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Justin Scharff
Touro Law Center

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THE COPYRIGHTABILITY OF FICTIONAL CHARACTERS: WHY HARRY POTTER, ARYA STARK, AND MATRIM CAUTION ARE COPYRIGHTABLE

*Justin Scharff**

I. INTRODUCTION

The wild world of fiction has captivated audiences from around the globe for thousands of years. The earliest written piece of fiction dates all the way back to 2700 B.C. with *The Epic of Gilgamesh*, which showcases King Gilgamesh and his heroic adventures through Sumerian Uruk.¹ Subsequently, hundreds of thousands of fictional stories have been written by authors from every country. Children of my generation remember growing up and reading J. K. Rowling's *Harry Potter*, a story about a boy wizard with a scar on his forehead who went to Hogwarts and faced off against evil. Others will remember the tale of Matrim Cauthon and humanity's battle against the Dark One in Robert Jordan's *The Wheel of Time*. Today, millions of people are captivated by watching HBO's adaptation of George R. R. Martin's *A Song of Ice and Fire*, a book series about determining who will sit atop the Iron Throne.²

*B.A. in Political Science, St. Joseph's College, J.D. Candidate 2020, Touro College Jacob D. Fuchsberg Law Center. I would like to thank my family for their unconditional support throughout my three years in law school. I will be forever grateful for the support they have provided me. I would also like to thank Touro's current Editor-in-Chief, Nicholas Maggio. His assistance in the publishing process has been vital. Finally, I would like to thank Professor Rena Sepowitz for everything she has done for me and the law review. Not only has she helped edit two of my notes, but she has provided invaluable advice to countless other student authors.

¹ See Tom Drake, *The Epic of Gilgamesh: The First Epic, from The First Civilization*, https://webpages.uidaho.edu/engl257/Ancient/epic_of_gilgamesh.htm (last visited Mar 13, 2019).

² See John Koblin, *Game of Thrones' Finale Sets Ratings Record*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/arts/television/game-of-thrones-finale-sets-ratings-record.html> (last visited Mar 12, 2019) (detailing that over sixteen million people watched the season finale of *Game of Thrones*.) It is important to note that while the series

In all these works, people are not only invested in the overall story, but in the individual characters as well. Most of the readers and watchers of *Game of Thrones* have incredibly strong beliefs in who they believe will win the Iron Throne. Some people wanted to see Stannis Baratheon on the throne, while others believed that Daenerys Targaryen should make her rightful return to Westeros as queen.³ Other readers, including George R.R. Martin's wife, have one plea: please do not let Arya Stark die.⁴ This illuminates the fact that these characters have an influence that exists outside the main story. All of this leads to a question when it comes to copyright law: are these fictional characters copyrightable? While the overall literary work would be copyrightable,⁵ there is a question of whether individual characters can receive copyright protection. While the Copyright Act is itself silent on whether individual characters are entitled to copyright protection,⁶ a majority of courts have held that individual characters are eligible for copyright protection.⁷ However, despite recognizing that individual characters can receive protection, the courts are split on how to determine when a literary character is copyrightable. A majority of courts follow the distinctive delineation test, which was set forth by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*⁸ Other courts follow the Ninth Circuit's story being told test, which was set forth in *Warner Bros. Pictures v. Columbia Broadcasting System.*⁹

The author will argue that the distinctive delineation test put forth by Judge Learned Hand eighty-nine years ago is the most

name is a *Song of Ice and Fire*, it is commonly known as the *Game of Thrones* series. This was the title of Martin's first book.

³ Stannis Baratheon is the brother of the previous king of Westeros, Robert Baratheon. Meanwhile, Daenerys Targaryen is the daughter of a bloodline that used to rule Westeros before a rebellion.

⁴ George R.R. Martin's wife has jokingly threatened to leave him if Arya Stark dies. See Hannah Wigandt, *George R.R. Martin's Wife Will Leave Him if He Kills Her Favorite Game of Thrones Character*, Mental Floss (Jan. 31, 2019), <http://mentalfloss.com/article/572305/game-of-thrones-george-rr-martin-wife-will-leave-if-stark-sisters-die> (last visited Mar 14, 2019).

⁵ See 17 U.S.C. § 102.

⁶ See 2 Patry on Copyright § 3:164.

⁷ See *Nichols v. Universal Pictures Corporation*, 45 F.2d 119, 122 (2d Cir. 1930); *Warner Bros. Pictures v. Columbia Broadcasting System*, 216 F.2d 945 (9th Cir. 1954); *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015); 1 Nimmer on Copyright § 2.12 (2018); *But see Fuld v. National Broadcasting Co.*, 390 F. Supp. 877, 881 (S.D.N.Y. 1975) (explaining that only the manner of use and development of characters are copyrightable, not the characters themselves). The latter case is the minority view within the courts.

⁸ *Nichols*, 45 F.2d at 122.

⁹ *Warner Bros. Pictures*, 216 F.2d at 945.

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effective way to determine whether a literary character is deserving of copyright protection. This Note will not only analyze both approaches but will also argue why the distinctive delineation test should be the prevailing view and adopted in all courts. Part II will discuss the Copyright Acts of 1909 and 1976 and the Copyright Office's treatment of the issue. Part III will analyze the two landmark cases that established the two tests that are used today. Part IV will examine the application of the tests in modern cases. Part V will discuss whether Arya Stark, Harry Potter, and Matrim Cauthon meet the requirements of both tests. Part VI will discuss which test should be adopted. Finally, Part VII will conclude the Note.

