theories and methodologies

The Picture of Oscar Wilde

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IF I WERE TO CHOOSE A SINGLE IMAGE TO REPRESENT THE INTEREST AND CHALLENGE OF WORKING WITH VISUAL MATERIALS, I THINK IT WOULD be the rather outlandish bit of kitsch in figure 1 and not a more attractive or impressive example. Part of the appeal for me, I would have to admit, is the visual humor of the situation, for this image of Oscar Wilde appears on a collectible cigar card, one that adult smokers were apparently meant to save, just as young baseball fans now save and cherish the cards of their heroes. In fact, this must have been one of the first such cards, which had only been in use for a few years when it appeared sometime around 1882. The novelty of the enterprise of collectible cards might explain Wilde's unexpected appearance here, where it is surprising to find a literary subject.

What makes the card all the more remarkable, though, is that at the time it was issued Wilde's celebrity had rather little to do with literature. He had published almost nothing, and he had written none of the works for which he is now remembered. Any measure of personal fame Wilde had earned at this time was based primarily on his abilities as a conversationalist. One or two of Wilde's early epigrams had become so well known in England that they had been lampooned in the popular press, and he had become notorious as the subject of cartoons in publications such as *Punch*. Straiton and Storm's cigar card was meant to capitalize on these caricatures, which had acquired an existence that was largely independent of Wilde himself. At this stage in his career, Wilde was famous because he was widely pictured and not vice versa.

Appropriately, then, this trading card also plays an indirect role in a controversy about the legal status of pictures. One of many thousands of such images manufactured in the hopes of profiting from Wilde's American lecture tour, the cigar card derives directly from a publicity photograph taken by Napoleon Sarony (fig. 2). His photographs of Wilde were widely copied and reproduced during the tour, and this particular image was used to promote a number of products besides cigars. So blatant was this reuse of Sarony's work

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that he sued the Burrow-Giles Lithographic Company, which had reportedly produced as many as 85,000 copies of certain images from Sarony's session with Wilde.[1] Sarony asked for damages under a United States law dating to 1865 that extended traditional copyright protection to photographs and photographic negatives. The case, which was ultimately heard by the Supreme Court in 1884, was a landmark in establishing the copyright status of photographs (Nimmer et al. 54–55).

In making its decision, the Court had to contend not just with the arguments of Burrow-Giles's lawyers but also with the challenge that photography poses to traditional definitions of artistic creativity. Burrow-Giles argued that a photograph cannot be protected by copyright because it is the result of a mechanical operation, an automatic process, and thus is not a truly authored work. By this argument, a photograph is merely a copy struck from reality, so that extending copyright to photographs amounts to granting copyright on bits and pieces of reality itself. The Court held, however, that the taking of a photograph can, though it need not always, involve "novelty, invention, originality" and that the photographer can be said to realize an "original mental conception" with the use of the camera. In this particular case, the Court accepted Sarony's argument that he had made the photograph his own "by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression" (Nimmer et al. 12–13). In other words, much that is visible in the photograph bears a traceable imprint of the photographer's conception, almost as if he were a painter working with props and fabrics instead of paint.



FIG. 1
Cigar card featuring Oscar Wilde, c. 1882. Library of Congress.

Though *Burrow-Giles Lithographic Company v. Sarony* has been superseded by later decisions that have made it possible to copyright even the most ordinary snapshots, whether they bear the impress of a particular artistic conception or not, this decision did settle, at least for legal purposes, certain challenging issues raised by mechanical recording media. For this reason, the photographs prompting the case have received more scholarly attention than ordinary society portraits would otherwise have attracted. In 1991 Jane Gaines made these pictures the focus of the second chapter of *Contested Culture: The Image, the Voice, and the Law*, still a valuable introduction to the legal issues raised for art by mechanical recording.[2] More recently, Paul

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Saint-Amour has touched on the case, and Daniel Novak has expanded Gaines's account, which did not have much to say about Wilde himself. Saint-Amour discusses the ironies of copyright in relation to Wilde, who was playfully ambiguous about literary property, while Novak interprets the Sarony case in the light of Victorian attempts to use photography to illustrate sexual types.

