

COPYRIGHTABILITY OF CARTOON CHARACTERS

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I. INTRODUCTION TO THE SUBJECT MATTER

Within the past few years, the intellectual property arena has been placed in the difficult position of determining the extent of legal protection to afford fictional and cartoon characters apart from the original, copyrighted work in which they first appeared. Although fictional and cartoon characters have become an important feature in today's society as a result of both their creative and economic value, they are not the subject of well-defined legal protection against infringement. Various aspects of intellectual property law, such as copyright, trademark and unfair competition, have attempted to protect characters such as Betty BoopTM, Mickey MouseTM, SupermanTM and the Peanuts GangTM from infringement. The most successful vehicle to gain legal protection for fictional and cartoon characters has been through copyright law.

II. PURPOSE OF, AND THE AUDIENCE FOR, THE PATHFINDER

Fictional and cartoon characters have infiltrated America and are an element in everyday society. The licensing of character images and the merchandising of products which feature these images is a multi-million dollar per year business. [n.1] However, the level of legal protection afforded these revenue-generating characters is not clearly articulated. The Copyright Act of 1976, [n.2] the federal statute which governs copyright law, does not explicitly address the issue of Character Protection, and courts have discretion in applying a number of standards to determine *498 whether or not a character is copyrightable. Courts may determine that a character is protected in the original, copyrighted work in which they first appeared but not protected when they leave the original work to pursue a solo career. Since characters have value when separated from the work in which they originally appeared, these characters and their images need well-defined legal protection against infringement when they are cast in an independent work.

The issue of Character Protection can affect a large percentage of both the public and private sectors. With the recent increase in the use of characters and their images for animated movies, television programs, video games and merchandise such as clothing articles, backpacks and lunch boxes, a number of individuals can share an interest in a single character. The initial creator of the character, members of the entertainment (or other) industry who promote the character and individuals who exploit the character's

image through advertising or license agreements will each share a common interest in protecting the character from another's improper use. These individuals are confronted with a number of questions to which answers are needed. For example, at what point does a character become entitled to legal protection? What is the extent of this protection when the character appears in a work which is separate from the original, copyrighted work? What protection is available when a character appears in a work that has become part of the public domain but then the same character is cast in a subsequent, copyrighted work? Where would one gain general information on copyright law and more specific information on Character Protection? Where can one find case law addressing this topic and what, or who, can be contacted to gain additional information in this area?

The above questions are the focus of this pathfinder, which attempts to provide a researcher with answers. Sources of law which a researcher can utilize to uncover the extent of copyright protection afforded to fictional or cartoon characters is analyzed. In the area of Character Protection, the best sources of information include case law and various interpretations of the case law expressed through law review articles and leading treatises. This pathfinder is intended for intellectual property attorneys, general practice attorneys who are confronted with the issue of Character Protection by a client and legal scholars who have an interest in the issue of Character Protection.

*499 III. OVERVIEW OF THE LAW SURROUNDING CHARACTER PROTECTION

The Copyright Act of 1909 [n.3] enumerated 15 categories of works which were given statutory protection. These same categories, as well as pantomime and choreography, are considered copyrightable subject matter under the 1976 Act. [n.4] Fictional and cartoon characters are not, per se, copyrightable subject matter under either the 1909 or 1976 Act. While characters enjoy copyright protection within the context of the works in which they appear, they are not independently copyrightable. [n.5] Characters become an element of a work together with the arrangement of incidents, the relationship among characters in the work and the settings in which they appear. [n.6] However, these characters can, and frequently are, removed from their original context and appear in separate works. The legal status of these characters, as they exist independent of their original context, create the problem of determining the level of legal protection afforded characters.

As a fundamental rule, copyright law protects the expression of ideas rather than the ideas themselves. [n.7] This is known as the idea/expression dichotomy. A dilemma arises in attempting to distinguish an idea (a talking lion character) from an expression (Simba, The Lion KingTM). In terms of copyrightability, the point at which fictional characters gain copyright protection depends upon their stage of development. Characters gain more protection as they become more developed and are "distinctly delineated" from the work in which they appear. This "distinctly delineated" test was formulated by Judge Learned Hand in the 1930 case of *Nichols v. Universal Pictures*, [n.8] a seminal case for determining the level of protection afforded characters. In *Nichols* Judge Learned Hand phrased the question as whether a character is "distinctly delineated" to qualify as

protectable expression or whether the character is an idea, which is not protectable. [n.9] The character must be more than just a "type" and must be sufficiently developed and *500 drawn with considerable detail. [n.10] Characters may be protected quite independently of the plot, however, the less developed the character, the less they can be copyrighted. [n.11] In addition, even when a character is considered "distinctly delineated" to warrant protection, copyright may still be denied due to the "scenes a faire" exception. "Scenes a faire" are "incidents, characters, or settings which are indispensable, or at least standard, in the treatment of a given topic." [n.12] The "scenes a faire" exception is not the focus of this pathfinder and is only mentioned to inform the reader of its existence. The Nichols "distinctly delineated" standard has been interpreted in a number of cases. [n.13]

In *Columbia Broadcasting Systems, Inc. v. DeCosta*, [n.14] defendant sued Plaintiff for infringing his character "Paladin" in Plaintiff's television series "Have Gun Will Travel." Although the Court of Appeals for the First Circuit found that Plaintiff had clearly copied the small details of defendant's character, relief was denied since the character had never been incorporated into any "work." [n.15] The court interpreted the Nichols standard of Character Protection as a two-fold inquiry:

1. Is the character, as originally conceived and presented, sufficiently developed to command copyright protection? If so,
2. Did the alleged infringer copy such development and not merely a broader and more abstract outline? [n.16]

The next major, and perhaps the most reknowned, case regarding protection of fictional or cartoon characters is *Warner Bros. Pictures, Inc., v. Columbia Broadcasting System, Inc.*, [n.17] also known as the "Sam Spade" case. This case dealt with protection of characters outside of the original work in which they appear and replaced the Nichols *501 "distinctly delineated" standard with the "story being told" standard. In this case, the entire copyright of *The Maltese Falcon* novel was assigned to the Plaintiff but the author of the Sam Spade novels continued to use the Sam Spade character and assigned the right to use the character to Defendant. Plaintiff's claimed that Defendant's use of the Sam Spade character in a radio show was an infringement of his copyright. The court held that the character "Sam Spade" was not protectable and that no character is protectable under copyright law unless the character is extremely well-delineated as to constitute "the story being told" rather than merely being a "chess man in the game of telling the story." [n.18] Under the "Sam Spade" doctrine, copyright protection afforded characters in one work is not extended to the same characters who appear in subsequent works. If characters are only vehicles for the story being told and the vehicles do not go with the sale of the story, then they are not entitled to copyright protection. [n.19]

The above cases dealt with the protectability of "literary" or "word" characters. Pictorial characters, such as characters in a cartoon strip, attain far more protection because of their physical and visual embodiment. Due to the visual renditions of the characters, they qualify as artistic works and attain copyright protection solely on this basis. [n.20] The visual images inherent in cartoon cases makes it much easier for a court to identify these

characters as "expressions" rather than mere "ideas." Because of the visual aspect of these characters, courts are more willing to grant copyright protection.

Hill v. Whalen & Martell [n.21] is an example of the ease with which a court will grant copyright protection to cartoon characters. In this case the Defendant produced theater production entitled "In Cartoonland" with stage characters named "Nutt" and "Giff." [n.22] The Plaintiff claimed, and the court agreed, that Nutt and Giff were carbon copies of Plaintiff's characters "Mutt" and "Jeff." [n.23] The court held that the theater production infringed the Plaintiff's cartoon since the characters Nutt and Giff were, in reality, Mutt and Jeff and that everybody viewing these characters understood the association. [n.24]

*502 Other examples of pictorial character cases include Walt Disney Productions v. Air Pirates, [n.25] which held that the character "Mickey Mouse" TM was entitled to protection apart from the stories in which he appeared. In this case the Ninth Circuit distinguished its holding in the "Sam Spade" case that refused copyright protection for literary characters since they constituted "little more than an unprotected idea." [n.26] Adding the rationale of the Air Pirates decision to the rationale of the Nichols decision, the majority view is that visual depictions of characters delineated in literary works are entitled to the same protection as component parts of the copyrighted works in which they are embodied. [n.27]

Detective Comics, Inc., v. Bruns Publications found that Defendant's "Wonderman" cartoon character infringed Plaintiff's copyright in the "Superman" TM character. [n.28] The court held that Defendants "used more than general types and ideas and . . . appropriated the pictorial and literary details embodied in the 'Superman' comics" and that the Superman comics were subject to protection by copyright. [n.29]

The "story being told" standard continues to be used in a number of copyright cases and has been both successful and unsuccessful in affording characters protection. For example, in Universal City Studios v. Kamar Industries, Plaintiff brought suit against Defendant for manufacturing merchandise with the inscription "E.T. Phone Home." [n.30] The court held that the "E.T." character was a central, copyrightable component of Plaintiff's movie, being "a unique and distinctive character about whom the movie revolved," thus Plaintiff was entitled to relief. [n.31] On the other hand, the Plaintiff was denied copyright protection in Warner Bros. v. Film Ventures International. [n.32] The court held that the character "Jessica" in Defendant's film "Beyond the Door" did not infringe the character "Regan" in Plaintiff's film "The Exorcist" because the story was not subordinated to the character of Regan. The *503 character of "Regan" was not entitled to copyright protection apart from its use in the movie the "Exorcist."