II. THE COPYRIGHT ACTS OF 1909 AND 1976: SILENCE

The Copyright Acts of 1909 and 1976 do not classify characters as a separate class of copyrightable work.¹⁰ However, as noted by Patry, this has not led to a bar on the copyrightability of characters.¹¹ During the 1950s, 1960s, and 1970s, Congress embarked on a legislative journey to rewrite federal copyright law.¹² To aid Congress in creating enduring copyright law, Congress asked the Register of Copyrights to help with the process.¹³ In 1966, the Register of Copyrights submitted a supplemental report on proposed copyright legislation.¹⁴ The report prepared by the Register of Copyrights covered the entirety of the proposed bill. Specifically, the Register of Copyrights stated:

Proposals have been advanced for identifying fictional characters as copyrightable works in themselves under the bill. There are undoubtedly some characters that are developed in detail and with such breadth and depth that they emerge as separately identifiable parts of the copyrighted works in which they appear. Others, perhaps the large majority, cannot be said to represent independent creations apart from

¹⁰ See Act of Mar. 4, 1909, Pub. L. No. 60-349, ch. 320, § 12, 35 Stat. 1075, 1078 (1909); see also 17 U.S.C. § 102.

¹¹ See 2 Patry on Copyright § 3:164.

¹² Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 89th Cong., 1st Sess. 6 (House Comm. Print 1965).

¹³ *Id.*

¹⁴ *Id.*

the particular literary or pictorial works depicting them. As is equally true in the case of detailed presentations of plot, setting, or dramatic action, we believe it would be unnecessary and misleading to specify fictional characters as a separate class of copyrightable works.¹⁵

Here, the Register of Copyright explicitly stated that some characters are sufficiently developed to warrant separate copyright status. This view is still endorsed today by the Copyright Office. In the 2017 Compendium of United States Copyright Office Practices, the Copyright Office stated:

Although the copyright law does not protect the name or the general idea for a character, a work that depicts or describes a particular character may be registered if it contains a sufficient amount of original authorship. A registration for a visual art work, a literary work, or a work of the performing arts that depicts or describes a character covers the expression set forth in the deposit copy(ies), but it does not cover the character per se. In other words, the copyright in the registered work protects the author's expression of the character, but it does not protect the mere concept of the character. The copyright in the character itself is limited to the artistic rendition of the character in visual form or the literary delineation of the character's specific attributes in textual form.¹⁶

This statement highlights the general rule of copyright: ideas themselves are not copyrightable; it is the expression of those ideas that are copyrightable.¹⁷ This result runs contrary to what some courts (prior to *Nichols*) found. Before *Nichols*, characters received copyright protection not for their own individual characteristics, but as part of the works in which they were embedded.¹⁸ Therefore, if a character was copied in a second work, the substantial similarity test

¹⁵ *Id.*

¹⁶ See U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 313.4(H) (3d ed. 2017).

¹⁷ See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1266 (11th Cir. 2001) (distinguishing the protectable expression from the nonprotectable idea in a work of fiction).

¹⁸ See Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on A Legal Problem*, 35 CARDOZO L. REV. 769, 783 (2013).

would look at not the character, but the story itself. However, this legal reasoning was rendered obsolete after *Nichols*.

III. THE LANDMARK CASES FROM THE SECOND AND NINTH CIRCUITS

In *Nichols v. Universal Pictures Corporation*,¹⁹ Judge Learned Hand would declare for the first time that characters themselves are eligible to receive copyright protection independent from the plot.²⁰ The case centered around two plays, one written by Anne Nichols (“Plaintiff”) and the other written by Universal Pictures Corporation (“Defendant”).²¹ Plaintiff’s play, *Abie’s Irish Rose*, presented a Jewish boy who fell deeply in love with an Irish Catholic girl.²² After a secret marriage before a minister, the Jewish boy took the girl home to his father.²³ Notably, the boy’s father expected that the girl he married would be nothing less than an Orthodox Jew.²⁴ In order to placate his father, the boy introduced the girl as being a member of the Jewish faith. This led to the boy’s father marrying the two before a rabbi.²⁵ During the marriage celebration, the girl’s father, a devout Catholic and anti-Semite, arrived with a priest.²⁶ Once both fathers discovered the true religion of the newlywed couple, their religious animosity flared up, and both demanded that the marriage be annulled.²⁷ Eventually, the newlyweds had a child, and the desire to see that child led both fathers to make amends and accept the marriage.²⁸ The defendant’s play, *The Cohens and The Kellys*, depicted a somewhat similar story.²⁹ Here, an Irish boy fell in love with a Jewish girl.³⁰ However, instead of focusing on religion, the play dealt with the wealth disparity between the two families.³¹ The Irish boy was the son of a

¹⁹ See *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2d Cir. 1930).

²⁰ *Id.* at 121.

²¹ *Id.* at 120.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

poor police officer while the Jewish family had received a large inheritance from a great-aunt.³² The one responsible for alerting the Jewish family about the inheritance was a lawyer who planned to marry the Jewish girl.³³ Once the Jewish father found out that his daughter had a child with the Irish boy, he disowned his own daughter.³⁴ After this happened, the lawyer, who notified the Jewish family that the inheritance belonged to them, confessed that the Irish boy was the one who was entitled to the inheritance.³⁵ The lawyer proposed to split the inheritance, but the Jewish father rejected the offer and visited his daughter to hand over the property.³⁶ The two families reconciled and decided to share equally in the estate and operate the clothing business as a joint partnership.³⁷ Judge Learned Hand not only focused on the overall plot, but also on the individual characters. For purposes of the Note, the discussion of *Nichols* will be limited to the individual characters. Judge Learned Hand famously explained that:

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, or Darwin's theory of the Origin of the 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.³⁸

Here, Judge Learned Hand makes a distinction between noncopyrightable ideas and copyrightable expressions. In this case, the characters used in plaintiff's play only amounted to simple ideas

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 121.

³⁷ *Id.*

³⁸ *Id.* at 121.

