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Mickey Mouse and Character(is)ing Copyright – “Character Protection” in UK Copyright Law?

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Mickey Mouse and Character(is)ing Copyright – “Character Protection” in UK Copyright Law?

Nouf Ali S Algazlan

Abstract

Fictional characters under UK copyright law currently face complex issues and uncertainties. As 2024 is quickly approaching, Disney’s Steamboat Willie will technically fall out of copyright. This could result in the public using the character at no cost. However, Disney could and most likely will argue that only the first version of Mickey Mouse can be used freely. This means that later versions are still protected even if they are the same character with minor updates. This dissertation examines the UK and US copyright laws on characters and aims to identify whether fictional characters are protected under the Copyright, Designs and Patents Act 1988. Based on the limited resources for UK copyright and fictional characters, this article asks: When should fictional characters like Mickey Mouse get copyright protection in the UK and what should the scope of protection be?

By examining the US approach towards this issue and its multiple tests, it is recommended that UK statutory provision should change and incorporate fictional characters under Artistic and Literary works. On this basis, this article recommends the ‘distinct delineated’ and ‘story being told’ tests. The statutory provision will also provide a strict test for characters with multiple versions. This is to restrict extra protection and provide legal certainty.

Keywords: Copyright – Disney – Fictional Characters - Law

I. Introduction

*'Disneyland will never be completed. It will continue to grow as long as there is imagination left in the world'*¹.

Intended to protect characters for a limited duration, Mickey Mouse copyright protection 'will never be completed'. It will never really expire, or fall to the public domain, so long as it 'continues to grow as long as there is imagination left in the world,' but is this even a bad thing?

The United Kingdom (UK) legislation of copyright law in characters is very unclear and a complex problem. The UK, which demonstrates a 'closed list' approach, gives copyright protection to designated classifications of the subject matter². This means that UK laws give protection to 8 types of work, including 'literary', 'dramatic,' and 'artistic'³ works. Due to its limited scope, the Copyright, Designs, and Patents Act 1988 (CDPA)⁴ often are not capable of dealing with new and separate evolving creative works such as characters. One notable matter expressed in this sense is whether the differences between the first version of Mickey Mouse (Steamboat Willie) and the Mickey Mouse we know today significant enough for Mickey Mouse to have longer and separate protection.

Approaching 2024, it is expected that Steamboat Willie will fall into the public domain. This suggests that the public might use Steamboat Willie at no cost. However, what the public will not be able to use are further versions of this character (such as Mickey Mouse with white gloves)⁵. The unclear laws surrounding this issue could lead Disney to use this strategy to always keep their characters protected (by adding minor changes e.g. the white gloves). Hence, it is unclear what the public can do once Steamboat Willie 'outlives'⁶ its copyright.

¹ Dan Heaton, 'Disneyland will never be completed...' (*The Tomorrow Society*, 26 July 2019), <<https://tomorrowsociety.com/disneyland-will-never-completed/#:~:text=Here%20is%20the%20opening%20of,our%20locations%20around%20the%20world>> accessed 7th November 2020.

² Tanya Aplin, and Jennifer Davis, *Intellectual Property Law Text, Cases, And Materials* (3rd Edn, OUP) 76.

³ Copyright, Designs and Patents Act 1988 (CDPA 1988), s 1(1)(a).

⁴ *Ibid.*

⁵ Jesse Kirkland, 'In 2024, Mickey Mouse Will Finally Enter the Public Domain – Sort of' (*The Blog*, 4 December 2019) <<https://blog.jipel.law.nyu.edu/2019/12/in-2024-mickey-mouse-will-finally-enter-the-public-domain-sort-of/>> accessed 9th November 2020.

⁶ Leslie A Kurtz, 'The Methuselah Factor: When Characters Outlive Their Copyrights' (1994) 11 U Miami Ent & Sports L Rev 438.

The article argues that copyright protection in characters should be governed by the proposed legislation. The methodology is a combination of both a doctrinal method and normative legal philosophy. From a doctrinal viewpoint, the article looks at what the law is under UK and United States (US). Thus, it asks: Do fictional characters receive copyright protection? Next, from a normative lens, this article will suggest what the law should be: if the fictional characters do receive protection, what should be the scope of such protection?

If UK copyright law remains the same in 2024, the public will be able to use Steamboat Willie. However, what they will be prohibited to do, is use the version of Mickey Mouse today⁷. This complicated example becomes even more complex when there's an evolution of the character and many more versions⁸. For this reason, when examining character protection under UK laws, it seems that "it is not impossible for copyright to be infringed by the parasitic use of another author's character"⁹. It's important to note that this does not necessarily confirm that there is copyright protection for characters, but hints that the personal characteristics of the character can constitute protection under UK copyright laws. However, as evident with other copyrighted works, character protection does not rely on 'individual elements', but the 'substantial part' that makes up the character. For example, famous sayings said by the character, its features, etc.

Nevertheless, as will be examined throughout this article, the limited UK case law highlights that fictional characters have encountered many differing judgements, which shows clear inconsistency and ambiguity¹⁰. Comparing the available character protection rules with the US, this article proposes the 'distinct delineation' and the 'story being told' tests that should be embedded into the UK copyright protection doctrine. Through case examples, this article demonstrates precisely how this proposed legislation would apply. The primary advantage of this character protection is providing the copyright owners protection over their work, whilst

⁷ Kirkland (n 5).

⁸ See e.g. *Plane Crazy* (1928); *The Gallopin' Gaucho* (1928); *Steamboat Willie* (1928); *The Opry House* (1929); *The Karnival Kid* (1929); *Blue Rhythm* (1931); *Parade of the Award Nominees* (1932); *Mickey's Garden* (1935); *Pluto's Judgement Day* (1935); *Mickey's Grand Opera* (1936); *The Whalers* (1938); *Mickey Mouse Meets Robinson Crusoe* (1938); *Mickey's Surprise Party* (1939); *Mr. Mouse Takes a Trip* (1940); *The Little Whirlwind* (1941); *Mickey's Delayed Date* (1947); *Pluto's Party* (1952); *Mickey's Christmas Carol* (1983); *Runaway Brain* (1995); *Mickey Mouse Works* (1999); *Mickey's Twice Upon a Christmas* (2004); *Mickey Mouse Clubhouse* (2006); *Epic Mickey* (2010); *Epic Mickey: Power of Illusion* (2012); *Get A Horse!* (2013); *Mickey Mouse* (2013); *Mickey Mouse Mixed-Up Adventures* (2017). See also (for differences and notes in changes): 'Mickey Mouse Through the Years' (*Disney Fandom*) https://disney.fandom.com/wiki/Mickey_Mouse_Through_the_Years accessed 20th November 2020.

⁹ Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*, Part II: Copyright and Related Rights (4th edn.) (London: Butterworths; 2011) at chapter 40.27. See also Intellectual Property Office, *Copyright and the Value of the Public Domain An empirical assessment* (2015/44) 17.

¹⁰ Josef Drexler and Anselm Kamperman Sanders, *The Innovation Society and Intellectual Property*, (EIPIN 2019) 104-105.

giving the public a balanced right. It will also mean that there's a clear consensus on when the character expires. This article finds that character protection legislation would enable clear, fair, and sufficient equal access to opportunities for expressions and character development.

Part II of the article will provide an overview of the differences between Steamboat Willie and further versions of Mickey Mouse. It will illustrate that these differences are minor, and not significant enough for it to have added protection. This part will also examine whether fictional characters are protected under UK and US laws. Unlike the UK, this part will show that the US have multiple approaches towards dealing with fictional characters under copyright law. Part III of the paper will provide a proposal for a potential legislative solution in the UK, adopting the benefits of the US approach including the distinct delineation and story being told standard. This part will also demonstrate how this provision would work and the advantages of the solution. Part IV will face the potential criticisms of the proposed provision and hence try to provide further support for the arguments being made. It is also important to note that trademark and passing off could be a factor¹¹ when it comes to character infringement, however, these topics are outside the scope of this article.

II. Copyright Protection of Fictional Characters (i.e. Mickey Mouse) in the UK and the US

Fictional characters have faced contrasting legal decisions in the UK¹². The main issue revolves around Disney's Steamboat Willie (created in 1928¹³) which is under copyright protection. However, in 2024, this iconic character could fall into the public domain¹⁴. Yet, even if the protection for Steamboat expire, Disney might possibly and easily find a way to prevent the character from being used. An argument that there are later versions of the same character (that are still protected) can be made. As a result, this could prevent the

¹¹ See also Jessica Litman, 'Mickey Mouse Emeritus: Character Protection and the Public Domain' (1994) 11 U Miami Ent & Sport L Rev 429.

