

Iconic Fictional Object as Separately Copyrighted Work from the Original Work

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ABSTRACT

Copyright is one of the IPR branches that protect the human's intellectual work in the field of science, arts, and literature. The film is a creation that is protected by copyright. In a film, there are not only characters that are easy to remember but also specific properties uniquely used by the characters, especially the main character. This property is called an iconic fictional object. This normative juridical legal research will discuss one legal issue, whether an iconic fictional object can be separately protected from the original work. Based on the analysis in this study, an iconic-fictional object is not explicitly stated as work protected by copyright according to Article 40 of Copyright Law No. 28 of 2014. However, iconic fictional objects fulfill elements of a work entitled to copyright protection: The creative work in the fields of science, art, and literature; Created by the ability, skill or expertise of the creator; and expressed in real form. Furthermore, The United States Court of Appeals for the Ninth Circuit on DC Comics vs Mark Towle Batmobile case had argued that iconic fictional objects could be separately protected from the original work as long as they meet three conditions: (1) Physical as well as conceptual qualities, (2) Sufficiently delineated, and (3) Especially distinctive and contain some unique elements of expression.

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1. Introduction

Humans were created with special abilities that no other living creature has. Naturally, the difference between humans and other living creatures lies in "intellect" or "ratio". One of the philosophers, Aristotle, state that animals with ratio are called humans¹. Intelligence is a basic foundation of humans to act. Intelligence or ratio is what makes humans can think, work, express, create, or innovate.

¹ Aburaera, S. & Muhadar, M. (2013). *Filsafat Hukum Teori dan Praktik*. Jakarta: Kencana. p.7.

Human thoughts in the form of ideas can be expressed in real forms in writing, painting, or other works that can be seen, touched and used. These works are protected by the Intellectual Property Rights Law, hereinafter referred to as IPR. One of the works that is produced from human thoughts and which is also protected by law is film. Due to film is an embodiment of human ideas, it is one of the works protected by IPR, especially copyright. Copyright is a branch of IPR that protects humans' intellectual results in science, art, and literature. It is contained in Article 2 Berne Convention for the Protection of Literary and Artistic Works, hereinafter referred to as the Berne Convention and Article 40 of Law Number 28 of 2014 concerning Copyright, hereinafter referred to Indonesian Copyright Law. Moreover, the film said as a collection of copyright²:

“A film is essentially a collection of copyrights, i.e., a screenplay, possibly based on a book, music, directing talent, actors' performances, as well as the contributions of the creative technical crew such as costumers and set designers”.

In a film, not only characters or actors are easily remembered by the audience, but also a certain property with a special role in the film. This property is usually used by the main character and becomes the center of interest. Brett McCracken, a journalist, writer, and film critic from Southern California even stated that³:

“In a movie, the raw materiality and physical geography on which the story plays out (i.e., nature, sets, bodies, props) resonate with us as much or more than the story itself”.

These properties become popular after their appearance in films. This property is what is meant by an iconic fictional object.

One of the iconic fictional object popularity phenomena can be seen in the Disney Film; *Beauty and the Beast*. The film, which is live action from the 1991 Disney animated film of the same title, has several iconic fictional objects popular in the world. One of them is the *enchanted rose*. Since the film's advent, many outside Disney parties have made replicas of the enchanted rose for sale. Another example is in the Cinderella movie. There is a pair of the glass slipper and a pumpkin-shaped carriage.

From the example explained above, the conclusion is iconic fictional objects have economic potential. The problem arises when who is commercializing is not the creator himself. It is because the perpetrators of exploitation economically in practice are often parties other than the creator⁴. A copyright dispute over the iconic fictional object has occurred between DC Comics v. Towle. Dc Comics sued Mark Towle because Towle had made and sold a replica of the Batmobile. The Batmobile is a high-tech fictional car used by Batman as his main mode of transportation. In the end, The United States Court of Appeals for The Ninth Circuit found Towle guilty of this.

² Renault, C-E. & Rob H Aft. (2011). From Script to Screen the Importance of Copyright in the Distribution of Film. *World Intellectual Property Organization (WIPO)*, 950E..p.12.

³ McCracken, B. 2010. 'Why Do We Watch Movies', available at <https://relevantmagazine.com/culture/film/why-do-we-watch-movies>, [accessed on 15 September 2018].

⁴ Mailangkay, F. (2017). Kajian Hukum tentang Hak Moral Pencipta dan Pengguna Menurut Undang-Undang Nomor 28 tahun 2014 tentang Hak Cipta. *Lex Privatum*, 4.p.138-139.

In Indonesia, the national copyright legal framework does not specifically cover iconic fictional objects. Article 40 of the Copyright Law has regulated the types of protected works. However, the article does not regulate whether iconic fictional objects in a film can be protected by copyright independently of the film itself. The absence of such regulation can harm the creator both morally and economically. It is because not all third parties have legal awareness. When they are about to take economic benefits from an iconic fictional object belonging to a creator, a third party who is not in good faith will not ask for permission so that the creator does not receive royalties for his work. Firm legal protection needs to be provided to protect works and also the rights of the creators and copyright holders. Indonesian Copyright Law must be a compatible instrument.