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that have always existed; the characters did not cross the threshold of copyrightability.³⁹ Judge Learned Hand refers to the lovers as mere stage properties while the father figures were simply loving fathers who had a hatred of either religion or class.⁴⁰ The characters were not developed enough to warrant copyright protection.⁴¹ An Eleventh Circuit case explained this dichotomy well:

At one end of the spectrum, scenes a faire—the stock scenes and hackneyed character types that “naturally flow from a common theme”—are considered “ideas,” and therefore are not copyrightable. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459–60 (11th Cir.1994). But as plots become more intricately detailed and characters become more idiosyncratic, they at some point cross the line into “expression” and are protected by copyright.⁴²

Here, the fathers were simply characters that naturally flowed from a common theme; there was not enough development to find that the characters were distinctively delineated. Copyright protection required more character development; there had to be character development that was independent of those ideas which simply flowed from common themes. The characters needed to break away from the common literary depiction of a religious and doting father; they needed to have their own distinct style.⁴³ The test enunciated by Judge Learned Hand would soon become the majority view of the courts.⁴⁴ However, only twenty-four years after *Nichols* was decided, the Ninth Circuit proposed a different test. In *Warner Bros. Pictures Inc. v. Columbia Broadcasting System Inc.*,⁴⁵ the court not only criticized the distinctive delineation test but created new standards to judge the copyrightability of fictional characters.⁴⁶ The Ninth Circuit case dealt

³⁹ *Id.* at 122.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1266 (11th Cir. 2001).

⁴³ One of the ways to make the character in the play copyrightable would be to add distinct backstories, proper character motivations, and individualized character development.

⁴⁴ *See Zahr*, *supra* note 18, at 784 (explaining that the distinctively delineated test has become the de facto majority test).

⁴⁵ *See Warner Bros. Pictures*, 216 F.2d at 945.

⁴⁶ *Id.* at 950.

with Dashiell Hammett's book, *The Maltese Falcon*,⁴⁷ which focused on Sam Spade, a fictional detective who accepted a case from Ruth Wonderly. Throughout the book, Sam Spade attempted to determine who killed his partner, the location of Ruth's sister, and the hiding place of the Maltese Falcon. The book concluded with Sam Spade's solving a variety of mysteries that arose during the investigation. After the book was published, Hammett would eventually sign away his rights to Warner Brothers for the purpose of producing a movie.⁴⁸

The court started its analysis of the contractual issues that arose during the case.⁴⁹ After ruling that Hammett did not sign away his right to use his characters, the court stated, "[i]t is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of protection afforded by the copyright."⁵⁰ Here, the court described what is now known as the story being told test. The court offered the legal theory that copyright protection is not afforded to characters that are simply the chessmen for the plot of a story; a character that is simply a vessel for the plot will not be awarded independent protection. This test created a very high bar for the copyrightability of literary fictional characters. The story being told test dictates that the focus cannot solely be on the story; there needs to be a distinctive focus on the characters as well. The court decided that the ultimate characters of the story did not matter. Sam Spade could have been easily interchanged with another detective and the story would not have changed much. Instead, what mattered most was the actual story; it was the intrigue and plot that captivated the readers. The characters were just a means to facilitate the plot. Simply put, the story being told was not of Sam Spade's character development as he investigated the sinister dealings, but the actual plot itself.⁵¹ This approach has been criticized by many as setting the bar too high for

⁴⁷ *Id.* at 948.

⁴⁸ *Id.* One of the disputes in the case was whether Hammett signed away the right to use the characters featured in *The Maltese Falcon*. The court found that Hammett did not sign away the rights to his characters, but since the characters were not copyrightable, Warner Bros. was free to use Hammett's characters in subsequent works. *Id.*

⁴⁹ *Id.* at 948-49. For purposes of this Note, it is important to focus solely on the issue of how the court approached the copyrightability of the fictional characters in the book.

⁵⁰ *Id.* at 950.

⁵¹ In dicta, the court seemed to implicitly reject *Nichols*. The court posited that no matter how distinct the character is, if the character's only purpose is to move the plot along, that character can never receive copyright protection. The character needed to have actual character development.

fictional characters.⁵² Furthermore, some courts have used the story being told test to offer the legal theory that fictional characters cannot be copyrighted.⁵³ Finally, in subsequent cases, the story being told test has been limited, especially when it comes to fictional characters that appear in pictorial works.⁵⁴

IV. MODERN APPLICABILITY OF THE DISTINCTIVE DELINEATION TEST AND THE STORY BEING TOLD TEST

Throughout the years following these two decisions, the court has awarded copyright protection to numerous fictional characters.⁵⁵ In *Bach v. Forever Living Prod. U.S., Inc.*,⁵⁶ the court analyzed both tests. This case focused, in part, on whether Jonathan Livingston, a seagull, warranted copyright protection.⁵⁷ At first glance, one might think that a fictional seagull would never warrant copyright protection. After all, a bird can be easily distinguished from human beings with backstories and superpowers. Moreover, a seagull is much different from the monsters who have come to terrorize the dreams of children. However, it is possible for a simple seagull to warrant copyright protection. Jonathan Livingston was a seagull who was tired of the monotonous life of scrounging for food on the beach.⁵⁸ He was fed up with his everyday routine; the seagull wanted more fulfillment out of his life.⁵⁹ In order to change himself, Livingston wanted to fly faster

⁵² See Zahr, *supra* note 18, at 784; See also Nimmer on Copyright § 2.12 n.15 (2018) (explaining that multiple courts have found that the test offered in the case was wrong).

⁵³ See *Hospital for Sick Children v. Melody Fare Dinner Theatre*, 516 F. Supp. 67, 73 (E.D. Va. 1980) (arguing that individual fictional characters may not be copyrightable); See also Nimmer on Copyright § 2.12 (2018).

⁵⁴ See *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978). This case shows that courts are more willing to grant copyright protection to fictional characters when they appear in pictorial works. This will be explored in the discussion of *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004).

⁵⁵ See *Bach v. Forever Living Prod. U.S., Inc.*, 473 F. Supp. 2d 1127, 1133 (W.D. Wash. 2007). The court in this case provides a useful list of cases that have awarded copyright protection to fictional characters. For a few of the more important decisions, see *Anderson v. Stallone*, 11 U.S.P.Q. 2d 1161, 1165–67 (C.D. Cal. 1989); see *Metro–Goldwyn–Mayer, Inc. v. Am. Honda Motor Corp.*, 900 F. Supp. 1287, 1297 (C.D. Cal. 1995); see *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004).