Another issue surrounding fictional and cartoon characters is the extent of protection afforded a character when it is used in a number of works or when the original work enters the public domain. When parts of a series enter the public domain, the characters appearing in the public domain work may be freely copied, even when other parts of the series are still protected by copyright. For example, a character may appear in a movie

based on a novel that has entered the public domain. The character may be entitled to protection for any new traits that have been added in the movie, but the character is not protected as to traits which were available in the original novel.

In the series of cases known as the "Hopalong Cassidy" cases, the issue involved the determination of the validity of the renewal copyrights in the Hopalong Cassidy books. In *Filmvideo Releasing Corporation v. Hastings*, [n.33] the court held that component characters developed in the novels and successfully brought to life in derivative motion pictures based on them were infringed by the unlicensed showing of the motion pictures (which were in the public domain) on television. The court then held, on appeal, that under the Nichols rationale, the characters which appeared in the novels and the character in the later motion pictures were distinctly delineated. The Second Circuit held that the possessor of a derivative copyright could not convey or release into the public domain that which they did not own. [n.34]

In *Silverman v. CBS*, [n.35] Defendant alleged that a musical play infringed its copyright in the characters "Amos n' Andy." The court allowed use of the character traits which were developed during Defendant's early radio scripts that had entered the public domain, but protected use of traits which were developed in later scripts and television programs that were still protected under copyright. [n.36]

As previously stated, fictional and cartoon characters are an important element in today's society. Licensing character images and selling products which feature these images generate millions of dollars a year. However, the level of protection afforded these revenue-generating characters is still not readily ascertainable. Since copyright law does not explicitly address the issue of protection for fictional and cartoon *504 characters, courts are free to apply a number of standards to determine whether or not a character is copyrightable. Another problem arises when courts determine that a character is protected in the original work in which they appear but not when they leave the original work to lead an independent life. Since characters have become valuable apart from the work in which they originally appear, these characters are entitled to well-defined legal protection against infringement.

IV. RESEARCH TOOLS

This pathfinder is organized into three major sections, with Part One addressing primary research tools; Part Two addressing secondary resource tools; and Part Three addressing organizations and practitioners who are knowledgeable in the area of copyright law.

When researching the issue of Character Protection, as when researching most legal questions and issues, one should first consult case law and then statutory law to locate answers and relevant information on the issue. Part One assesses the tools and approaches for finding case law and statutory law which addresses Character Protection. Part Two analyzes a variety of secondary source materials which deal with copyright law in general and Character Protection in particular. Part Two begins with a discussion of periodicals

since they provide the most extensive and most recent information. Books, bibliographies and treatise materials, among other sources, are also analyzed as they provide a broader perspective on the issue of Character Protection. The pathfinder concludes with Part Three, a section which details organizations, associations and practitioners in the field of copyright law who may provide a researcher with assistance in the area of Character Protection.

In addition, at the end of each category of research tools, there is a "Useful References" section which provides the citation information necessary for one to access a particular case law opinion, law review article, book, bibliography, treatise or other resource tool. Listings for publishing companies are located at the end of the pathfinder.

*505 V. PRIMARY RESEARCH TOOLS

A. CONSTITUTION

1. The Federal Constitution

The United States Constitution, in Article I, Section 8, Clause 8, expressly authorizes Congress to grant patents and copyrights:

The Congress shall have the power...to promote the Progress of Science and Useful Arts, by securing for Limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [n.37]

The U.S. Constitution provides copyright protection to "Authors" for their "Writings." However, there is not a specific reference contained in the Constitution which provides for copyright protection for fictional or cartoon characters.

2. State Constitutions

When Congress passed the Copyright Act of 1976, copyright protection was unified and brought under the exclusive control of Congress. Thus, there are no state Constitutional provisions on copyright protection for characters.

B. STATUTES

1. Federal Statutes

The federal statute which governs the law of copyright is 17 U.S.C. § 101 et. seq. Fictional and cartoon characters fall within the protected subject matter category of Pictorial, Graphic and Sculptural Works because of both the physical and visual elements of characters. [n.38] Therefore, a researcher searching for material about Character

Protection should focus on § 101, which defines Pictorial, Graphic and Sculptural Works as including "two- dimension and three-dimensional works of fine, graphic and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models and technical drawings, including architectural plans." [n.39] This definition provides the *506 starting point for determining whether fictional or cartoon characters are protectable subject matter under the Copyright Act of 1976.

a) Legislative History [n.40]

Character Protection is only a small piece of copyright law and has only recently gained widespread attention. Therefore, almost all of the legislative history surrounding the Copyright Act of 1976 is irrelevant to the issue of Character Protection. As a result, a search of federal legislative history does not reveal information on the issue of Character Protection.

The first step in beginning legislative history research is to consult Sources of Compiled Legislative Histories. [n.41] This source contains a compilation of legislative histories on various topics; however, it is limited in that it only provides legislative histories up to the 99th Congress. Recent amendments to the Copyright Act of 1976, such as the 1992 Amendments, will not be found in this source.

To locate a possible legislative history affecting the topic of copyright protection for fictional and cartoon characters, the next step is to consult United States Code Congressional and Administrative News (U.S.C.C.A.N.). A search under the Popular Name Act will locate "COPYRIGHT, AMENDMENTS" and more specifically, "COPYRIGHT AMENDMENTS OF 1992." Reviewing the 1992 Amendments to the Copyright Act, there is no reference to the issue of Character Protection.

Congressional Information Services Records, Committee Reports, House and Senate Documents provides an easier method for researching a legislative history. The first source to consult is CIS Annual Legislative Histories of Public Laws under Public Law #102-307 (1992 Amendments) which contains legislative history references (i.e. debate, *507 hearing, bill information) but no information related to this topic. A search in the Index for the CIS Annual Abstracts of Congressional Publications and Legislative Histories from 1981 through 1992 locates headings for "COPYRIGHT"; "COPYRIGHT ACT"; "COPYRIGHT AMENDMENTS"; "COPYRIGHT OFFICE"; "COPYRIGHT RENEWAL ACT"; and "COPYRIGHT ROYALTY TRIBUNAL." However, there is no information regarding the issue of Character Protection.

The Kamenstein Legislative History Project on the Copyright Act of 1976, [n.42] is, as its name suggests, a complete history of the Copyright Act of 1976 and contains an enormous amount of information. The index does not reference cartoons or fictional characters, however, there is reference to "PARODIES, BURLESQUE AND SATIRE." The discussion in this section is devoted to the fair use doctrine of copyright law and is not applicable for this topic.

2. State Statues

As referenced in the STATE CONSTITUTION section of this article, copyright law comes under federal jurisdiction. Therefore, there are no State Statutes regarding copyright protection for fictional or cartoon characters.

C. CASE LAW

Case law provides the most recent and relevant information on the issue of Character Protection. How courts have previously addressed the issue and the analysis a court undertakes in determining whether or not to extend protection to certain characters is of utmost importance. When a legal practitioner is researching the issue of whether protection will be afforded to a particular character, the factors and guidelines for protection which a court enunciates through case law is crucial. There are a number of sources available to assist a researcher in locating case law including annotated codes, the West Digest System, and several reporters.

1. West Digest System

The most useful research tool in locating case law on a particular topic is through the West Publishing Digest System. The Digest System contains annotations of cases which are published in both State (all 50 *508 included) and Federal digests. West classifies cases under various "topic" and "key numbers." When a researcher knows the relevant topic and key number, one can use the topic and key numbers to locate cases in a particular digest. West contains the topic heading, "Copyrights and Intellectual Property" (#99). The relevant key numbers include "1-100" for copyrights, with #6, Pictorial, Graphic and Sculptural Works, being the most relevant to the issue. Therefore, the most useful heading to locate information on Character Protection would be 99.6.