Legal protection for iconic fictional objects is very meaningful because the creator will enjoy his works and the results of this work directly or indirectly. If iconic fictional objects are included as copyrighted work, there will be legal certainty in exercising the rights to iconic fictional objects, especially about their commercialization. The protection of copyright law for iconic fictional objects is also a positive step to developing Indonesia's creative industry sector, especially in the film sector. So, this research will discuss one legal issue "whether iconic fictional objects can be separately protected by copyright from the original work?".

2. Method

This research is normative legal research that used a statutory approach because the main object studied is regulations or legal rules. In addition to the statutory approach, this research also used a conceptual approach, a case approach, and a comparative approach. In this case, the case approach used was the *DC Comics v. Towle*, in which DC has received a final decision by the United States Court of Appeals for The Ninth Circuit. A comparative approach was carried out by comparing Indonesian Copyright Law with the United States of America. The legal materials used in this research consist of statutory regulations as primary legal materials, literature as secondary legal materials, and dictionaries related to legal issues in this study as tertiary legal materials.

3. Analysis and Results

3.1. The Concept of "Work" in Law Number 28 of 2014 Concerning Copyright

The concept of work according to the Copyright Law as clearly stated in Article 1 Number 3 is "every creative work in the fields of science, art and literature that is produced based on inspiration, ability, thought, imagination, dexterity, skill, or expertise expressed in real forms". Based on this definition, it can be interpreted that the work in the Copyright Law at least has the following elements:

1) *The creative work in the fields of science, art, and literature*

Work in the field of science simply means that the work is based on science and knowledge. Science will create expertise, skills, and abilities, which are then used to create a work.

Furthermore, the meaning of art, as stated in Pius A Partanto's Popular Scientific Dictionary, is that everything that has to do with the work produced by the element of taste⁵. Hartono, in his book entitled "*Ilmu Budaya Dasar*" defines art as human work that contains special values other than the sensory value, the value of form, the value of knowledge, and the value of ideas, meeting, and arguments of justice, where these values are manifested outwardly so that humans can enjoy them through the senses, both sight and hearing and then feel satisfied with it⁶.

The literary meaning according to Sumardjo & Saini is the expression of the human whether an experience, thought, feeling, idea, spirit or belief that are drawn in a concrete manner with language that can evoke fascination⁷. Among science, art and literature, they cannot purely stand-alone. The three are interrelated. Literature is a part of art, and art is in its manifestation also requires knowledge.

The types of works in the fields of science, art and literature protected by copyright are mentioned in Article 40 Paragraph (1) of the Copyright Law, including:

- a. Books, pamphlets, published papers, and all other written works;
- b. Discourse, lectures, speeches, and other similar works;
- c. Teaching aids made for the purpose of education and science;
- d. Songs and/or music with or without text;
- e. Drama, musical drama, dance, choreography, puppetry, and pantomime;
- f. Fine art in all forms such as paintings, drawings, carvings, calligraphy, sculpture, statue or collage;
- g. Applied artworks;
- h. Architectural works;
- i. Maps;
- j. Batik art or other motifs;
- k. Photographic works;
- l. Portrait;
- m. Cinematographic works;
- n. Translations, interpretations, adaptations, anthologies, databases, arrangements, modifications and other works resulting from the transformation;
- o. Translation, adaptation, arrangement, transformation, or modification of traditional cultural expressions;
- p. Compilation of works or data, either in a format that can be read by computer programs or other media;
- q. Compilation of traditional cultural expressions during the compilation is original work;
- r. Video games; and
- s. Computer program.

⁵ Partanto, P. A. & Setiawan, H. (2011). Kamus Ilmiah Populer. available at <http://e-journal.uajy.ac.id/2174/3/2TA11210.pdf>. p.11.

⁶ Hartono. (2012). Ilmu Budaya Dasar. available at http://eprints.walisongo.ac.id/220/3/094111016_Bab2.pdf. p.17

⁷ Sumardjo & Saini. (1997). *Apresiasi Kesusastraan*. available at [http://eprints.uny.ac.id/8360/3/BAB 2-07204241003.pdf](http://eprints.uny.ac.id/8360/3/BAB%202-07204241003.pdf). p.3-4.

2) *Created by the ability, skill or expertise of the creator*

Basically, human nature is *homo sapiens*. It is said so because humans can think logically because they are endowed with intelligence. Starting from this intelligence, a French philosopher, Rene Descartes, stated *cogito ergo sum* that means "I think, therefore I exist" in English⁸. Apart from thinking creatures, humans are also unique persona. Humans are free to choose and are not bound by existing traditions or habits. That was what John Stuart Mill put it⁹.

