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Holy copyright, Batmobile in the fold

Fifty years ago, Adam West first appeared as the character Batman in the groundbreaking television series of the same name. In my mind, West is the real Batman.

Michael Keaton and Christian Bale are mere latter-day poseurs with none of the West character's deft irony. My thoughts turned to West and the other Batmen recently when I read the case of *DC Comics v. Towle* (9th Cir. 2015).

The case is not really about Batman or Robin, Joker or Catwoman. It is about another beloved character in the Caped Crusader's menagerie — the Batmobile. But I fear I am begging the question because that is the very issue to be decided in the case: Is the Batmobile a copyrightable character?

For Mark Towle much depends on the answer to that question. Towle, according to his lawyers, has a reputation as "one of the finest designers of replica Batmobiles in the world." We're not talking about toys here — these are real cars that Towle fabricates, based on the designs from expired design patents.

I suppose you could call them toys, but they cost \$90,000.

Towle's passion, indeed his livelihood, may depend upon whether the Batmobile is protected as a character under copyright law.

It was decided long ago that some characters can be protected by copyright independent of the work in which the character appears. But not every character makes the grade. Whether a character is protected by copyright depends on how well delineated the character is. A stock character without distinctive traits will not qualify.

As Judge Learned Hand, the source of much copyright doctrine, stated in *Nichols v. Universal Pictures* (2d Cir. 1930):

"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. ... It follows that the less developed the characters, the less they can be copyrighted. That is the penalty for marking them too indistinctly."

The case law is filled with examples of characters that have been held to be delineated sufficiently to be protected, including Mickey Mouse and his coterie, Sylvester Stallone's Rocky, Barney the Dinosaur, Godzilla and, of course, James Bond. Even the personas of certain professional wrestlers (Razor Ramon and Diesel) have come within penumbra of copyright.

Does the Batmobile qualify to be in the pantheon of copyrightable characters? Obviously being human is not required, as Godzilla and Barney will attest. Even cars have been protected such as Eleanor, a modified Ford Mustang in the movie "Gone with the Wind" (*Halicki v. Sanderson* (9th Cir. 2008)).

In the *Towle* case, the 9th U.S. Circuit Court of Appeals concluded that the Batmobile belongs in the pantheon as well.

The court held that the Batmobile's traits were sufficiently delineated to be recognizable as the same character whenever it appears. The traits appeared consistently, whether in the comic books, on television or in the movies.

As described by the court, the Batmobile has not only a name, but also a batlike appearance, jet black color, futuristic technology

INSIDE IP LAW



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and weaponry and is swift, cunning, strong and elusive. True enough, but these traits are pretty general and might also be said about my Prius (except the weaponry).

An important issue in the case was that the Batmobile has varied in appearance over the years. The 1966 television Batmobile (a long sleek '60s Cadillac look) is very different from the 1989 movie version (a souped-up curvaceous Corvette look). Towle asks the metaphysical question: How can

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two cars that look very different be one character?

This was not a problem in the court's eyes. Being protected by copyright does not require that a character be immutable.

"The presence of distinctive qualities apart from visual appearance can diminish or even negate the need for consistent visual appearance." After all,

James Bond has taken on the countenance Sean Connery and all the other actors who portrayed Bond. Bond qualifies for copyright no matter what actor portrays him, as long as the character retains his suave, overt sexuality, his license to kill and his penchant for martinis — shaken not stirred.

For DC Comics, it was important to get protection of the Batmobile as a character because automobiles are not otherwise protected by copyright.

They are useful articles, outside the scope of copyright. And although a drawing, painting or other pictorial representation of a useful article can be protected by copyright, the copyright law does not prevent another person from creating the useful article depicted.

Undeterred by the 9th Circuit's ruling, Towle filed a petition for a writ of certiorari with the Supreme Court. He argued that the ramifications of the 9th Circuit's decision are dramatic, enabling manufacturers to obtain copyright protection for useful articles contrary to the intent of Congress.

Towle argued that if Ford wants copyright protection for a new line of pickup trucks, it need only create a comic book featuring the truck as a character.

The same could be done, he fears, by the makers of kitchen blenders, cellphones, clothing, refrigerators and any other useful item.

Think of all the marvelous comic books that would flood into our world. What exciting tales of sentient blenders and refrigerators we can look forward to if the Supreme Court rejects Towle's petition.

Brace yourself for the onslaught. The court denied certiorari on March 7.