


1. Expression or Idea?


Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.
 900 F. Supp. 1287 (C.D. Cal. 1995)

KENYON, J.: . . . This case arises out of Plaintiffs Metro-Goldwyn-Mayer's and Dan-jaq's claim that Defendants American Honda Motor Co. and its advertising agency Rubin Postaer and Associates, violated Plaintiffs' "copyrights to sixteen James Bond films and the exclusive intellectual property rights to the James Bond character and the James Bond films" through Defendants' recent commercial for its Honda del Sol automobile.

Premiering last October 1994, Defendants' "Escape" commercial features a young, well-dressed couple in a Honda del Sol being chased by a high-tech helicopter. A grotesque villain with metal-encased arms² jumps out of the helicopter onto the car's roof, threatening harm. With a flirtatious turn to his companion, the male driver deftly releases the Honda's detachable roof (which Defendants claim is the main feature allegedly highlighted by the commercial), sending the villain into space and effecting the couple's speedy get-away.

Plaintiffs move to enjoin Defendants' commercial pending a final trial on the merits, and Defendants move for summary judgment. . . .

[I]n an effort to accommodate Plaintiffs' demands without purportedly conceding liability, Defendants changed their commercial by: (1) altering the protagonists' accents from British to American; and (2) by changing the music to make it less like the horn-driven James Bond theme. This version of the commercial was shown during the Superbowl, allegedly the most widely viewed TV event of the year. . . .

a. Plaintiffs' Ownership Of The Copyrights

Plaintiffs claim that the Honda commercial: (1) "infringes [P]laintiffs' copyrights in the James Bond films by intentionally copying numerous specific scenes from the *films*"; and (2) "independently infringes [P]laintiffs' copyright in the *James Bond character as expressed and delineated in those films*."

Neither side disputes that Plaintiffs own registered copyrights to each of the sixteen films which Plaintiffs claim "define and delineate the James Bond character." However, Defendants argue that because Plaintiffs have not shown that they own the copyright to the James Bond character in particular, Plaintiffs cannot prevail. Specifically, Defendants claim that James Bond has appeared in two films in which Plaintiffs hold no copyright — "Casino Royale" and "Never Say Never Again" — and therefore, Plaintiffs cannot have exclusive rights to the James Bond character.

It appears that Defendants misconstrue Plaintiffs' claim. First, Plaintiffs do not allege that Defendants have violated Plaintiffs' copyright in the James Bond character itself, but rather in the James Bond character *as expressed and delineated in Plaintiffs' sixteen films*. To the extent

2. Defense counsel argued at the hearing that the villain's arms were normal and merely gloved. The Court's review of the commercial indicates that at the very least, the gloves contained some sort of metal in them as indicated by the scraping and clanging sounds made by the villain as he tries to get into, and hold onto, the Honda's roof.

that copyright law only protects original *expression*, not *ideas*, Plaintiffs' argument is that the James Bond character as developed in the sixteen films is the copyrighted work at issue, not the James Bond character generally. See, e.g., *Anderson v. Stallone*, 11 U.S.P.Q.2d 1161, 1989 WL 206431, *6 (C.D. Cal. 1989) (holding that Rocky characters as developed in three "Rocky" movies "constitute expression protected by copyright independent from the story in which they are contained"). Second, there is sufficient authority for the proposition that a plaintiff who holds copyrights in a film series acquires copyright protection as well for the expression of any significant characters portrayed therein. See, e.g., *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517, 1521 n.5 (S.D.N.Y. 1988) ("Because New Line has valid copyrights in the Nightmare [on Elm Street film] series, it is clear that it has acquired copyright protection as well for the character of Freddy.") (emphasis added). And third, the *Sam Spade* case, [*Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945, 949-50 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955)] on which Defendants' rely, is distinguishable on its facts because *Sam Spade* dealt specifically with the transfer of rights from author to film producer rather than the copyrightability of a character as developed and expressed in a series of films.

Accordingly, Plaintiffs will likely satisfy the "ownership" prong of the test.

b. What Elements Of Plaintiffs' Work Are Protectible Under Copyright Law

Plaintiffs contend that Defendants' commercial infringes in two independent ways: (1) by reflecting specific scenes from the 16 films; and (2) by the male protagonist's possessing James Bond's unique character traits as developed in the films.

Defendants respond that Plaintiffs are simply trying to gain a monopoly over the "action/spy/police hero" genre which is contrary to the purposes of copyright law. Specifically, Defendants argue that the allegedly infringed elements identified by Plaintiffs are not protectible because: (1) the helicopter chase scene in the Honda commercial is a common theme that naturally flows from most action genre films, and the woman and villain in the film are but stock characters that are not protectible; and (2) under the Ninth Circuit's *Sam Spade* decision, the James Bond character does not constitute the "story being told," but is rather an unprotected dramatic character.

(1) Whether Film Scenes Are Copyrightable

[The court found that the plaintiffs were likely to succeed in their claim of copyright for the action film sequence common to the James Bond movies, noting that a "filmmaker could produce a helicopter chase scene in practically an indefinite number of ways, but only James Bond films bring the various elements [described by one of plaintiffs' experts] together in a unique and original way." Those elements were identified as "hybridiz[ing] the spy thriller with the genres of adventure, comedy (particularly, social satire and slapstick), and fantasy."]