Furthermore, according to Karl Marx's view, humans are also *homo faber* or working creatures.¹⁰ Life is about to produce work. Based on these views, work or creation is a logical consequence of humans as intelligent beings, unique personas, and working creatures. Creation is produced by a creator. The definition of a creator based on Article 1 Number 2 of the Copyright Law is "a person or several people who individually or collectively produce a unique and personal creation".

3) *Expressed in real form*

There is no copyright on ideas or thoughts that are not expressed in a real form. If the idea only stops in imagination and is not manifested in a form that can be enjoyed or reached by the five human senses, then the idea is not a work that can be protected by copyright. This element is reaffirmed in Article 41 Letter a, which states that "the work that has not been materialized in a tangible form (intangible work) is not protected by copyright".

The elements of work in the Copyright Law as described above have met the minimum standards for a copyrighted work according to Golkar Pangarso, including¹¹:

- 1) Fixation contained in the elements "expressed in its manifest form".
- 2) Originality
- 3) Creativity is contained in the element "created by the ability, skill, or expertise of the creator".

Based on these standards, originality is one of the fundamental requirements in Copyright¹². In the definition of work as referred to in Article 1 Paragraph (3) Copyright law does not mention the originality requirement, but the terms or principles of originality of the work have been accommodated in the phrase "distinctive and personal" contained in the definition of a creator as regulated in Article 1 Number 2 Copyright Law.

3.2. Iconic Fictional Object

In a fictional story, both in comics and films, not only the fictional character is famous but certain objects in the story can also become famous as well as the fictional character. Famous fictional characters, for examples are Mickey Mouse, Superman,

⁸ Susanti, D.I. (2017). *Hak Cipta Kajian Filosofis Dan Historis*. Malang: Setara Press, p.8.

⁹ Susanti.p.13

¹⁰ *Ibid*, p. 15.

¹¹ Pangarso, G. (2015). *Penegakan Hukum Perlindungan Ciptaan Sinematografi* (Bandung: Alumni, p.92-93

¹² Rahman, R. A., Ahmad Al-F. and Shu Mei, T. (2020). Should Indonesian Copyright Law Be Amended Due to Artificial Intelligence Development?: Lesson Learned from Japan. *Journal of Intellectual Property Law and Management*, 9(1), p.43

Batman, Cinderella, and Beauty and the Beast. Whereas one example of an iconic and phenomenal fictional object is the “enchanted rose” in the film Beauty and the Beast. Beauty and the Beast cannot be separated from a rose in a tube known as the accompanying enchanted rose and vice versa.

Thus, iconic fictional objects are objects that have certain characteristics. These certain characteristics make this object unique and different from similar objects in general. These objects are often properties used by the main character in the story, so because of their special characteristics and their importance in the story, they become popular and iconic.

Basically, iconic fictional objects can be found in literary works, especially comics and/or derivative works, especially films.

1) *Literary Works*

According to the Copyright Law of The United States and Related Laws Contained in Title 17 of the United States Code, hereinafter referred to as US Copyright Act Title 17, what is meant by literary works is:

“Literary works are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied”.

Based on this definition, it can be interpreted that what is included in “literary works” is literary works that contain words and/or numbers other than audiovisual, whether it is manifested in the form of written works such as books or magazines, or other forms such as cassettes or disks. Not all literary works contain iconic fictional objects in them, but only certain written works with fantasy stories or genres. A fantasy story is a fictional story with a fantasy genre that talks about things that are unusual, for example, Harry Potter¹³. So, the settings, events, and characters are not real¹⁴. In this research, written works containing fantasy stories are meant to be specifically written works, namely comics. This is because iconic fictional objects in comics are in the form of pictures, not just described in words. When an iconic fictional object is just described in words, everyone will have a different imagination about the physical form of the iconic fictional object. The lack of uniformity in the imagination of iconic fictional objects makes the concept of appearance or manifestation of iconic fictional objects are difficult to identify. In addition, the court, in fact, provides different treatment between literary characters and visual characters. Kurtz Leslie, as quoted by Sourav Kanti De Biswas, stated that¹⁵:

“Courts have been more lenient in protecting characters that have some kind of tangible visual elements than in protecting literary characters, whose image relies solely on abstractions of the human mind”.

Visual characters are easier to obtain copyright protection, although literary characters can also be protected even if they are not visualized. However, it is

¹³ Taum, Y. Y. (2017). Pembelajaran Sastra Berbasis Teks: Peluang dan Tantangan Kurikulum 2013. *Jurnal Ilmiah Kebudayaan Sintesis*, 11(1).

¹⁴ Pratista, H. (2008). *Memahami Film*. Yogyakarta: Homerian Pustaka, p.15

¹⁵ Biswas, S. K. D. (2004). Copyrightability of Characters. *Journal of Intellectual Property Rights*, p.149

difficult for copyright to reach literary characters because there is no clear depiction of it. Visualizing characters means taking one step further to gain copyright recognition and protection. Because “not all characters qualify for copyright protection, and not all characters are treated equally under the law”¹⁶.

