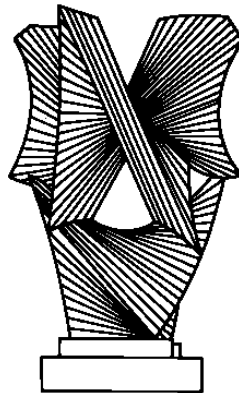


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## DOES BOGART STILL GET SCALE? RIGHTS OF PUBLICITY IN THE DIGITAL AGE

*Douglas G. Baird*

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DOES BOGART STILL GET SCALE?  
RIGHTS OF PUBLICITY IN THE DIGITAL AGE

*Douglas G. Baird\**

Benjamin Kaplan's *An Unhurried View of Copyright* remains the locus classicus of scholarship on intellectual property, and it is useful to recall the central theme of that book. Kaplan focused upon the need to fashion doctrine in a way that preserved the public domain:

If man has any natural rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and progress, if it is not entirely an illusion, depends on a generous indulgence of copying.

Kaplan believed that there would always be a frontier that marks the boundary between privately owned intellectual property and the open wilderness that is the public domain. While we want to protect creators, we need a large public domain as well.

Many follow Kaplan and believe that preserving the public domain is a principal goal of intellectual property law. In this paper, however, I ask whether this still makes sense. Perhaps the principal problem is no longer one of preserving the public domain, but understanding how the law of intellectual property should function in a world in which increasingly our cultural icons and symbols are privately owned. To a very large extent, Kaplan's frontier may no longer exist.

In a trivia contest, I once missed the following question: About what movie producer from the Golden Age of Hollywood was it often said that when he didn't like one of his actors, he would just cut him into little pieces? I answered with the name of the most abusive Hollywood producer that came to mind. (At this producer's garish and unusually well-attended funeral, one mourner whispered to another, "It just goes to show you. You give the people what they want

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and they will come.”) This was not the answer they were seeking, however. It was a trick question.

The answer they wanted was Walt Disney. This answer is correct only for the most literal among us. Celluloid is easily cut. But Disney loved all his stars, and they never let him down. Indeed, even though Mickey Mouse has not been in a movie for years, he remains eager to do another picture. And the best part, from Disney’s perspective, is that Mickey is still under contract.

Compare Mickey with another figure from Hollywood’s Golden Age—Humphrey Bogart. Like Mickey, Humphrey Bogart has not starred in a movie for many years. But Moore’s Law applies in Hollywood as elsewhere. Recall Moore’s Law. Computer chips get twice as fast and cost half as much every 18 months. The Digital Revolution has already made the motion picture industry a radically different place. *Jurassic Park* gave us digitally realized dinosaurs. In the latest *Star Wars* movie, most of the sets were computer-generated. Tom Hanks shook John Kennedy’s hand in *Forest Gump*. Nancy Marchand’s final appearance on *The Sopranos* came, with computer assistance, some months after she died.

Bogart himself did a commercial with Elton John in the early 1990s and had a cameo role with Steve Martin in *Dead Men Don’t Wear Plaid*. In these efforts, old clips of Bogart were reinserted into new footage, but we are not far from being able to start from scratch. We shall soon be able to produce a movie in which the drops of rain on Bogart’s trench-coat, his voice, eye-brows, twitch, and every distinctive facial gesture can be computer-generated and made to fit any scene a screenwriter can dream up. Indeed, Bogart has already appeared with Marilyn Monroe in *Rendez-vous in Montreal*, a 7-minute short.

In other words, some time soon, Bogart, like Mickey, could do another film. This raises the natural question. Mickey still works for Disney, but what about Bogart? Who owns the rights to him? Bogart is dead, but does he still get scale? There is already a literature on the question of intellectual property rights and “reanimation” as it is called.<sup>1</sup>

<sup>1</sup> The leading work here is Joseph J. Beard, Casting Call at Forest Law: The Digital Resurrection of Deceased Entertainers—A 21st Century Challenge for Intellectual Property Law, 8 High Technology Law Journal 101 (1993).

People come to this problem from many different directions. I come to it because it is emblematic of what I believe is going to be the central problem in our law of intellectual property. I shall begin by focusing on a narrow hypothetical. Then I shall set out the known landmarks in the legal terrain. Finally, I shall suggest how we should find our way in this undiscovered country.