The West Digest System contains various print digests. The General Digest is an inefficient method to locate appropriate case law due to the voluminous material. Further, since Character Protection is a recent issue, older General Digests will not be helpful. A search in the Federal Practice Digest is more successful. Both the Federal Practice Digest 3d and Federal Practice Digest 4th, under topic and key number 99.6 contain case references to the issue of Character Protection.

2. United States Patent Quarterly, 2nd (U.S.P.Q.2d) [n.43]

This source provides cases on Patent, Trademark, copyright and Trade Secret law. U.S.P.Q. is currently in its second series. The first series contains the United States Patents Quarterly Annual Digest Index which contains a classification index and

annotations. The classification number for copyrights in this series is "24" and under this classification number, is the subheading 24.301 "Matters Copyrightable." The 1986 Annual Digest for U.S.P.Q. does not contain information regarding Character Protection.

The United States Patent Quarterly - 2nd Series, (U.S.P.Q.2d) began publishing cases in 1987. Copyrights is now classified under "Division II" and includes topic headings to locate cases addressing narrow topics. Each volume of U.S.P.Q.2d contains the classification outline, case annotations and opinions. The relevant section for Character Protection includes "Characters" (classification number 211) and a subclassification -.11 for "Non-Copyrightable Matters" (classification *509 number 211.11). The separate classification number for characters is the area where new case law addressing Character Protection will be found.

U.S.P.Q.2d is updated weekly in looseleaf format and provides access to the most recent cases. Cases are usually distributed in looseleaf format within three weeks of publication. Therefore, a researcher should consult the looseleaf releases to locate recent cases addressing the topic of Character Protection.

3. Copyright Law Decisions

Copyright Law Decisions is a publication which deals strictly with decisions regarding copyright law. The topical index, which is organized by reference to paragraph, rather than page, numbers, contains the section "CHARACTERS - MOTION PICTURES, VILLIANS" (26,726). The paragraph numbers are located at the bottom of the page. This section contains references to case law addressing Character Protection.

Copyright Law Decisions is the bound volume of the looseleaf Copyright Law Reporter. Copyright Law Reporter is the looseleaf index and is arranged the same way as the bound volume, using reference to paragraph rather than page numbers. The topical index contains the heading "CARTOONS AND COMIC STRIPS" (580) and a further subheading "COPYRIGHTABILITY" (580.38); these sections contain references to recent case law on the topic.

4. Shepard's Citations [n.44]

Once a relevant case has been located, the case must be shepardized to ensure that it is still good law. Also, the Shepard's citator allows a *510 researcher to locate additional cases which address the same general topic and which have cited to the particular case being shepardized. Shepard's contains print citators for every set of statutes and case reporters. When one is using Shepard's with a case citation, one should note which headnote of the cited case deals specifically with Character Protection. By looking for the relevant headnote number in the list of citations, one can see which of the citing cases specifically address Character Protection. The downfall of using Shepard's is that it has a lag time of approximately four to six months for reporting cases.

5. American Law Reports

American Law Reports (A.L.R.) is an excellent, and sometimes overlooked, case finding tool. A.L.R. annotations compile cases from all jurisdictions on a particular, and usually narrow, point of law. If an A.L.R. annotation addressing the issue of copyright protection is located, then a researcher will have a majority of case law research completed.

A.L.R. annotations are not only a good source to locate case references on a specific topic, but they also provide background information on the topic. References to A.L.R. annotations can be found in a number of sources, such as Title 17 of U.S.C.S. and the A.L.R. Index to Annotations. A.L.R. is a publication of Lawyer's Cooperative and, as such, references to these annotations will not be found in the West Publication U.S.C.A.

The first index to consult is the A.L.R. Digest to 3/4/Fed which contains references to state cases. This digest does not contain references to the terms COPYRIGHT, FICTIONAL CHARACTERS or CARTOONS. The next index to consult is the A.L.R. Quick Index 3.4.5. (Volume A-Z). Searching the heading "COPYRIGHT AND LITERARY PROPERTY" and then the subheading "CARTOONS AND COMIC STRIPS" locates a number of documents. One relevant document located in the index included Extent of Fair Use Doctrine under Federal Copyright Act. [n.45] Although the article has a publication date of 1969, the pocket part is updated yearly and contains the recent case law and articles which address the topic. [n.46]

*511 The third index to consult is the A.L.R. Federal Quick Index A-Z, which contains excerpts from Federal District Court cases. Under the heading "COPYRIGHT AND LITERARY PROPERTY" there is no reference to fictional or cartoon characters. This index also contains the heading "TRADEMARKS, TRADENAMES, UNFAIR TRADE PRACTICES," which contains a references to "CARTOONS" at § § 3(a), 6(b)-8(a),9(b), 11, 12 and "FICTIONAL CHARACTERS" AT § § 3, 6-8(a), 9(b), 11, 12. While trademark protection is not the focus of this pathfinder, certain trademark sections in this A.L.R. are applicable to copyright protection. For example, under § 8 "Motion Pictures" there is a reference to Edgar Rice Burroughs v. Manns Theaters, [n.47] a copyright infringement case against a company which sought to exhibit Tarzan and Jane in a satirical X-rated film.

As of this writing, there are no A.L.R. annotations which address the specific issue of Character Protection. The lack of a compiled annotation is most likely due to the relatively new attention given to Character Protection. However, due to the rise in the use of fictional and cartoon characters, it appears that additional case law addressing the topic will be generated, and it will only be a matter of time before an A.L.R. annotation on point is written.

6. American Law Reports On-Line

Since A.L.R. annotations are published by Lawyer's Cooperative and are not a West Publication, WESTLAW does not contain A.L.R. references on-line. American Law Reports may be found on-line on Lexis. [n.48]

*512 7. Useful References

The most relevant cases addressing the topic of Character Protection include:

1. *Nichols v. Universal Pictures Corporation*, 45 F.2d 119, 7 U.S.P.Q. 84 (2d Cir. 1930)(only the most uniquely developed and distinctly delineated characters may be afforded Copyright protection).

2. *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F.2d 432, 45 U.S.P.Q. 291 (2d Cir. 1940).

3. *Edgar Rice Burroughs v. Manns Theaters*, 195 U.S.P.Q. 159 (Cal. 1976).

4. *Walt Disney v. Air Pirates*, 581 F.2d 751, 199 U.S.P.Q. 769 (9th Cir. 1978).

5. *United Feature Syndicate v. Sunrise Mold Co. Inc.*, 569 F.Supp. 1475 (S.D. Fla. 1983) (individual characters featured in comic strips are separate copyrightable components of the comic strip).

6. *Jones v. CBS, Inc.*, 733 F.Supp 748, 15 U.S.P.Q. 1380 (S.D.N.Y. 1990)(case follows the principles set forth in *Nichols*).

7. *New Line Cinema Corp., v. Easter Unlimited*, 17 U.S.P.Q.2d 1631 (E.D.N.Y. 1989)(Copyright protection analysis within a discussion of the copyrightability of characters in motion pictures).

8. *Rogers v. Koons*, 960 F.2d 301, 22 U.S.P.Q.2d 1492 (2nd Cir. 1992), cert. denied 121 L.Ed. 2d. 278, 113 S.Ct. 365, 61 U.S.L.W. 3286 (U.S. 1992).

9. *United Feature Syndicate v. Koons*, 817 F.Supp. 370, 28 U.S.P.Q.2d 1401 (S.D.N.Y. 1993)(in-depth discussion on the availability of copyright protection for cartoon and comic strip characters).

D. UNIFORM OR MODEL ACTS

Since copyright law is governed by federal law, there are no uniform or model acts for the area of copyright law.

VI. SECONDARY SOURCES

A. PERIODICALS, JOURNALS AND LAW REVIEWS

For one who is researching Character Protection, periodicals are a good source to begin since Character Protection is a timely topic and the current increase in animation among the movie, television and video industries is requiring courts to articulate well-defined legal protection that will be afforded to characters. Periodicals are up-to-date and report

on the recent developments in Character Protection in a timely manner. Numerous articles discussing Character Protection appear in traditional legal periodicals. In addition, specialized intellectual property periodicals and indexes devote sections to copyright protection in general and Character Protection in particular.

Access to legal periodicals is available through a number of resources such as Current Law Index, Index to Legal Periodicals and Legal Newsletters in Print. In addition, the Encyclopedia of Legal Information Sources also contains reference to periodical publications.

*513 1. Current Law Index

Current Law Index is available in paper form as well as in CD-ROM format. The paper source contains numerous headings, such as COPYRIGHT and FICTION, which can be searched to locate relevant information on Character Protection. Using the Current Law Index in its CD-ROM form, LegalTrac, more successfully locates relevant periodicals than using the paper form counterpart. Numerous searches located relevant law review or law journal articles. The relevant headings where one should search include "COPYRIGHT"; "FICTIONAL CHARACTER"; "CHARACTER"; "CARTOON" or "CARTOON CHARACTER."