2) *Derivative works*

Based on the US Copyright Act, Section 17, it can be understood that a derivative work is:

“a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship”.

Derivative works are works that are based on one or more pre-existing works. Indonesian Copyright Law does not recognize the term “derivative works”, instead of uses the nomenclature “adaptation” and “transformation” to describe derivative works.

Transformation of work can be found in Article 40 Paragraph (1) letter n, namely translations, interpretations, adaptations, anthologies, databases, arrangements, modifications and other works resulting from the transformation. Furthermore, Article 40 Paragraph (2) states that the result of the transformation is protected by copyright without prejudice to the copyright of the original work. This is in accordance with the provisions of Article 2 Section (3) of the Berne Convention that derivative works must be protected as original works without prejudice to the copyright of the original work.

In this research, the transforming work that is the focus of the research is fantasy films. Fantasy films, according to Himawan Pratista, cannot be separated from magical elements, myths, fairy tales, imagination, hallucinations, dreamland, magical swords and spells, dragons, flying horses, flying carpets, gods, witches, genies and fairies. Aspects of religion, God or angels who come down to earth, the interference of divine powers, heaven and hell are sometimes also included in this type of film.

David I Brainbridge in his book entitled *Intellectual Property Rights, Fourth Edition*, argues that films are included in derivative works because it is usually based on original literary, dramatic, musical and artistic works¹⁷. Quick, John, and Tom La Bau, as quoted by Ahmad M. Ramli and Fathurahman in their book, argued that film as an audiovisual communication medium has several characteristics, including¹⁸:

- a) There is a large demand according to the wishes of the community regardless of age, background, or experience;
- b) It has a large psychological impact, is dynamic, and is able to influence the audience;

¹⁶ Schreyer, A. (2015). An Overview of Legal Protection for Fictional Characters: Balancing Public and Private Interest. *Cybaris*, 6(1), p.60

¹⁷ Brainbridge, D.I. (1999), *Intellectual Property*, Fourth Ed. London: Financial Times Pitman Publishing, p.54

¹⁸ Ramli, A.M. & Fathurahman (2005). *Film Independen dalam Perspektif Hukum Hak Cipta dan Hukum Perfilman Indonesia*. Bogor: Ghalia Indonesi, p.49-50

- c) able to build attitudes by paying attention to the ratio and emotions of a film;
- d) Easy to distribute and display;
- e) Illustrated quickly as the embodiment of an idea or something else;
- f) Usually more dramatic and complete than life;
- g) Appropriately documented, both picture and sound;
- h) Observative; selectively able to show the characters and events that tell a story;
- i) Interpretive; able to relate something previously unrelated;
- j) Able to sell a product and an idea (a powerful propaganda tool);
- k) Can show a complex and structured situation;
- l) Able to bridge time; both past and future;
- m) Can cover long distances and penetrate hard-to-penetrate spaces;
- n) Able to zoom in and out of objects; can show something in detail (microscopically);
- o) Able to stop motion, accelerate or slow down real movement, and show complex time relationships (speed photography can show an event that occurs in microseconds); time-lapse photographs can show hours and days of activity in a few seconds;
- p) Constant (in content and explanation).

The characteristics of films, as mentioned above, are the reasons why this research focuses on films. After the visualization of iconic fictional objects in the film, an object may become popular or exist and can even be commercialized separately from the film in which it appears.

The current phenomenon is that iconic fictional objects in animated films have great potential to be commercialized because of the high public interest in them. This is due to the uniqueness or peculiarity of the appearance of the iconic fictional object depicted in the animated film.

This research focuses on iconic fictional objects contained in films, whether they are adaptations of comics or not. Even though in comics, the iconic fictional object has been depicted, it is not certain that everyone will pay attention to iconic fictional objects in the comics because iconic fictional objects are not characters that are told, iconic fictional objects are only in the form of properties.

However, when an iconic fictional object has been filmed, apart from everyone being able to receive a clearer depiction of its physical form, the object also becomes more reckoned with than it did in the comics. Without the film, objects that are fictional objects may not be iconic or very well known among the public.

The existence of a film visualization of the iconic fictional object also allows the continued use of the iconic fictional object itself. After the existence of films, it is possible that iconic fictional objects can be developed into new works outside of films. So that derivative work on fictional objects is not only in the form of films, but derivative work in the form of artistic work such as sculptures and so on. The definition of artistic works according to The Copyright, Design and Patent Act 1988 s 4 (1) the United Kingdom includes¹⁹:

¹⁹ Brainbridge. *Op.Cit.*, p.50

“a graphic work, photograph, sculpture or collage, irrespective of artistic quality; a work of architecture being a building or a model for a building; or a work of artistic craftsmanship”.