Useful and interesting as these discussions are, they don't seem sufficiently surprised by what is for me the most remarkable thing about *Burrow-Giles Lithographic Company v. Sarony*, which is that Wilde had no standing in the case. Though Gaines and Novak both note the ambiguity created when the Court awarded all rights in Wilde's pose to the photographer, neither of them worries overmuch about the legal irrelevance of copyright law to Wilde's situation. Usually Sarony paid his famous subjects a fee to pose and then made his profit by marketing the photographs. Though Wilde was apparently so interested in the potential publicity value of Sarony's work that he waived the usual fee, there is little question that the pictures were Sarony's property (Lewis and Smith 39). Wilde may not have understood this, since he planned at one point to produce lithographic versions himself (Holland and Hart-Davis 152). Had he done so, he would have violated Sarony's rights just as much as Burrow-Giles did, since the subject of a photograph does not have any inherent standing under copyright law (Beverley-Smith 33). Copyright exists to protect works, not persons; expressive effort, not mere existence. Fictitious characters can be placed under copyright but not, ordinarily, real people. In terms of copyright law, then, Wilde is just another one of Sarony's props, like the draperies or the rug.

Wilde's legally tangential relation to his own portraits is likely to astonish now because we are so used to the ways in which contemporary celebrities guard their images. As Rosemary Coombe points out, current law protects virtually every reproducible aspect of a famous person's identity: voice, appearance, costume, hairstyle, pose (90). However, this protection is afforded not by copyright but by another right, one that was most influentially formulated at the height of Wilde's celebrity. In 1890, the year the first version of *The Picture of Dorian Gray* was published, Samuel Warren and Louis Brandeis published their landmark essay "The Right to Privacy" in the *Harvard Law Review*. Prompted in part by an 1888 case concerning a situation much like Wilde's, one in which an actress objected to the reuse of photographs of her taken for publicity purposes (208; Beverley-Smith 147), Warren and Brandeis put in motion a significant change in American law. They based their reasoning on common-law copyright, which implicitly protects all unpublished materials: an author always has the right not to publish, and no one can take that right away



FIG. 2
Napoleon Sarony, photograph of Oscar Wilde, 1882. Library of Congress.

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by exposing to the public works the author wishes to keep private (Nimmer et al. 35–36). According to Warren and Brandeis, this right should be extended to "thoughts, emotions, and sensations . . . whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression" (206).

Of course, under ordinary circumstances, it is not possible to publish such personal expressions as these. But Warren and Brandeis note what is for them a troubling development: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'" (195). Several times in their article, the authors comment on the worrisome fact that "advances in photographic art" (211) have made it possible to invade a person's privacy by taking his or her image and publishing it without consent. Once photography develops to a certain point, everything visible becomes potentially publishable, and thus, by the reasoning of Warren and Brandeis, every personal expression becomes a fledgling work of art like a poem in draft or the sketches for a novel, which the artist has the right to withhold from publication if he or she so wishes.

To protect these expressions from unwanted publication, Warren and Brandeis postulate, on the basis of traditional copyright law, an entirely new right, the "right to privacy." Not to be confused with the right to privacy established later by federal courts, this right is not a constitutional protection against the government but a legal protection against infringement by private parties. Warren and Brandeis define their new right as a dignitary right and not a proprietary one. In other words, their purpose is to protect individuals from the indignity of invasion rather than to protect them from property loss. Their reasoning rests on an almost commonsensical belief in what they call the "right of the individual to be let alone" (205; Nimmer et al. 1006). In the view of later courts, to have one's expressions, one's features, used by others against one's will approaches involuntary servitude (Beverley-Smith 155). Though Warren and Brandeis begin their analysis with common-law notions of copyright, what they intend to protect is not property but "inviolate personality" (205).

Warren and Brandeis sometimes write as if any commercial use of personal features or expressions, even a sanctioned one, is a degradation of an inviolate personality, and this approach makes some sense because the privacy they imagine depends on and is indeed defined by its resistance to publication. One of the major ironies of American law, then, is that the right to privacy Warren and Brandeis asserted in their article gradually became the basis for something entirely different, for what has come to be called the "right to publicity" (Nimmer et al. 1195–96). This expression is not quite as illogical as it sounds. If one can prevent the use of one's features or expressions, then it follows that one can authorize their use, if properly compensated. Though Warren and Brandeis were clearly concerned by the growing commercialization of personal life made possible by mechanical recording, their definition of privacy as something to be protected by law also made it into a commodity.

