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Characters and Locations in a Digital Age - Indistinct Ideas or Elucidated Expressions?

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Abstract

During lockdown, unauthorised online interactions with cultural goods such as memes and fanfiction increased in importance as authorised interactions became unavailable. This article uses an analysis of recent case law to argue that some characters and locations reused in these works should attract copyright protection as expressions rather than ideas, bringing UK law into line with the US law.

Introduction

“Haven't Luke Skywalker and Santa Claus affected your lives more than most real people in this room?...And the same could be said of Bugs Bunny and Superman and Harry Potter. They've changed my life, changed the way I act on the Earth. Doesn't that make them kind of "real"? They might be imaginary, but they're more important than most of us here. And they're all gonna be around long after we're dead. So in a way, those things are more realer than any of us.”¹

Characters in the current cultural age are highly important. Indeed, for many people during the COVID-19 pandemic, they were interacting with fictional characters in similar ways to their interactions with family and friends – online, or through a screen. Viewers avidly binge watched series such as *Friends* or *Bridgerton*, and reunions became highly popular. While family and friends met online on Zoom, the *Friends* reunion was watched by more than 5.3 million viewers². This may be because the strong links viewers form with fictional characters have been shown to be analogous to how they relate to their family members, and the way characters handle problems influences how viewers interact with people in their daily life³.

Characters also have a strong financial value, controlling the organised commercial interactions between fans and media production companies, such as the purchase of merchandise or the attendance at events. As such, creators and producers are becoming increasingly protective of their intellectual property rights in characters. During lockdown many of these authorised opportunities for copyright holders to interact with consumers were unavailable – conventions were cancelled, theme parks were closed, and shops struggled to deliver merchandise. This highlighted a previously known problem – that fans have always found a way to interact with characters and locations outside of authorised spaces in the shadow of copyright law. Fans discuss their chosen characters in forums, and scour canon writings for hints as to character development. Copyright

¹ 'Imaginationland Episode III', *South Park* (31 October 2007).

² J Lang, "'Friends: The Reunion' Breaks Sky Viewership Records – Global Bulletin" (*Variety.com*) <https://variety.com/2021/film/global/friends-reunion-sky-ratings-1234994289/> accessed 16 July 2021.

³ J Cohen, 'Audience Identification with Media Characters' (2006) 13 *Psychology of Entertainment* 183.

holders historically promoted this as a secondary method of engaging with potential consumers, as they believe it promotes consumption of their products.

Yet a further category of fan goes beyond this, and interacts with these literary creations and elements as a form of 'play'. They draw fanart, create fanvids and fanfiction - all using characters and locations from copyrighted works. This is not a new phenomenon, but consumption and production has increased strongly in recent years. Archive of Our Own, one of the largest fanfiction communities, opened for users in 2009 and in the last 6 years production of works has increased 600%⁴. It currently hosts more than 7 million works. At the start of lockdown, demand for the site was so high emergency measures were needed to keep the site online⁵. Characters seem to 'affect their lives' more than most, and users believe it is only fair that they are permitted to interact in this way with these imaginary friends and foes.

There is a second group of people that interact with characters specifically, but in a different way, who must be discussed when talking about copyright and literary elements such as characters. These people are the meme creators, who use characters to make a cultural point. Characters, for these creators, are shorthand for the works they appear in, or a specific character type. These memes can be highly important culturally - images of Winnie the Pooh have been used in protests against the Chinese Communist Party, for example⁶. More broadly, memes are used to create cultural connections between internet users. During lockdown, they were used as a method of combatting self-isolation⁷. Memes require the use of characters and locations that are so successful

⁴ 1 million posts (February 2014), 7 million posts (December 2020) (The Archive of Our Own Reaches Million Fanworks' (*Organisation for Transformative Works*) <https://www.transformativeworks.org/the-archive-of-our-own-reaches-seven-million-fanworks/> accessed 16 July 2021

⁵ 'Emergency Measures Affecting Works' (*Archive of Our Own*) https://archiveofourown.org/admin_posts/15379 accessed 16 July 2021

⁶ 'Hong Kong Protesters Mock Chinese Leader in Defiance of Masks Ban' (ITV News) <https://www.itv.com/news/2019-10-19/hong-kong-protesters-mock-chinese-leader-in-defiance-of-masks-ban> accessed 16 July 2021.