¹² See e.g. *Kelly v Cinema Houses Ltd* (1928-35) MacG. C.C.; *Bolton v British International Pictures Ltd.* (1936) M.C.C. 20; *King Features v Kleeman* (1941) 2All ER 403.

¹³ See Steamboat Willie (Walt Disney Company 1928); Jim Korkis, 'Happy 90th Birthday Mickey Mouse: Fun Facts about "Steamboat Willie"' (*Cartoon Research*, 18 November 2018) <https://cartoonresearch.com/index.php/happy-90th-birthday-mickey-mouse-fun-facts-about-steamboat-willie/#:~:text=Walt%20was%20incorrect%20as%20to,October%20first%20for%20several%20years> accessed 20th January 2021.

¹⁴ Michele Debczak, 'Why Mickey Mouse Could Soon Be in the Public Domain' (*Mental Floss*, 9th January 2018) <https://www.mentalfloss.com/article/524325/why-mickey-mouse-could-soon-be-public-domain#:~:text=As%20Ars%20Technica%20reports%2C%20Steamboat,use%20Mickey's%20image%20for%20free> accessed 20th January 2021.

character from falling out of copyright protection. As discussed below, unlike the current position in the US, the limited scope of protection for characters in UK law requires an adequate change, especially in statutory provisions.

A. What are the differences between Steamboat Willie and further versions of Mickey Mouse?

A summary of the differences between Steamboat Willie and Mickey Mouse and an examination of the US case law revolving characters will demonstrate the current problems of UK legislation. In the US, *Nichols*¹⁵, as well as *Sam Spade*¹⁶, are key cases that demonstrate the scope of protection given to characters. These cases display that, unlike the UK, the US provides a clearer and more reasonable solution for dealing with characters such as Mickey Mouse.

Steamboat Willie VS. Mickey Mouse

Mickey has a variety of different versions¹⁷, including its first-ever version, Steamboat Willie. It is crucial to understand the key differences between the first version of Mickey Mouse (Steamboat Willie) and the Mickey we know today. These differences are illustrated and outlined below:

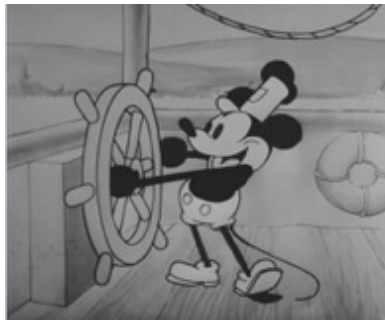


Figure 1 Steamboat Willie¹⁸

¹⁵ *Nichols v Universal Pictures Corporation*, 45 F.2d 119, (2d Cir. 1930) (*Nichols*).

¹⁶ *Warner Bros. Pictures, Inc. v Columbia Broadcasting System, Inc.* (9th Cir. 1954) 216 F.2d 945, 950 (*Sam Spade*).

¹⁷ See (n 8).

¹⁸ Steamboat-willie.jpg, 'Steamboat Willie', (Fandom) <https://disney.fandom.com/wiki/Steamboat_Willie?file=Steamboat-willie.jpg> accessed 20th January 2021.



Figure 2 Mickey Mouse¹⁹

- The Mickey we know today is in colour whilst Steamboat is in black and white.
- Steamboat does not have the white gloves which are evident in Mickey today.
- Steamboat's eye is merely a black dot, whilst Mickey shows moving eyes (that are white and black)²⁰.

Due to the uncertainties of the law in this area, Disney could prevent Mickey from falling into the public domain. Adding minor changes similar to the White Gloves leads to major consequences such as making the character 'new' again with another extra 70 years of protection. On January 1st 2024, everyone will (most likely) be able to freely use Mickey Mouse so long as they only copy the *Steamboat Willie* version accurately²¹. Nonetheless, if anyone uses a Mickey that includes White Gloves, then they might (and probably will) need to get a license or risk infringing the copyright because that particular version is not in the public domain²². This will lead to a strange situation where some versions of Mickey will always be under copyright.

This is especially relevant in situations where there are many authors. One of the strange issues about the US cases discussed below is that the copyright term was calculated differently from today. For instance, when Sherlock Holmes was written²³, US copyright protected works for 50 years from the date of publication²⁴. That's why the earlier works are in the public domain, but the later ones are not.

¹⁹ Mickey Mouse Disney 3.jpeg, 'Mickey Mouse', (*Fandom*) <https://disney.fandom.com/wiki/Mickey_Mouse?file=Mickey_Mouse_Disney_3.jpeg> accessed 20th January 2021.

²⁰ Kirkland (n 5).

²¹ See Debczak (n 14).

²² See Timothy B. Lee, 'Mickey Mouse will be public domain soon- here's what that means' (*Ars Technica*, 1 January 2019) <<https://arstechnica.com/tech-policy/2019/01/a-whole-years-worth-of-works-just-fell-into-the-public-domain/>> accessed 10 December 2020.

²³ Philip K. Wilson, 'Sherlock Holmes fictional character' (*Britannica*, 29 October 2020) <<https://www.britannica.com/topic/Sherlock-Holmes>> accessed 20th January 2021.

²⁴ 'Copyright Timeline: A History of Copyright in the United States' (*Association of Research Libraries*) <<https://www.arl.org/copyright->

One could argue that things are different now: today in the UK protection is provided for life +70 years²⁵. Therefore, if author A drew Steamboat Willie, and then ten years later added white gloves, both would fall into the public domain at the same time (i.e. 70 years after the author's death). That is true, but what happens commonly is a situation more like this: Author A draws Steamboat Willie, and then 10 years later Author B (also working for Disney) draws a new Mickey with White Gloves. If Author B dies *after* Author A, that means that the protection in the White Gloves Mickey will continue to last even though the Steamboat version is in the public domain.

B. Character Protection under UK and US Copyright Laws

There is no doubt that characters enjoy copyright protection within the works they appear in²⁶, however, the character, by itself, being protected is quite unclear. This is because characters become an important subject of the work as a whole, with their relationships among other characters and the surroundings they appear in²⁷. However, as evident from Mickey Mouse, these characters can, and commonly are, separated from their original works and then later appear in different works. As a result, problems arise as to figuring out the scope of protection given to those characters. Grimmeleman, a copyright scholar at Cornell Law School, reiterates that this issue is a “messy area for IP law”²⁸.

Nonetheless, as a basic rule in both the UK and US, commonly known as the idea/expression dichotomy²⁹ - there can be no copyright protection for *ideas*, but *expression*³⁰. A difficulty arises in identifying an idea (a talking mouse character) from an expression (Mickey Mouse, in “Steamboat Willie”). Moreover, when it comes to copyrighting characters, the stage at which fictional characters obtain copyright is subject to the character's development. A US foundational case for deciding the scope of protection given to characters is *Nichols*³¹ in which will be discussed later below.

[timeline/#:~:text=It%20was%20felt%20that%20the,were%20protected%20for%2075%20years\)>](#)
accessed 20th January 2021.

²⁵ 'How copyright protects your work' (Gov) <<https://www.gov.uk/copyright/how-long-copyright-lasts>> accessed 22nd January 2021.

²⁶ See Eleonora Rosati, 'Copyright protection of fictional characters: is it possible? how far can it go?' (*IPKat*, 28 November 2019) <<https://ipkitten.blogspot.com/2019/11/copyright-protection-of-fictional.html>> accessed 25th January 2021.

²⁷ *Nichols* (n 15); Cathy J Lalor, 'Copyrightability of Cartoon Characters' (1995) 35 *IDEA* 499.

²⁸ Lee (n 22).

²⁹ See Steven Ang, 'The Idea-Expression Dichotomy and Merger Doctrine in the Copyright Laws of the U.S. and the U.K.' (1994) 2 *Int'l JL & Info Tech* 111.

³⁰ *Baker v Selden*, 101 U.S. 99 (1879).

³¹ *Nichols* (n 15).

1. Character Protection according to UK Copyright Law

The 1988 Copyright, Designs and Patents Act (CDPA)³² demonstrates that UK copyright law protects creative “works”³³ that are original and fixed. Section 1 of the CDPA states the complete list of what counts as a “work”. For this article, the focus will be on section (a) which includes ‘literary, artistic, musical and dramatic works’³⁴. Though this list appears to be straight forward, deciding where characters fit in can be difficult. Can characters even be protected? Are characters able to be protected separately from the works they appear in? What kind of works are they?