Let us assume that we are Warner Brothers and we hold the copyright to all the motion pictures in which Bogart appeared and to all the novels on which the movies are based. We have decided to make a sequel to the *Maltese Falcon*. We would like to have Bogart take the lead role of Sam Spade. We want to bring back once more the Bogart persona, the man on the silver screen who wore a trench coat better than anyone. The icon that was rediscovered at the Brattle Street cinema in the 1950s and has been on a poster in every college dorm ever since. Can we do this without getting permission from Bogart's heirs?

There are at least three possible answer to the question of who controls the rights to this Bogart persona. First, Bogart's heirs may control it. One can argue that we can no more cast Bogart in a movie without getting permission of his heirs than we can cast Clint Eastwood in the part without getting his permission. Second, you can argue Warner Brothers already has the rights. The Bogart persona is entirely captured in the films. The Bogart persona is simply the Sam Spade of the *Maltese Falcon*, the Philip Marlowe of *The Big Sleep*, and the Richard Blaine of *Casablanca*. You can't separate the dancer from the dance. Finally, you can argue that this icon is part of our culture and is in the public domain, free for any of us to use.

Let us now take a survey of the relevant legal landscape. We can start by turning to first principles. The foundation of intellectual property law rests on the idea that we need to give people the incentive to create in the first instance. Indeed, this idea is in the Constitution. The Constitution gives Congress the power: "To promote the Progress of Science and the useful arts by securing for limited Times . . . to Authors . . . the exclusive Right . . . to their Writings"

The Copyright Clause is one of the few provisions of the Constitution that explains why it exists. Congress has the power to give authors the exclusive right to their writings *in order to promote science and the useful arts*. As Benjamin Kaplan reminded us more than three decades ago, we give exclusive rights for a specific reason, and we have to worry about granting rights that interfere with the ability of

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others to create new work. Hence, copyright gives only limited protection.

We give artists rights only to their original “expression.” Ideas and facts remain in the public domain, where they are free for anyone to use. The principal job we face in any given case is figuring out what is an “idea” that anyone is free to copy and what is “expression” that the creator controls. The idea-expression distinction has served us tolerably well. It is sometimes vague and uncertain in its application, but it can give us some clean answers.

As an illustration, let me remind you of another classic of film noir. Released in 1988, it is also a detective story set in 1940s California. As the posters for the film told us, it is a steamy love triangle between “a man, a woman, and a rabbit.” The people who made *Who Framed Roger Rabbit?* did not have to get permission from those who held the rights to the *Maltese Falcon*, *The Big Sleep* or *Chinatown*. Doing a detective story in 1940s California is something anyone can do. It’s a genre. Not only has it been done before, but it provides merely the general architecture for the story. Hence, it is an unprotectable “idea,” not copyrightable “expression.”

For the same reason, using cartoon characters drawn in three dimensions who interact in a movie seamlessly with human actors is also an idea, rather than an expression. Warner Brothers did not need Disney’s permission to pair Bugs Bunny with Michael Jordan in *Space Jam*, even though they may have taken the idea from *Roger Rabbit*. But Disney does get copyright protection for its original “expression.” Combining the 1940s detective story genre with the conceit that the cartoon characters in Hollywood films really existed and lived in their own segregated neighborhoods, may itself be protected by copyright. More relevant for us, the character of Roger Rabbit is protectable “expression” under copyright law. If you want to do a movie starring Roger Rabbit, you have to get Disney’s permission.

The idea-expression distinction is one of the main landmarks in our landscape and it does give us some purchase on our own problem. Take the character of Sam Spade (as opposed to the Bogart persona). This is the same as asking about doing a sequel to the *Maltese Falcon*, but casting someone other than Bogart in the role of Sam Spade. The character of Sam Spade seems protectable expression just like Roger Rabbit. For example, there has been a case holding that the

character of Freddy Krueger in *Nightmare on Elm Street* is copyrightable, quite apart from the actor who played him.<sup>2</sup>

There are differences to be sure between Sam Spade on the one hand and Roger Rabbit and Freddy Krueger on the other. A cartoon rabbit is visually distinct in a way a character in a novel or movie is not. Freddy's glove is unique, unlike Sam Spade's trench coat. To protect Sam Spade, you have to distinguish him from the generic 1940s private detective. But you can make distinctions between a general stereotype and a particular incarnation of it. There is the stereotype of the 1960s jet-setting bachelor spy that is in the public domain, but the characters James Bond, Napoleon Solo, Maxwell Smart, and Austin Powers are all protected by copyright. You cannot, however be 100% sure about this or another other question of intellectual property. Indeed, there is a Ninth Circuit case involving the *Maltese Falcon* that asserts that the character of Sam Spade is not copyrightable.<sup>3</sup>