Although artistic works do not tell a story but only describe a form, both two-dimensional and three-dimensional, through the embodiment of iconic fictional objects in that art form, the commercialization of iconic fictional objects can be done. Iconic fictional objects can be painted, made into sculptures, or other forms that can be traded.

3.3. Iconic Fictional Object in Law Number 28 of 2014 Concerning Copyright

The iconic fictional object is not regulated under the Indonesian Copyright Law. Article 40 Paragraph (1) has clearly stated what types of works are protected by copyright, and iconic fictional objects are not included in one of these types of works. Although it does not mention iconic fictional objects in Article 40 Paragraph (1), iconic Fictional objects meet the requirements to be called a “work”. The following is an analysis of iconic fictional objects based on the concept of work in the Copyright Law:

- 1) *The creative works in the fields of science, art and literature*
As previously stated, iconic fictional objects can be found in literary work (comic) and derivative work in the form of audiovisual work (film), as well as derivative work in the form of artistic work such as sculptures. In both literary works and derivative works, iconic fictional objects are a combination of shapes, images, and colors. The combination creates a beautiful appearance. Since iconic fictional objects contain aesthetic elements, it can be said that iconic fictional objects are products that have artistic value.
- 2) *Created by the ability, skill or expertise of the creator*
Iconic fictional objects are the product of human thought. Humans use their abilities, skills, or expertise to arrange or combine shapes, images, and colors to make one beautiful unit. The arrangement of the shapes, images and colors is not done carelessly. However, creativity is needed in order to have an aesthetic value. Thus, only capable, skilled, and expert people can create iconic fictional objects. Iconic fictional objects are created by the creator according to their creativity. Basically, every creator has different creativity, so that they will produce different works. These works are considered to have their respective originalities, and each of them is protected by copyright as well. Iconic fictional objects fulfill the principle of originality because iconic fictional objects are created based on the creativity of their creators. This creativity will distinguish the iconic fictional object from other works.
- 3) *Expressed in real form*
Iconic fictional objects both in literary works and in derivative works are clearly depicted and manifested in two-dimensional or three-dimensional forms. Not only in the form of ideas, concepts, or imagination but also manifested or visualized into a tangible form that can be accepted by the five human senses. Although it meets the requirements to be called a work according to the Copyright Law, however protection for the iconic fictional object is not independent or separate from the original work. Iconic fictional objects are protected as an integral part of a comic or film. If an iconic fictional object

appears in a comic, the comic is protected by copyright, and it also happens for a film. The iconic fictional object can only be protected separately if they are manifested in separate tangible forms. The real form referred to, among others, has been described in Article 40 of the Copyright Law.

3.4. Iconic Fictional Object can be Separately Copyrighted

Iconic Fictional objects have basic similarities to fictional characters. Both are in a story and their existence can transcend the story itself. Iconic fictional objects are an integral part of fictional characters. Kenneth L. Port said that fictional characters are humans, animals, even robots or aliens that appear in books, dramas, comics, and films²⁰. These books, dramas, comics, and films contain stories, so it can be said that fictional characters come from the stories. Kurtz, as quoted in Kenneth L. Port, further explained that "Fictional characters can be composed of voices, shapes, personalities, mannerism, and attitudes"²¹. Thus, fictional characters are composed of voices, shapes, personalities, mannerisms, and attitudes that are described by the creator.

America is one of the countries that is progressive enough in terms of protecting fictional characters. In several cases of copyright infringement lawsuits, United States court rulings show that fictional characters can be separately copyrighted from the original work. According to Black's Law Dictionary, as quoted by Ahmad M. Ramli and Fathurahman, the meaning of independent terminology is as follows²²:

"Not subject to the control or influence of another (independent Investigation); not associated with another (often larger) entity (an independent subsidiary); not dependent or contingent on something else (an independent person)".

Several conditions or tests are carried out by the court to determine whether the fictional character is copyrightable or not. However, these tests are not consistently applied by the courts. Thus, protection for fictional characters is not completely certain. Some of the tests used by the courts in deciding copyright disputes over fictional characters include:

1) *Sufficiently Delineated Test*

In various sources, this test is also known as sufficiently developed or distinctly delineated. This test appears in the case of *Nichols v. Universal Pictures Corp.* This later becomes the standard for violating other fictional characters, such as *Olson v. National Broadcasting Co.* According to the judge, fictional characters become copyrightable if they are depicted clearly or in as much detail as possible. The more detailed and clear the character is depicted, the easier for it to obtain copyright protection.

2) *Story Being Told Test*

This test was used in the case of *Warner Bros. v. Columbia Broadcast Systems.* The court held that to be copyrighted; characters had to be at the center of the

²⁰ Spahn, K. E. (1992). The Legal Protection of Fictional Character. *University of Miami Entertainment & Sports Law Review*, 9(3).

²¹ Pert, K. L. (1988). Copyright Protection of Fictional Character in Japan. *Wisconsin International Law Journal*, 7.

