Rethinking Intellectual Property Rights in Characters

This project looks at when characters in artistic content, especially literature, can be copyrighted, and inquires into whether and when they seem more accurately described as trademarks than copyrights. As a baseline matter, characters do not explicitly receive copyright protection under the Copyright Act. However, once they are deemed sufficiently “expressive” or well enough delineated to be “distinctive,” they may be copyrightable, and in practice, often are protected. Yet the tests for copyrightability (raised in the context of whether subsequent works have infringed) are not especially coherent. They range from a requirement that characters be “fully delineated,” to powerful dictum suggesting that characters should “constitute the story being told” in order to qualify for copyright protection. Neither of these standards tracks literary theories of character or plot development. Worse still—from the law’s perspective—one might interpret the mandate to delineate characters fully as importing a backdoor quality standard into copyright law, which strives to avoid evaluating works of art for their artistic merit. Legal scholarship has noted some of the inconsistencies in the treatment of characters under copyright, but it has not engaged the literary texts and criticism that might provide helpful guidance for the law.

An aim of this project therefore is to juxtapose legal theories of character protection under copyright with literary treatments of the agonistic relationship of characters to their surrounding content, and more specifically, to their authors. What does it mean for authors to invent, use, reuse, and lose control of, characters? What implications might that have for ownership under copyright? In other words, what lessons can the law draw from literature’s manifestations of the anxiety of influence? I am imagining the phrase ‘anxiety of influence’ here not only as Bloom intended it—the anxiety of authors wrestling with their forbears’ work in order to secure their own legacies—but also as an anxiety mediated through characters, expressed symptomatically as authors wrestle with their own creations and the creations of others.

I am interested in a number of areas at this point, including the problem of derivative works, such as unauthorized sequels and fan fiction that reuse characters originated by other authors; the distinction between visual and literary characters that has developed in relevant case law; and the implications of advertising’s ‘creep’ into artistic content including literature, which may be one reason that so many characters seem to operate more as trademarks than copyrights. A further goal of this project will be to offer up a set of guidelines for more sharply delimiting copyright protection for characters, especially when the characters seem to be functioning more properly as trademarks.