⁵⁶ See *Bach v. Forever Living Prod. U.S., Inc.*, 473 F. Supp. 2d 1127 (W.D. Wash. 2007).

⁵⁷ *Id.* at 1135.

⁵⁸ *Id.*

⁵⁹ *Id.*

and higher than any seagull had ever flown.⁶⁰ He wanted to experience a different life; he knew that there had to be something less mundane.⁶¹ Throughout the story, Livingston developed a multitude of philosophical ideas about what life was and how to handle conformity.⁶² At the end of the story, Livingston returned to the flock of seagulls that he had left at the start of the book.⁶³ He taught them the wonders of individuality; he enlightened the flock on finding new meaning in life.⁶⁴ Ultimately, Livingston imparted the message that it is important not to conform to society's belief; a seagull needs to become his or her own bird.⁶⁵ After converting the flock into establishing its own identity, Livingston went off to teach future flocks how to break the chains of a normal seagull's life.⁶⁶ As can be seen from the plot, Livingston is more than just a common seagull. Throughout the book, Livingston was sufficiently delineated to be more than a bird one sees at the beach; he became a philosophical, inspirational seagull. In determining whether Livingston warranted copyright protection, the court enumerated various factors to consider. The court wrote, "In determining whether a character deserves copyright protection, courts look at the many elements of the character—visual depictions, name, dialogue, relationships with other characters, their actions and conduct, personality traits, and written descriptions—to determine whether it is sufficiently delineated such that it is a unique expression."⁶⁷ In arguing against Livingston receiving copyright protection, the defendants stated that the seagull was simply that, a seagull.⁶⁸ The defendants argued that a seagull is akin to a stock character that Judge Learned Hand brought up in *Nichols*; he is merely a seagull who spreads inspirational messages about life and change. Time and time again, there have been characters who have tried to enlighten other peers in their group about philosophy and the dangers of conformity. These characters should never receive copyright expression; they are akin to the foppish steward or the riotous knight. However, the court rejected this argument. While a

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1134.

⁶⁸ *Id.* at 1135.

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common seagull could not receive copyright protection, Livingston was more than that. The court stated that “Jonathan Livingston Seagull is a well-defined character—an ordinary seagull named Jonathan Livingston Seagull who is determined to fly higher and faster, who transcends his beginnings, and who teaches others to do the same.”⁶⁹ Throughout the story, Livingston developed as a character through experiences with other seagulls. At the end of the story, he was a completely different entity than he was at the start of the journey; he found hope in a brighter future. Not only would Livingston find copyright protection under the distinctive delineation test, the court stated that Livingston would also receive copyright protection under the story being told test.⁷⁰ In only a few sentences, the court stated that the book was not about a generic journey to achieve enlightenment.⁷¹ Instead, the book was specifically about Livingston’s journey to go farther than any seagull has gone before. Livingston was not simply a chessman of the story; Livingston was the character that was being developed throughout the story. This was unlike Sam Spade; Spade was simply a detective who investigated crime. Livingston himself developed into a new seagull. The story was not about a general journey of transformation, but Livingston’s personalized transformation. Finally, the defendants attempted to argue that granting copyright protection to Livingston would monopolize the themes of achievement, enlightenment, and perseverance.⁷² Despite the defendants’ fearmongering, the court rightfully rejected this argument. The copyright only protects Livingston as a character; there are still limitless ways to describe the themes presented in the book. The decision to grant protection in no shape or form limits a potential author from describing the journey to enlightenment. There are still hundreds of thousands of ways to do so. It just cannot be done through a seagull that shares the same character traits as Livingston.⁷³ Another case that helps define the issue of copyrightability of fictional

⁶⁹ *Id.* at 1135-36. Interestingly, the court stated that it does not matter that the character has not been delineated over time like E.T. or Godzilla.

⁷⁰ *Id.* at 1136.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Moreover, it is still possible to write a story that features a seagull with a human personality. The copyright protection simply protects a seagull with the same makeup as Livingston. It is the makeup of the character that is protected, not the idea.

characters is *Gaiman v. McFarlane*.⁷⁴ This case involved a claim that two of the comic book characters in the comic series *Spawn* were not copyrightable.⁷⁵ The defendant claimed that since Medieval Spawn and Cogliostro, the two comic book characters in contention, were not copyrightable, the jury verdict should have been reversed.⁷⁶ To start off the relevant section of analysis, Judge Posner rightfully articulated that not all fictional characters are eligible for copyright protection. Posner stated:

If a drunken old bum were a copyrightable character, so would be 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, a masked magician, and, in Learned Hand's memorable paraphrase of *Twelfth Night*, "a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress."⁷⁷

Posner went on to state that if every character could receive protection, it would be almost impossible to write fiction. Every potential author would need to worry about infringement whenever utilizing a stock character. This would stymie fictional writing and create monopolies on certain types of characters. Posner drew a distinction between the stock character and the character that has a specific appearance and name. The copyright owner is not claiming copyright protection on the stock character,⁷⁸ but on the character that the owner created. Posner stated that this is enough to establish protection. He stated, "Cogliostro's age, obviously phony title ("Count"), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character. No more is

⁷⁴ See *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004). If the reader is interested, the author would recommend reading this opinion. Judge Posner's brilliant personality can be seen throughout this opinion. Moreover, for purposes of this Note, the focus will be on the specific issue of character copyrightability. This case focused on a variety of copyright issues, including contractual, joint authorship, and statute of limitations questions.

⁷⁵ *Id.* at 650.

⁷⁶ *Id.* at 657.

⁷⁷ *Id.* at 660.

⁷⁸ For context, the character Cogliostro was an unexpectedly intelligent wino. The copyright was not based on this idea but on who Cogilostro was outside this stock character.

