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United States: Ninth Circuit Court Of Appeals: The Batmobile Is A Character Under Copyright Law – New, Three-Part Test For Determining Character Protection

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

The U.S. Court of Appeals for the Ninth Circuit held that the Batmobile, Batman's famous car, is subject to copyright protection as a character, independent of any specific work in which it has appeared and irrespective of whether it "lacks sentient attributes and does not speak." Fross Zelnick represented winning appellee DC Comics in the appeal.

Mechanic Mark Towle's business, which operated under the name "Gotham Garage," offered and sold knock-offs—or, in Towle's words, "replicas"—of DC Comics' Batmobile. Customers could either provide a working automobile that Towle would alter for \$90,000, or purchase a do-it-yourself kit. Towle offered "replicas" of both the Batmobile that appeared in the Adam West television program in 1966 and the modernized Batmobile used in the motion picture starring Michael Keaton in 1989. Towle's finished products of both models substantially resembled the originals and incorporated many of the Bat logos and distinctive (albeit non-functional) gadgets. Towle's advertisements contained explicit references to DC Comics' trademarks and its Batman character.

The United States District Court for the Central District of California granted DC Comics' motion for summary judgment on its copyright, trademark, and unfair competition claims and held that the Batmobile is protectable as a character, notwithstanding that the character is an inanimate object. The district court held that Towle infringed DC Comics' rights under copyright in both: (i) the Batmobile as it appeared in the *Batman* comic books and (ii) the 1966 Batmobile and the 1989 Batmobile. As for the comics, Towle conceded that DC Comics owns all rights in the comic books, but argued that his replicas did not infringe the comic Batmobile because they were copied from later works. Towle argued strenuously that the many versions of the Batmobile over the decades, including the marked differences between the Batmobiles appearing in the earliest comic books and the 1966 and 1989 Batmobiles, undermined the similarity required to prove both an identifiable character and an infringement claim. As for the 1966 and 1989 Batmobiles, Towle conceded that his replicas were close copies and therefore infringing, but argued that DC Comics did not own rights in those works. After the district court ruled, the parties executed stipulations such that Towle could appeal. In Towle's appellate brief, he largely conceded the trademark and unfair competition claims, focusing instead on the copyright claim.

The circuit court, which issued its judgment after hearing oral argument, began by acknowledging the fame of the Batman character and the Batmobile. And, while acknowledging the Batmobile's varied appearances over the last 75 years, the court noted the sufficiently consistent nature of the vehicle's iterations. Although visually distinct from prior versions, the court explained that both the 1966 Batmobile and the 1989 Batmobile maintained a "bat-like appearance" and were "equipped with

state-of-the-art weaponry and technology." *DC Comics v. Towle*, 802 F.3d 1012, 1016-17 (9th Cir. 2015). The court also noted that the agreements between DC Comics and the production companies responsible for making the TV show and film made clear that DC Comics had reserved all rights not specifically granted, including publication and merchandising rights.

The circuit court determined that "the Batmobile, as it appears in the comic books, television series, and motion picture, is entitled to copyright protection." *Id.* at 1019. Looking to precedent in the Ninth and Second Circuits, the court established "a three-part test for determining whether a character in a comic book, television program, or motion picture is entitled to copyright protection," as follows:

First, the character must generally have "physical as well as conceptual qualities." Second, the character must be "sufficiently delineated" to be recognizable as the same character whenever it appears. Considering the character as it has appeared in different productions, it must display consistent, identifiable character traits and attributes, although the character need not have a consistent appearance. Third, the character must be "especially distinctive" and "contain some unique elements of expression."