It's an old case, however, and the person on the other side was Dashiell Hammett, the author of the novel on which the film is based. Warner Brothers argued that, because it acquired the copyright from Hammett, it alone controlled the rights to a sequel. The question was ultimately one of contract and the discussion of the copyrightability of the character of Sam Spade may be best seen as dictum. Notwithstanding this case, I think we can say that Sam Spade is protected by copyright and that we, Warner Brothers, own it. But we are not home-free by any means. We have concluded only that we have the exclusive rights to do a sequel to the *Maltese Falcon*. That doesn't tell us whether we need anyone's permission to cast Bogart in the lead.

Let's identify one more landmark. Actors and celebrities have what is known as a "right of publicity." They have the right to control their name and likeness and prevent them from being used to sell goods. The right of publicity in this context functions like a trademark. You can't use Bette Midler to sell your cars without getting her permission.<sup>4</sup> The right of publicity doctrine suggests that

<sup>2</sup> See *New Line Cinema Corp. v. Bertelsmann Music Group, Inc.*, 693 F. Supp. 1517 (S.D.N.Y. 1988).

<sup>3</sup> See *Warner Bros. Pictures Inc. v. Columbia Broadcasting System, Inc.*, 216 F.2d 945 (9th Cir. 1954).

<sup>4</sup> See *Midler v. Ford Motor Co.* 849 F.2d 460 (9th Cir. 1988).

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there are some uses of Bogart's name and likeness that are subject to intellectual property protection. I can't make trench coats and use Bogart as my model.

I have to make a qualification here, however. There is an important difference between Bette Midler and Humphrey Bogart. Bogart is dead. Is your ability to control how others use your name and likeness a property right that you can pass along to your heirs?<sup>5</sup> To put it in legal terms, is the right of publicity is descendable? This technical legal question is one of state law and the answer varies according to the jurisdiction you are in. But let us assume that we are in a jurisdiction where it is descendable and Bogart's heirs could assert his right of publicity. They could and stop us from using Bogart's likeness to promote trench coats.

But this still doesn't answer our question. We are not proposing to use Bogart to sell trench coats. We are talking about using the Bogart persona in a movie. Does the right of publicity apply in *this* context? The paradigm case here is *Zacchini v. Scripps-Howard Broadcasting*.<sup>6</sup> Zacchini is a human cannonball. He goes around from one state fair to another shooting himself out of a cannon. A local news program in Ohio films his act and broadcasts it. Zacchini sues claiming that his act is entitled to intellectual property protection. You can't appropriate his act and show it on television regardless of whether you are connecting him to the sponsorship or the sale of any product. It seems only a small step from protecting Hugo Zacchini, the man who wears the satin cape and defies death, to protecting the Bogart persona, the man who wears the trench coat and casts a cold eye. But it is a step we want to be careful about taking.

We are talking about taking a film persona, that part of the Bogart style that is different from the character of Rick in *Casablanca*, Philip Marlowe in the *Big Sleep*, and Sam Spade in the *Maltese Falcon*. But what is this exactly? More to the point, what is it that is independent of what Warner Brothers owns by virtue of its copyrights in Bogart's movies? Let me give you a recent case that illustrates this problem. A restaurant chain obtains a license from the producers of the television

<sup>5</sup> See *Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978). The descendability of the right is recognized in about half the states, see Thomas McCarthy, *The Rights of Publicity and Privacy* §61[B] (1992).

<sup>6</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

sit-com *Cheers* to build bars that look like the set of the show. The bars include dummies that replicate two of the regular characters, Norm and Cliff. The actors who play these characters sue, claiming that their rights of publicity are infringed.<sup>7</sup>

They can claim no copyright in the characters of Norm and Cliff. The producer of the series holds the copyright to the characters. But the actors point out that the dummies bear a physical resemblance to them. This physical resemblance, they argue, is distinct from the way the dummies embody the fictional personas of Norm and Cliff. In other words, the dummies are not of Norm and Cliff, but of them, as actors, playing the characters of Norm and Cliff. Copyright law gives the producers the right to the characters of Norm and Cliff, but it does not give them the right to continue to use the flesh-and-blood actors in these roles. Nor does it give them the right to control facsimiles of these actors in these roles. Thus, the argument goes, if the restaurant wants dummies of Norm and Cliff who look like the actors who played them, it has to strike a deal with the actors as well as the producers. This line of reasoning identifies for us the first danger in the landscape. We must be careful about recognizing rights (the actors' right to control their personas) that overlap with rights (the producers' copyright in the characters) that already exist.

