COPYRIGHT IN LITERARY AND DRAMATIC PLOTS AND CHARACTERS

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1 INTRODUCTION

The author of a literary or dramatic work, such as a novel or a play, is clearly afforded some protection by the Copyright Act 1968 (Cth).[1] Precisely the degree of protection preventing the appropriation by others of material from his creative works will be a question of some concern to him. Most frequently the writing of a play or novel will require vast expenditure of skill, effort, time and labour. As a result his work will often be of potentially great commercial value, resulting from sales of the work itself and associated sales, such as the sale of film and television rights. If successful, an author may have the opportunity to sell sequel rights.[2] If a character of his creation invokes the public's imagination, the author will be concerned to reap its full commercial potential, or at least control others' efforts in doing so, particularly with regard to 'spin-off' products, such as dolls, tee-shirts, product endorsements, icy poles and the like. However, the principle which underlies such an expectation, that a man is entitled to reap the fruits of his skill and labour, must be contrasted with a concurrent policy that as composition does not occur in a vacuum, and each author is inspired (whether he knows it or not) by the work of his fellows, then his creative works should likewise join the pool of common inspiration available to all. The law of copyright seeks to accommodate these two factors.

It is in this respect that the protection afforded by copyright is to be contrasted with that afforded to a registered design or patent. Whilst designs and patents confer a 'true' monopoly, effective even against persons whose work owes nothing to the design proprietor or patentee,[3] copyright affords no such monopoly. Thus it must be recognized from the outset that someone who quite independently produces a work which is substantially similar to or exactly the same as a pre-existing work does not breach any right of the first producer.[4] For example, if by some miraculous coincidence a man who had never known it was to compose anew Keats' 'Ode on a Grecian Urn' he would not breach any existing copyright subsisting in the original poem (a somewhat unreal assumption anyway, in this

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[1] See *e.g.* s. 31, and *infra*.

[2] See *e.g. Warner Brothers Pictures v. Columbia Broadcasting System* (1954) 216 F.(2d) 945.

[3] *L.B. (Plastics) Ltd v. Swish Products Ltd* [1979] R.P.C. 551, 570.

[4] *Sutton Vane v. Famous Players Film Co. Ltd.* [1928] MacGillivray copyright cases ['M.C.C.'] 6; *Sheldon v. Metro-Goldwyn Pictures Corp.* (1936) 81 F.(2d) 49.

case!). Indeed, he would also obtain copyright protection of his own work.[5] Practically, however, such a purportedly independent producer may encounter difficulty in proving that fact.[6]

Difficulties arise when a subsequent author is not an independent producer, but one who incorporates in his work particular features from an earlier work. How much of another's skill and labour may he appropriate? Is he entitled to follow the same general lines as the earlier author, taking the benefit of his cleared path? May he appropriate the plot of an earlier author, and fill it with different characters, or *vice versa*? Given that copyright does not afford the earlier producer a monopoly on his work, it is necessary to investigate those restrictions which it does impose upon subsequent users.

2 *PLOTS*

The Act protects both literary and dramatic works by, amongst other means, conferring exclusive right to reproduction of that work upon its author.[7] A work may be reproduced if a substantial part is reproduced; it is not necessary that the infringer reproduce the whole.[8] As a shorthand way of answering the question whether a plot can gain copyright protection ('copyright'), it could be asked whether a plot is substantial enough. However, like many convenient shortcuts, this disguises two questions which must necessarily be asked: first, is a plot capable of protection *in limine*, and second, has there been an infringement of a substantial part of the whole work? In pursuit of clarity, it is proposed to answer both questions.

(i) The idea/expression dichotomy

A plot may be no more than an undeveloped idea. In this sense, 'plot' acquires the meaning of an idea, theme, or even genre. Thus a plot of a movie may be that of a shark terrifying a community,[9] or an alien befriending a child.

From the earliest cases courts have been averse to protecting 'mere ideas'. In *Baker v. Selden*[10] it was said that whilst a book on an art attracts copyright, this affords no monopoly on the art itself contained within such a book. This was amplified in *Holmes v. Hurst*[11] where the right secured under the American Act was said to be

> not a right to the use of certain words, because they are common property of the human race . . . nor is it the right to ideas alone since in the absence of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas, an incorporeal right to print a set of intellectual ideas, or modes of thinking, communicated in a set of words and sentences and modes of expression.[12]

[5] *Sheldon v. Metro-Goldwyn Pictures Corp* (1936) 81 F.(2d) 49.
[6] However, for a case where an independent producer was successful, see *Sutton Vane v. Famous Players Film Co. Ltd* [1928] M.C.C.6.
[7] S. 31 (1) (a) (i).
[8] S. 14 (1) (b).
[9] See *Zeccola v. Universal City Studios Inc.* (1983) 46 A.L.R. 189.
[10] (1880) 101 U.S. 99.
[11] (1898) 174 U.S. 82.
[12] *Ibid.* 86.