²² Ramli & Fathurahman, *Op.Cit.*, p.21

story. Characters must be an important part of the story, not just “mere chessman or vehicle” to tell the story. Apart from America, in the case of Sazaesan’s copyright infringement lawsuit in Japan, the Tokyo District Court also adopted a test standard similar to this story being told.

The protection of fictional characters is still a matter of debate today. Kenneth L. Port said that in general courts do say that fictional characters can be separately protected, but the real issue is not the copyright of the fictional character itself, but rather whether a particular use violates the original work, which is the object of copyright²³. Furthermore, he wrote that²⁴:

“A fictional character itself is not the target of copyright, but rather is one entity of the overall plot, setting, or story that is copyrighted. A fictional character has no tangible existence outside of the original work”.

In line with Kenneth L. Port, Kenneth E. Spahn stated that²⁵:

“Because the character does not have a “tangible existence”, copyright law does not recognize nor protect the character outside the specific copyrighted work in which it appears”.

The position of a fictional character in copyright law is strengthened after part of the character can be protected by copyright independently, apart from the original work and even from the fictional character itself. The part or element in question is an iconic fictional object. Iconic fictional objects, directly or indirectly, are important supporting elements in identifying a fictional character clearly.

In its progress, regardless of the original work and the fictional character it is attached to, iconic fictional objects can become copyrightable objects. In the case of *New Line Cinema v. Russ Berrie*, an American district court ruled that the gloves used by Freddy Krueger in the film *Nightmare on Elm Street* are independently protected by copyright²⁶. The next iconic fictional object case that is the main reference for this discussion is the *Batmobile* case between *DC Comics v. Mark Towle*. DC Comics is the publisher and copyright owner of Batman comics made in 1939. In these comics, Batman cannot be separated from Batmobile. The Batmobile is a high-tech fictional car depicted in varied forms, but its name and main characteristics as Batman’s personal combat vehicle remain consistent. The Batmobile was introduced as Batman’s main mode of transportation to perform his heroic acts in 1941. The Batmobile has also been depicted in various television programs and films, which are adaptations of Batman comics.

The television programs and films in question are the television series entitled *Batman* in 1966 and the film *BATMAN* in 1989. The television series entitled *Batman* in 1966 is the result of a license agreement between DC, the National Periodical Publications, Inc., and the American Broadcasting Company (ABC). In 1965, the National Periodical gave ABC an exclusive license to produce a TV series based on the *Batman* story,

²³ Pert. *Op.Cit.*, p.7

²⁴ Pert. *Op.Cit.*, p.22

²⁵ Spahn. *Op.Cit.*, p.333.

²⁶ Schreyer. *Op.Cit.*, p.63

including the characters in it. These exclusive rights include the right to translate, adapt, or control Batman as far as ABC wants in making its TV series and the right to protect the TV series that was created. In this agreement, not all exclusive rights will be transferred to ABC. National Periodical still has exclusive rights, including publication rights and merchandising rights for all products made and distributed under the name of any character in the Batman comics.

Subsequently, in 1966 ABC produced the Batman TV series. In the TV series, the Batmobile design is not directly copied from what is depicted in the comics. However, the Batmobile still maintained its bat-like appearance and was equipped with advanced weaponry and technology, as depicted in the comics. In 1979, DC again licensed Batman to Batman Productions, Inc (BPI). DC gave BPI exclusive rights to make films based on its comics. BPI had the right to adapt, use, or modify it for the purposes of making its films. However, as in the 1965 ABC license agreement, not all exclusive rights were transferred to BPI. DC can exercise the immutable rights indefinitely unless stated otherwise in the agreement. These rights include publication rights and merchandising rights related to products made and distributed on behalf of Batman or other characters or other things included in DC comics.

BPI then sub-licensed its rights to Warner Bros, inc., which eventually produced the BATMAN 1989 film. Like the 1966 TV series, the batman 1989 film depicts the Batmobile's physique as different from the comics and TV series. Even so, the Batmobile in the film retains its physical form that is like a bat and is also equipped with futuristic technology and weapons to fight crime.

The defendant, in this case, namely Mark Towle, is the owner of Gotham Garage, a company that produces cars shown in films or television. One of the Towle products is a Batmobile replica, both the Batmobile that appeared in the 1966 TV series and in the 1989 film. He then sold it to collectors who know the history of the Batmobile. It also sells equipment that allows consumers to modify their cars to look like the Batmobile. Towle admits that his replica copies the Batmobile's design, although not all parts are copied.

Before DC brought the case to litigation, Towle marketed his replica as the Batmobile and used the domain name batmobilereplicas.com to market his business. Towle admitted that he had no permission from DC to make or to sell any product whose copyright or trademark is owned by DC.

In May 2011, DC sued Towle with allegations of copyright infringement, trademark rights and unfair competition arising from the manufacture and sale of a Batmobile replica. Towle denied that he had infringed DC's copyrights. He claimed that the Batmobile as featured in the 1966 television show and the 1989 film was not protected by copyright. As an alternative, Towle argues that DC did not own the copyright to the Batmobile as it appeared on television or film.