The heading "COPYRIGHT" contains subheadings which are useful to the issue of Character protection. The subheadings include "FICTION"; "LAWS, REGULATIONS, ETC." and "ANECDOTES, CARTOONS, SATIRE, ETC." Each of these subheadings contain references to periodicals and law review articles which address Character Protection. The references are included at the end of this section.

2. Legal Newsletters in Print

This source provides information on over 2000 newsletters, bulletins and reporting services that are issued periodically and found in looseleaf format. This tool contains a subject index which makes researching titles very easy. A search under the subject "COPYRIGHT" locates a number of relevant publications. The Copyright Law Journal is published bi-monthly and provides practical analysis on recent cases, developments and pending legislation in the area of copyright law. Practice tips are also included in this source. Intellectual Property Law Journal contains an analysis on current developments and cutting edge issues in all areas of intellectual property.

3. Index to Legal Periodicals

Although this source is useful in locating periodicals in general, the subject index in this source does not contain any references to Character Protection.

*514 4. On-Line Searches

Several indices to legal periodicals are available on-line. WESTLAW and Lexis both contain databases which locate articles regarding copyright protection for fictional or cartoon characters. [n.49]

5. Useful References

The relevant documents located by the methods previously discussed include:

1. AIPLA Quarterly Journal, (American Intellectual Property Law Association, 1984 - present).
2. The Copyright Law Journal, N. Boorstyn, ed. (San Francisco: 1984 - present).
3. IDEA: The Journal of Law and Technology, (Franklin Pierce Law Center, 1957 - present).
4. Intellectual Property Law Review, (Clark Boardman, 1969 - present).
5. Journal of the Copyright Society of the U.S.A., (NYU Law Center, 1981 - present).
6. Patent, Trademark and Copyright Journal, (BNA, 1970 - present).

Relevant Articles:

1. Bruce H. Joffe, Law, Ethics and Public Relations Writers, *Public Relations Journal*, July, 1989 at 40.
2. Herbert R. Lottman, Court moves in Italy to block "Zhivago" Sequel, *Publisher's Weekly*, October 19, 1992 at 13.
3. Francis M. Nevins, Jr., Copyright + Character = Catastrophe, 39 *Journal of the Copyright Society of the USA*, Summer '92, at 303-344.
4. Kenneth L. Port, Copyright Protection of Fictional Characters in Japan: The Popeye Case - It's not just a Mick(e)y Mouse Affair, 103 *The Los Angeles Daily Journal*, July 1990, at 7.
5. Stuart M. Wise, The Icing on the Case (Cartoon Characters in the Courts), 7 *The National Law Journal*, December 1984, at 59.
6. Owner of Batman Mark and Copyright Loses Bid to Halt use of "Batcave" for Bookstore, 24 *Patent, Trademark and Copyright Journal* No. 581, p. 88 (May 27, 1982).

*515 B. LAW REVIEWS [n.50]

Law reviews are an excellent research tool to locate relevant information on the topic of Character Protection. The same methods discussed previously to locate periodical articles will also locate law review articles. Current Law Index is useful in locating law review articles for the topic of Character Protection. Again, the CD-ROM format is more useful in locating law review articles than its paper form counterpart. Numerous searches under different headings such as "FICTIONAL CHARACTER"; "CARTOON

CHARACTERS" or "COPYRIGHT" (which contains the subheadings "FICTION" and "ANECDOTES, CARTOONS, SATIRE, ETC.") will locate relevant law review articles.

1. Useful References

The following are law review articles, listed in chronological order, which contain relevant information on Character Protection:

*516 1. Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 127 (January, 1993).

2. Michael Todd Helfand, When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional, Literary and Pictorial Characters, 44 Stan. L. Rev. 623 (1992).

3. Kenneth E. Spahn, The Legal Protection of Fictional Characters, 9 U. Miami Ent. & Sports L. Rev. 331 (1992).

4. Dean D. Niro, Protecting characters through Copyright Law: Paving a New Road upon which Literary, Graphic and Motion Picture Characters can all Travel, 41 DePaul L.Rev. 359 (1992).

5. Judy D. Vaccaro, Good News for the Character Infringer, 11 Loy. L.A. Ent. L.J. 133 (Winter 1991).

6. David B. Feldman, Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection, 78 Cal. L. Rev. 687 (1990).

7. E. Fulton Brylawski, E.T.: An Extraterrestrial Caught in a Copyright Dilemma, 52 Geo. Wash. L. Rev. 395 (1989).

8. Leslie A. Kurtz, The Independent Legal Lives of Fictional Characters, 1986 Wis. L. Rev. 429 (1986).

9. Lawrence L. Davidow, Copyright Protection for Fictional Characters: A Trademark-Based Approach to Replace Nichols, 8 Colum. J.L. & Arts 513 (1984).

10. James L. Turner, It's a Bird, It's a Plane or is it Public Domain?: Analysis of Copyright Protection Afforded Fictional Characters, 35 Fed. Comm. L. J. 268 (1983).

C. BOOKS AND BIBLIOGRAPHIES

Books are useful tools which should not be overlooked since they contain an abundance of information on a particular subject within one work. Also, books can provide a broader perspective on a particular topic, rather than a narrow discussion on one aspect of an issue which may reflect the view of an article's author rather than the majority view on the topic.

1. The Encyclopedia of Legal Information Sources

This source contains entries for publications, organizations and associations. The Encyclopedia is arranged in alphabetical order and contains a section on "COPYRIGHTS" but does not contain a separate section for "CHARACTERS." Within the "COPYRIGHT" section, there are sub-sections for "LOOSELEAF SERVICES &

REPORTERS"; "HANDBOOKS, MANUALS, FORMBOOKS" and "TEXTBOOKS AND GENERAL WORKS." The difficulty associated with this source is that, if one does not know under which category a particular source will fall, one will have to check through every category to locate particular sources.

*517 2. Law Books in Print

This source contains a listing of books written solely on topics relating to the legal field. This publication is organized by author, title and publisher; however, utilization of the title index is cumbersome unless one has a specific title of a book in mind. A search in the subject index under "COPYRIGHT" locates books listed alphabetically by author. A search in the subject index is time consuming, unless one is armed with information about an author who has written on the topic of Character Protection. Law Books in Print also contains information relating to looseleaf publications and information on copyright law in other countries.

3. Books in Print

This source is organized similarly to Law Books in Print. This tool is not user friendly due to the small typeface, approximately 9 point, and its alphabetical listing by author. A search in the subject index contains the heading "CHARACTERS IN LITERATURE"; however, this heading does not contain references for the topic. Another search under "CARICATURE AND CARTOONS" also fails to reveal information regarding Character Protection.

Of the three paper sources consulted, The Encyclopedia of Legal Information Sources appears to be the most user-friendly since information is broken down into specific categories. Research may be more difficult using this publication if one is unsure what category would best serve the purpose.

4. On-Line Research

Books in Print is also available on-line in WESTLAW through the "BIP" database. A search of "CHARACTER w/4 PROTECTION" locates two books, the citations to which can be found in the Useful References section below. These books appear to be extremely relevant to the issue of Character Protection.

Neither Books in Print nor an equivalent publication is available on Lexis. [n.51]

*518 5. Useful References

Books

1. Ralph S. Brown and Robert C. Denicola, *Cases on Copyright, Unfair Competition and other topics bearing on the Protection of Literary, Musical and Artistic Works*, 5th ed. (Foundation Press: 1990).
2. Ron Grover, *The Disney Touch: How a Daring Management Team Revived an Entertainment Empire* (Irwin Prof. Publishing, 1991).
3. Dorothy J. Howell, *Intellectual Properties and the Protection of Fictional Characters: Copyright, Trademark or Unfair Competition?*, (New York: Quorum Books, 1990).

Bibliographies

1. Selected Bibliography of Copyright Materials with Annotations, by J. Lomino & S. Kuklin, 4 *Legal Reference Services Quarterly* 39 (1984).
2. Bibliography, 31 *Journal of the Copyright Society* 643 (1984).

D. TREATISES

Although there are a variety of treatises specifically devoted to the general category of copyright law, the narrow topic of Character Protection has not been given a large amount of attention in these treatises. For example, *The Copyright Primer* contains basic and rudimentary principles regarding copyright law and does not engage in any discussion regarding characters or cartoons. Further, although the *Law of Copyright* contains an advanced discussion of copyright law, it is not helpful in locating information regarding Character Protection or similarly narrow research topics.

Treatises can be located through the *Desk Encyclopedia of Intellectual Property*, *Encyclopedia of Legal Information Sources* and *Law Books in Print*. These sources provide references to a number of treatises within the general area of copyright law.