There have been a few examples where the copyright has been rejected simply because of the difficulty and inability of placing those works amongst one of the classifications that have been specified by the CDPA³⁵, including assembly of a scene³⁶ (a photograph for the *Be Here Now* album) or even the Stormtrooper Helmet³⁷ (from the Star Wars Film). This same inability and impossibility of placing works into the specified subject matter are seen within characters. Are characters a dramatic work? An artistic work? A literary work³⁸? Moreover, determining when copyright protection in characters expires is an even more difficult task as a character can have multiple versions³⁹.

When it comes to character protection under UK copyright law, there’s a limited amount of legislation and cases that can be referred to. There seems to be no aligned agreement in character protection under UK copyright laws. For instance, in the case of *Kelly v Cinema Houses Ltd*⁴⁰, the court establishes that Sherlock Holmes, a famous and well-known character under literary works, would most likely not draw up character protection under UK copyright laws⁴¹. An important judgement by Maugham J states:

“If, for instance, we found a modern playwright creating a character as distinctive and remarkable as Falstaff, or as Tartuffe, or (to come to a recent classic) as Sherlock Holmes,

³² CDPA 1988 (n 3).

³³ *Ibid* s 1.

³⁴ *Ibid*, s 1(a).

³⁵ CDPA 1988 (n 3).

³⁶ *Creation Records Ltd v News Group Newspapers* (1997) EMLR 444.

³⁷ *Lucasfilm Ltd v Ainsworth* (2011) UKSC 39, (2012) 1 AC 208.

³⁸ Rosati (n 26).

³⁹ See (n 8), (n 20).

⁴⁰ *Kelly v Cinema Houses Ltd* (1928-35) MacG. C.C (*Cinema House*).

⁴¹ Harbottle & Lewis, ‘Sherlock Holmes and the case of characters’ copyright’ (*Harbottle*, 12 November 2013) <https://www.harbottle.com/sherlock-case-copyright-literary-characters/> accessed 12 December 2020.

would it be an infringement if another writer, one of the servile flock of imitators, were to borrow the idea and to make use of an obvious copy of the original? I should hesitate a long time before I came to such a conclusion"⁴².

Judge Maugham demonstrates unclarity and doubt regarding characters being protected by copyright. Here, Sherlock Holmes could be compared to Mickey Mouse in terms of being a "distinctive and remarkable" character. Hence, even if Mickey Mouse was "distinctive and remarkable," there is a chance that the UK courts will most likely not find it protectable.

Nonetheless, this case could be contrasted to *Bolton v British Int. Ltd*⁴³. Farewell J states that he does not believe there is anything "original"⁴⁴ in the reuse of two comic telephone repairmen in a later version of the play (that came from a current existing play). As a result, this constituted copyright infringement. One of the most influential cases that developed the scope of originality is *Walter v Lane*⁴⁵ (a case about the Earl of Rosebery who carried out famous speeches in which reporters have written down and edited, that was later published in a book). Though the court of Appeal held that this was not original, this was later rebutted by the House of Lord which formed the basis to the "skill, labour and judgement" approach to originality today.

Furthermore, fictional characters could be seen as "artistic" works. In the case of *Features v Kleeman*⁴⁶, 'Popeye,' a fictional character was held protectable under UK copyright law. It was decided that the reproduction, which was based, although indirectly, on several drawings of this character constituted infringement in the artistic copyright in those drawings and therefore of the character⁴⁷. In contrast, the name and address of Sherlock Holmes' were not able to be copyrighted in *Conan Doyle*⁴⁸. It was also held that literary characters cannot be copyrighted under UK laws. This is seen when the courts decided that both Dr Watson and Sherlock Holmes could not constitute copyright protection as per *Tyburn Productions*⁴⁹.

Hence, it seems that visual characters, like Popeye, have received copyright protection under the CDPA category of artistic works. However, there is some doubt about whether

⁴² *Cinema Houses* (n 40) 362 at 368 per Maugham J; See also Intellectual Property Office (n 9).

⁴³ *Bolton v British International Pictures Ltd* (1936) MacG. C.C.

⁴⁴ *Ibid* (1936) MacG. C.C. 20.

⁴⁵ *Walter v Lane* (1899) 2 Ch 749, (1900) AC 539.

⁴⁶ *King Features v Kleeman* (1941) 2All ER 403.

⁴⁷ *Drexel and Sanders* (n 10) 105.

⁴⁸ *Conan Doyle v London Mystery Magazine* (1949) 66 RPC 312.

⁴⁹ *Tyburn Productions Ltd v Conan Doyle* (1991) Ch. 75 CA.

characters that initially appear as literary works qualify for protection, such as Sherlock Holmes. This seems to raise two questions. 1. Is it fair that visual characters (like Popeye) receive protection, but literary characters (like Sherlock) might not? And 2. Even if visual characters like Popeye can get copyright, under what circumstances? Should all visual characters receive protection? Or just some of them?

Therefore, fictional characters under UK copyright laws remain a complex and uncertain area of law, particularly when examining the US approach, where it outlines clear tests and judgements. In particular, the story being told⁵⁰ and distinct delineated⁵¹ tests that will be examined in greater detail below.

2. Character Protection according to US Copyright Law

The US provides copyright protection to a range of different categories, including, but not limited to literary, musical, dramatic, pictorial, graphic and sculptural works as well as motion pictures and other audio-visual works⁵². Similar to the UK, for copyright protection to subsist, the work needs to be original⁵³. *Feist*⁵⁴ demonstrates that the originality requirement is important. In this case, it indicated that the scope of creativity is low, and therefore, original characteristics or traits are not formed. Hence, if there's a 'minimal degree of creativity' or 'creative spark', then that would be enough for copyright protection for characters⁵⁵.

The US has taken a different approach to copyright protection in characters. For example, *Klinger*⁵⁶, a case which added a new character attribute for Sherlock Holmes which gave him empathy, a new feature, touched on an intriguing matter of the scope to which fictional character features are able of copyright protection, particularly when some versions of those characters are in the public domain. In *Klinger*, there were 50 Sherlock Holmes stories that were in the public domain, and 10 which were still protected by copyright (because they were written later and US law at that time was slightly different to what it is now). In the last 10, Sherlock became more empathetic. In this case, Klinger wanted to use the *original* Sherlock (not the later empathetic one). The Doyle estate tried to argue that because the

⁵⁰ *Sam Spade* (n 16).

⁵¹ *Nichols* (n 15).

⁵² The U.S. Copyright Act 1976 s 102 (a)(1)(2)(3)(5)(6).

⁵³ *Ibid*, s 102 (a).

⁵⁴ *Feist Publications, Inc. v Rural Telephone Service Co.* 499 U.S. 340 (1991).

⁵⁵ Bashayer Al-Mukhaizeem, 'Copyright Protection of Fictional Characters in Film: U.K. and U.S. Perspectives' (2017) 5 Legal Issues J 1, 6.

⁵⁶ *Leslie S. Klinger v Conan Doyle Estate, Ltd.*, No. 14-1128 (7th Cir. 2014) (*Klinger*).

later Sherlock was copyright protected, Klinger was not allowed to use the *original* one⁵⁷.

It was held that it was impossible to “find any basis in statute or case law for extending a copyright beyond its expiration. When a story falls into the public domain, story elements – including characters covered by the expired copyright – become fair game for follow-on authors”⁵⁸. Judge Posner, also referring to *Silverman*⁵⁹, went on to elaborate stating that “Holmes and Watson were distinctive characters and therefore copyrightable. They were ‘incomplete’ only in the sense that Doyle might want to (and later did) add additional features to their portrayals. The resulting somewhat altered the characters... the alterations do not revive the expired copyrights on the original characters”⁶⁰.

*Klinger*⁶¹ raises two important notes: 1) The characters are distinctive and therefore could be copyrightable and 2) the changes in these characters in later versions “do not revive the expired copyrights on the original characters”⁶². This demonstrates that characters need to be developed and complex enough to be deserving of copyright. An underdeveloped character cannot constitute copyright protection. Moreover, this also can imply that even though there are changes in later versions of the characters, such changes do not necessarily allow the estate, in this case, to argue that there is separate copyright for those later versions. Though Judge Posner was quite dismissive of this argument, Disney could still argue that because Mickey now has white gloves, the public cannot use Steamboat Willie even though that version is in the public domain. Although the estate in *Klinger*⁶³ was not successful in its case, this does not necessarily mean Disney will not be.