Subsequently, the court ruled that Batmobile is a character entitled to copyright protection. According to the court, the name Batmobile has always been consistent and has been recognized as Batman's personal vehicle, and although some of its physical features have changed over time, others have remained consistent, including high-tech, armed, bat-like patterns, and jet-black color. The court added that the Batmobile has

always been described as cunning, fast, strong and elusive, even as a superhero or Batman friend.

The court also ruled that DC retained its copyright to Batmobile as it appeared in the 1966 television and 1989 film based on its ownership of merchandising rights. As an alternative, the court concluded that DC owned the Batmobile's copyright because the Batmobile in the Batman television program and film is a derivative of the Batmobile depicted in his comics. In this case, Towle was deemed to have infringed DC's copyright.

To answer the question of whether the Batmobile as stated in comics, TV series and films, has the right to receive copyright protection, the court acknowledged that in addition to being granted to work, copyright protection could also be given to quite special elements in it, such as characters. After much deliberation, the court ruled that this particular character is granted copyright protection even though it is not stated rigidly in the United States Copyright Act.

Judges in their deliberations use references to case decisions regarding the copyright of fictional characters. Examples are the characters James Bond, Batman, and Godzilla. The judge also considered a case similar to Batmobile's, namely the Halicki Film, LLC v. Sanderson Sales & Mkt, about the copyright of Eleanor's automotive (car) character in a film. In the Halicki case, the court also ruled that the automotive character (car) could be protected by copyright.

In making a decision in the Batmobile case, the court made three tests to determine whether a character in a comic, television program or film can be protected by copyright or not. The three tests include:

1) *Physical as Well As Conceptual Qualities*

The principle of this test is that the physical form of the character must conceptually be manifested or described clearly in accordance with the concept. The Batmobile fulfills these requirements because the Batmobile is depicted in graphic form in the comics and is also depicted in three-dimensional form in the TV series and films. The Batmobile is not just a literary character.

2) *Sufficiently Delineated*

This second test requires that the characters be sufficiently drawn consistently. The court has ruled that the Batmobile maintains its conceptual physical form since its first appearance in the comics in 1941. As well as being a highly interactive vehicle, equipped with advanced technology and equipped with weapons to aid Batman in fighting crime, it is almost always a bat-like shape. These bat-like appearances are consistently depicted in comics, TV series and films, although they are not the same over time.

The Batmobile's character and attributes are consistently depicted. However, apart from that, the Batmobile is known as a sleek and powerful crime-fighting car in helping Batman move quickly against evil. Because the Batmobile is consistently depicted and its characters and attributes are easily identifiable, it has met this second test.

3) *Especially Distinctive and Contains some Unique Elements of Expression*

This test requires that a character must be unique and have a unique expression. In this sense, apart from the Batmobile being known as Batman's

“best friend”, the name Batmobile itself is a unique and very well-known name. The Batmobile is not just a “stock character”. The stock character is²⁷:

“Stock characters are those types of characters who have become conventional or stereotypical through repeated use in particular types of stories. Stock characters are instantly recognizable to readers or audience members (e.g., the femme fatale, the cynical but moral private eye, the mad scientist, the geeky boy with glasses, and the faithful sidekick). Stock characters are normally one-dimensional flat characters, but sometimes stock personalities are deeply conflicted, rounded characters (e.g., the “Hamlet” type)”.

The court ruling stating that the Batmobile as a fictional object can be separately copyrighted from the original work, even apart from its inherent character (Batman) is also a matter of debate. In the verdict, the Batmobile was equated or at least considered as a character. In fact, based on the interpretation of the meaning according to law, the general characters are humans, animals, or anthropomorphic characters who interact with other people and experience events²⁸. The character in question is not a ‘character’ in the sense of character, trait, or temperament, but rather a character in the sense of a character or actor. Meanwhile, the Batmobile is an object used by a character. These objects cannot interact or experience events without being used by the character. The Batmobile is an object and acts as an object in the Batman story. Unlike Barbie, at first Barbie was just an object (doll). However, Barbie in Barbie films is not told as an object. Barbie acts as a character or actor in the story, not just a doll. It is true that characters do not have to be able to speak or be like humans, but characters are more than just an object.

Contrary to Missy G. Brenner’s opinion, according to Himawan Pratista, objects can be categorized as characters. The types of characters, according to Himawan Pratista, consist of²⁹:

- 1) Human Character
Human characters are generally used as the main actors of the story
- 2) Non-human Character
The use of this type of character is very limited. Non-human characters can often be found in family drama, science fiction, fantasy, and horror films. Non-human characters forms include animals, extraterrestrials, monsters, mechanical objects, or even inanimate objects.
- 3) Non-Physical Character
Non-Physical characters are usually supernatural characters who are not bound by time and space, such as spirits or ghosts.
- 4) Animated Character
Animated Characters are two-dimensional and three-dimensional characters, including human characters, animals, monsters, aliens, mechanics, and even inanimate objects that are brought to life with animation techniques.