⁷ S MacDonald, 'What Do You (Really) Meme? Pandemic Memes as Social Political Repositories' (2021) *Leisure Sciences*, 43(1-2) 143-151.

they are known worldwide. Yet, it is these characters that are likely to be of most commercial value to their creators and licence-holders.

Much analysis has been undertaken as to the need for clarity in relation to how the fair dealing copyright exceptions apply in these circumstances, and whether sites that host this material should be liable for communicating them to the public⁸. However, there is also an important question logically to be asked before that analysis takes place – primarily, whether copyright can, and should, apply to characters and locations as literary works themselves. This is the research gap this article responds to. Given that the fair dealing defence requires analysis of proportionality in the reused work and the underlying work, if certain characters and locations attract their own copyright protection, this may impact any cases brought to court.

The following analysis will use the relatively clear recent jurisprudence of cases such as *Tixdaq*⁹ and *Meltwater*¹⁰ to argue that certain characters, like those listed at the start of this article, are ‘real’ in the sense that they are expressed in a firm manner. The clarity of the artistic choices made in their creation mean that characters which attain this status of ‘real’¹¹ should be protected as examples of original expression. The position of locations will be shown to be less clear. This analysis permits for a discussion into the wider element of how the incentive function of copyright¹² operates in an age of ‘spreadable media’¹³.

⁸ For example S Guzel, Article 17 of the CDSM Directive and the Fundamental Rights: Shaping the Future of the Internet’ (2021) EJLT 12(1)

⁹ *England and Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EWHC 575 (Ch); [2016] Bus LR 641

¹⁰ *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890; [2012] Bus LR 53

¹¹ The following analysis will focus on characters as individual expressions. It is accepted academic thought that there are 4-9 different character ‘types’ – such as protagonist, antagonist, confidante, foil and ego, which are usually used as stock characters, especially for background or secondary elements. However, this analysis reflects the importance of the way in which the author creates tension by playing on different archetypes (and reader expectations) in their works, and the way they apply individual characteristics to these stock creations. It is these artistic choices that make a work engaging (D Fishelov, ‘Types of Character, Characteristics of Types’ (1990) 24 *Style* 422), and which should attract protection as examples of originality and artistic judgment.

¹² WM Landes and RA Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18 *The Journal of Legal Studies* 325, 325; N Elkin-Koren and EM Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge 2013).

¹³ H Jenkins, S Ford and J Green, *Spreadable Media: Creating Value and Meaning in a Networked Culture* (New York University Press 2013).

There is little research¹⁴ or case law that has discussed whether these types of literary elements are protectable under copyright in the UK, and thus it is not clear whether they are in the public domain and thus free for reuse. Should they be found to be unprotectable *a priori*, it will be for the author of the underlying work to argue that the character or location is a 'substantial' part of their work and thus reuse amounts to infringement, which is an extra step to the analysis for the claimant to make. Alternatively, courts have looked to reputational damage under the tort of passing off. Neither of these are very efficient methods of protecting works which, as will be seen, should otherwise attract protection under current copyright theory.

This is an important question to ask at a time when more and more indistinct creations are attempting to be brought within the long and strong protection offered by copyright. For example in recent times the design of a pair of jeans (*Cofemel*), and the taste of cheese (*Levola Hengelo*), have both been litigated on¹⁵ in Europe. The outcome of this trend is that the legislative history in the UK requiring subject matter to appear within specific closed lists to be protectable is almost certainly incompatible with European law. Although this appears less important post-Brexit, the European Union (Withdrawal) Act 2018 s4 ensures that all pre-existing European legislation was copied into UK law. Whether the UK will continue to follow EU/US trends in future copyright legislation, or follow its own path, is not yet clear. This analysis starts from the current legal position.