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required for a character copyright.”⁷⁹ Moreover, Posner seemed to utilize the distinctive delineation test in *Gaiman*. When discussing the comic book characters, Posner stated that “he [the fictional character] became sufficiently distinctive to be copyrightable.”⁸⁰ This language echoes the distinctive delineation test.⁸¹ Finally, Posner chastised the decision made in the famous Sam Spade case.⁸² Posner clearly stated that the decision not only was wrong but has been killed without the usual obsequies in the Ninth Circuit itself.⁸³ Posner noted that even if the case was controlling in the circuit, the caselaw would not apply because of the differentiation between characters in literary works and graphic works.⁸⁴ When reading a description of a character in a novel, the reader is the one who has to imagine what the character looks like.⁸⁵ However, in a graphic work, not only is there a description of who the character is, but the author has provided the reader with a picture. This artistic depiction brings the character to life. Despite it being easier to achieve copyright protection in a character that is featured in a graphic work, it is still very much possible to achieve protection in a literary work as well. Finally, Nimmer points out that copyright protection for characters can extend outside the human and animal kingdom.⁸⁶ While fiction usually pertains to humanoid and animal characters, there are times when inanimate characters are featured prominently.⁸⁷ In a case about the famous Batmobile, the Ninth Circuit described the requirements that inanimate characters must satisfy to qualify for protection.⁸⁸ The court stated,

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

⁷⁹ See *Gaiman*, 360 F.3d at 660.

⁸⁰ *Id.* at 661.

⁸¹ See *Nichols*, *supra* note 19.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Posner also, correctly in my mind, states that “kids lose a lot when they don’t read fiction, even when the movies and television that they watch are aesthetically superior.”

⁸⁶ See 1 Nimmer on Copyright § 2.12 [5] (2019).

⁸⁷ There are some good fictional work that feature inanimate objects with human characteristics. For the reader’s pleasure, the author would recommend *Toy Story* and *Cars*.

⁸⁸ See *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015).

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.” It cannot be a stock character such as a magician in standard magician garb. 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.⁸⁹

It is notable that the Ninth Circuit offered a heightened standard for fictional inanimate object characters. The court seemed to use a modification of the distinctive delineation test.⁹⁰ The court stressed the need for inanimate characters to be especially distinctive, which makes sense as they are often silent. However, as the Ninth Circuit pointed out, even characters that do not speak can warrant copyright protection.

V. WHETHER ARYA STARK, HARRY POTTER, AND MATRIM CAUTION MEET THE REQUIREMENTS OF BOTH TESTS

With the creation and widespread use of the internet, the way fictional characters are treated has changed dramatically. Back in the days before the internet, book clubs commonly existed among friend groups.⁹¹ A list of books would be distributed before the meeting, and the group members would read the books and then meet to discuss what they read. If a fictional character particularly appealed to a reader, one could only discuss the character within the friend group. If the character was lucky enough to receive national attention, one could possibly go to certain fan group meetings. The internet was a gamechanger. Now, in a few clicks, it is possible to interact with fans of a literary character from around the world. Not only is it easier to discuss characters with people, but information about these characters can be easily found without having access to the source material.

⁸⁹ *Id.* at 1021.

⁹⁰ The court distinguished this case from *Warner Bros* by stating that, “a comic book character has physical as well as conceptual qualities and is more likely to contain some unique elements of expression than a purely literary character. *See Id.* at 1019.

⁹¹ The author is not claiming that book clubs have gone the way of the buffalo. They still happen regularly, especially at libraries. However, there are a multitude of new ways to discuss books.

Almost every notable book series has a fan-made wiki that hosts a variety of information about the plot and characters. Some of the more passionate fans have detailed every single appearance the character has made in the series.⁹² This is especially useful in tracking character development or refreshing one's recollection when the author takes multiple years to publish the next book. This has resulted in intense fandoms for certain fictional characters. These people spend hours discussing the characters from their abilities in battle to possible romantic relationships.⁹³ All of this shows the importance of allowing an avenue for authors to copyright individual fictional characters. Today, more than ever, a book is not all about the story. It is about the characters that comprise the story. The first character that will be discussed is Arya Stark. Arya comes from *A Song of Ice and Fire*,⁹⁴ a series of books written by George R.R. Martin. While the books themselves were popular, the series exploded in popularity due to HBO's adaptation. As of today, the television adaptation, which is titled *Game of Thrones*, has a huge following. The third episode of Season 8, which was broadcasted on April 28, 2019, had millions of viewers and cost over \$15 million to produce.⁹⁵ *Game of Thrones* features multiple plotlines that are interwoven with each other. At a fundamental level, the story is about who will rule the Iron Throne of Westeros. Many of the potential conflicts throughout the series stem from multiple noble families attempting to jockey for positions of power. While the ultimate end goal of the book is figuring out the rightful ruler of the Iron Throne, many characters travel around the fictional world to accomplish different tasks that are unrelated to the war surrounding the throne. One of these characters is Arya Stark.

The Stark family is a noble house from the northern region of Westeros. There, the Starks have control over Winterfell and are known as the Wardens of the North. At the start of the books, Arya is

⁹² For a good example, look at Arya Stark's wiki page. See https://gameofthrones.fandom.com/wiki/Arya_Stark.

⁹³ While researching this Note, I learned that people often spend hours pairing up certain characters romantically. This has come to be known as "shipping" in the literary world. I cannot understate just how passionate these "shippers" are. Not only do they produce hundreds of pages of fanfictions about potential couples, but they also draw fan art and badger content creators to make their "ship" canon (as in come true in the story).

⁹⁴ The show is commonly referred to as *Game of Thrones*.