Recently, Netflix faced a lawsuit from the estate of Arthur Conan Doyle⁶⁴. Here, the Enola Holmes movie⁶⁵ has copied the *later* version of Sherlock, and the Doyle estate argued that this later character is still protected. The makers of Enola Homes presented ‘a humane side’⁶⁶ to the character. Such trait was only presented in stories that are still protected under

⁵⁷ Heather Schubert, 'It's Elementary: Why We Need a New Copyright Standard, with Statutory Guidance, for Characters in a Series' (2015) 12 Rutgers J L & Pub Pol'y 216, 217.

⁵⁸ *Klinger* (n 56) Judge Posner at p8 referring to *Silverman v CBS* 870 F.2d 40, 49 -51 (2d Cir. 1989).

⁵⁹ *Silverman v CBS* 870 F.2d 40, 49 -51 (2d Cir. 1989) (*Silverman*).

⁶⁰ *Klinger* (n 56) Judge Posner at p13.

⁶¹ *Ibid*.

⁶² *Ibid*.

⁶³ *Ibid*.

⁶⁴ See Nedim Malovic, '[Guest post] The Casebook of Copyright: are the character traits of Sherlock Holmes protected by intellectual property?' (*IPKat*, 29th September 2020) <<https://ipkitten.blogspot.com/2020/09/guest-post-casebook-of-copyright-are.html>> accessed 3rd February 2021.

⁶⁵ 'Enola Holmes' (*IMBD*, 2020) <<https://www.imdb.com/title/tt7846844/>> accessed 4th February 2021.

⁶⁶ Alison Flood, 'Lawsuit over 'warmer' Sherlock depicted in Enola Holmes dismissed' (*The Guardian*, 22 December 2020) <<https://www.theguardian.com/books/2020/dec/22/lawsuit-copyright-warmer-sherlock-holmes-dismissed-enola-holmes>> accessed 27 December 2020.

US laws. The main issue was whether the filmmakers have infringed the copyright of an emotional version of Sherlock Holmes. As in the past, Sherlock Holmes was “aloof and unemotional”⁶⁷. The defendants argued that such traits are not capable of copyright protection as they are simple ideas. In contrast, the estate argued that Sherlock Holmes has developed and now appears as a “warm” character – therefore it should be protected by copyright. Though it appears that this case was settled, the court decision could go both ways and character copyright protection remains complex.

Further, a well-known US case, *Silverman v CBS*⁶⁸, held that the musical scriptwriter infringed copyright because the characters used were originally based on the claimant’s work. The characters used here were in the public domain. However, the court held that it constituted copyright infringement because not only were these characters used but, the updated traits that were added later were also used – this meant that it “existed in a copyrighted derivative work”⁶⁹.

This becomes problematic as it can be very difficult to detach the added original features to the unprotected and expired version of the character. As a result, this could lead to having the entire character protected which includes the features and traits that are meant to be for the public domain. These cases have a significant consequence on the reliability that works are for the public use. The UK have a different approach to ‘derivative works’ where works are protected only if they are majorly different from the existing work, this is judged on the labour of the author⁷⁰.

There are also two ways in the US to see whether characters are protected: the ‘sufficiently delineated’ and ‘story being told’ approach⁷¹. Firstly, it’s been said that the more the character’s development is, the more copyright protection they will be able to receive, and the more ‘distinctly delineated’ from the subject in which they appear in. In *Nichols*⁷², the test of *distinctly delineated* was put together by Judge Learned Hand which looked at both when a character is ‘distinctly delineated’ to fit as an expression, or an idea that is not deemed protectable⁷³. For a character to constitute copyright protection, it has to be more than just a

⁶⁷ Ibid.

⁶⁸ *Silverman* (n 59).

⁶⁹ Al-Mukhaizeem (n 55) 16.

⁷⁰ Al-Mukhaizeem (n 55) 17.

⁷¹ Aaron Schwabach, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection*, (Taylor & Francis Group, 2011) 25.

⁷² *Nichols* (n 15).

⁷³ Ibid, at 86-7.

“type” and must be adequately evolved and detailed⁷⁴. As per *Nichols*⁷⁵, characters can be copyrighted separately from the plot or the works they appear in. However, the less advanced the character, the less copyright protection they can enjoy⁷⁶.

The *Nichols*⁷⁷ ‘distinctly delineated’ test has been referenced in some cases. For instance, in a case involving *Tarzan*⁷⁸, the courts have applied the ‘distinctly delineated’ test from *Nichols*⁷⁹ and found that protection could be afforded for Tarzan as it is sufficiently delineated for copyright protection. Nonetheless, if the character was deemed not distinctly delineated, then copyright protection would have been rejected.

Moreover, although the courts in *Columbia Broadcasting Systems., Inc. v DeCosta*⁸⁰ found that there are little details which have been copied, it did not constitute copyright infringement as the character had not been included in any ‘work’⁸¹. The courts performed the *Nichols*⁸² test by asking two questions:

1. Is the character, as regarded as being original, sufficiently developed enough to constitute copyright protection? If yes,
2. Did the supposed copyright infringer copy such sufficient development of the character, and not simply a broad or abstract outline⁸³?

Another seminal case that deals with copyright protection is the *Sam Spade* case also known as *Warner Bros v Columbia Broadcasting System*⁸⁴, which initiated a strict test. This case assessed the copyright protection of characters beyond the original work in which they are in and swapped the *Nichols* ‘distinctly delineated’ test with the ‘story being told’ test⁸⁵. This case held until the character is very well-delineated to be constituted as “the story being told”, in comparison to just a character or “chessman in the game of telling the story”,⁸⁶ it

⁷⁴ *Ibid.*

⁷⁵ *Nichols* (n 15).

⁷⁶ See Schubert, (n 57) 222.

⁷⁷ *Nichols* (n 15).

⁷⁸ *Burroughs v Metro-Goldwyn-Mayer, Inc.*, 519 F.Supp. 388 (S.D.N.Y. 1981).

⁷⁹ *Nichols* (n 15).

⁸⁰ *Columbia Broadcasting Sys., Inc. v DeCosta*, 377 F.2d 315 (1st Cir. 1967).

⁸¹ *Ibid*, at 317, 153 U.S.P.Q. at 651-2.

⁸² *Nichols* (n 15).

⁸³ Lalor (n 27) 500.

⁸⁴ *Sam Spade* (n 16).

⁸⁵ Lalor (n 27) 501; See Kathryn M Foley, 'Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide' (2009) 41 Conn L Rev 929.

⁸⁶ *Sam Spade* (n 16) case at 950, 104 U.S.P.Q. at 107.

would not draw up copyright protection⁸⁷. Under this test, copyright protection given to characters in one specific work in which they appear does not expand to the same character in other works. It could be said that ‘the story being told’ is a criterion of an essential high level of delineation. *Sam Spade* is looked at as indicating that for a character to deem copyright protection, it has to be sufficiently delineated and the major thing in the story, then the test is most likely reconcilable.

The cases discussed above dealt with copyright protection in “literary” characters. Artistic characters, or pictorial characters such as cartoons, can gain protection far easier than “literary” as the physical and visual appearance is apparent and easily distinguished. Due to the visual image, they are more likely to qualify as artistic works and gain protection⁸⁸.

In a case featuring *Walt Disney*⁸⁹ “Mickey Mouse” was granted protection separate from the works in which the character appeared⁹⁰. Here, citing *Sam Spade*, the judge asserted the limitations characters are under. For instance, it is not easy to delineate distinctively a literary character. Nonetheless, the addition of visual image could make this process easier⁹¹. As seen in this case⁹², if there is the copying of a character, even if it is detached or separate from the plot of where the character has appeared, could lead to copyright infringement. This demonstrates that in the US, it is most likely that characters can exist separately from the works they have featured⁹³. This is because a character can change over time. Mickey Mouse, when it first came into existence, it was shown as “roguish, drinking beer and smoking”⁹⁴. Then, the character was changed to demonstrate a very gentle and modest personality that is also adventurous⁹⁵. This highlights how a character can evolve, and further indicates that characters can exist separately from works they appear in, and possibly could form artistic work.

So, the ‘story being told’ test is one way of identifying whether US courts deem a character protectable. For instance, one might use a copyrighted character at no cost if the character

⁸⁷ Andrew J. Williamson, ‘Copyright in literary and dramatic plots and characters’ <<http://www5.austlii.edu.au/au/journals/MelbULawRw/1983/21.pdf>> p307 accessed 19 December 2020.

⁸⁸ *Hill v Whalen & Martell*, 220 F. 359 (S.D.N.Y. 1914).

⁸⁹ *Walt Disney Productions v The Air Pirates* (1978) 581 F.(2d) 751.

⁹⁰ Lalor (n 27) 502.

⁹¹ *Walt Disney* (n 89) at 755.