Id. at 1021 (citations omitted). "Even when a character lacks sentient attributes and does not speak (like a car), it can be a protectable character if it meets this standard." *Id.*

The court found that these facts were sufficiently addressed by the lower court, such that no remand was required. Applying the first prong of the test, the court held that "the Batmobile has appeared graphically in comic books, and as a three-dimensional car in television series and motion pictures." *Id.* For the second prong, the court provided, "the Batmobile has maintained distinct physical and conceptual qualities since its first appearance in the comic books in 1941," namely, "a highly-interactive vehicle, equipped with high-tech gadgets and weaponry used to aid Batman in fighting crime," and a "bat-like . . . appearance, with a bat-themed front end, bat wings extending from the top or back of the car, exaggerated fenders, a curved windshield, and bat emblems on the vehicle." *Id.* In addition, the court noted the Batmobile's "crime-fighting" nature with sleek and powerful characteristics that allow Batman to maneuver quickly while he fights villains." *Id.* Next, the court pointed to many highly literary descriptions in the comic books of the vehicle, including that it waits "[l]ike an impatient steed straining at the reins . . . shiver[ing] as its super-charged motor throbs with energy' before it 'tears after the fleeing hoodlums' an instant later." *Id.* The vehicle's "ability to maneuver" and the manner in which it is weaponized and equipped with the latest technology and features further helped to delineate the vehicle such that it is consistent and identifiable. *Id.* at 1022. For the third prong, the court relied on the vehicle's "status as Batman's loyal bat-themed sidekick," together with both the many distinctive features that had satisfied the prior prongs and the Batmobile's unique and highly recognizable name. These together rendered the Batmobile more than "a stock character," as required under the test.

The court considered and rejected two of Towle's arguments that the Batmobile was not subject to copyright protection as a character. First, Towle insisted that non-conforming appearances of the Batmobile, including one in which the Batmobile appeared as an armored tank, destroyed the notion that the Batmobile was a singular, consistent character. However, the court likened such inconsistencies to mere "costume changes," which do not undermine a character's identity. "In context, the depictions of the Batmobile as a tank or missile promote its character as Batman's crime-fighting super car that can adapt to new situations as may be necessary to help Batman vanquish Gotham City's most notorious evildoers." *Id.*

In addition, Towle sought to have a jury, not the court, determine "whether the Batmobile displayed unique elements of expression and consistent, widely identifiable traits." *Id.* However, because the facts were not in dispute, the court held that it was proper for the court to apply the facts to the law. With that, the court concluded that the Batmobile is a copyright-protectable character under the 1976 Copyright Act.

The court next rejected Towle's assertion that DC Comics lacks rights under copyright in the 1966 and 1989 Batmobiles. Towle asserted that DC Comics' rights in the underlying comics were not sufficient to bring suit because Towle had admittedly copied the derivative Batmobiles from the television show and film, not the vehicles portrayed in the comics. The court, however, made clear that a rights-holder can bring a claim against an infringer, even if the infringement is clearly of a derivative work, to the extent that the infringing work contains protectable elements of the original and to the extent that the original rights-holder retains ownership of the original work. Given that the court had just held that the 1966 and 1989 Batmobiles were different iterations of the same character that appeared in the comic books, the 1966 and 1989 Batmobiles clearly contained protectable material from the underlying work. And, since the replicas were slavish copies of the derivative works, and since DC Comics reserved all rights not conveyed in the agreements, the court held that DC Comics was able to assert copyright infringement against Towle. Furthermore, the court noted that DC Comics had retained separate merchandising rights under the relevant agreements, giving DC Comics an additional basis for a copyright infringement claim against replica automobiles based on the television and film properties.

Finally, the circuit court readily affirmed the lower court's finding of infringement. It held that the district court had established

that the Batmobile is protectable as a character under copyright law and that DC Comics possessed a copyright interest in the character as it is expressed in the 1966 and 1989 Batmobiles. The evidence, including Towle's admissions that he had created replicas, permitted the district court to determine without further analysis that Towle had infringed DC Comics' rights.

Owners of character-driven entertainment properties are likely to welcome this decision, which clarifies an expansive view of the protection accorded to characters – a position that underpins the latest notable decisions in this field. And, as such rights-holders review the ruling, they may also enjoy the circuit court's light sprinkling of quips evocative of the original Batman television show, such as "To the Batmobile!" and "Holy copyright law, Batman!"

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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