

Batman vs. the Black Bat

Copyright's Derivative Work Rule

This case, which the court called “a rare phenomenon,” involves a plaintiff who had the gall to plagiarize a famous copyrighted work and then sue the copyright owner for infringement!

The Black Bat

In 1984, Jeffrey Sapon drew a modification of the famous Batman cartoon character and named it “The Black Bat.” He allegedly sent a copy of it to DC Comics, publisher of the Batman comic books and owner of the Batman copyright. Sapon suggested that DC Comics should adopt his modification as a modernization of Batman’s appearance. DC Comics never responded. Fifteen years later, DC Comics produced an animated television series titled “Batman Beyond,” in which a new person takes over Batman’s role, because the original Batman was 80 years old.

that Batman Beyond was an infringement. DC Comics denied Sapon’s infringement claim and counterclaimed alleging that Sapon was the real copyright infringer. It also filed a motion for summary judgment on both aspects of the case, which the court granted.

Presumption of Validity

Ordinarily, a registered copyright is entitled to a presumption of validity. But in this case the presumption was rebutted because:

- ☉ *Sapon’s modified Batman drawing was an unauthorized derivative work (see “Copyrights on Derivative Works” on page 5),*
- ☉ *Sapon hadn’t disclosed that fact to the Copyright Office when he applied for registration, and*
- ☉ *The Office might well have rejected his application if it had known.*

Absent a presumption of validity, the court was free to invalidate Sapon’s copyright on two grounds: 1) Sapon’s modified Batman drawing was an unauthorized derivative work, and 2) Sapon’s drawing lacked sufficient original material not derived from DC Comic’s Batman.

In support of the second ground, the court found that the elements Sapon claimed as original were in fact not, because he had actually derived them from DC Comic’s Batman character.

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It is a fundamental principle of copyright law that an idea can’t be protected by a copyright — only a particular original expression of an idea can be.

Deciding that he had been wronged, Sapon obtained a copyright registration for his Black Bat drawing and sued DC Comics, claiming

These elements included:

- ⊙ *A shiny black bullet-proof costume,*
- ⊙ *A silver utility belt,*
- ⊙ *Bat horns,*
- ⊙ *Ability to fly using bat wings,*
- ⊙ *Crime-fighting equipment, and*
- ⊙ *Two-way radios.*

With so many similarities, the Black Bat lacked enough originality to stand on its own.

Original Expression Of Ideas

Further, the court held that many of the remaining elements of Sapon's modified Batman drawing were mere ideas, and it is a fundamental principle of copyright law that an idea can't be protected by a copyright — only a particular original expression of an idea can be. Thus, protection was precluded for:

- ⊙ *A science-fiction character,*
- ⊙ *A superhero with an alter ego,*
- ⊙ *A deeply sinister appearance, and*
- ⊙ *A full mask disguise.*

In addition, the court held that the few remaining

Copyrights on Derivative Works

Copyright law doesn't protect a work derived from a previous work — such as Sapon's Batman modification — if the previous work is covered by an existing copyright and the derivative work's author lacks the original work copyright owner's permission. In addition, even if that author obtains permission, the derivative work must contain substantial original material in addition to the material derived from the previous work.

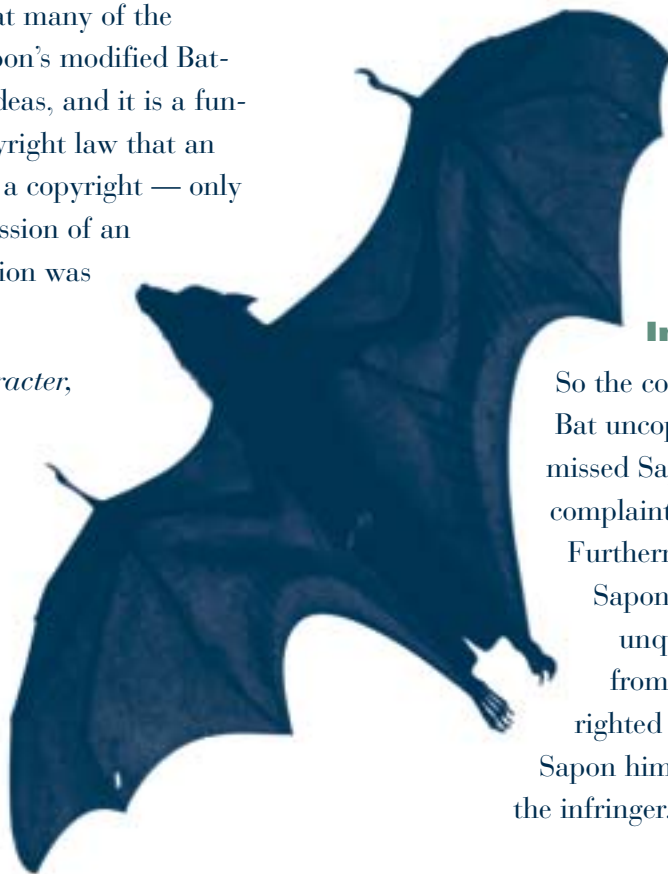
original elements of Sapon's drawing failed to reach the minimum threshold of originality required for copyright protection. And those few original elements were so inextricably integrated with the uncopy-

rightable elements as to preclude identifying a separate copyrightable segment of the whole.

Who's the Infringer?

So the court held the Black Bat uncopyrightable and dismissed Sapon's infringement complaint against DC Comics.

Furthermore, because Sapon's drawing was unquestionably derived from DC Comics' copyrighted Batman character, Sapon himself was the infringer. ⊙



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INTELLECTUAL PROPERTY LAW

Current issues on patents, trademarks and copyrights

A Return to Reason

How the Doctrine of Equivalents Affects Your Patent

The U.S. Supreme Court has recently handed down an important patent decision, the *Festo* case. If you're a patentee, the decision is mostly good news. But if you're a potential patent infringer, you'd best tread carefully.

The Doctrine of Equivalents

To appreciate *Festo*, you must understand the doctrine of equivalents and its nemesis — prosecution history estoppel. In an attempt to define the invention verbally, one or more “claims” describe a patent’s scope of protection. These claims exist to tell the public precisely what the patent covers. But in the real world, words often fail to attain precision.

Furthermore, when attorneys draft patent claims, they simply can't accurately forecast

the infinite variety of future evasions that an infringer may design. The game of cat and mouse between a patentee and a potential infringer is loaded in the latter's favor because, before the patent issues, the patentee must commit to a specific verbal formulation of the claims. That formulation then presents a stationary target for the infringer to shoot at in “designing around” the patent. To redress this imbalance, courts have created the doctrine of equivalents, which holds that a patent covers not only what falls within the literal terms of the claims, but also anything that is equivalent thereto.

This is a big help to patentees and a big headache for their competitors. How a patent attorney representing a patentee's competitor decides what is and is not “equivalent” is

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