⁹² *Ibid.*

⁹³ Al-Mukhaizeem (n 55) 5.

⁹⁴ *Ibid.*

⁹⁵ ‘Western Animation / Mickey Mouse’ <<https://tvtropes.org/pmwiki/pmwiki.php/WesternAnimation/MickeyMouse>> accessed 21 December 2020.

does not possess significance on the work as a whole. Hence, it would be copyright infringement if one copies the characters in *Friends*, as *Friends* is a 'character-driven' work. Therefore, the work would not be completed without such characters. In contrast, there are characters in 'plot-driven works' such as in *E.R.*⁹⁶. Here, some of the characters are only features of the story, which means these characters can easily be replaced and not essential. As a result, they can be used at no cost.

If there is a character that is sufficiently common and established, is known outside the work they appear in, the character will most likely be copyrighted, in both UK and US Laws⁹⁷. For instance, the first version of Mickey Mouse is very known, even outside the works it appears in. In fact, it has beat Santa Clause as one of the 'most recognisable images in the world'⁹⁸. Therefore, it would be reasonable for the courts to disallow others from copying such character in their new work⁹⁹. Nonetheless, some elements need to be considered before determining whether a character is deserving of protection. This includes 1) name, 2) physical appearance, 3) personality and features of character¹⁰⁰. It's been said that if a character does not fulfil the mentioned criteria, then the character is a simple unprotected idea. This is because they are not adequately distinctive which means that anyone can come up with such ideas, commonly known as 'stock characters'¹⁰¹.

In another case, the US adopted a 3-part test to identify if *Batmobile*¹⁰² is eligible for copyright protection¹⁰³. First, the characters must have qualities that are both physical and conceptual. Second, the character should be 'sufficient delineated'. This is so it's noticeable as the identical or the same matching character wherever it appears (e.g. the character's personality). Note, here, the character does not necessarily need to look the same throughout. Third, the character needs to be "distinctive" and unique, it cannot be a "stock character" as discussed above¹⁰⁴.

⁹⁶ Kaelyn Christian, 'Fan Fiction and the fair Use Doctrine' (2013) 65(3-4) *The Serials Librarian* 281.

⁹⁷ Al-Mukhaizeem (n 55) 12.

⁹⁸ Claire Suddath, 'A Brief History of Mickey Mouse' (*Time*, 18 November 2008) <http://content.time.com/time/arts/article/0,8599,1859935,00.html> accessed 10th November 2020.

⁹⁹ Christian (n 96) 281.

¹⁰⁰ Ibid, See also Al-Mukhaizeem (n 55) 12.

¹⁰¹ Ibid.

¹⁰² *DC Comics v Towle*, No. 13-55484 (9th Cir. 2015); See also Sven Schonhofen, "Holy Copyright Law, Batman! The Batmobile is a copyright character" (2016) *J.I.P.L.P.*

¹⁰³ See Rosati (n 26); See Thomas Key, 'The Ninth Circuit rules that The Moodsters characters are ineligible for copyright protection, denies panel and en banc rehearings: Daniels v Walt Disney Company' (*IPKAT*, 26 May 2020) <https://ipkitten.blogspot.com/2020/05/the-ninth-circuit-rules-that-moodsters.html> accessed 19th January 2021; See also *DC Comics v. Towle*, No. 13-55484 (9th Cir. 2015).

¹⁰⁴ Rosati (n 26).

Though the US copyright law regarding characters is much more detailed or examined than UK courts, US laws have still faced a lot of criticism. Some US cases reveal that ‘stock characters’ can be provided with copyright protection, even though they do not fulfil the test discussed above. Moreover, ‘the sufficiently delineated’ and the ‘story being told’ tests can sometimes lead to different results. Hence, this unpredictability increases the unclarity around characters under copyright law¹⁰⁵.

C. Criticisms of the UK and US Copyright Laws

After examining both UK and US law, there is no doubt that copyright protection for fictional characters remain an unsolved problem. Though it could be said that US legislation and case law provide a clearer solution for this issue, there remain conflicting and inconsistent decisions.

The UK’s closed system is a problem for several reasons. First, it is very difficult to place where characters fit in – as they could be dramatic, artistic or even literary works. As a result, there is a possibility that characters will not be capable of protection¹⁰⁶. This then means that some characters who ‘deserve’ copyright protection (because they took a lot of labour to create for example) might not get protection in the UK which seems potentially unfair. Second, it may lead to a situation where the characters get protection in some countries but not others. For instance, if someone creates a new character today, they might get protection in the US for that character, but not the UK.

Moreover, as discussed above, it seems like UK courts would most likely provide copyright protection for characters under artistic works but not literary works¹⁰⁷. This is also potentially unfair as characters can be written (hence literary works) similar to how they are drawn (artistic work). It is also strange to make characters less copyrightable under literary work than their counterparts in artistic work. Further, there is no clarity on the scope of protection for characters under UK laws. This could allow an extensive scope of protection or, a very restricted approach. The UK approach could therefore be contrasted with the US.

¹⁰⁵ Schwabach (n 71) 31.

¹⁰⁶ See *Tyburn Productions Ltd v Conan Doyle* (1991) Ch. 75 CA.

¹⁰⁷ See Popeye in *King Features v Kleeman* (1941) 2All ER 403; See Sherlock Holmes in *Kelly v Cinema Houses Ltd* (1928-35) MacG. C.C.

US cases can sometimes illustrate the overprotection of fictional characters which is at the cost of the public domain¹⁰⁸. For instance, *Warner Bros*¹⁰⁹ held that using materials displaying movie characters on items like t-shirts was lawful because the characters used are in the public domain. Nonetheless, using the same images, in 3-D items, have constituted copyright infringement. This is because it gave rise to a person's memory of the copyrightable aspects of the character of the movie, more powerfully and completely than any sole picture would. This creates a level of uncertainty as the involved character is in the public domain. Hence, any use of that character should be lawful. However, it constituted copyright infringement. As a result, the public will be confused and uncertain on whether the use of a character (which is in the public domain) protected or not. It is also hard and awkward to assume that the same picture, which is in the public domain, could be lawful in flatforms (shirts) but unlawful if it is in a 3-D form¹¹⁰. Therefore, basic alterations to the shape or arrangement of the matter (that are in the public domain) could lead to extensive laws on copyright infringement¹¹¹.

Despite the limited legal literature on fictional characters under UK copyright law¹¹², McGee and Scanlon make an interesting argument that US protection is too strong. The US courts have put forward a test for assigning copyright to the literary attributes of a character (which is more complicated and complex) than simply imposing that the character is made within a work¹¹³. Though McGee and Scanlon are in favour of UK courts recognising copyright protection for characters, they propose a much more restricted test than the US. The test includes characters being drawn with "specificity" and the medium (in which the character is in e.g. novel or film) needs to be "subordinate" to the make of the character. The medium is essential, in their view, for affording characters copyright protection¹¹⁴. On the other hand, as per the current *Moodsters* litigation, others believe that US laws are too strict¹¹⁵. This comes

¹⁰⁸ Mike Masnick, 'Wizard of Oz Court Ruling Suggests Moviemakers Can Reclaim Parts of The Public Domain and Put It Under Copyright'. (*Techdirt*, 8 July 2011) <https://www.techdirt.com/articles/20110707/13110415001/wizard-oz-court-ruling-suggests-moviemakers-can-reclaim-parts-public-domain-put-it-under-copyright.shtml> accessed 22 December 2020.

¹⁰⁹ *Warner Bros Entertainment, Inc., et al. v. X one X Productions, et al.*, No. 10-1743 (8th Cir. 2011).

¹¹⁰ Al-Mukhaizeem (n 55) 13.

¹¹¹ Ray Dowd, 'Eighth Circuit: Adding a Phrase or Dimension to Public Domain Work is Copyright Infringement' (*Copyright Litigation Blog*, 6 July 2011) <http://copyrightlitigation.blogspot.co.uk/2011/07/eighth-circuit-adding-phrase-or.html>> accessed 22 December 2020.

¹¹² Andrew McGee and Gary Scanlan, 'Copyright in character, intellectual property rights and the internet: Part 1' (2005) Ent. L.R. 16(8), 209-214.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ See the *Moodsters Company v The Walt Disney Company, et al.*, (2020) No. 20-132; See also Stephen Carlisle, 'Copyright in characters: "The Moodsters" vs. Disney's "Inside Out"' (*NSU*, 16th April

from the fact that the type of characters that get protected under the US tests are usually more “famous”¹¹⁶ characters from big companies, and that smaller creators find it harder to produce characters that pass the test.

