

## BOOK REVIEW

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*Literary Characters in Intellectual Property Law*. Jani McCutcheon. Cheltenham, UK: Edward Elgar, 2023. 302 pp. ISBN 978-1-78811-431-8. US\$145.00.

In *Literary Characters in Intellectual Property Law*, Professor Jani McCutcheon examines what, if any, intellectual property rights exist in literary characters separate from the underlying work that features the character. She uses copyright, moral rights, and trademark laws of common law jurisdictions, including the United Kingdom (UK), Canada, Australia, and the United States (US), to conclude that literary characters should not have intellectual protection outside of the underlying work. While I am not fully convinced by her analysis, the book is engaging and presents a multi-jurisdictional approach to a complicated issue. The timeliness of this issue was reflected by a standing-room-only panel at the 2024 International Trademark Association (INTA) Annual Meeting entitled “To Infinity and Beyond: What is the Proper Scope of Trademark Protection for Characters After Their Copyrights Expire?.” While that panel focused on trademark rights in an illustrated character, I continually found myself thinking about this book during the discussion.

McCutcheon focuses on the “character as work” doctrine, a doctrine that asserts that literary characters are extractable independent works apart from a literary or dramatic text. This doctrine is applied to popular fan fiction based on the characters of books such as the *Twilight* and *Game of Thrones* series, litigation related to unauthorized “sequels” such as *Brideshead Regained: Continuing the Memoirs of Charles Ryder* (based on Evelyn Waugh’s *Brideshead Revisited*), the *James Potter* series (based on J.K. Rowling’s *Harry Potter* series), and *60 Years Later: Coming Through the Rye* (based on J.D. Salinger’s *Catcher in the Rye*), and reinterpretations of works such as *The Wind Done Gone* (reinterpreting Margaret Mitchell’s *Gone with the Wind*) and *Lo’s Story* (reinterpreting Vladimir Nabokov’s *Lolita*). She begins her analysis with the question, “[A]re literary characters copyright works?” (p. 10). She starts by reviewing Judge Learned Hand’s 1930 decision in *Nichols v. United Pictures Corp.*, which stated, “It follows that the less developed the character, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinct” (p. 12, quoting *Nichols*). Instead of endorsing the process of copyrighting literary characters, McCutcheon argues that Judge Hand meant the less distinct a character is, the less they can be *infringed* because without distinction there is nothing to infringe.

McCutcheon applies the basic test for copyrightability in the US to refute the assumption that literary characters should be independently protected by copyright. Based on the Copyright Act, copyright exists in original works of authorship fixed in any tangible medium of expression, including the eight enumerated but not limited categories of works. She notes that works must be fixed in copies and that the fixation must permit a work to be perceived, reproduced, or otherwise communicated. Based on literary theory, she asserts that literary characters cannot be located solely in the text for three reasons: characters are partly formed through the reader’s cognitive process; literary characters cannot be identified as a coherent unit in the text because characters evolve in a literary work; and readers create mosaics of characters based on an amalgam of different works. She writes, “Characters cannot be physically perceived in a copy because they result from an alchemy of text combined with imagination. [...] A literary character can never exist as a discrete literary work, because it is necessarily inextricably interwoven into the literary work that contains it” (pp. 24, 27). In the *Bach v. Forever Living Products U.S., Inc.* opinion, the US District Court for the Western District of Washington lists a number of characteristics, finding that “[t]his description accurately reflects Plaintiffs’ rendering of the Jonathan Livingston Seagull character in the novel” (p. 29, citing *Bach*). McCutcheon counters that it might be a summation of the character but doesn’t identify Jonathan Livingston Seagull as a work apart from the text because “literary characters are quintessentially elusive. Trying to identify them is like grasping at smoke” (p. 29).

After examining US law, she turns to the Australian Copyright Act of 1968, which grants copyright only in works included in an exhaustive list that doesn't include literary characters. Similarly, there is no explicit protection in the UK's Copyrights, Designs and Patents Act of 1998. In fact, the Whitford Committee dismissed the suggestion that a "character right" should be recognized in the UK in 1977. Canada does recognize character protection, but most case law focuses on graphic/literary hybrids, such as illustrated works or graphic novels. While Canadian case law provides greater protection to the eponymous lead of Lucy Maud Montgomery's *Anne of Green Gables*, the beloved Canadian children's series, McCutcheon finds that, overall, Canadian jurisprudence is equivocal on independent copyright protection for literary characters.

After examining the right to reproduce and adapt literary characters under copyright law, McCutcheon turns to moral rights. Given that the US does not recognize moral rights in literary works, the discussion focuses on the UK, Canada, and Australia. While McCutcheon finds that the moral right of integrity may address authors' complaints about non-authorized uses of their literary characters, she also examines the weakness of using moral rights to protect characters and concludes that character appropriation generally does not harm an author's honour or reputation, a requirement for violating the moral right of integrity.

McCutcheon then focuses on the shortcomings of trademark protection for literary characters. Trademark registration is confined to protecting specific marks in connection with particular goods and services. As McCutcheon notes, "No general right to restrict 'use' of a character in a broad sense is conveyed through trade mark registration" (p. 156). Similar issues arise when attempting to protect a literary character through unregistered trademark rights and their associated goodwill. She asks, "What aspects of the literary character generate goodwill?" (p.192). Again, the intangible nature of literary characters makes it challenging to articulate what is claimed when asserting unregistered trademark rights in literary characters.

In her conclusion, McCutcheon reestablishes her position that "most character appropriation [...] is not infringing" (p. 274). She summarizes that this book "sought to unravel the intractable and fundamentally flawed character as work doctrine by showing the hopelessness of identifying literary characters as distinct works" (ibid.). She acknowledges that her arguments are unlikely to persuade stakeholders with entrenched positions that benefit from courts acknowledging rights in literary characters separate from the underlying works. While I am not completely persuaded by McCutcheon's arguments, I found the book thought-provoking. The incorporation of literary theory expands the analysis beyond the traditional legal arguments and the multi-jurisdictional discussions explore the variety of ways that common law countries approach this thorny issue.

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