Thus, in relation to drawings, Lord Justice Salmon in *L.B. (Plastics) Ltd v. Swish Products Ltd*[13] stated that 'it is trite law that there can be no copyright in an idea or concept' but that the copyright subsists in its expression.[14] Consequently another catch-phrase has arisen, namely that ideas are not protected, but only their expression.

However, this catch-phrase may be misleading. This results from the sometimes artificial distinction between ideas and their expression, which are often merely two facets of the same object. A more accurate summary would be that whilst a bare idea, theme, or plot may not gain copyright, the development of such a theme will.

The word 'expression' here is both inadequate and misleading as it suggests the literal form in which a work is conveyed to the recipient, for example, a novel's expression is its words, a film's expression is its exact cinematography and so on. However, it is clear that an author's language need not be appropriated for an infringement to occur. In *Sutton Vane v. Famous Players*[15] the plaintiff, a playwright, alleged that the defendant had infringed his play 'Outward Bound'. As the infringing work was a silent film, it could not have been the verbal expression, the plaintiff's words, which was copied. The trial Judge found an infringement, but was reversed by the Court of Appeal on the ground that the defendant was in fact an independent producer and that therefore there had been no copying. However, had he copied in fact, the Court would have upheld the finding of infringement despite the change in medium. Similarly, in *Holland v. Vivian Van Damm Productions*[16] Oscar Wilde's play 'The Thorn and the Rose' was infringed by the defendant's ballet, clearly a situation where it was not the plaintiff's words that were taken. In both cases, therefore, the Court protected more than the author's mere written expression.

A recent American case further highlights the difficulties of the idea-expression dichotomy. *Sid and Marty Krofft T.V. Productions Inc. v. McDonalds Corporation*[17] involved an allegation by producers of a children's television show that the defendant's hamburger commercial infringed the plaintiff's copyright. The defendant had employed voice experts used on the Krofft's show and hired ex-Krofft employees to build sets and costumes. This resulted in characters (whilst not exact copies of those of the plaintiffs' and speaking very different dialogue) and a commercial which 'captured the total concept and feel of the Pufnstuf show'.[18] The defendants admitted that they had copied the plaintiffs' idea of a fantasy land, but argued their expression was totally different. However the setting and the 'inhabitants' were similar. H.R. Pufnstuf, who wore a yellow and green dragon suit with a blue cummerbund from which hung a medal inscribed 'Mayor' was reproduced by 'Mayor McCheese' a hamburger-headed character wearing a pink formal dress

[13] [1979] R.P.C. 551.
[14] *Ibid.* 637.
[15] [1928] M.C.C. 6.
[16] [1936] M.C.C. 69.
[17] (1977) 562 F.(2d) 1157.
[18] *Ibid.* 1167.

coat and knickerbockers, and a diplomat's sash from which hung a medal inscribed 'Mayor'.

Judge Carter acknowledged the difficulties caused by giving the first thinker a monopoly on an idea and repeated the often drawn distinction between an idea and its expression. He acknowledged that 'courts tend only to pay lip service to the idea-expression distinction without it being fairly descriptive of the results of modern cases'.[19] He concluded, however, that this was due more to the application of the distinction than the distinction itself. I suggest that this divergence between practice and theory arises from the uncertain meaning of the phrase.

His Honour recognised that sometimes an idea and its expression are indistinguishable. The expression of a jewelled bee-brooch was likely to be identical to its concept. The idea and its expression coincide where the expression provides nothing new or additional over the idea. In such a case copyright will still attach, however near identity will be required to establish an infringement.[20] Judge Carter adopted the statement of Judge Learned Hand in *Peter Pan Fabrics v. Weiner*,[21] that

> [o]bviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea', and has borrowed its 'expression'. Decisions must therefore inevitably be *ad hoc*.[22]

Judge Carter ruled that there had been an infringement, applying the *Nichols* test, which will be examined below.