1. Nimmer on Copyrights

This is the most informational and frequently cited treatise in the area of copyright law. This five-volume treatise contains information on the research topic in § 2.12 - CHARACTER PROTECTION. The discussion of Character Protection is brief, encompassing only eight pages of the five volume treatise. However, the information contained in the chapter is useful. The discussion focuses on when Character Protection is available, leading cases which discuss Character Protection and alternative forms of protection if copyright is not available. The treatise also contains extensive footnotes which cite to many cases and law reviews. While a researcher may find that the chapter discussion is elementary or too basic, the references to case law and law review articles are invaluable.

*519 2. Copyright Law in Business and Practice

This treatise contains § 2.6 - QUESTIONS OF COPYRIGHT ON VARIOUS SUBJECT MATTERS and the subheading [3], CHARACTERS. However, although a section is devoted to the topic, there is only one page of material discussing Character Protection. The cumulative supplement to Copyright Law in Business and Practice should be consulted, as it contains recent case references.

3. Copyright: Principles, Law & Practice

This publication contains useful material on the topic of Character Protection. Section 2.7 - LITERARY WORKS contains information on copyright protection for literary characters. Section 2.11 - PICTORIAL, GRAPHIC AND SCULPTURAL WORKS contains information regarding visually depicted characters (e.g. cartoon characters). It also contains a discussion differentiating protection of literary characters and protection of visually depicted characters.

4. Intellectual Property Law: Commercial, Creative and Industrial Property

This treatise only contains passing sentences regarding characters in general in § § 1.02(5) and 5.03(1)(d). In § 9.01[3], located within the trademark section, there is a brief discussion of trademark protection for characters in creative works. The discussion focuses on trademark protection as a useful supplement to copyright protection for characters and the more lenient standard to satisfy trademark infringement rather than copyright infringement.

5. Copyright Law: A Practitioner's Guide

This source contains a section on "PROTECTION OF CHARACTERS." This section focuses on the requirement that a work be an original work of authorship. While the text in this section contains more elementary than advanced information, it cites to numerous cases and law review articles that contain specific information on the topic at issue. There is also a section on "CARTOONS" which contains elementary information but does not contain the extensive case annotations as the section on "PROTECTION OF CHARACTERS."

*520 6. CD-ROM SERVICES

a) NELLCO

Treatises can also be accessed through non-print sources such as the CD-ROM New England Law Library Consortium (NELLCO). This service provides listings of law books from law libraries in the entire New England region. A title and subject search using search terms such as "COPYRIGHT PROTECTION FOR FICTIONAL

CHARACTERS" or "CARTOON AND CHARACTER PROTECTION" can locate treatises which encompass Character Protection.

b) EPIC

The EPIC on-line system is an electronic card catalog which conducts a search of over 20,000,000 cataloged sources in over 10,000 libraries in the United States, Canada and Europe. A search using the term "COPYRIGHT and (FICTIONAL OR CARTOON OR ANIMAT?)" locates a few sources addressing Character Protection, including the Dorothy Howell book cited to in the Books and Bibliographies Useful References section below.

7. On-Line Sources

WESTLAW contains the U.S. Library of Congress Machine Readable Cataloging System in the LCMARC-B database. This system conducts searches of all books cataloged with the Library of Congress since 1968. [n.52]

Currently, there are no treatises on-line in Lexis.

8. Useful References

1. Copyright Law: A Practitioner's Guide, 2d ed. by H. Henn (Practicing Law Institute, 1988).
2. Copyright: Principles, Law & Practice, by Paul Goldstein (Little Brown, 1989).
3. Copyright Law in Business and Practice, by John W. Hazard, Jr. (Prentice Hall, 1989).
4. Intellectual Property Law: Commercial, Creative and Industrial Property, by Jay Dratler (Law Journals Seminar Press, 1991).
- *521 5. Modern Intellectual Property, by Michael A. Epstein (Prentice Hall Law and Business, 1989 - present).
6. Nimmer on Copyright, by M. Nimmer (Matthew Bender, 1963 - present).
7. The Visual Artist's Guide to the New Copyright Law, by T. Crawford (Graphic Arts Guild, 1978).

E. PRACTICE MATERIALS [n.53]

Practice materials are useful in locating information on Character Protection and copyright law.

1. Copyright Registration Practice

This material provides forms on how to pursue copyright protection for various works. Section 15.12 - CARTOON WORKS contains a brief description of what types of characters are eligible for protection by copyright and which aspects of the characters will be afforded protection. Section 15.12 also describes the procedure one would follow to register cartoons and comic strips.

2. The U.S. Copyright Office Speaks

Surprisingly, this material is a useful practice guide. This publication contains a collection of articles written by members of the copyright Office. The article Licensing of Characters [n.54] by Peter F. Nolan contains relevant information. There is information regarding the acquisition of exploitation rights such as ownership, merchandising and television rights, as well as promotional tie-ins and maintenance of protection on characters. There is also guidance for creating licensing agreements, including examples of clauses for the term of a license and royalty payments.

3. Protecting Trade Secrets, Patents, Copyrights and Trademarks

This practice guide contains samples of forms and instructions for filling out forms that may prove useful. The entries include, but are not limited to, licensing and assignment of characters, work for hire agreements, enforcing rights (e.g. cease and desist orders) and commencement of an infringement action.

*522 4. American Jurisprudence Forms, 2d Edition

This Lawyer's Cooperative Publication contains relevant information. Chapter 72 contains the section COPYRIGHT AND LITERARY AND ARTISTIC PROPERTY. This material contains forms to use in drafting documents related to literary, artistic and musical property and copyrights therein. It also includes information on the transfer, assignment and protection of owner's rights in intellectual property, acquisition of statutory copyright protection and agreements for the sale and exploitation of intellectual property. There are a number of other references which may be helpful, including A.L.R. References and Practice Aid Information (Am. Jur. 2d, Am. Jur. Practice Forms). There is no specific information regarding Character Protection.

5. Useful References

1. American Jurisprudence Legal Forms, 2d ed., (Lawyer's Cooperative, 1971 - present).
2. Copyright Registration Practice, by James E. Hawes (Clark Boardman, 1990-present).

3. Forms and Agreements on Intellectual Property and International Licensing, 3d ed. by L. Melville (Clark Boardman, 1979 - present).

4. Protecting Trade Secrets, Patents, Copyrights and Trademarks, by Robert C. Dorr (Wiley Law Publications, 1990).

F. LOOSELEAF SERVICES [n.55]

Looseleaf services are frequently referred to as "One-Stop Shopping." This is because of their incorporation of primary source material (case law, statutory law, regulations) as well as secondary source material (articles and comments). Since looseleaves are updated frequently, they are of particular importance in the emerging area of Character Protection. Looseleaf services provide the most recent developments occurring in a particular area of law. Looseleaves are an invaluable method of obtaining up to date information on certain cases, articles and treatises in a particular area.

1. Legal Looseleaves

This source uncovers a number of looseleaves in the general area of copyright law such as BNA's Patent, Trademark and Copyright Journal, *523 Copyright Registration Practice and International Copyright Law and Practice. Unfortunately, a number of the looseleaves did not contain a significant amount of information on Character Protection. However, looseleaf publications which contain recent case law on Character Protection include United States Patent Quarterly, Second Series and the Copyright Law Reporter (discussed previously in the section on CASE LAW). Legal Looseleaves in Print also contains a section on which looseleaves are electronically available.

2. Useful References

1. BNA's Patent, Trademark and Copyright Journal, (BNA, 1970).
2. Copyright Law Reporter, (CCH, 1978 - present).
3. Copyright Registration Practice, (Clark Boardman, 1990 - present).

G. LEGAL ENCYCLOPEDIAS

While legal encyclopedias do not provide in-depth analysis on specific legal issues, they do provide a basis from which one can build. The information contained in legal encyclopedias is helpful to one who is not comfortable or knowledgeable regarding a particular topic, and it is also helpful in leading a researcher to further research sources. The most useful legal encyclopedias are Corpus Juris Secundum (C.J.S.) and American Jurisprudence 2d (Am. Jur. 2d).

1. Corpus Juris Secundum (C.J.S.)

In C.J.S. the section which contains relevant information on Character Protection is found in Volume 18, § 1, entitled "COPYRIGHT AND INTELLECTUAL PROPERTY". There are references to § 15 - CHARACTERS and § 20 - FICTIONIZATION. Section 15 discusses which aspects of a character's physical characteristics are protectable, as well as case references which address this issue. Section 20 does not contain information on Character Protection. Relevant material may also be found in Volume 87, "Trade Regulation." The index to Volume 87 contains the section § 112 - "CARTOONS, INJUNCTION TO PROTECT AGAINST UNFAIR COMPETITION. This section does not discuss copyright protection for characters but rather, how a cartoonist could get an injunction against one who infringed his/her cartoon.