Let me now turn to a second danger. Just as we don't want to step upon rights that already exist, we don't want to intrude upon what ought to be in the public domain. Return for a moment to *Zacchini*. The news station still has to be able to report on Zacchini's act. How can you do this effectively on the evening news and not "appropriate" his act, at least to some extent?

We have the same problem with the Bogart persona. You can't copyright facts any more than ideas. Let us say you want to write a book about Bogart and the making of the *Maltese Falcon*. Do you need anyone's permission to do this? Absolutely not. In today's world, the making of the *Maltese Falcon* is a dissertation topic. Remember what they say at universities. Garbage is garbage. But the history of garbage—that's scholarship! A book on this subject is cinema studies, it's history. Copyright law doesn't prevent you from writing history.

Not only that, but to explain the importance of Bogart the man, we must capture some of the persona. The man is interesting in large

<sup>7</sup> See *Wendt v. Host International, Inc.*, 125 F.3d 806 (9th Cir. 1997).

part because of the cultural icon he created. What about a television docudrama about Bogart and the making of the *Maltese Falcon*? Some might argue that such a commercial venture is different from serious history, but I doubt we can draw a line between scholarship and docudramas for intellectual property purposes any more than we can say there is a difference between the *New York Times* and the *New York Post* for First Amendment purposes. In short, we can't craft the right of publicity in such a way that the heirs of Al Capone can prevent someone from making *The Untouchables*, as indeed they tried to do.<sup>8</sup>

Let us see where we stand. We have identified two dangers with protecting the Bogart persona. First, the *Cheers* case suggests that we risk creating overlapping property regimes. A legal rule that gives two different people exclusive rights to the same thing doesn't make a lot of sense. Second, our concerns about ensuring free access to facts also make us cautious about extending protection to this kind of expression.

What conclusion can we draw? Should we say that intellectual property protection should be limited to what copyright protects (and thus belongs to Warner Brothers) and to the traditional right of publicity that functions like a trademark (and belongs to the heirs) so that everything else is in the public domain?

Let me give you a case that shows why such a world comes with its own problems. It is the early 1950s. In his spare time, a Rhode Island mechanic with a passion for the Wild West named Victor DeCosta goes around to rodeos, horse shows, and parades. He is a quick-draw artist. Victor DeCosta can do all sorts of tricks with his gun. He can spin it, draw it, fire it, and otherwise impress people. He has a moustache, dresses in black, and wears a black, flat-topped hat with a silver medal on it. He personifies the nobility of the gunfighters of the Wild West. A fellow Italian-American recognizes this by calling him the word in Italian that means "knight"—Paladino. Victor shortens it to "Paladin" and uses it as his moniker. To promote himself, he passes out cards with the symbol of a chess knight printed on it that tells people how to reach him: "Have Gun, Will Travel. Wire Paladin, North Court St., Cranston, Rhode Island."

<sup>8</sup> See *Maritote v. Desilu Productions, Inc.*, 345 F.2d 418 (7th Cir. 1965).

CBS comes along several years later with a television Western starring Richard Boone. CBS claims that it knew nothing about Victor DeCosta. But the name of the show is “Have Gun, Will Travel.” Moreover, Boone’s character calls himself Paladin, has a moustache, dresses in black and wears a black flat-topped hat with a silver medal on it. Similarly, his card has a knight printed on it and also says, “Have Gun, Will Travel.” There, however, are some differences. The card, for example, says, “Wire Paladin, San Francisco,” rather than “Wire Paladin, North Court St., Cranston, Rhode Island.”

DeCosta lost in large part because the court bought CBS’s defense of coincidence.<sup>9</sup>The court, however, also resisted giving protection as a general matter. Protecting a persona free from the book, the movie screen, or the proscenium arch risks intruding upon the public domain. The *DeCosta* court, like others, was fearful of what happens if we expand intellectual property protection too far.

