</sup> The Ninth Circuit further used the Batmobile as a measuring tape to evaluate The Moodsters’ characteristics.<sup>325</sup> Notably, the Batmobile first appeared in comic books in 1941<sup>326</sup> and is recognizable to most of the world.<sup>327</sup> In comparison, The Moodsters, which first appeared in 2005, only had fifteen years to develop

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<sup>317</sup> *Daniels v. Walt Disney Co.*, 958 F.3d 767, 774 (9th Cir. 2020) (“[*Sam Spade*] and [*DC Comics*] are two different tests for character copyrightability.”).

<sup>318</sup> *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 n.10 (9th Cir. 1978); Deamer, *supra* note 65, at 442.

<sup>319</sup> *DC Comics v. Towle*, 802 F.3d 1012, 1020–21 (9th Cir. 2015) (first quoting *Air Pirates*, 581 F.2d at 755; then quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003); and then quoting *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008)).

<sup>320</sup> See *supra* Section I.C.4, for a more complete discussion.

<sup>321</sup> See *infra* Section IV.A.2.

<sup>322</sup> Because this is the same standard as the Second Circuit, The Moodsters would also not be copyrightable in the Second Circuit. As noted above, the Second Circuit is a higher standard when compared to originality and the Seventh Circuit standard, but is not as rigorous as the Ninth Circuit.

<sup>323</sup> *Daniels v. Walt Disney Co.*, 958 F.3d 767, 772 (9th Cir. 2020) (comparing the first generation Moodsters who had “an insect-like appearance, with skinny bodies, long ears, and tall antennas that act as ‘emotional barometers’ to form a distinctive shape when an emotion is strongly felt” with the second generation Moodsters, who “look like small, loveable bears . . . [that] are round and cuddly, have small ears, and each dons a detective’s hat and small cape”).

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 772–73; see also *DC Comics v. Towle*, 802 F.3d 1012, 1021–22 (9th Cir. 2015).

<sup>326</sup> *DC Comics*, 802 F.3d at 1015.

<sup>327</sup> See Bryan Lowry, *Batman and Superman Still Occupy A Unique Place as Pop Culture’s Most Iconic Heroes*, CNN ENT. (Oct. 18, 2021, 3:11 PM), <https://www.cnn.com/2021/10/18/entertainment/batman-and-superman-challenges/index.html>.

“consistent, identifiable character traits.”<sup>328</sup> And, while the Ninth Circuit stressed the Batmobile’s “consistent” characteristics and attributes throughout its seventy-four-year tenure,<sup>329</sup> it has undergone significant redesigns and continues to adapt its appearance dependent on Batman’s needs.<sup>330</sup>

The Ninth Circuit’s claims are refuted by the 2005 Moodsters Bible, which displays anything but “[l]ightly sketched’ characters . . . without identifiable character traits.”<sup>331</sup> Rather, The Moodsters Bible showcases fully colored and expressive characters with significant descriptions, such as the angry character’s tendency to “blow her top,”<sup>332</sup> and notable attributes, such as pigtails drawn in the shape of flames to display a character’s fiery nature or a security blanket “tied around [a character’s] shoulders like a superhero cape.”<sup>333</sup>

By failing to evaluate the originality of The Moodsters and declining to address the differing circumstances surrounding the characters’ opportunity to develop consistent and identifiable traits,<sup>334</sup> the Ninth Circuit further diverged from the constitutional basis of copyright and created a standard that would only allow already-famous characters to obtain copyright protection.

Ironically, the Ninth Circuit’s ability to manipulate *DC Comics* and apply it as a fame-based standard stems from the large amount of precedent incorporated into the test. Because each prong of the three-part test incorporates a prior decision from the Ninth Circuit, the underlying principles are often muddled, allowing courts to utilize a combination of conflated precedent to create outcomes that benefit media conglomerates such as Disney.<sup>335</sup> If left unchecked, this will create a perverse incentive for large corporations with the means to create and distribute their content to exploit smaller creators who come to them with original characters.<sup>336</sup>

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<sup>328</sup> *Daniels*, 958 F.3d at 769–70 (quoting *DC Comics*, 802 F.3d at 1019, 1021).

<sup>329</sup> *Id.* at 773 (noting that, for over twenty years, the Batmobile “had numerous identifiable and consistent character traits and attributes”).

<sup>330</sup> *See supra* Section I.C.4.

<sup>331</sup> *Daniels*, 958 F.3d at 772.

<sup>332</sup> *See* Amended Complaint, *supra* note 12, at 72 (displaying the angry character has pigtails, which seem to signify flames, indicating her fiery personality).

<sup>333</sup> *Id.* at 75.

<sup>334</sup> Comparatively, at the time of *DC Comics*, Batman had seventy-six years to develop consistent and identifiable traits. *See supra* Section I.C.4.