*524 2. American Jurisprudence Second (Am.Jur.2d)

In Am.Jur.2d relevant information is found in Volume 18, "COPYRIGHT AND LITERARY PROPERTY." The general index contains references to "CARTOONS - § § 49, 83 and 84" and "CHARACTERS- § § 44, 49, and 84." Section 49 sets forth special rules as to the copyrightability of characters and discusses the availability of copyright protection for cartoon and comic book characters. This section also gives case annotations.

3. The Guide to American Law

This encyclopedia contains a general overview of copyright law. There is no mention of fictional characters or cartoons in this section or in the index. The information contained in this encyclopedia is basic and is more useful to a layperson rather than a copyright practitioner or researcher.

4. McCarthy's Desk Encyclopedia of Intellectual Property

This encyclopedia contains legal definition of words as well as what field of intellectual property to which they would apply. While this source contains a definition for "CHARACTER," the definition is not relevant to the research topic. Although the term "COPYRIGHT" is defined, the definition is general and does not uncover any information regarding fictional or cartoon characters.

5. Useful References

1. American Jurisprudence 2d., (Lawyer's Cooperative, 1936 - present).
2. Corpus Juris Secundum, (West Publishing, 1936 - present).

3. The Guide to American Law, (West Publishing, 1983 - present).
4. McCarthy's Desk Encyclopedia of Intellectual Property, (BNA, 1991).

H. ADMINISTRATIVE LAW

Rules or regulations promulgated by an agency may produce persuasive or suggestive authority on a particular topic. The Copyright Office of the Library of Congress has the responsibility for administering the United States Copyright System and, more specifically, for the filing and registration of copyrights. Although a search through the administrative materials did not locate information on the topic of Character Protection, this section is included to inform a researcher of *525 its existence. Moreover, since the issue of Character Protection is gaining widespread attention, there may be information in this area in the future and access to such information would be completed by searching the following reference materials.

1. The Index to Code of Federal Regulations [n.56]

The bound volume of this source contains the heading "COPYRIGHT" which refers to 37 C.F.R. for copyright, patents and trademark. However, under this heading, there is no reference to Character Protection. Similarly, in the paperback Index to Code of Federal Regulations there is no reference to Character Protection. A search through 37 C.F.R. located no information regarding the topic.

2. The CIS Federal Register Weekly Index

This publication is arranged by subject and names heading and provides quick access to the topic at issue. A search under the headings "COPYRIGHT"; "COPYRIGHT OFFICE" and "COPYRIGHT ACT" did not contain any references to fictional characters, characters or cartoons. Similarly, neither the CIS Federal Register Weekly Index nor the List of Sections Affected (L.S.A.) contains information relevant to this research topic.

I. CONGRESSIONAL COMMITTEES

While there are a number of government agencies and congressional committees in the field of intellectual property, there are no particular *526 committees empowered with the responsibility of determining copyright protection of fictional or cartoon characters. The sources, while failing to provide specific information regarding Character Protection, did provide useful information on committees which deal with copyrights in general.

1. The Congressional Yellow Book

The index to this publication contains the heading "LIBRARY OF CONGRESS" and the subheading "COPYRIGHT". The COPYRIGHT section contains names, phone numbers and titles of those individuals who are responsible in certain subdivisions such as Examining Division, Information and Reference Divisions, Licensing Division and Records and Procedures Division.

The Congressional Yellow Book contains five main sections on committees and the table of contents preceding each section details the various responsibilities of each committee. For example, Section III, Committees of the U.S. Senate (103rd Congress), contains a listing for the Committee on the Judiciary and a Subcommittee on Patents, Trademarks and copyrights. [n.57] Within this category there is information regarding the names of majority and minority members of the committee and key staff aides. There is no information regarding copyright protection of fictional or cartoon characters.

Another section, Section IV, Committees of the U.S. House of Representatives (103rd Congress), contains the same information as the Senate section. Under the Table of Contents there is a listing for Committee on the Judiciary and a Subcommittee on Intellectual Property and Judicial Administration. The information contained in the subcommittee section includes majority and minority members and key staff aides. There is no information regarding Character Protection

2. Congressional Directory

The index to this source contains references to the headings LIBRARY OF CONGRESS and COPYRIGHT. The information provided in the *527 directory includes the name and telephone numbers of the Register of Copyrights, Legal Affairs Counsel, Policy Planning Advisors and other division chiefs.

3. The United States Government Manual

This publication contains a reference to LIBRARY OF CONGRESS - COPYRIGHT OFFICE, and includes contact information on the Librarian of Congress, Directors and Associate Librarian for Copyright Services. [n.58] The information is arranged in a concise and clear manner and gives easy access to a particular division within the Copyright Office.

4. Washington Information Directory

This publication contains information on various agencies which deal with copyright matters. The subject index includes references to COPYRIGHT OFFICE and PATENTS, COPYRIGHTS AND TRADEMARKS. Under the COPYRIGHT OFFICE heading there

is information regarding the responsibility of each agency and contact information for that agency. [n.59]

The Washington Information Directory also contains information on Congressional committees such as the House and Senate Judiciary and Library of Congress. Contacting the judiciary, whose responsibility it is to review decisions of the Patent and Trademark Office (PTO), including opposition and interference proceedings, can be accomplished by contacting the Court of Appeals for the Federal Circuit. [n.60]

*528 Information regarding non-governmental agencies, such as American Intellectual Property Law Association and Educators Ad Hoc Committee on Copyright Law, is also available in this publication. The Washington Information Directory contains invaluable information on "who to contact where."

Useful References

1. The Congressional Yellow Book, (Washington Monitor, 1976 - present).
2. Congressional Directory, (U.S. GPO, 1888 - present).
3. The United States Government Manual, (Office of the Federal Register, 1981 - present).
4. The Washington Information Directory, (U.S. GPO, 1976 - present).

J. GOVERNMENT COMMISSIONS

There have not been any government commissions which specifically address the issue of copyright protection for fictional or cartoon characters.

VII. ORGANIZATIONS AND PRACTITIONERS

A. ORGANIZATIONS AND PRACTITIONERS

Contacting organizations, associations and individuals in the intellectual property field is useful for a number of reasons. Practical information that one in the field has gained through experience can be given to one interested in Character Protection. This type of research provides one with certain information that may have been unavailable or uncovered in the course of structured and traditional research.

1. Attorneys

An attorney specializing in copyright law should be familiar with current case law and research materials on a particular topic. Information on knowledgeable attorneys is available through Who's Who in Intellectual Property Law [n.61], Law and Business

Directory of *529 Intellectual Property Attorneys [n.62], Ford's National Referral Directory of Law Firms by Specialty [n.63], the Lawyer's Register International by Specialty and Fields of Law [n.64], and on-line. [n.65]

2. Professional Associations

Resources for Professional Associations include the Encyclopedia of Associations [n.66], The Washington Representatives [n.67], and on-line services [n.68]

*530 Useful references include the American Copyright Society, the American Intellectual Property Law Association, the Copyright Society of U.S.A., Educators Ad Hoc Committee on Copyright Law, Intellectual Property Owners, INC., and the International Copyright Information Center. [n.69]

*531 VIII. CONCLUSION

This pathfinder was developed to assist a researcher confronted with the issue of Character Protection. Information on primary resource tools such as case law and statutory material and secondary resource tools such as periodicals, law review articles, treatise material and legal encyclopedias has been provided. Secondary sources which contain general background information on copyright law are offered to allow those unfamiliar with copyright law to gain an understanding of the area of law that covers the narrow topic of Character Protection. Contact information on organizations and practitioners in the area are also included. Moreover, search queries to locate information on-line are offered to assist a researcher during computerized research.

[n.1]. Beauty and the Bucks, Newsweek, April 25, 1994, at 65.

[n.2]. 17 U.S.C. § 101, et. seq. (1988 & Supp. 1993).

[n.3]. 17 U.S.C. § 5 (1970).

[n.4]. 17 U.S.C. § 102(a) (1988 & Supp. 1993).

[n.5]. Id. at § § 101-914.

[n.6]. Nichols v. Universal Pictures Corp., 45 F.2d 119, 7 U.S.P.Q. 84 (2d Cir. 1930), cert. denied, 282 U.S. 902, 75 L.Ed. 795, 51 S.Ct. 216 (1931).

[n.7]. *Baker v. Selden*, 101 U.S. 99 (1879)(there can be no copyright protection in ideas).

[n.8]. *Nichols*, 45 F.2d at 121, 7 U.S.P.Q. at 86-7.