Literary Elements as Literary Works

Copyright in the UK protects "original literary, dramatic, musical or artistic works" (LDMA works) and "films"¹⁶. The definition of LDMA works is clear in the legislation¹⁷, and covers all works

¹⁴ The most recent article in this journal dates back to 1988 - TR Martino, "'Popeye the sailor': man of letters - the copyright protection of literary characters", (1988) EIPR 10(3) 76

¹⁵ *Cofemel v G-Star Raw* (C-683/17) EU:C:2019:721 [2019] 9 WLUK 110; *Levola Hengelo v Smilde Foods* (C-310/17) EU:C:2018:899 [2018] Bus LR 2442.

¹⁶ Copyright Designs and Patents Act 1988 s(1)(1)(a) and (b)

¹⁷ s3(1) and s5B CDPA 1988

which are likely to spark the types of derivative use that this analysis focuses on - mainly novels, TV programmes and films. It is clear therefore that the works in which the characters and locations appear are at first instance protectable by copyright¹⁸.

The ability of copyright protection to be extended to characters outside of the works in which they appear has been discussed in only one case in the UK, where it was held that literary elements of this type are not suitable for copyright protection as they are not LDMA works within the closed list laid out in S1 CDPA 1988¹⁹. This would seem to preclude any further analysis, and avoid the creator being able to claim any protection for characters or locations separate from the novel, film or TV programme in which they appear. It would require any infringement case to be decided on the later (but closely related) discussion as to whether they are a 'substantial part' of the story in which they appear.

A statement that characters as literary elements are de facto not capable of copyright protection would seem to make it easier for unauthorised derivative reusers, as in theory it places the burden on the copyright holder to prove that their character or their location is such a vital part of the story that reusing it takes a 'substantial' part of the underlying work. This would seem to follow the spirit of copyright law - that we do not wish to ringfence too much of the public domain, and that protection should only be given to specified types of work. Other forms of work, such as databases, are protected as needed by *sui generis* rights created through legislation, as policy dictates that they should not receive the same form of protection as the LDMA works.

However, there is good reason why this is not the way copyright applies to these types of work - namely, that they are creative works, and thus should be treated as LDMA works, as opposed

¹⁸ The requirement for fixation of these types of work is a moot point for this analysis, as the discussion focuses on successful characters and locations - without being fixed, they would not be well-known enough and well-defined enough to attract sufficient awareness to be reused in memes, gifs, and fanworks.

¹⁹ *Conan Doyle v London Mystery Magazine Ltd* [1949] 1 WLUK 56 (1949) 66 RPC 312; *Tyburn Productions Ltd v Conan Doyle* [1991] CH 75, [1990] 1 All ER 909.

to other types of less artistic/more technical works such as databases or sound recordings²⁰. This philosophy follows the extension of copyright protection (rather than application of new sui generis rights) to the ‘works’ discussed in *Cofemel* and *Levola Hengelo*.

This broadening of the application of copyright protection is also shown in the move towards protecting separate elements of written work demonstrated in *Meltwater*²¹. As such, an analogy is drawn here that characters are also elements of the work in which they appear. Hermione Granger, for example, exists beyond the mere sections of descriptive text devoted to her in the Harry Potter novels. This is an important distinction, as otherwise the ruling of *Hyperion Records*²² would preclude protection of individual written sections of the work. Characters as important elements of works rather than mere groups of words is strongly supported by prominent literary theory²³, and arguably follows the philosophy of the limited case law to date.

Literary Elements as Expressions of Originality and Artistic Choice

Literary elements not only need to meet the test for LDMA works. They must also be ‘original’ to merit protection. The test for ‘originality’ differs in case law in the UK and the EU. The UK historically required an ‘expression of thought’²⁴ from the author, which showed ‘skill, labour and judgement’²⁵, while EU case law focused on “the choice, sequence, and combination of those words that the author may express his creativity in an original matter and achieve a result that is an

²⁰ This can be seen in the different originality standards that apply to LDMA works and the other more technical, entrepreneurial works that copyright protects.