⁹⁵ See Hannah Preston, *How much did the Battle of Winterfell cost HBO?*, NEWSWEEK (Apr. 28, 2019), <https://www.newsweek.com/game-thrones-season-8-episode-3-how-much-did-battle-winterfell-cost-hbo-1407934>. The episode lasted well over an hour and contained numerous CGI scenes including dragons and fire.

a typical tomboy. She does not fit in with her sister; she has no desire to wear girlish dresses and learn proper etiquette. She wants nothing more than to practice sword fighting with the butcher's boy. However, everything changed when the King of the Iron Throne, Robert Baratheon, came to Winterfell. Due to Robert's request, Ned Stark, Arya's father, took his family to King's Landing, the home of the Iron Throne, to serve as the Hand of the King. As a result of meddling and political conspiracies, Ned Stark is eventually beheaded for supposed treason. The ensuing political chaos forces the members of the Stark family to either escape or be held against their will. While fleeing King's Landing, Arya had a multitude of experiences that changed her entire outlook on life. She changed from a free-spirited tomboy to a bitter girl who wants nothing more than to cross names off a list. The list contains people who killed her father or had wronged her in the past. These are people that one day she plans to kill. Eventually, she ends up in Braavos, a foreign country, and trains with the Faceless Men to become an assassin who will ultimately take revenge. In the show,⁹⁶ Arya masters her assassin training and comes back to Westeros in order to carry out her revenge. At this point, her family has been decimated and her home destroyed.⁹⁷ Bitter, but not broken, Arya is able to reunite with the remaining members of the Stark family. Utilizing her assassin skills, she has managed to remove numerous names on her list. In episode 3 of Season 8, Arya saved Westeros by killing the Night King, who was built up for over eight years to be the big bad villain of the series. As a result of Arya's literary description, character development, and relationship with others, she would easily receive copyright protection in both the book and HBO series under the distinctive delineation test.⁹⁸ Courts have stated that one needs to look at "visual depictions, name, dialogue, relationships with other characters, their actions and conduct, personality traits, and written descriptions."⁹⁹ Before the characters appeared in the show, George R.R. Martin went to painstaking lengths to describe what each

⁹⁶ For the majority of the seasons, the show producers followed Martin's books. However, due to Martin's notoriously slow release schedule, the producers ended up running out of content. The last two seasons are not Martin's creations, but the show writers.

⁹⁷ Arya's father had his head cut off early in the series. Arya's mother, Catelyn Stark, and older brother, Rob Stark, were killed during a wedding. Rickon Stark, Arya's youngest sibling, died in a hail of arrows.

⁹⁸ Many other characters in the book would qualify for copyright protection. For example, Jon Snow and Tyrion Lannister would easily satisfy the distinctive delineation test.

⁹⁹ See *Bach*, *supra* note 56.

character looked like. Through other characters, Martin was able to paint a verbal picture of what Arya looked like and who she was. Theon Greyjoy, a vassal of the Stark Family, described Arya as “Arya Underfoot. Arya Horseface. Robb’s younger sister, brown-haired, long-faced, skinny as a stick. Always dirty.”¹⁰⁰ Catelyn Stark, Arya’s mother, stated that,

Arya would often be [mistaken by Ned’s visitors as] a stableboy if they rode into the yard unannounced. Arya was a trial, it must be said. Half a boy, half a wolf pup. Forbid her anything and it became her heart’s desire. She had Ned’s long face, and brown hair that always looked as though a bird had been nesting in it. I despaired of ever making a lady of her. She collected scabs as other girls collected dolls, and would say anything that came into her head.¹⁰¹

This is the type of imagery that provides vivid context of who Arya is. From the words on the page, the reader can imagine what Arya Stark looks like. Moreover, not only does the reader know what she looks like, but the reader knows her personality. She started off as a foppish tomboy and ended as a bitter assassin who can change her face at will. Furthermore, her character interactions are memorable. Arya has had multiple chapters dedicated to her point of view; she was the one narrating her own story in these chapters.¹⁰² Martin has dedicated numerous pages to describing what Arya looks like, what type of person she is, and how she has developed. Her interactions with other characters span pages. She would easily receive protection under the distinctive delineation test. However, it is a closer call when it comes to the story being told test. That test considers the story itself; the character cannot be a simple chess piece for the story. The main story of the *Song of Ice and Fire* is the battle between noble families for the Iron Throne. While Arya is an important character, she does not play that big of a role in that particular battle. Throughout the series, she has developed her character and powers far away from King’s Landing. While she will most likely have an impactful role in the books, she has yet to have a direct impact on determining who will

¹⁰⁰ See *A Dance with Dragons*, Chapter 12, Reek I.

¹⁰¹ See *A Clash of Kings*, Chapter 55, Catelyn VII.

¹⁰² See *A Clash of Kings*, Chapters 30, 38, and 37; *A Storm of Swords*, Chapters 39, 43, and 47.

sit on the Iron Throne. Moreover, in a world as vast as *A Song of Ice and Fire*, it is incredibly hard to pinpoint a single storyline. There are multiple plotlines that stretch across thousands of pages; it is important to consider characters in an individualized setting. Some courts, like the court in *Bach*,¹⁰³ would likely state that while it is true that Arya is not moving the main storyline forward, she is moving her own storyline. Arya has a distinct story arc in the book. While it does not involve the main story arc, it is still her story. Arya is not some faceless assassin who simply moves the story along; she is an individual character who develops as a human and has individualized human interactions. Therefore, Arya would most likely pass the story being told test if the court considers her storyline distinctive and apart from the main storyline. One of the reasons that Arya Stark is discussed in this Note is to highlight the ability of a minor character to receive copyright protection.¹⁰⁴ It is easy to make the argument that world-renowned main characters such as Mickey Mouse and Godzilla deserve copyright protection. These characters are not only beloved by hundreds of millions of people, but they have also been adapted to all different types of media. These characters are at the forefront of the series that they represent. However, minor characters, if developed enough, should be just as entitled to receive copyright protection as major characters. The minor characters simply need to be distinctively delineated. While *Games of Thrones* is extremely popular in the present time, J.K. Rowling's *Harry Potter* series received a similar level of popularity only a few years ago.¹⁰⁵ *Harry Potter* focuses on a young wizard. The young wizard, aptly named Harry Potter, was the only surviving member of his family after an attack from Lord Voldemort, the main villain of the series. In the process, his parents died protecting him. After surviving the attack, Potter was marked with a distinctive lightning bolt scar on his forehead. In order to ensure that Potter was safe from the forces of evil, the wizardry world sent

¹⁰³ See *Bach*, *supra* note 56 and accompanying text.