<sup>335</sup> *See supra* Part II.

<sup>336</sup> *See Arenz, supra* note 27 (“No other area of copyright law has this fame-based standard. And for good reason. A fame-based standard will inherently favor large entertainment corporations with the ability to broadcast their works to the detriment of individual artists and small companies without the means to widely publicize their works.”). When challenged, courts would simply apply the test to deny copyright protection for the smaller creator’s character.



The implications of the Ninth Circuit's increasingly heightened standard to obtain character copyrightability are contrary to the underlying principles of copyright and exemplify the dangers of conflated and ambiguous tests not predicated on originality. Thus, settling on a uniform standard that is rooted in originality and considers factors other than whether a character is famous enough to be copyrightable is paramount.

### *B. Considerations for a Uniform Standard*

As alluded to above, the Ninth Circuit's *DC Comics* three-part test<sup>337</sup> allows courts unchecked discretion to analyze characters in favor of a certain party.<sup>338</sup> The decisions reached by the Ninth Circuit show the parties benefitting from its standards are almost entirely prominent entertainment studios, such as Disney.<sup>339</sup> The *DC Comics* test also fails to consider the underlying principles of copyright. As such, this section will analyze *DC Comics*' shortcomings with respect to (1) policy, cost recovery, and unjust enrichment; and (2) complying with the Copyright Act of 1976.

#### *1. Policy and Economic Considerations*

The Ninth Circuit's *DC Comics* three-part test contradicts the main purpose of copyright law: to incentivize authors to create works to advance the useful arts and sciences.<sup>340</sup> One aspect of this incentive is of economic value. As put by the Supreme Court, "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."<sup>341</sup>

For example, to create The Moodsters, Daniels and her company "raised over \$3 million in investment capital,"<sup>342</sup> "recruited industry-leading talent to help

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<sup>337</sup> This three-part test also encompasses the Second Circuit's "sufficiently delineated" standard. *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015) (quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003)). Thus, the Second Circuit standard does not warrant a separate discussion.

<sup>338</sup> Notably, while the Ninth Circuit has greatly expanded the protections afforded to characters, its decisions were limited to iconic characters owned by considerable entertainment companies. See *infra* note 339.

<sup>339</sup> See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754–55 (9th Cir. 1978) (holding in favor of Disney); *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1452–53 (9th Cir. 1988) (holding in favor of NBC); *Rice*, 330 F.3d at 1175–76 (holding in favor of Fox); *DC Comics*, 802 F.3d at 1022 (holding in favor of DC Comics).

<sup>340</sup> See U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]").

<sup>341</sup> See GORMAN ET AL., *supra* note 247, at 30.

<sup>342</sup> *Petition for Writ of Certiorari*, *supra* note 8, at 7.

develop and express the characters,”<sup>343</sup> and created initial materials with the characters, such as *The Moodsters Bible*.<sup>344</sup> Thus, the Ninth Circuit’s test prevents smaller creators who do not have standing in the entertainment world, like Daniels, from being able to recoup their creation costs, and could lead to disincentivizing creators from innovating.

An argument in support of the three-part *DC Comics* test is that it “permits rightsholders to recoup investment and production costs.”<sup>345</sup> This argument, however, also supports the Seventh Circuit’s stock character test. High transaction costs are not exclusive to large movie studios. And, while large movie studios have immense budgets, small creators may have to invest their life savings into creating a character.<sup>346</sup>

In addition to cost recovery, it has been suggested that *DC Comics* “prevent[s] . . . unjust enrichment by unauthorized exploiters” who profit off the market the creator has already established by the company.<sup>347</sup> Considering Daniels and her company, Moodsters Co., created *The Moodsters*, this suggestion shows the deficiency with the *DC Comics* test. Moreover, while *The Moodsters* did not have an established market for the characters at the time of suit, by denying the characters copyright protection, the Ninth Circuit denied Moodsters Co. the opportunity to develop one.<sup>348</sup> As such, it could be argued that Disney was unjustly enriched.

## 2. *Failure to Comply: The Copyright Act of 1976*

“The Ninth Circuit’s standard also violates basic elements of the Copyright Act [of 1976].”<sup>349</sup> At its core, the Copyright Act of 1976 motivates authors to create and improve the useful arts and sciences through allowing an artist’s

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<sup>343</sup> *Id.* at 6.

<sup>344</sup> *Id.* at 7.

<sup>345</sup> Deamer, *supra* note 65, at 459. For example, “[*DC Comics*] protected the lucrative Batmobile merchandise market, which contributes to Warner Brothers’ \$6 billion annual toy revenue.” *Id.* at 459–60. Moreover, one commentator noted the high transaction costs associated with creating entertainment today, especially films and television, and reasoned “derivative markets have become increasingly important in the recovery of investment” because, “[f]or some films, merchandising revenue surpasses box-office revenue.” *Id.* at 460.