Thus it may be summarised that an idea is not necessarily different from its expression, but each may be a facet of the other, that 'expression' does not include only literal or near reproduction in a similar medium, and that a play's expression is not limited to its dialogue. It will now be illustrated that the test that courts apply, in determining whether copyright can attach to a plot *in limine*, is to examine the degree to which the plot has been developed.

(ii) The degree of development

Given that an undeveloped idea or plot will not attract copyright, what degree of development is necessary before copyright will attach?

This question was answered in *Nichols v. Universal Picture Corporation*[23] where the plaintiff alleged his play was infringed by the defendant's motion picture play which showed a not dissimilar plot. Two passages of Judge Learned Hand's judgment bear copying (affirming that that which is worth copying is worth protecting!).

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than a general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas', to which, apart from their expression, his property is never extended.[24]

[19] *Ibid.* 1163.
[20] *Ibid.* 1164. For a case of similar reasoning, see *Kenrick v. Lawrence* (1890) 25 Q.B.99.
[21] (1960) 274 F.(2d) 487.
[22] *Ibid.* 489.
[23] (1930) 45 F.(2d) 119.
[24] *Ibid.* 121.

Thus, necessarily, if a plot is sufficiently developed, that is, a pattern of some specificity, it is capable of being protected. His Honour notes that no one has ever been able to fix the boundary between the protected and the unprotected, later echoed in *Peter Pan*,[25] and *McDonalds*.[26]

The second passage concerns both plots and characters. (The first passage regarding general patterns is likewise applicable to characters.)

> But we do not doubt that two plays may correspond in plot closely enough for infringement. How far that correspondence must go is another matter . . . If Twelfth Night were copied, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household . . . it follows that the less developed the characters the less likely they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.[27]

Thus it is the degree of development, or level of abstraction or concreteness, which is the determining factor. The more abstract a plot is, the less likely copyright is to attach. An investigation must therefore be made into the level of development a plot has obtained. The location of a plot on a scale, bearing at one extreme a single mere theme and at the other a complex web of intrigue, must be ascertained. Is the plot about fear, about a shark, a shark terrifying a community, a shark terrifying a community and the bravery of a policeman whose wife betrays him to her ex-boyfriend who is a shark wrestler . . . ? The action in *Wilmer v. Hutchinson*[28] failed, the theme was *autrefois convict* in both movies, but that was the only similarity, and such a theme was too abstract to attract copyright.

In considering the degree of development, the theme is not the only consideration. The way a plot has been spun or worked out, and the dramatic situations and incidents will all be looked at. This extra dimension of a plot was illustrated in *Rees v. Melville*.[29] The plaintiff complained that the defendant's play infringed her play. Both were of the 'Melvillian breed', a melodramatic style particularly associated with the defendant — who was being sued by the plaintiff writing in his style! Warrington J. stated that

> [i]n order to constitute an infringement it was not necessary that the words of the dialogue should be the same, the *situations and the incidents*, the mode in which the ideas were worked out and presented might constitute a material portion of the whole play, and the court must have regard to the *dramatic value* and importance of what was taken . . . on the other hand, the fundamental idea of the two plays may be the same, but if worked out separately and on independent lines they might be so different as to bear some resemblance to one another.[30]

Although couched in language relating to whether there had been a substantial infringement, it is suggested that these factors are equally determinative of the degree of development the plot has reached, and whether it is capable of protection at all. So not only must the general patterns, theme, or plot be examined, but also the arrangement of the incidents and working out of the play, in short, the whole *mis en scéne*.

[25] (1960) 274 F.(2d) 487, 489.
[26] (1977) 562 F.(2d) 1157, 1163.
[27] (1930) 45 F.(2d) 119, 121.
[28] [1936] M.C.C. 13.
[29] [1911] M.C.C. 168.
[30] *Ibid.* 174 (emphasis added).

This was illustrated in *Fernald v. Jay Lewis Productions*,[31] where the author plaintiff alleged a film infringed four pages of his novel — a novel with a broad theme of life on board a navy ship, and concerning somewhat unrelated incidents. The court held that the four pages contained some twelve literary or dramatic features in which the theme was developed, all of which were reproduced in the film. Thus copyright will attach not just to the basic idea but to the way in which it was clothed or worked out, in incident and dialogue. Similarly, in *Zeccola v. Universal Studios*[32] the Full Court of the Federal Court granted an interim injunction restraining the makers of a 'Jaws'-like movie from proceeding, stating that 'copyright subsists in the combination of situations, events and scenes which constitute the particular working out or expression of the idea or theme'.[33] It is this much fuller notion of 'expression', more accurately referred to as the 'development', that will determine whether copyright will or may attach to a plot *in limine*.