[n.9]. *Id.*

[n.10]. *Id.*

[n.11]. *Id.* at 122, 7 U.S.P.Q. at 87.

[n.12]. *Olson v. National Broadcasting Co.*, 855 F.2d 1446, 8 U.S.P.Q. 1231 (9th Cir. 1988).

[n.13]. *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F.Supp 388, 391, 215 U.S.P.Q. 495 (S.D.N.Y. 1981), *aff'd* 683 F.2d 610 (2d Cir. 1982). This court applied the *Nichols* standard. Here, the Second Circuit afforded protection for *Tarzan*, because the character was sufficiently delineated by the author to warrant copyright protection. However, had *Tarzan* not been sufficiently delineated, copyright protection would have been denied.

[n.14]. *Columbia Broadcasting Sys., Inc. v DeCosta*, 377 F.2d 315, 320, 153 U.S.P.Q. 649 (1st Cir. 1967), *cert. denied*, 389 U.S. 1007, 10 L.Ed.2d. 603, 88 S. Ct. 565 (1967).

[n.15]. *Id.* at 317, 153 U.S.P.Q. at 651-2.

[n.16]. *Id.* at 321, 153 U.S.P.Q. at 654.

[n.17]. *Warner Bros. Pictures, Inc., v. Columbia Broadcasting Sys., Inc.*, 216 F.2d 945, 104 U.S.P.Q. 103 (9th Cir. 1954), *cert. denied*, 348 U.S. 971, 99 L.Ed. 756, 75 S.Ct. 532 (1955).

[n.18]. *Id.* at 950, 104 U.S.P.Q. at 107.

[n.19]. Id.

[n.20]. Lawrence L. Davidow, Copyright Protection for Fictional Characters: A Trademark-Based Approach to Replace Nichols, 8 Colum. J.L. & Arts, 513, 544 (1984).

[n.21]. Hill v. Whalen & Martell, 220 F. 359 (S.D.N.Y. 1914).

[n.22]. Id.

[n.23]. Id. at 359-60.

[n.24]. Id.

[n.25]. Walt Disney Productions v. Air Pirates, 581 F.2d 751, 199 U.S.P.Q. 769 (9th Cir. 1978), cert. denied, 439 U.S. 1132, 59 L.Ed.2d. 94, 99 S.Ct. 1054 (1979).

[n.26]. Id. at 755, 199 U.S.P.Q. 773.

[n.27]. Id.

[n.28]. Detective Comics, Inc., v. Bruns Publications, 111 F.2d 432, 45 U.S.P.Q. 291 (2d Cir. 1940).

[n.29]. Id.

[n.30]. Universal City Studios v. Kamar Indus., 1982 Copyright L. Decisions (CCH) 25,452 (S.D. Tex. 1982).

[n.31]. Id. at 17,684.

[n.32]. Warner Bros. v. Film Ventures Int'l, 403 F.Supp. 522, 525, 189 U.S.P.Q. 591, 593 (C.D. Cal. 1975).

[n.33]. *Filmvideo Releasing Corp. v. Hastings*, 426 F.Supp. 690, 193 U.S.P.Q. 305 (S.D.N.Y. 1976).

[n.34]. 668 F.2d 91, 208 U.S.P.Q. 750 (2d Cir. 1981).

[n.35]. *Silverman v. CBS*, 870 F.2d 40, 9 U.S.P.Q.2d 1778 (2d Cir. 1989), cert. denied, 492 U.S. 907, 106 L.Ed.2d. 569, 109 S.Ct. 3219 (1989).

[n.36]. *Id.* at 50, 9 U.S.P.Q. 2d at 1785.

[n.37]. U.S. Const. art.I, § 8, cl. 8.

[n.38]. 17 U.S.C. § 101.

[n.39]. *Id.*

[n.40]. Legislative histories can also be conducted on-line, both on WESTLAW and Lexis. Researching legislative histories is a simpler procedure when conducted on-line rather than through the manual sources due to the reduction of time and ease offered by the on-line services. On WESTLAW the database "LH" contains legislative histories for the United States Code from 1948 to present. Neither the "LH" database nor the "CR" (Congressional Record) database contains information on Character Protection.

On Lexis access to the Congressional Record would be conducted through the "COPYRT" library and the "RECORD" file. The information contained in the "RECORD" file is narrow as it includes only documents relating to intellectual property. However, as on WESTLAW, on-line legislative history searching proved unsuccessful in locating information regarding copyright protection for characters.

[n.41]. Nancy P. Johnson, *Sources of Compiled Legislative Histories*, (F.B. Rothman & Co., 1979 - present).

[n.42]. Alan Latman & James F. Lightstone, *The Kamenstein Legislative History Project on the Copyright Act of 1976*, (F.B. Rothman & Co., 1981).

[n.43]. The U.S.P.Q.2d may also be accessed on-line. While WESTLAW contains U.S.P.Q. and U.S.P.Q.2d on-line, LEXIS does not. On WESTLAW, the "USPQ" database includes references to the relevant cases in the area of Character Protection. A search using the term "COPYRIGHT /5 PROTECTION /5 FICTIONAL or CARTOON AND CHARACTER" located a number of relevant case references, the citations of which are included in the Useful References section infra.

[n.44]. Shepard's Citators may also be accessed on-line. Both WESTLAW and Lexis contain the Shepard's Citators on-line and perform the same functions as the Shepard's print sources (i.e. update case law and locate additional cases which address similar issues). WESTLAW contains the databases "SH" for Shepard's Citations, "IC" for Insta-Cite and "QC" for Quick-Cite. The "SH" database shepardizes a case for the researcher, and Shepard's Preview contains the most recent cases. The on-line Shepard's also has a lag time of approximately four to six months. The "Insta-Cite" and "Quick-Cite" features are also available and these databases only have a lag time of approximately 1- 3 weeks after a decision.

On Lexis, the Shepard's Citators are found in the "CITE" library and "SHEP" file. However, Lexis contains the Auto-Cite feature (.ac) which provides up-to- date validation and gives citations to connected cases. Using the Auto-Cite feature, which has a lag time of approximately 1 -3 weeks, one can locate subsequent appellate history, subsequent treatment history, prior history of the case and negative references.

[n.45]. 23 A.L.R.3d 139 (1969 & Supp. 1994).

[n.46]. This article refers to "CARTOONS AND COMIC STRIPS" in a number of sections, including:

§ 28 General

§ 10 Acknowledging source of reproduction, effect of

§ § 6(d), 7(c), 28, 30(b) Manufacture and selling toys or dolls of characters from Cartoons and Comic Strips;

§ 7(b) Copying for similar medium or audience;

§ § 8, 28 Stage production of cartoon strip characters.

Section 28 discusses what use unauthorized persons may properly or fairly make of copyrighted comic strips or cartoons. This section contains numerous case annotations that are helpful for the topic. The remaining sections discuss the specific topic of cartoon and fictional characters within general categories.

[n.47]. Edgar Rice Burroughs v. Manns Theaters, 195 U.S.P.Q. 159 (Cal. 1976).

[n.48]. Full-text A.L.R. references can be accessed on Lexis either directly from the main menu through the "ALR" library or through the "LAWREV" library, where the file

"ALR" is contained. The annotations would be more relevant to one wishing to gain an overview of copyright infringement and the fair use doctrine. A search query of "COPYRIGHT w/20 FICTIONAL w/5 CHARACTER or CARTOON" locates two documents which may be useful for the topic. One of the documents includes the article *Extent of the Doctrine of Fair Use under Federal Copyright Act*, supra. The second document is *Parody as Infringement or Fair Use under Federal Copyright Act*, 75 A.L.R.Fed. 822 (1985).

[n.49]. WESTLAW contains the Current Index to Legal Periodicals (containing weekly listings and indexes of articles from hundreds of periodicals). This resource can be accessed through the "CILP" database. However, no information is currently in this database regarding Character Protection.

On Lexis, in the "NEWS" Library and "MAGS" file, the search "FICTIONAL w/2 CHARACTERS w/10 PROTECTION" locates documents relevant to Character Protection. The documents located in this database included references to articles in *Publishers Weekly* and *Public Relations Journal*. Another file contained in the "NEWS" Library is "NWLTRS." The same search as above locates relevant documents. The documents located were either law reviews or law journal articles. These articles provide an abundance of information on the topic. Lexis also contains the "TRDMRK" Library and the "PTCJNL" file. The search "PROTECTION w/10 FICTIONAL w/5 CHARACTERS" also leads to relevant documents on Character Protection. The citation information to these documents are included below.