<sup>346</sup> See Danny Lewis, *A Single Video Game Character Can Cost Around \$80,000 to Make: It Takes Money to Make Money*, SMITHSONIAN MAG. (Sept. 3, 2015), <https://www.smithsonianmag.com/smart-news/single-video-game-character-can-cost-around-80000-make-180956492/>.

<sup>347</sup> Deamer, *supra* note 65, at 460.

<sup>348</sup> For example, as of February 2022, when searching for “personified emotions,” almost every link referenced *Inside Out*. Search of “personified emotions,” GOOGLE, <https://www.google.com/> (follow hyperlink, then search “personified emotions”).

<sup>349</sup> Petition for Writ of Certiorari, *supra* note 8, at 20.

copyright term to vest automatically when a work is created.<sup>350</sup> Copyright protection vests when the work is initially “fixed.”<sup>351</sup> In the Copyright Act of 1976, “‘fixed’ means put in a tangible medium of expression, like on paper or other material object that stores the work.”<sup>352</sup> Subsequent versions of the work that are “fixed or expressed on a tangible medium are derivative, separate works.”<sup>353</sup> If a derivative work adds to the original version, these elements are independently protected under copyright law.<sup>354</sup> Moreover, the “copyrightability of any work depends on the time that the artist *first expressed [their] work in a tangible medium.*”<sup>355</sup>

Contrary to this principle, the Ninth Circuit in *DC Comics* held the Batmobile was copyrightable even though the Batmobile was originally “an ordinary red sedan,”<sup>356</sup> which significantly differs from the Batmobiles in the 1966 television show and the 1989 movie that served as the basis for the copyright finding.<sup>357</sup> Because the Ninth Circuit’s test evaluates characters over multiple iterations—finding similarities or differences to determine what is copyrightable or not—the test inherently goes against a key aspect of the Copyright Act of 1976—that copyright protection vests based on an artist’s initial expression in a tangible medium.<sup>358</sup>

### C. *An Oldie but a Goodie: The Seventh Circuit’s “Stock Character” Test as the Uniform Standard*

Though the Seventh Circuit’s “stock character” test does not expressly adopt the Supreme Court’s *Feist* standard of originality,<sup>359</sup> it maintains the low bar to obtain copyright protection. The test, which determines whether a character is sufficiently distinct from a stock character by evaluating if it has “enough

<sup>350</sup> 17 U.S.C. § 302(a) (stating copyright term “subsists from [a work’s] creation”).

<sup>351</sup> *Id.* § 101.

<sup>352</sup> Petition for Writ of Certiorari, *supra* note 8, at 20 (citing 17 U.S.C. § 101).

<sup>353</sup> *Id.* (citing 17 U.S.C. § 101).

<sup>354</sup> 17 U.S.C. § 103(b) (“The copyright in a . . . derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”).

<sup>355</sup> Petition for Writ of Certiorari, *supra* note 8, at 20 (emphasis added).

<sup>356</sup> DCE Editorial, *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>.

<sup>357</sup> *DC Comics v. Towle*, 989 F. Supp. 2d 948, 953 (C.D. Cal. 2013).

<sup>358</sup> Petition for Writ of Certiorari, *supra* note 8, at 20 (“[C]opyrightability of any work depends on the time that the artist *first expressed [their] work in a tangible medium.*” (emphasis added) (citing 17 U.S.C. § 101)).

<sup>359</sup> *See supra* Section III.B.2.

expressive content for copyrightability,”<sup>360</sup> allows authors’ original characters to obtain copyright protection on their creative merits. Further, the “stock character” test accounts for the idea/expression dichotomy and does not permit ideas to be protected. Moreover, the Seventh Circuit’s test would allow for the broadest protection to characters and generate the most incentive for authors to continue developing them. As such, the following section will (1) explain how the stock character test preserves the idea/expression dichotomy; and (2) apply the test to *The Moodsters*.

### 1. *Preserving the Idea/Expression Dichotomy*

Though the Seventh Circuit has not further defined “enough expressive content,” the concept holds a similar sentiment to the idea/expression dichotomy itself.<sup>361</sup> When promulgating its “stock character” test, the Seventh Circuit considered licensing as a potential obstacle for authors who wished to build upon existing works. However, the Seventh Circuit discarded the idea of using “standard features”<sup>362</sup> to obtain copyright protection, stating “such stereotyped [stock] characters are the products not of the creative imagination but of simple observation of the human comedy.”<sup>363</sup> Thus, the Seventh Circuit ensured simple ideas of characters could not be protected.<sup>364</sup>

Further, any form of originality above a stock character that has “enough expressive content,” i.e., an original expression of an idea, would be afforded copyright protection. For example, the Seventh Circuit noted a character that may have begun as a stock character became copyrightable after being named, drawn, and given speech.<sup>365</sup> These characteristics constituted “enough expressive content” to be sufficiently distinctive and satisfy originality.<sup>366</sup>

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<sup>360</sup> *Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004).