(iii) Infringement

It has been noticed in *Rees v. Melville*[34] above that a court may not consider expressly the need for protection *in limine*, but will only consider the issue of infringement. It is argued however that the process which the court must necessarily go through does first involve considering protectability *in limine* and then involves questions of infringement. These two stages often appear combined because of the great similarity of the tests — is it developed (or, loosely, 'substantial') enough to be protected and is that which is taken substantial?

Naturally, if a plot attracting copyright is taken bodily, even with some minor additions or subtractions, then there will be an infringement.[35] If another does not take all of a plot, but a substantial part, he will infringe.[36] Broadly, if he does copy, the question whether he has copied a substantial part depends more on the quality than on the quantity of that which is taken.[37]

In *Holland's* case[38] the ballet was held substantially to reproduce Wilde's story, as it reproduced the

> combination or series of dramatic events in the tale. True it is that some of the incidents in the tale are old. There is no originality in the idea of a nightingale's breast being pierced by a thorn . . . but taking the whole thing together the idea of the nightingale's sacrifice in order that the course of true love as she conceived it should run smoother than it otherwise would do, seems to me to afford subject-matter which can be and has been substantially reproduced by the ballet.[39]

As the ballet reproduced the whole plot, the fact that many of the constituent parts were not original did not prevent there being substantial reproduction. However, if only one or two small parts of a plot were copied, the question of originality is paramount. An unoriginal incident would most likely not amount to a substantial

[31] (1975) 1 F.S.P.L.R. 499.
[32] (1983) 46 A.L.R. 189.
[33] *Ibid.* 192.
[34] [1911] M.C.C. 168.
[35] *Kelly v. Cinema Houses Ltd.* [1932] M.C.C. 362.
[36] S. 14 (1) (b).
[37] *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 W.L.R. 273, 293.
[38] [1936] M.C.C. 69.
[39] *Ibid.* 76.

part of the work, not only by a quantity test, but on qualitative grounds.[40] Obversely, reproduction of an original incident which forms a constituent part of the plot would be substantial reproduction. The combination of a few unoriginal incidents may together attain the requisite originality to be considered substantial, although not amounting to the entire plot itself, and thereby capable of infringement. Also, by definition, if that taken is merely highly abstract of the whole, or of a particular part, and reproduces the first work abstracted to that level, then there is no infringement if both are on the unprotected side of the *Nichols* abstraction boundary. Thus to be infringed the part reproduced must first have descended into that concreteness, been sufficiently developed, and then have been substantially reproduced.

3 CHARACTERS

The law of copyright relating to characters builds on the same foundation as that already laid for plots. However, because on the one hand characters are of potentially greater commercial value, and on the other hand may be more limited or inclined to follow general patterns and difficult to delineate distinctively, some comment above that already given to plots is necessary. Those advocating protection of characters rely on the rationale expressed by Judge Carter, dissenting, in *Kurlan v. Columbia Broadcasting*.[41]

> Characters and characterizations which are products of the mind should be held to be protectible property interests . . . radio programmes are often built around a single character or family, personality or characterization, which continues from day to day, week to week, year to year. It should be apparent to even the least intelligent that these programmes are as valuable as the most gilt-edged security listed on the Stock Exchange. No court would hesitate to extend its protection to the lawful owner of a security, and yet equally valuable characters are not given the same protection.[42]

It is proposed to deal separately with (i) characterizations and (ii) character names.

(i) Characterizations

There is a dearth of English case law on characterizations (by that term meaning a character's attributes, personality, eccentricities and distinctive features). Two cases suggest that there is no protection of a characterization *per se*, but possibly only in their use, as incidents of the plot. *Kelly v. Cinema Houses*[43] relegates a characterization to a mere bare unprotectable idea. In answering the question whether a character can be protected the court said

[40] *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 W.L.R. 273; also, *Warwick Film Productions Ltd v. Eisinger* [1967] 3 All E.R. 367.

[41] (1953) 40 Cal. Rptr (2d) 799; 256 P.2d 799; see also Brylawski E.F., 'Sam Spade Revisited' (1975) 22 *Bulletin of the Copyright Society of USA* 77.