Nonetheless, there have been situations where US courts go so far as protecting the invisible components of the character (such as relationships, thoughts) which is outside the reach of copyright protection. The courts in *Anderson v Stallone*¹¹⁷ found that the unauthorised continuation (expanding on the relationships and experiences)¹¹⁸ of the Rocky character in the *Rocky* film (based on the original characters) constituted copyright infringement. Here, this case dealt with protecting the character as a whole, rather than the character on its own. Hence, this could be seen as broadening the scope of copyright protection in the US as the courts are being somewhat lenient towards fictional characters, which extends further than the US Copyright Protection Act.

Therefore, as has been discussed, the UK approach to fictional character protection is quite strict, whilst the US approach is deemed to be lenient. The most appropriate approach would be somewhat in the middle – this is expanded further in part III of the article.

III. A Solution for the UK: Adopting the best out of the US approach

In order to ensure clear protection for fictional characters (e.g. Mickey) in the UK, there needs to be a change in the statutory provisions to provide both (1) where characters fit in under the copyright act¹¹⁹ and (2) a clear consensus on the scope of protection for fictional characters. The statutory solution is comparable to the US distinct delineation¹²⁰ and the story being told test¹²¹.

A. A Statutory Solution

To provide the essential and reasonable balance to the copyright holder and the public, this article suggests a broad provision granting character copyright protection. This is in exchange for a fixed duration to the copyright owners regardless of subtle updates to the character. To reach the objective, the suggested provision should be consistent with and fit

2020) <http://copyright.nova.edu/inside-out/#note-1864-8> accessed 19th January 2021; See also Key (n 103).

¹¹⁶ Ibid, *The Moodsters Company v The Walt Disney Company, et al.*, (2020) No. 20-132 p5.

¹¹⁷ *Anderson v Stallone* 11 USPQ2D 1161 (1989).

¹¹⁸ Ibid.

¹¹⁹ CIPA 1988 (n 3).

¹²⁰ *Nichols* (n 15).

¹²¹ *Sam Spade* (n 16).

in the legislation¹²².

1. Draft of a UK ‘Character Protection’ Provision

To assure certainty, the suggested provision covers characters, but it is expressed according to the UK copyright law. Hence, the suggested provision would blend in section 3 for literary works and section 4 for artistic works of the Copyright, Designs, and Patents Act¹²³, where all copyright protection works can be seen. A rough draft of the provision could resemble the following¹²⁴:

3 Literary, dramatic and musical works.¹²⁵

(1) In this Part—

- “literary work” means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—

(a) a table or compilation **[F1]**other than a database], **F2**. . .

(b) a computer program; **F3**. . .**[F4(c)** preparatory design material for a computer program]**[F5 F5(d)**a database]

...

(e) and characters

...

3B Characters

(1) In this Part “characters” includes but not limited to the attributes, qualities, and personality that creates the individual nature of a person or thing which is

(a) highly distinct delineated and/or

(b) constitutes the story being told standard

(2) For the purposes of this Part, a literary work consisting of a character is original. Moreover, if the first version of the character has added changes in later versions, it will not deem extra protection, unless, and only unless, the changes are so distinct that it is a new character.

¹²² CDPA 1988 (n 3).

¹²³ CDPA 1988 (n 3) s 3 and s 4.

¹²⁴ See bold parts for the additions to the statutory provision.

¹²⁵ CDPA 1988 (n 3) s 3.

4 Artistic works.

(1) In this Part “artistic work” means—

- (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,
- (b) a work of architecture being a building or a model for a building, or
- (c) a work of artistic craftsmanship.¹²⁶

(d) a work of artistic characters

(2) In this Part—

- “building” includes any fixed structure, and a part of a building or fixed structure;
- “graphic work” includes—

(a) any painting, drawing, diagram, map, chart or plan, and

(b) any engraving, etching, lithograph, woodcut or similar work;

- “photograph” means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film;
- “sculpture” includes a cast or model made for purposes of sculpture¹²⁷
- **“characters” include but are not limited to the attributes, qualities, and personality that create the individual nature of a person or thing which is highly distinct delineated and/or covers the story being told standard.**

For the purposes of this Part, an artistic work consisting of a character is original. Moreover, if the first version of the character has added changes in later versions, it will not deem protection, unless, and only unless, the changes are so distinct that it is a new character.

Section 3(1) of the CDPA¹²⁸ states that literary works are anything that is written, spoken or sung. Hence, Section 3(1) shall be amended to include characters that appear in a written format (e.g. books). Moreover, Section 4 includes artistic works such as photographs or sculptures. This part should also be amended to explicitly include artistic characters. The amendments in artistic works are identical to the literary works for characters including the scope of protection.

¹²⁶ Ibid s 4.

¹²⁷ Ibid.

¹²⁸ CDPA 1988 (n 3) s 3(1).

2. Similarities and Differences of the US approach

To achieve copyright protection for fictional characters, the draft of the UK provision includes tests drawn from key cases of the US including *Nichols*¹²⁹ and *Sam Spade*¹³⁰. Though the US has many different approaches for fictional characters¹³¹, the ‘distinct delineated’ test is the most used¹³². The proposed provision also includes slight differences and improvements. The next part of the article will demonstrate and discuss which elements have been used and why it was slightly altered.

a. Similarities - Parts drawn from the US tests for fictional characters

The statutory proposed in this article explicitly uses two main tests (from the US approach) to determine character protection under Literary and Artistic Works. According to Section 3 (e) of the provision and Section 4 (d), the judgement of the court shall consider characters as either a literary work if they are in writing or artistic works if they are in painting, sculpture, or drawing. The decision on literary or artistic work is dependent on Section 3B (literary) or under (2) of artistic works, where the character has to be (1) highly distinct delineated and/or (2) constitutes the story being told test. Due to this flexibility, this updated provision will allow the UK courts to reach an acceptable and fair judgement (by using the most appropriate test). It is also important to note that these considerations are not exclusive, since the statutory provision clearly says the courts’ judgement is not limited to such factors. For example, the statutory provisions include elements like attributes, qualities, and personality to identify a specific character. However, the courts are free to look at other elements or features such as the name of the character, their address, their relationships, etc.

The highly distinct delineation standard is important for examining whether a character is worthy of protection, which is required for the exercise of the provision¹³³. As discussed above with the US approach, the highly distinct delineation is particularly essential to determine whether a character is developed enough to fit as an expression (that is copyrightable) rather than an idea that is not worthy of protection¹³⁴. As characters can be simple in different works, this part of the provision is important as it protects the complicated

¹²⁹ *Nichols* (n 15).

¹³⁰ *Sam Spade* (n 16).

¹³¹ See chapter I for the US approach.

¹³² See Schubert (n 57) 222.

¹³³ See Section 3B, B (literary) and See Section 4 d (Artistic).

¹³⁴ *Nichols* (n 15) at 86-7.

and more distinct character rather than a simple version. This is to ensure that the provision is not overprotecting and hence not stifling new creations.

The story being told is important especially in literary works as a character is being described rather than seen. A character is worthy of protection only if it is so well-delineated (part a of the proposed test) that it could constitute the story being told. Hence, the courts can look at whether the character is valuable to the story when determining whether the character is worthy of protection. However, this is a factor that the courts can consider only if they deem necessary. This is because the character is required to be highly distinct delineated first.

b. Differences - Parts adjusted for the UK legislative style

The suggested provision has been worded in a way that it would fit in the current UK legislation. The additions and alterations made (from the US approach) was to ensure the most appropriate tests were followed and worded to fit the UK's statutory style. The proposed legislation is also slightly inspired by McGee and Scanlon approach to this issue¹³⁵. However, only the first part that has to do with "specificity"¹³⁶. This is reflected in the legislation through the word "highly" in the first part of distinct delineated. However, the proposed legislation ignores that the "medium" should be "subordinate" to the make of character (as proposed by McGee and Scanlan)¹³⁷. This is because a character can be worthy of protection even though the medium is not subordinate to it – simply because the character created is so distinct delineated and complex.

Also, the final addition to the provision is of importance (in both literary and artistic works). When a character is copyrighted, the newer version of such character cannot have added protection unless, and only unless, it is so distinct from the original character that it constitutes its own character. As big companies tend to update or slightly change their characters (e.g. Disney adding white gloves to Steamboat), this new legislation will restrict expanding the scope of protection for characters. The effect of this is of prominent relevance since it is of the main objectives of UK Copyright Law to provide protection for copyright owners and give the public a balanced right (as copyright is intended to last 70 years after the author's death)¹³⁸.

¹³⁵ McGee and Scanlan (n 112).

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Aplin and Davis (n 2) p 1.

