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Characters

Purely Fictional Characters

Real Person Inspired Characters

Public/Stage Personas of Real People

Fictionalized Versions of Real People

Real People

Actors Portraying The Characters

Causes of Action

Copyright
Trademark
Unfair Competition

Right of Publicity
Copyright
Trademark
Unfair Competition
Defamation
Invasion of Privacy
Emotional Distress

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Legal Protections for Characters:
& Third Party Rights/Concerns

1. Copyright – original works of authorship
   • Not substantially similar to another party’s character

2. Trademark and Related Rights – signifiers of source or origin
   • No likelihood of confusion
   • Avoiding dilution claims

3. Rights of Publicity – name and likeness/identity
   • False Endorsement
   • Use of person’s identity for commercial or trade purposes

4. Defamation and Invasion of Privacy
   • Statement that harms person’s reputation
   • Discloses private information about person
Copyright For Fictional Characters

- If a character is “sufficiently delineated” it will be entitled to protection. The more highly developed, the greater protection available (Nichols v. Universal Pictures)

Abbie’s Irish Rose 1922 play

Cohens and Kellys film

Play and film shared basic storyline of young Irish and Jewish lovers with parents objecting to relationship.
“Story Being Told” Test

- “The story being told” test; more than a mere chessman
  (Warner Bros. v. Columbia Broad. Sys. - Sam Spade Case)
Stallone v. Anderson, (Combines two tests: so highly delineated and central to films that they were the story being told)

Metro-Goldwyn-Mayer v. American Honda, Developed with enough specificity to constitute protectable expression.

Suntrust v. Houghton Miflin, As characters become more idiosyncratic, they at some point cross the line into 'expression' and are protected by copyright.
Copyright

- Visual Characters easier to protect (Disney v. Air Pirates)
DID SOMEBODY SAY INFRINGEMENT?

Sid & Marty Kroft Television v. McDonalds (copying look and feel of characters may constitute copyright infringement)
New Line Cinema v. Russ Berrie & Co.,
161 F. Supp. 2d 293 (S.D.N.Y. 2001)

• Copyright protection in a character can extend to its component parts.
1. Character must generally have physical as well as conceptual qualities.

2. Character must be sufficiently delineated to be recognizable as the same character whenever it appears.

3. Character must be especially distinctive and contain some unique elements of expression. Cannot be a “stock character.”

• Batmobile is a copyrighted character with “a series of readily identifiable and distinguishing traits”

• Alternatively, it has separately identifiable creative elements independent of its utilitarian aspects
Characters not protectable by copyright: insufficient delineation


High-top sneakers, baggy shorts and backward baseball cap on skeleton not sufficient delineation to give rise to copyright protection in character
Character must be “especially distinctive” and have “widely identifiable traits” to be protectible independent of larger work.
• Although a written description of a stock character might not be copyrightable, such character can become sufficiently distinctive upon being drawn, named and given speech.

Dispute over ownership of contribution to character; not infringement
Characters not protectable by copyright: historic figures/real people

Chase-Riboud v. Dreamworks (DC C.Calif, No. CV 97-7619 ABC (Jgx), 12/8/97)

Novelist’s depiction of Joseph Cinque, an actual historical figure not protectable by copyright because fictionalization was not “especially distinctive”.
Stock or Genre characters
Developments of Scenes a faire
• “Stirring one’s memory of a copyrighted character is not the same as appearing to be *substantially similar* to that character, - - only the latter is infringement.”
Characters not protectable by copyright: characters existing in nature

*Le Calvez v. Disney* “A clown fish is a clown fish.”
"A clown fish is orange. It has three white stripes ... Everything is already there in nature."
Copyrights Expired in U.S. (and perhaps elsewhere like New Zealand) but not in the U.K.

- Edgar Rice Burroughs (d. 1950): Tarzan (1912)
  - © U.S. expired; U.K. won’t expire until 2020

- Johnston McCulley: (d. 1953): Zorro (1919)
  - © U.S. expired; U.K. won’t expire until 2023
Court rejected proposition that if a complex character continues to be developed after early appearances of such character have entered the public domain, the copyright owner should continue to receive protection in that character due to the difficulty of separating a character’s personality into in and out of copyright parts. Court also rejected the proposition that the latter user should be free to use elements from more recent stories because such elements were unprotectible events not subject to copyright protection.
No protection for infringing characters (see Sapon v. DC Comics)
Trademark
To extent serve as signifier of source or origin: names, nicknames, logos, images of characters, slogans or expressions, titles of series in which the character appears, costumes, props or devices can be trademarks.

Hi-yo, Silver Away!

FASTER THAN A SPEEDING BULLET
Frederick Warne & co. v. Book Sales, Inc.

Tri-Star Pictures, Inc. v. Del Taco, Inc.
Lanham Act: Section 43(a)

- When product is entertainment ... not only advertising of the product but also an *ingredient* of the product ... can be protectable ... because an ingredient can ... symbolize the plaintiff or product in the public mind." *DC Comics v. Filmation*

- Sec. 43(a) protection available without traditional trademark usage

- *Warner Bros. v. Gay Toys*
Burnett v. Twentieth Century Fox Film Corp.

- Burnett sued to protect fictional character and herself bringing copyright, trademark and right of publicity claims.
Original character-persona

“Naked Cowboy In Times Square”
Actor – Persona as Character
What are these guys' names?

Cliff & Norm

Adam West v. Ian Leech & Associates

• Actor playing a role of a character does not receive or create a property right absent a contract.
Public Domain Character vs. Right of Publicity
EDGAR WINTER et al. v. DC COMICS et al., 30 Cal. 4th 881; 69 P.3d 473; 134 Cal. Rptr. 2d 634 (June 2, 2003)

New Expression, Meaning or Message
Characters in Video Games as Themselves
Characters in Video Games

1. Real people doing what they do (football players playing football, singers singing): not okay
2. Real people: commentary, history, parody, transformative; new meaning/message: okay
3. Fictional characters parodying or inspired by real people:
   • Not close enough to be considered representations (not using actual names or likenesses; composites, “transformative” use): okay
   • First amendment protected expression, commentary, parody
Real Person: Vickie Stewart

- Lived on Cottage Lane in Atlanta
- Attended Northfield High School
- Got married, 2 kids, including daughter named Mindunn
- 1st husband killed in car accident
- Received large insurance settlement
- Later married guy named Harold
- Harold stole her insurance money and gave to his mistress
- Divorced Harold, awarded $750K in divorce, unable to collect
- Placed ads in FLA newspapers offering reward for info on Harold’s location
- At 50 became flight attendant
- Red/auburn hair
- Chain-smoker

Real Person: Susan Virginia

- Lived on Cottage Circle in Atlanta
- Attended Northfield High School
- Got married, 2 kids, including daughter named Mignon
- 1st husband killed in car accident
- Received large insurance settlement
- Later remarried
- New husband stole her insurance money and gave to his mistress
- Divorced, awarded $750K in divorce, unable to collect
- Placed ads in FLA newspapers offering reward for info on Harold’s location
- Later became a flight attendant
- Red/auburn hair
- Chain-smoker
- Alcoholic: drank before & during flights
- Insensitive right-wing reactionary