[42] (1953) 40 Cal.Rptr (2d) 799; 256 P.2d 962, 965.

[43] [1932] M.C.C. 362.

> [i]f, for instance, we found a modern playwright creating a character as distinctive and remarkable as Falstaff, or . . . Sherlock Holmes, 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 . . . Anyone may introduce into his show Harlequin, Pierrot, Columbine and Pantaloon . . . just as anyone may use in . . . a machine levers, toothed wheels . . . and other well-known mechanical parts. It is the use which the author of play or film makes of these well-known characters in composing his dramatic scenes that the Court has to consider in a case of alleged infringement: in other words, the plaintiff has to show that the combination or series of dramatic events in the infringing work have been taken from the like situations in the plaintiff's work.[44]

In *Bolton v. International Pictures*[45] it was decided that there was no striking skill or ingenuity in introducing comic telephone repairmen into the particular plot. The courts would therefore appear to be treating characterizations merely as incidents in a plot, and not inquiring whether they are protectable in themselves. It is suggested that this is not in accordance with Judge Learned Hand's reasoning in *Nichols*. It is further suggested that there is no compelling reason why the *Nichols* test, having been adopted in relation to plots, should not also be applied to characterizations. Judge Learned Hand expressly addressed himself to characters, concluding that if a character is distinctively marked or delineated, is more than a mere stock-type, and is highly developed, then it is capable of attracting copyright.[46] It is unclear whether, to infringe, it is sufficient to take another's clearly delineated characterization, or take merely his name, or whether both must be copied. However it is clear that, first, the character must be sufficiently developed to command copyright, and second, that the alleged infringement copied such development and not merely a broader and more abstract outline.[47]

On this test, one would have thought that Sherlock Holmes, with his tweed mode of dressing, violin playing, drug ingestion, and his other eccentricities would be sufficiently delineated so as to be copyright. However *Kelly dicta* state that he is not copyright. As *Nichols* was not cited in *Kelly*, but the *Nichols* abstraction test is applied in relation to plots, it is suggested that if the case were reheard today, Holmes would be protected.

The case of *Warner Bros v. Columbia Broadcasting System* (*Sam Spade* case)[48] proposed a more restrictive test. The court proposed that unless the character 'constituted the story being told'[49] it would not attract copyright. 'If the character is only the chessman in the game of telling the story he is not within the area of protection afforded by the copyright.'[50] The character must be more than the 'vehicle for telling the story'. The court cited *Nichols* as supporting this test. Commentators have described this test as ill thought out, confusing and too restrictive, and not in fact in accord with the *Nichols* test.[51] Few characters are

[44] *Ibid.* 368-9.
[45] *Bolton v. British International Pictures Ltd.* [1936] M.C.C. 20.
[46] See text accompanying n. 25.
[47] Nimmer M., *The Law of Copyright* (1974) paras 2.12, 2.171.
[48] (1954) 216 F.(2d) 945.
[49] *Ibid.* 950.
[50] *Ibid.*
[51] Nimmer, *op. cit.* para. 2.171; Brylawski, *loc. cit.*

themselves the story, with exceptions such as Hurtle Duffield in Patrick White's *The Vivisector*. However if the *Sam Spade* test is viewed as suggesting that a character will often not be sufficiently delineated unless he is in fact the major ingredient in the story, the test is in fact reconcilable. That is, the 'story told' is an indicator of a requisite high degree of delineation.

A more recent case, *Walt Disney Productions v. The Air Pirates*[52] shows that the *Sam Spade* test can be reconciled with the *Nichols* test, although not expressly stating such. The *Air Pirates* concerned copying by the defendant of the plaintiff's cartoon characters (not the subject of separate copyright in the U.S.) for use in the defendant's counter culture books. The characters were free thinking, bawdy, promiscuous, and drug-ingesting, such use being 'antithetical to the accepted Mickey Mouse world of scrubbed faces, bright smiles and happy endings'.[53] Thus it was not the literary characterizations that were copied, but the cartoon images. The *Sam Spade* case was cited and approved. Judge Stephens reasoned that characters are always limited and fall into limited patterns. He decided that it was difficult to delineate distinctively a literary character, but this difficulty was reduced by the addition of a visual image.[54] It would therefore seem to follow that a literary character may achieve separate copyright even if it does not meet the 'story being told' standard, providing it is sufficiently developed and finely drawn so as to cross the line from the abstract or general pattern to the concrete, that is from 'idea' to 'development'.