Moreover, as per the criticisms discussed above on the US laws, this provision does not include every test the US has on fictional characters. This is because some tests overprotect characters such as in *Warner Bros*¹³⁹ or in *Anderson*¹⁴⁰ (where courts protected the relationships and thoughts of the character). The main aims of this provision are to ensure there is protection for fictional characters under artistic and literary works and a clear scope of protection.

Hence, the proposed solution is appropriate as it does not protect the relationships or thoughts of the character (which constitutes overprotection). The proposed legislation also does not look at whether a character is famous or not (which constitutes less protection). The test simply requires the characters to be highly distinct delineated and/or constitute the story being told test. Moreover, the courts have some degree of flexibility to look at other features in very complicated cases. This does not mean that the other features (e.g. relationships) are protected – but they are used to determine whether the character is worthy of protection. This is evident in “includes but not limited to” in the provision. So, the proposed legislation is somewhat flexible. To narrow its scope and to bring a justifiable extent of legal certainty, Section 3B (a) and under Section 4(2) state ‘highly distinct’ which frames a high level as to the application of the provision by requiring characters to be highly distinctive. This ensures that only highly distinctive characters fall within the scope of this section.

3. Implementation of the Character Protection Provision (Examples)

Artistic works (Disney)

The main example of how this new provision would work is with Disney’s Steamboat Willie. As discussed in this article, Steamboat’s copyright is likely to expire in 2024. This means that the public is likely to use Steamboat at no additional cost. However, if one uses a later version of Steamboat Willie (such as Mickey Mouse¹⁴¹), they are likely to be sued for copyright infringement. This results in an odd situation where the public is confused on which character is protected and which is in the public domain. It will also allow companies to exploit this area of law (as it is unclear). Hence, some characters will never fully be in the public domain.

¹³⁹ *Entertainment, Inc.* (n 109).

¹⁴⁰ *Anderson* (n 117).

¹⁴¹ See differences in chapter I.

Under this new provision, Steamboat (or Mickey) would fall under Section 4 (d) as it is an artistic work (more like a sculpture that is visually seen rather than in writing per literary works). The reason why Mickey is artistic rather than literary is that Mickey Mouse came into existence via a drawing. Mickey Mouse is also known for its physical appearance¹⁴² rather than its part in books.

According to Part d of the provision, courts would have to consider whether Steamboat has its own original attributes, qualities, and personality that make it highly distinct delineated from other characters. Courts are also free to look at any other features as the provision clearly states that the courts are not limited to such tests. From the above, courts can ask two questions to grant a character copyright protection:

(1) Does steamboat have its own qualities, features, and attributes? Here, the courts will almost definitely agree that Steamboat Willie has its own original features etc.

(2) Is Steamboat highly distinct delineated and/or covers the story being told standard? The answer here is most likely yes as Steamboat is not a simple mouse character, but, designed in a uniquely and distinctly manner. Therefore, under this provision, Steamboat Willie is highly distinct delineated and worthy of protection.

The more complex part comes when examining Mickey Mouse, an updated version of Steamboat. So, the same test applies here:

(1) Does Mickey Mouse have its own features, qualities, and attributes? The answer here is most likely no (as Mickey Mouse has the same features as Steamboat, they are both mouses for example). They both also have the same qualities (a squeaky voice, the same kind of generic appearance, etc).

(2) Is Mickey Mouse highly distinctly delineated and/or covers the story being told standard? Under this new provision, Mickey is not highly distinctly delineated. There are no major differences in the two characters. The only differences are the colours, eyes and the addition of the gloves. Therefore, is Mickey Mouse worthy of added protection? The courts, under this new provision, will most likely reject any additional protection.

This is because the updated versions of Steamboat are not highly distinct delineated to constitute its own character (or the story being told). Though there are differences such as Steamboat being in black and white and Mickey Mouse being in colours, this is more to do with time rather than the actual development of the character. The slight changes (added

¹⁴² Suddath (n 98).

gloves, eyes) in Mickey Mouse are not enough to constitute it being a new 'original' character. This is later confirmed when we look at the last part of the provision, where it goes on to say when the character has 'added changes in later versions, it will not deem protection, unless, and only unless, the changes are so distinct that it is a new character'.

Essentially, both Steamboat and Mickey are the same character. With the proposed legislation, Mickey will not remain protected under copyright. Mickey Mouse will only be protected when it is completely different (changed from being a rabbit to a mouse for example). This has happened before as illustrated below:



Figure 3 Oswald The Lucky Rabbit (1927)¹⁴³

Mickey Mouse essentially started as a rabbit and later changed to a mouse following a dispute¹⁴⁴. This change would be considered 'highly distinct delineated' as the characters features, qualities and attributes have changed which is sufficient to constitute its own character. Changing colours or adding minor adjustments such as white gloves or eye shape is not enough for it to be a new character as it is not highly distinct delineated, and therefore, it cannot constitute the story being told test too.

Literary Works (Sherlock Holmes)

Another significant example of how this new provision would work is with Sherlock Holmes under literary works. Characters are mainly visual and hence protected as 'artistic' works¹⁴⁵. However, they can also go under 'literary' works. This is because some characters initially appear or introduced in the context of books and novels (e.g. Sherlock Holmes¹⁴⁶). Hence, if

¹⁴³ Will Heilpern, 'Disney 'holy grail' film 'Sleigh Bells' rediscovered' (CNN, 11th December 2015) <<https://edition.cnn.com/2015/11/04/europe/oswald-rabbit-film-rediscovered/index.html>> accessed 10th April 2021.

¹⁴⁴ Kendall Trammell, '6 Mickey Mouse facts you probably didn't know' (CNN, 18th November 2017) <<https://edition.cnn.com/2017/11/18/entertainment/mickey-mouse-fun-facts-trivia-trnd/index.html>> accessed 10 April 2021.

¹⁴⁵ See Kurtz (n 6) 439.

¹⁴⁶ Wilson (n 23).

characters come into existence in the form of literary works, then they need to be protected as literary works. It would be odd to make characters copyrightable under artistic works and not literary works.

Under this new provision, Sherlock Holmes in *Kelly v Cinema Houses Ltd*¹⁴⁷ would deem character protection. This is because, under section 3(e) of literary works, Sherlock Holmes is a literary character. This is also seen when the courts apply section 3B of the proposed provision. The courts will look at the attributes, qualities and personality of Sherlock Holmes. However, the courts, again, are not limited to such factors. Moreover, the courts will have to look at whether Sherlock Holmes is 'highly distinct delineated' and/or whether it 'constitutes the story being told test'. Here, it is clear the Sherlock Holmes is a unique character which also plays a big part in its stories. Therefore, under this new provision, Sherlock Holmes would deem copyright protection under literary works.

The second part of the provision looks at the development of the character and whether later versions of the character should be protected¹⁴⁸. Sherlock Holmes has developed 'human emotion', an attribute Sherlock did not have. It is up to the courts' discretion whether this development is sufficient enough for it to constitute a new character and therefore added protection. The courts need to consider whether the new version of Sherlock Holmes is 'highly distinct delineated' and whether it constitutes 'the story being told test'.

It is argued that later versions of Sherlock Holmes can be protected as the characters attributes have changed in a 'highly' manner. Sherlock now shows strong human emotions, something it did not have before. This is later confirmed when we look at the final part of the provision, where the courts can examine whether such qualities are so distinct that it is a new character (which arguably, in this situation, Sherlock Holmes new version is a new character).

B. Advantages of Character Protection in the Statutory Provisions

This article is aimed to deliver a suggested solution, which incorporates the advantages of the US tests and blends it in with the UK statutory framework. As the CDPA does not usually update and not very flexible (e.g. it does not incorporate other works of creative nature such as characters), this creates several issues. Therefore, this article suggests a provision that

¹⁴⁷ *Cinema Houses* (n 40).

¹⁴⁸ See Jessica L Malekos Smith, 'Sherlock Holmes & the Case of the Contested Copyright' (2016) 15 *Chi-Kent J Intell Prop* 538.

combines the advantages of the US approach (such as their distinct delineated test and the story being told test) in a way where the UK can implement it.

In particular, as discussed within the criticisms above (UK 'closed list' within the CDPA), the new provision will grant copyright protection to characters that include but not limited to being highly distinct delineated and/or constitutes the story being told test. This means that characters that took *time* and *judgment* (originality),¹⁴⁹ as well as labour to create, will be granted protection. Moreover, this provision will mean that characters have the chance and the ability to be protected rather than remaining an unclear issue.