(2) Whether James Bond Character Is Copyrightable

The law in the Ninth Circuit is unclear as to when visually-depicted characters such as James Bond can be afforded copyright protection. In the landmark *Sam Spade* case, *Warner Bros.*, 216 F.2d at 950, the Ninth Circuit held that the *literary* character Sam Spade was not copyrightable because he did not constitute "the story being told." The court opined: "It is conceivable that the character really constitutes the story being told, but if the character is only

the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.” *Id.*

Two subsequent Ninth Circuit decisions have cast doubt on the continued viability of the *Sam Spade* holding as applied to graphic characters. In *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979), the circuit panel held that several Disney comic book characters were protected by copyright. In acknowledging the *Sam Spade* opinion, the court reasoned that because “comic book characters . . . are distinguishable from literary characters, the [*Sam Spade*] language does not preclude protection of Disney’s characters.” *Id.* The *Air Pirates* decision may be viewed as either: (1) following *Sam Spade* by implicitly holding that Disney’s graphic characters constituted the story being told; or (2) applying a less stringent test for the protectability of graphic characters. One rationale for adopting the second view is that, “[a]s a practical matter, a graphically depicted character is much more likely than a literary character to be fleshed out in sufficient detail so as to warrant copyright protection.” *Anderson*, 1989 WL 206431, at *7. However, as one district court warned, “this fact does not warrant the creation of separate analytical paradigms for protection of characters in the two mediums.” *Id.* A second Ninth Circuit opinion issued in 1988 did little to clarify *Air Pirates*’ impact on the *Sam Spade* test. In *Olson v. National Broadcasting Co.*, 855 F.2d 1446, 1451-52 n.6 (9th Cir. 1988), the court cited with approval the *Sam Spade* “story being told” test and declined to characterize this language as dicta. Later in the opinion, the court cited the *Air Pirates* decision along with Second Circuit precedent,⁹ recognizing that “cases subsequent to [the *Sam Spade* decision] have allowed copyright protection for characters who are especially distinctive.” *Id.* at 1452. *Olson* also noted that “copyright protection may be afforded to characters visually depicted in a television series or in a movie.” *Id.* However, later in the opinion, the court distanced itself from the character delineation test applied by these other cases, referring to it as “the more lenient standard[] adopted elsewhere.” *Id.*

There have been no Ninth Circuit cases on the protectability of visually-depicted characters since *Olson*, and therefore, it behooves this Court to analyze James Bond’s status under the *Sam Spade*/*Olson*/Ninth Circuit “story being told” test, as well as under the *Air Pirates*/Second Circuit “character delineation” test.

Predictably, Plaintiffs claim that under either test, James Bond’s character as developed in the sixteen films is sufficiently unique and deserves copyright protection, just as Judge Keller ruled that Rocky and his cohorts were sufficiently unique. *See Anderson*, 1989 WL 206431, at *7-8. Plaintiffs point to various character traits that are specific to Bond—i.e. his cold-bloodedness; his overt sexuality; his love of martinis “shaken, not stirred”; his marksmanship; his “license to kill” and use of guns; his physical strength; his sophistication—some of which, Plaintiffs’ claim, appear in the Honda commercial’s hero.

On the other hand, Defendants assert that, like *Sam Spade*, James Bond is not the “story being told,” but instead “has changed enormously from film to film, from actor to actor, and from year to year.” Moreover, Defendants contend that even if Bond’s character is sufficiently delineated, there is so little character development in the Honda commercial’s hero that Plaintiffs cannot claim that Defendants copied more than the broader outlines of Bond’s personality. *See, e.g., Smith v. Weinstein*, 578 F. Supp. 1297, 1303 (S.D.N.Y.), *aff’d*, 738 F.2d 419 (2d Cir. 1984) (“no character infringement claim can succeed unless plaintiff’s original conception

9. The Second Circuit has adopted an alternate test for determining whether dramatic characters are protectable under copyright law. In the landmark case of *Nichols*, 45 F.2d at 121, the court held that copyright protection is granted to a character if it is developed with enough specificity so as to constitute protectable expression. This has been viewed to be a less stringent standard than *Sam Spade*’s “story being told” test.

sufficiently developed the character, and defendants have copied this development and not merely the broader outlines”).

Reviewing the evidence and arguments, the Court believes that James Bond is more like Rocky than Sam Spade — in essence, that James Bond is a copyrightable character under either the *Sam Spade* “story being told test” or the Second Circuit’s “character delineation” test. Like Rocky, Sherlock Holmes, Tarzan, and Superman, James Bond has certain character traits that have been developed over time through the sixteen films in which he appears. Contrary to Defendants’ assertions, because many actors can play Bond is a testament to the fact that Bond is a unique character whose specific qualities remain constant despite the change in actors. See Pfeiffer and Lisa, *The Incredible World of 007*, at 8 (“[Despite the different actors who have played the part] James Bond is like an old reliable friend.”). Indeed, audiences do not watch Tarzan, Superman, Sherlock Holmes, or James Bond for the story, they watch these films to see their heroes at work. A James Bond film without James Bond is *not* a James Bond film. Moreover, as discussed more specifically below, the Honda Man’s character, from his appearance to his grace under pressure, is substantially similar to Plaintiffs’ Bond. . . .