But you also have to consider the consequences if you don’t recognize the rights of those like Victor DeCosta. The persona that DeCosta developed is no different from the core of what intellectual property law has long protected. Nor is it any different from the Bogart persona. Intellectual property law should give people the incentive to create these and other icons. We should not be afraid that some of them will be too successful.

Every society has its own stories and its own icons. In ancient Greece, everything turned on the stories and the characters in the *Iliad* and the *Odyssey*. At other times and other places, there were different stories. It may seem odd that the myths and stories that define a culture could be privately owned. The idea that Aeschylus should have to negotiate with Homer’s grandchildren seems absurd. But we have to look at our world and accept its basic features. When we do, we discover there is a limit to how much we can rely on any legal rule premised on the existence of a large public domain.

Someone might come up with a mouse that was every bit as good as Mickey, but it would not be the same. It’s not just any gigantic dog leading Macy’s Thanksgiving Day parade. It’s Snoopy. In our culture, we have John Wayne, Humphrey Bogart, and Marilyn Monroe. *Hoop Dreams*, *Mission Impossible*, and the *Right Stuff*. I’ll make you an

<sup>9</sup> See *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F.2d 499 (1st Cir. 1975).

offer you can't refuse. Go ahead, make my day. Here's looking at you, Kid.

A society defines itself by a limited number of stories. The *Iliad* and the *Odyssey*, *Genesis* and *Exodus*, *Jack and the Beanstalk* and *Cinderella*. And in our society, our cultural icons are often privately produced and privately owned by large corporations. There is an instinct to fight against this reality. Freedom of expression, the reasoning goes, requires careful guardianship of the public domain. We don't want corporate giants like Disney suing people who use Mickey to engage in social satire now and again. Second, we want to protect the moral rights of artists, nonwaivable rights to ensure their artistic integrity against corporate rapacity.

These impulses, however, are ones that we should resist. It is not necessarily a bad thing that Disney still owns rights to Mickey Mouse. It gives Disney an incentive to preserve this icon. Without intellectual property protection, there would be nothing to stop cheap reproductions, and the dilution and tarnishing that comes with it. There would be nothing to stop the use of Mickey for any and all purposes. Our world is not necessarily a better place if anyone can show Mickey Mouse shooting heroin, as indeed someone has tried.<sup>10</sup>

We may have little to fear from the Bogart persona being subject to intellectual property protection. Perhaps, rather than wanting it in the public domain, we should want *someone* to own the persona, promote it, and take care it is well preserved. Bogart's rights are ultimately no different from those of Lauren Bacall or any other living actor. To be sure, we can't let these rights prevent us from seeing films that have already been made, but if we do not recognize these kinds of rights, every movie producer could do a movie with Vanessa Redgrave or Meryl Streep without their permission.

In providing for ownership of an actor's persona, we should remember *why* we are doing it. A producer should not be able to cast a young Sean Connery in a new James Bond movie without having contracted for the right, either in the past, or in the present with the Sean Connery of today. But our interpretation of these contracts should have nothing to do with moral rights, artistic integrity or Sean

<sup>10</sup> See *WaltDisneyProductions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

Connery's sensibilities. Rather, it should be driven by what we know about markets.

We must do a better job of ensuring that intellectual property rights are transferable, and that contracts written about them are enforced according to their terms. The problems with the *Cheers* case were not with rights of publicity per se, but the failure of the parties to draft a clear contract and the failure of the courts to give it a fair reading.

Our world of artistic expression is, for better or worse, a marketplace in which resources are scarce. The right question to ask about rights of publicity is whether crafting a right in one way rather than another is going to make the world a better place. Our starting question —Does Bogart Still Get Scale?— should be understood in the first instance as a question of contract law. We should ask not what rule best respects Bogart's artist soul, but rather what rule of contract interpretation will best promote science and the useful arts, both for the contracts already written and those that will be. Benjamin Kaplan's world has changed. Our problem ultimately is no longer one of preserving the public domain.

Talking about rights of publicity in these terms is not something likely to gain me favor among literati. They think commodification and markets don't belong in their world. But what I have said follows merely from conditions of scarcity and the need to take best advantage of the limited number of icons our culture possesses. Those in arts and letters surely know that we live in a world in which our icons are finite. From Mark Twain at the start of the 20th Century to Tom Wolfe at its end, it is distinctly understood that only one man may wear the white suit.

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