1. Compatibility with existing UK copyright law

The proposed solution is adjusted to fit in perfectly with the UK statutory framework making it compatible. Character is a type of creative works that can go under both literary and artistic works. The first part of the proposed solution (section 3B (a) of literary work and the first part of artistic work) is inspired by *Nichols*¹⁵⁰ distinct delineated test. However, as discussed, the wording is slightly adjusted to fit in with the rest of the act. The changes are also inspired by the two-part requirement in Databases in part F13 of the act¹⁵¹. By adding more than one solution (highly distinct delineated and the story being told test) and allowing the courts some flexibility, this allows the suggested provision to fit in and be compatible with other creative works.

2. Easier for courts to find infringement (Legal Certainty vs Flexibility)

The suggested provision is intended to provide clear copyright protection for characters to ensure legal certainty. As discussed above, this article showed that sometimes courts find artistic works protectable (Popeye¹⁵²), but not literary works (Sherlock Holmes¹⁵³). This, as a result, leads to uncertainty in the law¹⁵⁴. However, this new provision aims to ensure certain legal decisions. This is supported by the courts' decision (subsection 3B 1) which could consider the highly distinct delineated and the story being told tests. However, the courts are flexible to take into account what they deem necessary. Nonetheless, though the courts have some flexibility, there is also guidelines and an expectation to follow. By setting out a high level (highly distinct delineated) for protection, the scope is restricted. This means that

¹⁴⁹ *Walter* (n 45).

¹⁵⁰ *Nichols* (n 15).

¹⁵¹ See CDPA 1988 s 3A.

¹⁵² *King Features* (n 46).

¹⁵³ *Conan Doyle* (n 48) 56.

¹⁵⁴ See David B Feldman, 'Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection' (1990) 78 Calif L Rev 695.

this new provision is not too broad and will not overprotect characters. The requirement of highly distinct delineated will increase legal certainty, especially when comparing this to the US system.

Moreover, when there is clear legislation for this issue, courts will find it easier to find infringement. Since characters develop and change over time, this provision will help in 1) identifying when a character can get copyright protection and 2) identify whether or not later versions should have added protection. This will help courts come to a consistent decision on this complex area of law. As a result, the decisions of future cases will be foreseeable.

3. A balance between Copyright Holder and the Public Domain

Another advantage to this provision is providing this balance between the rights of the copyright holder and the public domain. This means that authors who have created complex characters by using their labour, skill and judgement will have their character protected. At the same time, the public will have an idea of when these characters will fall into the public domain. This is because any additional changes or updated versions of such characters will not deem extra protection unless the differences are so 'highly distinct delineated' that it is a new character. This will also mean that big companies will be prevented from exploiting the length of copyright protection for their characters by adding minor changes.

IV. Potential Criticisms on the proposed UK Character Protection

As this article suggests a proposal that will result in significant amendments in two sections of the CDPA (literary and artistic works), this may lead to potential criticisms. The possible major criticisms will be discussed in the upcoming part of the article.

1. Legal Uncertainty

Contrasting UK court judgements that refused copyright protection to certain characters¹⁵⁵, this article suggests the enforcement of clear criteria and scope of protection in the UK. This enforcement is inspired by the US approach which could create some legal uncertainty. This is because it is a newly evolving area of law that has multiple tests in the US (from different courts)¹⁵⁶. Hence, such amendments in the provision (e.g. highly distinct delineated or judge's discretion) could be argued that it would lead to differing judgements. Consequently,

¹⁵⁵ See Chapter I; See also *Tyburn Productions* (n 49).

¹⁵⁶ *Ibid.*

this would create a degree of legal uncertainty (as judges could differ in opinion and give different judgements to similar characters). However, this criticism is exaggerated, and the proposed solution of character protection is recommended.

As mentioned, the closed list of CDPA shows that it is unclear where characters fit in and there needs to be some clarification especially when it comes to the scope of protection given to characters. To ensure legal certainty, the proposal suggests changes to ensure a consistent and certain approach taken by the courts to find whether characters are deemed protection. This is divided into two areas of the CDPA to clear the doubts and uncertainty of where characters fit in under the legislation. Moreover, the test is the same in both to ensure legal certainty and ensure the same level of protection given to characters in different works (literary and artistic). As characters are constantly developing and there are many different types (such as fictional, non-fictional, etc.), this proposed provision allows the courts to take into consideration any other factors they deem necessary. This does not mean that different approaches will be taken as there is a clear guideline to follow (to find whether characters are protectable) but to ensure the test is broad to cover most (if not all) characters.

The provision also states “highly distinct delineated” which ensures certainty as only characters that are complex can deem protection. As a result, this will allow the copyright holder to not only claim their rights over their work but also increase legal certainty and predictability as the public would have an idea of when a character is protected and when such protection would expire.

2. More Rights to Copyright Holder (overprotection)

One of the main purposes for the implementation of a clear scope of character protection is to ensure that there is a fair and reasonable balance between the rights of the copyright holder and the public domain. It could be criticised that this provision overprotects and gives more rights to the copyright holder. However, this is exaggerated and is also outweighed by other concerns.

Firstly, this provision does not overprotect copyright holders. Having a clear provision for characters does not necessarily mean that copyright holders are given more rights. This is because some characters have already gained copyright protection (e.g. ‘Popeye’¹⁵⁷). Instead, this provision clears the uncertainties of characters under artistic and literary works.

¹⁵⁷ *Bolton* (n 43).

This is done by limiting the scope of protection that is granted to updated versions of the same character. Moreover, in today's society, it is hard to come across a new and unique character. This suggests that there is a need to incentivise more creativity. In order to do that, there needs to be a strong and clear scope of copyright protection. This is done via a strict test that requires the characters to be "highly" distinct delineated – meaning that only complex characters are deemed protection. Hence, it does not overprotect characters but protects only the distinct and complex characters. It also suggests a clear scope of protection that includes some restrictions for protection to characters with multiple versions.

Moreover, having a rather strict scope of protection (for multiple versions of characters) has multiple advantages¹⁵⁸. Creators of characters are given protection to protect their works for a limited period. This is to inspire other creators to create new works whilst also giving credit to creators. When authors create impressive characters, that's good. However, these works need to fall back in the public domain¹⁵⁹. This provision allows for some sort of limitation to the scope of protection given to characters because the CDPA main objective is to eventually advantage or give back to the public domain¹⁶⁰. For instance, Disney's Mickey Mouse is an important and creative figure. There is also no hesitation that this character has upgraded and advanced our society. Yet, the protection given to this character should not extend so far in protecting other versions despite the minimal changes. It is extremely vital to ensure that the proposed legislation does not give out powerful protection that will allow big companies such as Disney to obstruct or even hold back the formation of new characters and hence human advancement.

3. Unrealistic?

To solve the problem surrounding characters under UK copyright law, the statutory provision needs to change. As a result, some may argue that this proposal is unrealistic. However, this is also exaggerated.

The main issue with the CDPA is that it does not keep up with society. This means that we are constantly faced with new evolving things that require a change in the statutory provision. A previous example of that is when the CDPA had to change to incorporate

¹⁵⁸ See the previous chapter.

¹⁵⁹ Litman (n 11) 434.

¹⁶⁰ Samuel J Coe, 'The Story of a Character: Establishing the Limits of Independent Copyright Protection for Literary Characters' (2011) 86 Chi-Kent L Rev 1308.

computer programs in the 1960s¹⁶¹ where it eventually was put under literary works. Hence, there is no doubt that it would be difficult to incorporate change for characters, however, this is not unrealistic. With recent cases arising to supreme courts¹⁶², this could boost or help amend the statutory provision.

V. Conclusion

A UK statutory provision based on the US approach on fictional characters would help identify when characters should get copyright and what the scope of protection be. Having explored fictional characters through a copyright lens, future research can examine this issue through other factors such as unfair competition and trademark law.

Nonetheless, as discussed throughout the article, characters should be protected under both literary and artistic works. This would help increase legal certainty as well as help society advance. There are already updated, but not distinct characters, which should not be eligible for additional copyright protection. The need for a statutory change is vital as it will harm society if multiple versions of characters such as Mickey Mouse are still protected. Hence, the proposed character protection is the best solution to 'completing'¹⁶³ Disney Mickey Mouse despite its minimal growth.

¹⁶¹ D Young & Co LLP, 'The protection of computer programs' (*Eureka*, 13th June 2012) <<https://www.eurekamagazine.co.uk/design-engineering-features/ip-advice/ip-advice-the-protection-of-computer-programs-1/43017/>> accessed 10th April 2021.

¹⁶² See *Moodsters* (n 115).

¹⁶³ *Heaton* (n 1).

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