²¹ Proudman J in *Newspaper Licensing Agency Ltd v Meltwater Holding BV* (n9), at [71]: “In my opinion headlines are capable of being literary works, whether independently or as part of articles to which they relate”. Affirmed [2012] Bus LR 53 at [22].

²² *Hyperion Records v Sawkins* [2005] EWCA Civ 565; [2005] 1 WLR 3281

²³ R Hayaki, ‘Fictional Characters as Abstract Objects: Some Questions’ (2009) 46 *American Philosophical Quarterly* 141; E Terrone, ‘On Fictional Characters as Types’ (2017) 57 *The British Journal of Aesthetics* 161.

²⁴ *University of London Press Ltd v University Tutorial Press Limited* [1916] 2 Ch 601; [1916] 7 WLUK 79

²⁵ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273; [1964] 1 All ER 465. Also *Interlego AG v Tyco Industries* [1989] AC 217; [1988] 3 WLR 678

intellectual creation”²⁶ or the “personal touch” of the creator²⁷. The focus in UK law on the thought originating from the author would appear less strict than the European test (given that it does not appear to require a discussion of the creativity of the work). Yet both jurisdictions, as signatories of the Berne Convention, are implementing the definition of originality contained within - “the making...of creative choices not dictated by...external constraints”²⁸. Indeed, following *Meltwater*²⁹ it has been strongly argued that ‘judgement’ in the UK law should be read as a synonym of artistic choice³⁰. This therefore is the test that will be used in the following analysis, which will analyse several different literary elements to prove that images of literary characters used in memes, gifs, and fanfiction are expressions of artistic choice or judgement of the original author, and thus attract copyright protection outside of the work in which they appear. The same analysis will conclude that most locations will not meet this test.

Practically speaking, how can a creator demonstrate sufficient artistic choice to merit protection for their work? The common theme taken from the cases mentioned is that artistic choice is whatever steps the creator has taken to move from an indistinct idea to an elucidated expression. It is well known in copyright jurisprudence³¹ that mere ideas do not attract copyright protection. Ideas require illustration and formalising to be entitled to safeguarding as expressions³² - to clearly express a work, the creator is demonstrating their artistic choices.

Applying this argument to literary elements, it can be shown why plot as a literary element does not attract copyright protection. It is difficult for authors to show a clear expression of specific

²⁶ *Infopaq International A/S v Dankse Dagblades Forening* (C-5/08) EU:C:2009:465; [2012] Bus LR at [45], as followed in *Bezpečnostní softwarová asociace v Ministerstvo kultury* (C-393/09) EU:C:2010:816; [2010] 12 WLUK 773 and *Football Dataco v Yahoo* (C-604/10) EU:C:2012:115; [2012] Bus LR 1753.

²⁷ *Painer v Standard Verlags GmbH* (C-145/10) EU:C:2011:798; [2011] 12 WLUK 47

²⁸ Articles 2(3), 2(5), 8 and 14bis Berne Convention for the Protection of Literary and Artistic Works

²⁹ *Newspaper Licensing Agency Ltd* (n9)

³⁰ A Rahmatian, ‘Originality in UK Copyright Law: The Old “Skill and Labour” Doctrine under Pressure’ (2013) 44 *International Review of Intellectual Property and Competition Law* 4, 30.

³¹ *University of London Press* (n20)

³² JP Barlow, ‘Selling Wine Without Bottles: The Economy of Mind on the Global Net’ (2019) 18 *Duke Law & Technology Review* 8, 10.

artistic choice in relation to their plots, as they tend to be either insufficiently described³³, or too close to stock types of storyline³⁴. Standard copyright policy supports the lack of protection for plots, given that copyright should be utilised to incentivise production of new works, rather than ringfencing the 'commons'. Permitting creators to use copyright to monopolise the expression of standard ideas and themes, as demonstrated by many plotlines, would preclude this. Plots are therefore usually free for reuse. In relation to the unauthorised user-generated content discussed in this article, this is more likely to be important for fanfiction authors than those creating memes or gifs, as these latter types of content do not tend to focus on plot points.