<sup>361</sup> *See supra* Section III.A.3.

<sup>362</sup> *Gaiman*, 360 F.3d at 659.

<sup>363</sup> *Id.* at 660. The Seventh Circuit considered “a drunken old bum[.] . . . a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels, [and] a masked magician” to be stock characters. *Id.* (citing *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1175–76 (9th Cir. 2003)).

<sup>364</sup> Similarly, Judge Learned Hand distinguished ideas from the expression of ideas in relation to characters. For example, he stated “a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress . . . would be no more than Shakespeare’s ‘ideas’ in the play.” *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>365</sup> *Gaiman*, 360 F.3d at 661 (stating the character differed from stock characters only through “his costume and manner of speech, together with the medieval background”).

<sup>366</sup> *Id.*

## 2. Application to *The Moodsters*

Under the Seventh Circuit’s “stock character” test, *The Moodsters* would be copyrightable characters. When applying the test, the question asked would be: Are *The Moodsters* sufficiently distinct from stock characters?

For a character to be sufficiently distinct from a stock character, it must have “enough expressive content for copyrightability.”<sup>367</sup> While there is no specific Seventh Circuit definition of “enough expressive content,” the Seventh Circuit has found characters which have minimal characteristics—such as a specific name, costume, or manner of speech—copyrightable.<sup>368</sup> As displayed in *The Moodsters Bible*, the characters appear in full color with distinguishable characteristics, such as the angry character’s propensity to “blow her top,”<sup>369</sup> or the scared character’s signature accessory: a security blanket “tied around his shoulders like a superhero cape.”<sup>370</sup> Even when only considering these two attributes,<sup>371</sup> both are anything but stereotypical or stock characters.<sup>372</sup> Most notably, before *Inside Out* premiered in 2015, there were no characters that resemble personified emotions. This fact, in and of itself, belies any argument that *The Moodsters* are stock characters.

## CONCLUSION

Denise Daniels, who created *The Moodsters* as a tool to help children understand and develop their emotions, was deprived of the opportunity to properly share her innovative and unique characters with the world because the Ninth Circuit determined they were not copyrightable. Had her case been before the Seventh Circuit, however, *The Moodsters* would have obtained copyright

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<sup>367</sup> *Id.*

<sup>368</sup> See *supra* Section I.A.

<sup>369</sup> See Amended Complaint, *supra* note 12, at 72 (displaying the angry character has pigtails, which seem to signify flames, indicating her fiery personality).

<sup>370</sup> *Id.* at 75.

<sup>371</sup> Even though when applying *DC Comics* to *The Moodsters* the Ninth Circuit noted that “other than the idea of color and emotions, there are few other identifiable character traits and attributes [of *The Moodsters*] that are consistent over the various iterations,” no other decision has contained this added requirement. *Daniels v. Walt Disney Co.*, 958 F.3d 767, 772 (9th Cir. 2020) (emphasis added). Because the Ninth Circuit added that “the character need not have a consistent appearance” in order to find two famous characters, the Batmobile and Eleanor, copyrightable, it is likely this was to ensure only already-famous characters could obtain protection. *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015) (citing *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008)).

<sup>372</sup> When the Ninth Circuit evaluated *The Moodsters*, “[i]t made no finding that there was only one or just a few ways to express the idea of emotion-based characters so that Daniel’s [sic] ideas and the expression of *The Moodsters* merged,” and, thus, refused to acknowledge the fact *The Moodsters* are not stock characters. Petition for Writ of Certiorari, *supra* note 8, at 12; see also 17 U.S.C. § 101.

protection under that court's "stock character" test, a standard closer to copyright's constitutional roots.

Given the current circuit split, standards for character copyright protection can be manipulated to a court's desired result—such as the Ninth Circuit creating a fame-based standard that guarantees only iconic and already-recognizable characters copyright protection. Such heightened standards fail to recognize the heart of copyright: to motivate authors to create original works which advance the useful arts and sciences, thereby creating a rich public domain. These heightened standards also incentivize entertainment conglomerates to continue taking advantage of small creators who do not have the resources to gain the notoriety required to obtain copyright protection. Consequently, these heightened standards may deter creators from sharing their work with the world or creating characters at all. By adopting the Seventh Circuit's "stock character" test to resolve the circuit split regarding character copyrightability, independent creators would be encouraged to create and share new characters—a result consistent with the sine qua non of copyright law: originality.

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