[n.50]. Law reviews can be researched on-line. On WESTLAW law reviews are located in the "JLR" database, a database containing not only law reviews, but Continuing Legal Education (CLE) course materials and bar journals as well. Using the search term "COPYRIGHT PROTECTION w/10 FICTIONAL CHARACTERS or CARTOONS or CHARACTERS" will locate a number of law review articles relevant to the issue of Character Protection. One could create a "cite list" of the documents found, then review the article in its paper form to determine whether it is useful. This method will lead a researcher to relevant articles and will save money by allowing the researcher to determine the usefulness of the article off-line. The search term locates articles which are pertinent to the issue of Character Protection. The citations to these articles are included at the end of this section.

In addition to the "JLR" database, other databases exist in WESTLAW which contain law review articles. One such database is the "IP-TP" database. Like the "JLR" database, "IP-TP" contains references to law reviews, texts and journals. The advantage of this database is that the documents located are specifically referenced to the area of intellectual property. If cost is of concern to a researcher, this database would be more cost-effective to use than the "JLR" database because of its narrow focus on intellectual property. The "TP-ALL" database also locates relevant articles, although most of the documents retrieved were similar to those found in the "IP-TP" database. As a practice tip, a researcher should be aware that a database with the extension "-ALL" is charged at a rate twice the amount of databases which do not contain the extension.

Lexis does not contain the amount of information that WESTLAW does with respect to law reviews, as it only offers access to a limited number of law reviews on-line. Law reviews are accessed through the library "LAWREV." This library contains numerous files, including individual file listings for law reviews (e.g. NYULR for the New York University Law Review). The most beneficial approach is to access the "ALLREV" file which will search the entire listing of law reviews available on Lexis.

[n.51]. The easiest method to locate books and bibliographies is the WESTLAW on-line service. While the same information found on WESTLAW could be located in the paper source Books in Print, the paper research may be more time consuming than utilizing the on-line service, unless one has a specific title in mind.

[n.52]. A search using the term "COPYRIGHT W/20 CHARACTER PROTECTION" locates relevant treatises. Treatises can also be located through the "TEXTS" database, using the same search term as above. The "MODIP" database contains the treatise Modern Intellectual Property which covers intellectual property.

[n.53]. Practice materials are not yet available on-line in either WESTLAW or Lexis.

[n.54]. Peter F. Nolan, Licensing of Characters, The Copyright Office Speaks Out, p. 607 (Prentice Hall Law and Business, 1990).

[n.55]. Looseleaf services are available on WESTLAW. BNA's Patent, Trademark and Copyright Daily can be accessed through the "BNA" database and "BNAPTD" file. Looseleafs can be located on Lexis either through the "BNA" or "COPYRT" libraries and the "BNAPTD" file.

[n.56]. The Code of Federal Regulations can also be researched on-line. WESTLAW contains the "CFR" database which the researcher may access to determine whether there are any federal regulations passed on topic of copyright protection for fictional and cartoon characters. A search query of COPYRIGHT /s PROTECTION /20 FICTIONAL /s CHARACTER did not locate any documents. A similar search of COPYRIGHT w/25 FICTIONAL or CARTOON failed to locate documents.

The CFR may be accessed through the "CODES" library and "CFR" file on Lexis. The search queries COPYRIGHT w/2 PROTECTION and FICTIONAL and LITERARY w/2 CHARACTER failed to locate any reference to the topic. A similar search in the "COPYRT" library, under the files "CFR," "FEDREG" and "ALLREG" failed to reveal information.

While cost may concern a researcher, the time saved by utilizing the on-line services to determine applicable C.F.R. regulations may well be worth the expense. While this

researcher failed to locate any information regarding the research topic, the recommended on-line service is Lexis because of its ability to conduct narrow searches within the field of intellectual property.

[n.57]. If one wished to contact this particular committee, the contact information is:

U.S. Senate Judiciary Committee
Subcommittee on Patents, Copyrights and Trademarks
Subcommittee chairman: Mr. Dennis DeConcini
SH-327 Hart Senate Office Building
Washington, D.C. 20510
(202) 224-8178

[n.58]. The address for the Copyright Office is:

The Copyright Information Office - Library of Congress
RM LM-401
James Madison Memorial Building
101 Independence Avenue, S.E.
Washington, D.C. 20559
(202) 707-3000

[n.59]. Justice Department - Civil Division

Mr. Vito J. DiPietro, Director - Commercial Litigation
550 11th Street, N.W.
Washington, D.C. 20530
(202) 514-7223

[n.60]. United States Court of Appeals for the Federal Circuit (CAFC)

Chief Judge
717 Madison Place, N.W.
Washington, D.C. 20439
(202) 633-6562

[n.61]. This directory is more specialized and is useful in locating attorneys who may be knowledgeable about Character Protection. The directory is organized by state and country. Turning to the appropriate state or country, one would then locate an alphabetical listing of intellectual property attorneys who practice in the state

[n.62]. This directory contains the names of attorneys specializing in intellectual property. The table of contents contains the heading SPECIAL KNOWLEDGES INDEX and the subheading COPYRIGHT KNOWLEDGE. The COPYRIGHT KNOWLEDGE

section contains attorney names, firm, city and state of practice and specialty area. The specialty areas including Academic Intellectual Property, Arts and Entertainment Law, Visual Arts, Graphic Arts, Infringement/Validity, Licensing and Motion Pictures. More specific areas including, "Textile, Toys" and "Video Games and Toys" are also available.

[n.63]. This directory is well-indexed and easily accessible. There is a section on trademarks and copyrights which contains an alphabetical listing of attorneys by state, and then the name and city of their firm, along with the name, address and telephone number of a contact person.

[n.64]. This directory contains a Patent, Trademark and copyright law section, which lists attorney names and firms by state. The section on Intellectual Property Law contains firm names as well as a brief blurb about the type of practice in which the firm engages as well as the location of the firm's branch offices. The directory also contains a section on corporate counsel which alphabetically lists corporations, subsidiaries, branches and regional offices which maintain corporate counsel. The legal specialty of all attorneys working for a particular organization is listed, as well as contact information and the law school each attorney attended.

[n.65]. On WESTLAW, the "WLD-IP" database contains information on attorneys practicing in a particular area of law and in particular areas of the country. A search including a state and area of interest (i.e. state(xx) and practice(copyright)) will locate the information on attorneys in a particular state which practice copyright law. By taking a firm name listed in the "WLD- IP" database and accessing the database "NALP-DIR," one can locate in-depth information on a firm, including whether they practice Character Protection and who specializes in this area of copyright law.

On LEXIS, information on attorneys practicing copyright law can be found through the "MARHUB" library and "ALLDIR" file. A search similar to the one used on WESTLAW (i.e. state (xx) and practice(copyright)) will locate attorneys and firms who practice copyright law in a particular state.

[n.66]. This publication contains an intellectual property section which lists forty to fifty associations. The listing contains an abundance of information on an association including the number of members, staff budget, description of activities, publications of association and price of such publications, annual meetings and conventions. The COPYRIGHT heading contains fifteen associations which deal with copyright matters but there is not an association which deals exclusively with Character Protection.

[n.67]. This source contains information on organizations that represent various groups on Capitol Hill. The COPYRIGHT AND PATENTS sections lists organizations such as American Intellectual Property Law Association (AIPLA); American Property Rights

Alliance; American Society of Composers, Authors and Publishers and Intellectual Property Owners, Inc.

[n.68]. WESTLAW contains the "EOA" database, a computerized version of the paper source Encyclopedia of Associations. The search term "COPYRIGHT AND LITERARY OR PICTORIAL PROTECTION" locates associations which may be active or informed on Character Protection. Lexis does not consist of a library which contains information on professional associations.

[n.69]. American Copyright Society

Gerard Delachapelle, Managing Director

345 West 58th Street

New York, New York 10019

(212) 582-5705

Publications: None

American Intellectual Property Law Association

Michael W. Blommer, Executive Director

2001 Jefferson Davis Highway

Suite 203

Arlington, Virginia 22202

(703) 415-0780

Publications: AIPLA Bulletin; AIPLA Quarterly Journal

Copyright Society of U.S.A.

Walter J. Josiah, Jr., President

Columbia University School of Law

435 West 116th Street

New York, New York 10017

(212) 854-7696

Publications: Journal of the Copyright Society

Educators Ad Hoc Committee on Copyright Law

c/o National School Boards Association

August W. Steinhilber, Chairman

1680 Duke Street

Alexandria, Virginia 22314

(703) 838-6710

Publications: None

Intellectual Property Owners, INC.

Herbert C. Wamsley, Executive Director

1255 23rd Street, N.W. #850

Washington, D.C. 20037

(202) 466-2396

Publications: IPO News

International Copyright Information Center

c/o Association of American Publishers

Carol A. Risher, Director, Copyrights & New Technology
1718 Connecticut Avenue, N.W. #700
Washington, D.C. 20009
(202) 232-3335
Publications: None