Similarly, most locations or settings are deemed to be 'stock' or basic, and will fail to go beyond indistinct ideas. For example, many young adult novels are set in schools, and many thrillers take place in or around governmental departments. An author must therefore be highly specific in describing their own versions of these 'stock' locations to attract protection for their specific setting - and would do better to create completely new locations, rather than setting their works in pre-existing places such as MI5 or London.

There are exceptions to this analysis. Hogwarts, for example, has been sufficiently described (and therefore demonstrates sufficient artistic choices) by JK Rowling in her seven *Harry Potter* novels to be protectable under copyright. As an example, it is so well described geographically that it can be placed somewhere in the Highlands of Scotland³⁵. This is an outlying example however, and most fictional location will fail the 'expression of artistic choice' test and thus not attract their own

³³ *Baigent and Leigh v The Random House Group* [2007] EWCA Civ 247; [2007] 3 WLUK 725

³⁴ C Booker, *The Seven Basic Plots: Why We Tell Stories* (Continuum 2004). See also the *scènes à faire* doctrine in the US - for example *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir.), cert. denied, 476 U.S. 1159 (1986)

³⁵ The Hogwarts Express takes a day to travel the distance from Kings Cross, London to Hogwarts, and passes a real-world town (Peebles, near Edinburgh) on its journey. By authorising a film adaptation of the books which she was highly involved in the production of, there may also be a claim that the physical layout and look of Hogwarts has also been sufficiently delineated to be protectable.

copyright protection. Only on rare occasions, such as if floor plans or pictures, or strict literary descriptions are provided, will locations attract protection³⁶.

If locations are reused in fanfiction, memes, or gifs, the author must therefore prove that they are such a 'substantial part' of the underlying story that their reuse amounts to infringement. In many cases, this is unlikely to be an issue as the location is not of such central importance to the author as to raise issues leading to a case for infringement³⁷. Furthermore, in most cases reuse of location occurs alongside reuse of characters, so this distinction is perhaps unimportant. Analysis of potential infringement would turn on the clearer point as to the ability of those characters to attract protection.

As argued above, after *Meltwater* the previous sparse case law on the topic of copyright and characters is likely no longer good law. Rather, the older ruling from *Kelly v Cinema Houses*³⁸ is arguably more in line with current jurisprudence in the area, whereby judgement on the availability of copyright protection for the character at hand should be deemed to turn on whether the character was sufficiently depicted (i.e. under today's parlance, whether sufficient 'judgement' or 'artistic choices' had been demonstrated). Although on the facts the judge deemed the characters before him too trivial to merit protection, he admitted that in a different case with more accurately portrayed ("distinctive and remarkable"³⁹) characters, he would likely have provided protection.

Let us take James Bond and Jason Bourne as an illustration of this point. They are both examples of a male protagonist operating in a thriller novel, with the same initials and similar

³⁶ The only genres of novel that might attract more protection for locations is science-fiction or fantasy, where the story takes place in a different universe and artistic choices related to physics, biology and chemistry are clearly demonstrated. All other literary locations are likely to be unprotectable under this test.

³⁷ And, where locations are highly important to authors, they can use trademark protection instead. For example, Hogwarts has been trademarked in the UK and the EU (under number EU001301761) by Warner Bros (the film producers and owners of the related theme parks). However, most authors do not register their locations or characters as trademarks when they create the works, as it requires an upfront financial investment which at the time of creation, they are unaware of whether they will recoup.

³⁸ *Kelly v Cinema Houses* (In MacGillivray, EJ, "Copyright Cases 1928-35, Vol 6 (Publishers Association 1936) at 362).