¹⁰⁴ The author understands that some readers may not think that Arya is a minor character. This argument is strengthened by Arya's role in the HBO series as of late. However, in the grand scheme of the books, she is a relatively minor character. While her chapters in the book series are enjoyable, she has not played a major role in the ultimate battle for the Iron Throne. When the new book eventually comes out, it will be interesting to see if Martin elevates Arya to a main character. There is also a question of what makes a character a main or minor character.

¹⁰⁵ Despite the popularity of other fictional series, *Harry Potter* has continued to be popular and inspirational to younger generations.

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Potter to live with his non-wizard relatives. However, Potter was never accepted by his new family and was ostracized. Potter was forced to live under the staircase and was exposed to subhuman conditions.

Eventually, Potter would be sent off to the magical school of Hogwarts. While at school, Potter was placed in House Gryffindor and made numerous friends along the way. He would become the star Quidditch player, a sport that is played on flying broomsticks. At the end of the series, Potter would master the art of magic, defeat Lord Voldemort, and bring peace to the wizarding world. Unlike Arya Stark who is more of a minor character, Harry Potter is the main focus of the story. Potter is the boy who survived; he is the one that every other student is interested in. The story revolves around Potter; it was inevitable that he would be the one to face Lord Voldemort at the end of the books. Therefore, it is much easier to make the case that Harry Potter deserves copyright protection. Much like Arya Stark, Potter has been described page after page. Potter most famously has jet black hair, glasses, and a lightning bolt scar that graces his forehead. This description is one that jumps off the page at the reader who can instantly imagine who Harry Potter is and what he looks like. Furthermore, the character interactions are ones that focus squarely on Potter. Potter eventually becomes a Gryffindor hero by winning Quidditch matches and earning favor points for his house. Moreover, Potter also develops over the series. While Potter starts as a sheepish wizard due to his upbringing, he eventually breaks out of his shell and faces Lord Voldemort head-on. Potter, along with his friends, went on a journey to find all of the necessary equipment to kill Lord Voldemort. Through several books, Potter matures and becomes a new person. As a result, Potter will easily pass the distinctive delineation test.

Furthermore, Potter would easily receive copyright protection under the story being told test. The story being told is not the wizarding world's battle against Lord Voldemort. Instead, it is all about Potter's journey and eventual battle against Lord Voldemort. It was not a generic story where Potter simply was the vessel that drove the story. Instead, it was Potter's journey; it was his battle. Therefore, Harry Potter would receive copyright protection under the story being told test. Finally, it is important to look at one of the longest fictional series of all time, Robert Jordan's *The Wheel of Time*. Jordan's series

spans fifteen books that detail the fight against the Dark One.¹⁰⁶ The story starts out with a small town, Emond's Field, oblivious to the world around it. The only problems that the town faced were a cold winter, marital problems, and restless children. However, everything started to change when the Dark One awoke from his supposed eternal sleep.

Eventually, monsters known as Trollocs would descend on the town of Emond's Field. Luckily, an Aes Sedai,¹⁰⁷ known as Moiraine, was in town and saved the village. When she left, she took three young boys from the village with her. She took Rand Al'Thor, the main character of the series, Perrin Aybara, and Matrim Cauthon. Each of these three boys was considered by Moiraine to be Ta'vern, or individuals whose fate was used to correct the wheel of time. While Rand is the ultimate main character of the book, Perrin and Mat have equally important parts. Specifically, Mat was the one who, from the start of the book, rejected his inevitable fate. He wanted absolutely nothing to do with Moiraine, magic, his apparent destiny, or the impending end of the world. He wanted to sit idly by and enjoy a calm, relaxing life in his hometown. However, Mat's Ta'vern nature did not allow this to happen; his fate dragged him all over the world. Mat's most defining feature in the fifteen-book series is his extraordinary luck. Whenever Mat felt the dice rolling in his head, he knew something bad was going to happen. His luck made him an incredibly successful gambler and survivor of multiple assassination attempts. Moreover, through a cursed dagger and a magical horn, Mat ended up not only learning multiple old languages but became a master general.

Mat, in a series of amusing events, would become one of the greatest tacticians the world had ever seen. His gambits during some of the ensuing wars and the final battle impressed even the most steadfast of leaders. Moreover, through sheer luck and his Ta'vern nature, Mat ended up marrying one of the main antagonists of the series and preventing a war between two nations. In the end, Mat played an

¹⁰⁶ Robert Jordan died before finishing the series. Realizing his impending fate, Jordan wrote down notes of what he wanted to happen and in the event of his death, he asked famed fiction author Brandon Sanderson to finish his work. Sanderson wrote the last three books in the series.

¹⁰⁷ Aes Sedai are the female magic users of the world. In Jordan's world, only females can safely use magic. One of the main plot points is that men who can practice magic are either killed, made so they cannot use magic, or hide away. The main character, Rand Al'Thor, is a magic user who is the Dragon Reborn. The tower of Aes Sedai attempts to control Rand, but he eventually escapes and leads a revolution.

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integral role in the story. However, it is important to note that it was Rand Al'thor who eventually defeated the Dark One. *The Wheel of Time* is different from the Harry Potter series and the *Song of Ice and Fire* in one distinct way: there is no proper television or movie adaptation.¹⁰⁸ Therefore, the only source material available is the book itself. Despite the fact that Mat is only a side character, he should be granted copyright protection under the distinctive delineation test. More than the two previous authors, Jordan spent pages upon pages defining each character. A reader would know exactly what type of person Mat was from the beginning. In one of the most memorable scenes of the series, Mat states, "I'm a gambler, a farmboy, and I'm here to take command of your bloody army!"¹⁰⁹ These words capture the progression of Mat as a character. He started off as a lowly farm boy who played pranks on the residents of his town.¹¹⁰ However, shortly after the story began, Mat's tremendous luck turned him into a gambler who would risk it all. Finally, he became a general, earning the respect of troops far and wide. This would often lead Mat into situations that would exasperate him. However, he would always pull through in the end. As Mat would always say, "Dovie'andi se tovyo sagain (It's time to toss the dice.)"¹¹¹ Furthermore, the books often focused on Mat's relationship with others. Mat hated the Aes Sedai and did everything in his power to escape from them. However, his fate always brought him back to them. Moreover, while Mat would attempt to shirk his duties, he would always come through and earn the respect of his troops. Mat would eventually become known as the Son of Battles, the Gambler, and the Lord of Luck. Due to Mat's distinct personality traits, relationship with other characters, and own personal storyline, Mat would easily satisfy the distinctive delineation test. However, there would be potential problems when it comes to the story being told test. Ultimately, the story being told in *The Wheel of Time* is the battle against the Dark One. The Dragon Reborn would fight the Dark One, and if the Dragon lost, the world would be doomed to

¹⁰⁸ There was a pilot episode produced in 2015, however it was poorly received and without the permission of Jordan's widow. Excitingly, a television adaptation headed by Amazon is planned for a late 2020 release.