On such a test, Sherlock Holmes and other major characters would be copyright, once sufficiently delineated. For an infringement to occur, the taker must take that which lies below the fine line dividing the abstract from the concrete. Taking only the general idea of a character would not infringe (as the general idea is not protected *in limine*), nor would the taking of an insubstantial characteristic. That which is allowed to be taken will necessarily be uncertain, however by making available the general character though not the particular, the author will still contribute to the pool of common inspiration. He does not gain a monopoly on the type, only on the particular, and thus he suffers not the penalty for marking his characters too indistinctly.

(ii) Characters' Names

Suppose a later author took that which was not copyright after carefully studying another's character. For instance, from Conan Doyle's Holmes he abstracts the idea of an intellectual detective, but does not take any further aspects of the characterization. That is, he takes a general pattern which falls on the abstract side of the line dividing the abstract from the concrete. Suppose he also takes the name, Sherlock Holmes. Is this an infringement? Suppose he then further delineates his

[52] (1978) 581 F.(2d) 751.
[53] *Ibid.* 753.
[54] *Ibid.* 755.

character so that it acquires some characteristics the original Holmes did not possess or leaves it at that unprotectable abstract level. The question is, does the use of the name alone, or at least in the same very general *milieu*, infringe copyright? This will often be an important question, particularly if the first author wishes to secure sequelization rights.

Previously courts have held that the mere taking of a character's name does not infringe copyright, for one of two reasons. In *Tavener Rutledge v. Trexapalm Ltd*[55] licencees of the name 'Kojak' from the creators of the television programme of the same name sued a manufacturer of lollies called 'Kojakpops', alleging, *inter alia*, infringement of copyright. The plaintiff did not succeed. The court held that there was no copyright in a character's name. In *Exxon Corporation v. Exxon Insurance Consultants International Ltd*[56] the court held that there was no copyright in invented words as they were not 'literary works' within the meaning of the Act. The reasons for this were that, although a great deal of labour and skill had engaged in developing the word, it would cause great inconvenience to the public if they could not use the word without infringing copyright. Mr Justice Graham also held that the word had no meaning by itself. Because the word had no meaning in itself, and was not a title or distinguishing name, it had to be accompanied by other words in a particular context or juxtaposition to be considered a literary work.

However, Mr Justice Graham adverted to the possibility that a word, having qualities or characteristics in itself may justifiably be recognized as an original literary work. If his Honour means by this a word which conjures up associations and substance, such as a generic word for a product, it may be possible that a character's name, if the character had previously been sufficiently well developed, could also attract copyright. His Honour suggests this by his reference to the word 'Jabberwocky', suggesting its use in some other literary context might be held to be an infringement as being a substantial part of the whole of Lewis Carroll's poem. It is suggested that 'Sherlock Holmes' is no less an invented word (or words). The value of appropriating a character's name lies solely in the fact that it will immediately be recognized by, and conjure up many memories and characteristics to, those who read it again.

On these most slender of grounds, it is submitted that copyright might lie in a character's name alone, if the whole characterization had previously been so developed as to attract copyright. It is recognized that this could cause problems with legitimate users (such as someone's real name being that of a character). However if it was so narrowly limited to a similar field of activity, or by using a passing off type analysis, copyright could protect the name from appropriation by another author, and indirectly the unexpressed associations that attach to that name. No court has yet adopted Mr Justice Graham's *dictum*, and such an argument may be unsuccessful, however it is worthy of consideration.

[55] (1978) 4 F.S.R. 479.
[56] (1981) 7 F.S.R. 238.

4 CONCLUSION

Mr Justice Whitford's explanation in *L.B. (Plastics) Ltd v. Swish Products Ltd*[57] of judicial policy in relation to the scope of copyright protection is thus shown to be accurate. Copyright will never confer such a monopoly as to prevent truly independent production. Copyright allows the composition of novels and plays along homologous lines to those works pre-existing. Copyright will only prevent the reproduction of that which has reached a sufficient degree of development. In this way general ideas are always available for re-development, so long as that re-development does not involve appropriation of too liberal a portion of another's creative effort.

[57] [1979] R.P.C. 551, 570. 'From start to finish copyright never stops anyone working on the same lines, upon the same basic idea, and copyright cannot be effective against anyone who produces something independently. It is only effective to stop third parties from helping themselves to too liberal a portion of another man's skill and labour for their own exploitation.'