³⁹ 'The Six Detectives - Copyright' (*CopyrightUser*, 23 May 2017) <<http://www.copyrightuser.org/educate/the-game-is-on/episode-2-case-file-21/>> accessed 3 December 2017.

sounding names. Both are described as cold, hard men who kill in the service of a governmental or quasi-governmental body. As such, at first glance they would fail to meet the test for originality elaborated above.

However, they also have specific elements and characteristics that distinguish them both from each other, and from the stock male character within those types of novel. Differences such as nationality, conscience, and background, which together show sufficient elements of artistic choice. Bond is a British character who never develops much of a sense of right or wrong, and merely follows orders as given from his superiors at MI5. His lack of respect for authority and womanising ways are begun at when he is expelled from Eton. In comparison, Bourne is American, develops a strong sense of conscience over the course of his storyline, and is much more honourable in his dealings with women. While Bond is an orphan who is only very briefly married, Bourne has a wife and child at one point, and a brother is also part of the plot. These choices by Ian Fleming and Robert Ludlum clearly ensure that it would be clear which character is which, and (vital to this analysis) they are not interchangeable.

Copyrightable Literary Elements in the US

It is useful here to turn to the US as a fellow Berne Convention signatory country, with a similar cultural market for creative works. The US has a detailed history of cases (and learned opinion⁴⁰) on the ability of copyright owners to copyright the characters they create separate from the story in which they appear – and so provides a good illustration of how the above argument would work in practice. The test for originality in US copyright is laid out in *Feist*⁴¹: for a work to be

⁴⁰ L Kellman, 'The Legal Protection of Fictional Characters' (1958) 25 Brooklyn Law Review 3; F Waldheim, 'Characters - May They Be Kidnapped Part I' (1964) 12 Bulletin of the Copyright Society of the U.S.A. 210; ZK Said, 'Fixing Copyright in Characters: Literary Perspectives on a Legal Problem' (2013) 35 Cardozo Law Review 769.

⁴¹ *Feist Publications, Inc, v Rural Telephone Service Co*, 499 US 340 (1991)

copyrightable, it must be “a work of authorship” with “some minimal degree of creativity” that goes beyond ‘sweat of the brow’⁴². How then does this apply to protection for characters and locations?

The first case in which characters were discussed separate from the story in which they appear in the US was *Nichols*⁴³ where Learned Hand laid out the ‘sufficient delineation’ test, whereby “characters can only be protected if they are sufficiently developed enough in the underlying work”⁴⁴. This is similar to the EU jurisprudence on ‘artistic choice’, and was followed in *Detective Comics*⁴⁵ where it was held that the abstract outlines of fictional characters (such as names ending in -man, or the wearing of a cape) are not copyrightable, but that developed creative specifics (such as specifically describing Clark Kent/Kal-el such as his job at a newspaper, and his relationship with Lois Lane) are worthy of protection as demonstrations of creativity or originality. At first instance therefore this would seem to support the analysis of this article that characters should be protectable in this way.

However, this test has not been fully accepted judicially and many further tests have been described. An alternative test was given in *Warner Bros v Columbia*⁴⁶ where it was held that there can only be copyright protection for a character when that character is the embodiment of the whole ‘story being told’. If the character could exist outside of the plot of the story, they may attract copyright protection; if not, they were just “the chessman in the game of telling the story”⁴⁷ and attract no separate protection. This seems to have strengthened the protection of characters, and has led to claims this is overstepping the boundaries between copyright and other forms of intellectual property protection, such as trademark⁴⁸. While this is a different test to the *Nichols*

⁴² *Ibid*, at [38,41,29].

⁴³ *Nichols v Universal Pictures Corp*, 45 F2d 119 (2d Cir 1930).

⁴⁴ M McCardle, ‘Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?’ (2003) 9 B.U. J. Sci & Tech. L. 433, 446.

⁴⁵ *Detective Comics Inc v Bruns Publications Inc*, 111 F2d 432 (2d Cir 1940).

⁴⁶ *Warner Bros Pictures Inc v Columbia Broadcasting*, 216 F2d 945 (9th Cir 1954).