¹⁰⁹ See *The Fires of Heaven*, Chapter 51.

¹¹⁰ One common literary archetype is to have a character who is a person of low stature become elevated to new heights through divine intervention or in-universe events. The literary concept of starting as a lowly individual is not copyrightable; it is the character's development throughout that journey that can possibly earn copyright protection for the character.

¹¹¹ See *The Fires of Heaven*, Chapter 53.

eternal darkness. Fortunately, Mat was not the Dragon Reborn. Instead, he was the Dragon Reborn's friend and would often be sent on tasks throughout the world. Due to his incredible luck and helpful supporting cast, Mat would be successful in any task assigned to him. Nevertheless, his role was not to fight the Dark One directly. Therefore, it is questionable if Mat's story is really the story being told. The final fight in the series is not between Mat and the Dark One; it is between the Dragon Reborn and the Dark One. However, when one looks at Mat's entire story arc, along with modern jurisprudence, it is likely that Mat would satisfy the story being told test.¹¹² While Mat is not the Dragon Reborn, he does have a distinct storyline. Mat is one of three Ta'vern; he is one of three individuals that go against fate. Mat has hundreds of pages dedicated to his journey throughout the world. The story focuses on his development, his luck, and his extraordinary prowess on the battlefield. Moreover, there is great focus on Mat's relationship with women throughout the series, whether it be Aes Sedai or his eventual wife. All of this shows that Mat has a distinct storyline within the series itself; he is not a simple chess piece that moves the story along. Therefore, he would receive copyright protection under the story being told test. Mat's copyrightability benefits from the fact that he has appeared in multiple series. Through each book, Mat became more distinct as more qualities developed as he matured. *The Wheel of Time* spanned twenty-two years and consisted of fifteen books, which gave Mat plenty of time to develop as a character. However, it is possible for a series to pose a potential problem for copyright protection when the original work ends up in the public domain. Nimmer points out that "when an original work enters the public domain at a time that later installments remain[s] protected, protection for the character may continue, even though the first work in which the character was created may now be freely reproduced *in toto*."¹¹³

VI. WHICH TEST SHOULD BE ADOPTED

Judge Posner was correct when he stated that not every character should be eligible for copyright protection. It is important for there to be stock characters that aspiring authors can use to create

¹¹² See Gaiman, 360 F.3d at 660 (citing *Olson v. National Broadcasting Co.*, 855 F.2d 1446, 1452 n.7 (9th Cir.1988)); *Walt Disney Productions v. Air Pirates*, 581 F.2d at 755 n.11.

¹¹³ See 1 Nimmer on Copyright § 2.12 (2019).

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their own individualized stories without worrying about potentially infringing on another's work. However, when an author does create a distinctively unique character that has his or her own personality and character traits, it is important to be able to receive copyright protection for that character. More than ever, individual characters are becoming cult icons. This has only increased the need for individualized copyright protection for fictional characters, which is best achieved by the distinctive delineation test. This test strikes a careful balance between characters that are simply stock characters and ones that are sufficiently delineated. The test focuses not only on the literary description of the characters but how the character interacts with others and develops over time. It looks at the relationship between the characters; the test considers all of the proper elements of a fictional character. Critics of the idea that individual fictional characters can be copyrightable point out that this type of copyright protection could create monopolies on certain types of characters. If one author could receive copyright protection for a wizard, it would make it harder for other authors to write about the world of magic and wizardry. However, this concern is overstated. The copyright protection does not bar an author from gaining inspiration from stock characters that have existed for hundreds of years. Instead, it simply means that the author cannot copy that particular character with those particular traits. As an author, one can still write about a boy wizard who goes to a school of magic. The author can still have the boy wizard defeat the villain. Moreover, the author can still create a wondrous system of magic that controls the wizarding world. All of this is still available to the author. The only thing the author cannot do is take the specific character that has received copyright protection. Again, you can have a boy wizard, just not one with jet back hair, glasses, and a lightning scar. This highlights the reason that the story being told test should not be adopted by future courts. The story being told test is too narrow and would deny copyright protection to characters that are deserving of protection. In today's fiction, there are multiple storylines throughout one story; it is almost impossible to ferret out the actual main story. While it is true that the quest for the Iron Throne is the main aspect of the story in *Game of Thrones*, there are too many individualized storylines of side characters that play an important role in the story. Rejecting copyright protection for those characters would be a disservice to the author. Moreover, this would

frustrate the purpose of copyright law, as authors and artists would be denied the fruits of his or her creation.

VII. CONCLUSION

The world of fiction is ever-expanding. Today's technology has allowed the dissemination of thousands of original fictional works. Readers are exposed to fictional universes that house one-of-a-kind magic systems, political systems, and religious systems. In these worlds, characters are plunged into bizarre and outlandish situations. Often, readers are invested in those particular characters and their struggles, conquests, and defeats. When an author has created a character that is distinctive enough, it is important that the character itself is protected by copyright. Not only does this ensure that the author is adequately protected, but it allows the copyright owner to continue expanding the universe for those characters. The distinctive delineation test offered by Judge Learned Hand eighty-nine years ago accomplishes this objective. All circuits should adopt this test in order to protect the fictional characters that we all know and love.