²⁷ ‘Types of Characters in Fiction’, *Colin Welch’s Education Resources*, 2011 available at https://pbeetles.com/wp-content/uploads/2013/10/types_of_characters_in_fiction.pdf.

²⁸ Brenner, M. G. (2017). *Shadow of the Bat(Mobile): Character Copyright After Dc Comics v. Towle*. *Santa Clara Law Review*, 57(2), p.507

²⁹ Pratista. *Op.Cit.*, p.80-82

So, based on Himawan Pratista's view, fictional objects can be categorized into non-human characters and animated characters.

Apart from the status as a questionable character, the three tests for the Batmobile are also ambiguous when it comes to one of the tests for a fictional character. As previously described, there are two tests to determine the copyright of a fictional character. These tests are "Sufficiently Delineated Test" and "Story Being Told". Sufficiently Delineated has been implemented in this Batmobile case. The second test is that Story being told is not used. The story being told requires a character to be at the center of the story in order to be copyright protected. This test received a lot of criticism because it was judged to reduce the chances of a character getting protection. The Batmobile is not the center of the story; Batman is the center of the story. If Story Being Told is implemented, it will be more difficult for the Batmobile to get the copyright.

Another criticism of the Batmobile ruling concerns the doctrine of *scènes à faire*. Kenneth E. Spahn, in his journal wrote that "*scènes à faire* are incidents, characters, or settings which are indispensable, or at least standard, in the treatment of a given topic"³⁰. So, copyright does not protect some elements in the story, such as incidents, characters, or settings that are commonly used. Missy G. Brenner argues that the Batmobile belongs to the scope of *scènes à faire* because the equipment used by a superhero, including the vehicle, is of course, sophisticated and powerful special equipment. He stated that³¹:

"The Towle court failed to recognize that generally, superhero vehicles with outlandish capabilities belong in the scènes à faire category, just like mechanized body armor".

Protection of fictional objects is not expressly stated in the United States Copyright Act. This protection is given after a lawsuit for copyright infringement. Likewise, fictional characters are protected not because they are stated in the law but because of a copyright infringement lawsuit.

Table 1. The Comparison of Iconic Fictional Objects Protection in Indonesia and The United States.

Indonesia	United States
It is not mentioned rigidly in the law; there is no court decision about the iconic fictional object	It is not mentioned rigidly in the law, but there is jurisprudence that can be followed
Even though it meets the requirements of work:	It can be independently and separately copyrighted from the original work, as long as it meets the three criteria:
<ol style="list-style-type: none"> 1) <i>Creative work in the fields of science, art, and literature;</i> 2) <i>Created by the ability, skill or expertise of the creator;</i> 3) <i>Expressed in real form.</i> 	<ol style="list-style-type: none"> a. <i>Physical as well as conceptual qualities</i> b. <i>Sufficiently delineated</i> c. <i>Especially distinctive and contain some unique elements of expression</i>
However, Iconic Fictional Objects are protected as an integral part of the original work unless manifested in another form.	
In other words, the one that is protected is	

³⁰ Spahn. *Op.Cit.*, p.334

³¹ Brenner. *Op.Cit.*, p.511.

original work containing iconic fictional objects, such as comics or films.

Protection outside the original work is not for iconic fictional objects themselves, but for other forms of iconic fictional objects in which the form is a type of work protected by the law, such as paintings (the protection is given to painting object, even if it shown an Iconic Fictional Object).

Protection is independently granted to Iconic Fictional Objects because of their existence.

Source: Secondary data, 2020 (Edited).

Based on the explanation above, it can be concluded that iconic fictional objects can be separately protected by copyright from the original work as long as they meet the following requirements or criteria:

- 1) *Physical as well as conceptual qualities*
- 2) *Sufficiently delineated*
- 3) *Especially distinctive and contain some unique elements of expression*

4. Conclusion

Iconic Fictional Objects are not explicitly stated as objects protected by copyright according to Article 40 of Law Number 28 of 2014 concerning Copyright. However, Iconic Fictional Objects fulfill three elements of a work: (1) *creative works in the fields of science, art, and literature*; (2) *created by the ability, skill or expertise of the creator*; (3) *Expressed in real form*. So, it can be concluded that the Iconic Fictional Object is a work that is entitled to copyright protection. In determining whether an Iconic Fictional Object can be protected by copyright independently regardless of the original work or not, the judge in the *United States Court of Appeals for the Ninth Circuit on DC Comics vs Mark Towle case* has argued that iconic fictional objects can be separately copyrighted from the original work as long as it meets three requirements: (1) *Physical as well as conceptual qualities*, (2) *Sufficiently delineated*, and (3) *Especially distinctive and contain some unique elements of expression*.

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