⁴⁷ *ibid* at [16]

⁴⁸ MT Helfand, ‘When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters’ (1992) 44 Stanford Law Review 623, 641, 644.

test, and has led to some confusion on the point, it confirms the argument made in this article that only sufficiently important (or ‘real’) characters should attract protection as examples of originality.

This test was later limited to literary characters by dicta in *Walt Disney v Air Pirates*⁴⁹, meaning memes or fanfiction of characters in novels face a different test than similar content based on characters from films or cartoons. Those characters are protected by a separate ‘look and feel’⁵⁰ test, which operates as an extension of the *Nichols* test, as it states the general look and concept⁵¹ of drawn or designed characters (such as Disney princesses) can be protected outside their underlying work. These tests can be applied together such that elements of characters such as their personality, gait, shade, and theme music could all make a character distinguishable enough to satisfy the test for protection⁵².

Following these judgements, it is likely that most main characters in underlying works of fiction will be considered under US law to attract copyright protection, whether used in memes, gifs or fanfiction. While it may appear confused, with a focus on separate ‘named’ tests, it is clear after cases such as *American Honda*⁵³ and *Castle Rock*⁵⁴ that these individual tests are designed, like UK and EU law, to reaffirm the distinction between expressions (which are protectable) and ideas (which are not). This use of copyright protection to protect commercial characters may have knock on harmful effects on the diversity of the cultural market as it incentivises production of sequels/prequels, as can be seen by the current importance of follow-on works in the US film market. However, this summary of US jurisprudence shows that clearly permitting the protection of characters has not necessarily led to the over-narrowing of focus that some academics fear. Despite this increasing creep of copyright protection, there is still a healthy creative industry, and in fact

⁴⁹ 581 F2d 751 CA Cal [1978]

⁵⁰ The test originally given in *Sid Marty Krofft Televison v McDonalds Corp*, 562 F2d 1157 (9th Cir, 1977)

⁵¹ Further defined to cover such things as “the total concept and feel, theme, characters, plot, sequence, pace and setting” in *Castle Rock Entertainment Inc v Carol Publishing Group*, 150 F3d 132 (2d Cir, 1998) at [140]. This covers elements which wouldn’t be covered in EU/UK law such as plot and setting.

⁵² *United Artists Corporation v Ford Motor Company* 483 F Supp 89 (SDNY 1980).

⁵³ *Metro-Goldwyn-Mayer v American Honda Corp*, 900 F Supp 1287 (CD Cal 1995).

⁵⁴ *Castle Rock Entertainment Inc v Carol Publishing Group*, 150 F3d 132 (2d Cir 1998).

there is a demonstrated “digital renaissance”⁵⁵ in progress where digitalisation is allowing more engagement with content, and more creativity, across the market.

In conclusion therefore, the fictional novel or TV programme or film that contains the character is clearly protectable by copyright in both the US and UK. When looking at separate literary elements, the level of protection is less clear, but some likely inferences can be made. Where images of characters are used⁵⁶ such as the ‘Shocked Pikachu’ meme, sufficient artistic choices or judgement are demonstrated such that the character is likely protectable in both the UK and US outside of the story or novel in which they first appear. Furthermore, literary characters that are sufficiently well described to be recognised outside their storyline⁵⁷ are likely to attract copyright protection in the UK and US as literary elements, so long as they meet the ‘originality’ test. While it is theoretically possible that locations may also meet the originality test, it is less likely. It must be noted that this analysis only applies to well-fleshed out, main characters - it is much less likely that secondary, tertiary or background characters will meet the artistic choice originality standard⁵⁸. In conclusion, while it is less clear what the law would be in the UK due to the lack of case law, it is likely to follow the American jurisprudence in this area, given both are seen to focus on the distinction between ideas and expressions, and both are Berne Convention signatories.

Extending copyright to cover ‘real’ characters and locations would have little practical effect if it were not also part of an ongoing trend towards the digitalisation of content - and the sharing of content online. The control of this behaviour, and the linked issue of ensuring fair reward for creators, is the main issue facing legislatures in a digital age⁵⁹. By turning physical pages and ink into bits and bytes on a webpage, content is becoming much less solid and hard to contain, both

⁵⁵ J Waldfoegel, *Digital Renaissance: What Data and Economics Tell Us About the Future of Popular Culture* (Princeton University Press, New Jersey, 2018)

⁵⁶ Especially where the reason for that use is in relation to some specific characteristic of the character itself

⁵⁷ I.e. that reach the definition of ‘real’ in the introduction to this chapter

⁵⁸ Except, possibly as a nominative group. For example, the students that make up ‘Dumbledore’s Army’ in Harry Potter would be protected as a group, even if many of the students were too indistinct to meet the test themselves individually.

⁵⁹ JP Barlow (n31) 13.

physically and metaphysically. Fanfiction and memes are examples of the way creative content 'leaks' from authorised containers and spreads across the net. Attaching copyright protection to content such as characters and locations ought to operate as a closed container, keeping them firmly within their creator's control. In practice, following established literary theory, this cannot be the case. As soon as works are released, theorists such as Barthes argue, the author loses control over them⁶⁰. Therefore, copyright protection has at its heart the protection of the ability to commoditise the creative work, rather than the ability to control it completely - Barlow's idea of 'fair reward'. It does this by preventing certain reuses of copyrighted content. The control of reuse of content should be done using the separate issues of copyright infringement and fair dealing (and the related hot-button topic of communication to the public under the Copyright in a Digital Single Market Directive), and not by the prevention of protection for literary elements.

Conclusion

Characters and settings "might be imaginary, but they're more important"⁶¹ than many other forms of literary element (such as plots). They influence behaviour and guide consumers through hard times, and can operate as much-needed friends in time of crisis⁶². Many, such as Bugs Bunny or Luke Skywalker, attain life outside the works that birthed them, and may even be called 'real'. They may also be much loved by fans, even where they appear in stories where fans disagree with the plot – indeed, this is possibly why many fans write fanfiction⁶³. To achieve this level of existence, their author or creator must have made a significant amount of artistic choices or judgements, and thus in these specified cases the characters ought to achieve protection as

⁶⁰ R Barthes, 'The Death of the Author' in S Heath (tr), *Image-Music-Text* (Fontana 1977)..

⁶¹ 'Imaginationland Episode III' (n1)

⁶² Such as the COVID-19 lockdown.

⁶³ C Handley, 'Distressing Damsels: Narrative Critique and Reinterpretation in Star Wars Fanfiction', *Fan Culture: Theory/Practice* (Cambridge Scholars Publishing 2012); A Jamison, 'Love Is a Much More Viscious Motivator' in A Jamison, *Fic: Why Fanfiction is Taking Over The World* (Smart Pop, an imprint of BenBella Books, Inc 2013).

individual elements, following the logic laid out in cases such as *Infopaq*, *Cofemel*, and *Levola Hengelo*⁶⁴.

This analysis is becoming highly important in the digital age, as an example of the somewhat misguided way copyright functions. The “greatest challenge” for any form of copyright regime in a digital age, is how it operates in “the age of social production”⁶⁵. Due to a lack of legal clarity on topics such as whether copyright can in fact be used to protect characters and settings, the rights of ownership in these literary elements have been left in “such an ambiguous condition that once again property adheres to those who can muster the largest armies...of lawyers”⁶⁶. Thus, copyright holders and license-holders for the underlying work have been able to undertake a ‘land grab’ of part of the public domain (characters and locations), using jurisprudence to encroach on commons best left to the masses. The effect of this ‘land grab’ in a digital age, and whether new legislation such as the Copyright in a Digital Single Market Directive can constrain it, remains to be seen.

⁶⁴ *Cofemel v G-Star Raw; Levola Hengelo v Smilde Foods* (n14).

⁶⁵ N Elkin-Koren and EM Salzberger (n12) 346.

⁶⁶ JP Barlow (n31) 14.