Judicial decisions following Warren and Brandeis adapted the definition of privacy as a dignitary right into a definition of publicity as a proprietary right. Indeed, there were a number of cases in the years immediately following Warren and Brandeis that, had they been decided just a few years earlier, would have given Wilde the right to sue Burrow-Giles. In 1907, for instance, Thomas Edison sued the Edison Polyform Manufacturing Company to force it to stop using his name and picture in advertisements for a patent medicine (Beverley-Smith 156–57). By 1911 courts had generally decided that a person has "an exclusive right to his picture on the score

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of its being a property right of material profit" (157). The neatest parallel to Wilde's situation did not occur, however, until 1953, in *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.*, a case that is often cited as definitively establishing the right to publicity (Gaines 187–88; Nimmer et al. 1191–95). In this case, Topps was forced to withdraw certain trading cards, the twentieth-century successors to the Oscar Wilde cigar card, because the baseball players pictured on them had sold the rights to their likenesses to another company.

Wilde's appearance on the cigar card might have afforded an ideal test case for Warren and Brandeis if only they had published their essay a few years earlier. And yet Wilde's appearance also exposes some of the inconsistencies in the argument that Warren and Brandeis offer in defense of their new right to privacy. Their notion that the features, appearance, poses, and voice of a person can be considered proper to that person is mocked by the situation behind Wilde's appearance on the card. The American tour had started as an elaborate publicity stunt by Richard D'Oyly Carte, the producer for William Gilbert and Arthur Sullivan. Gilbert and Sullivan had included in a recent play called *Patience* a character meant to lampoon the young aesthetes of the time (Ellmann 151–52). D'Oyly Carte was concerned that American audiences had little acquaintance with the aesthetic type, and so he arranged for Wilde to appear as the flesh-and-blood original of Bunthorne, the aesthete in the play (Lewis and Smith 22). The idea was that Wilde would accompany productions of the play, certifying them, in a way, by showing that they were genuine copies of reality. Not incidentally, Wilde's association with D'Oyly Carte was also supposed to protect Gilbert and Sullivan's plays from the competition of copycat productions (24). Wilde was to function, in other words, as a human form of copyright protection.

One of many problems with this strategy was the fact that Bunthorne was not entirely or exactly based on Wilde, so that in order to represent the original and authentic aesthete, Wilde had to change his appearance. The costume that appears in Sarony's photographs and that caused a great deal of the stir in the course of Wilde's tour was contrived to resemble Bunthorne's (Gagnier 56). Wilde did design the elaborate fur-lined overcoat that appears in some of the photographs, and he may have once or twice worn the sort of knee breeches and hose that he wears in almost all of them (Lewis and Smith 28), but the latter, at least, were so thoroughly identified with Bunthorne that they had become a virtual trademark of the play. An additional difficulty was the fact that Wilde, famous though he was as a conversationalist, did not have any experience as an orator before embarking on his lecture tour, and he was not especially good at public speaking. Therefore, the celebrated wit visited an elocutionist and developed with his help an appropriate vocal style, "natural," as Wilde said, "with a touch of affectation" (qtd. in Ellmann 155).

This last comment shows how playfully Wilde toyed with the idea of "inviolate personality" that supports Warren and Brandeis's right of privacy. But the cigar card also helps to expose a deeper and more fundamental inconsistency in their argument, which bases the value of personal expressions on two quite different justifications. On one hand, Warren and Brandeis attach value to expressions and acts insofar as these are directly connected to an individual personality, and they seek to protect an individualism that they see as distinct and unique by definition. On the other hand, though, even by their own reasoning personal expressions become potential works of art only if they can be made available for publication. It is the possibility of duplication that gives a person's pose, clothes, or haircut the same legal status as that person's plays.[3] Therefore, the cigar card may be said to have created the very property it might otherwise seem to appropriate, or, as Gaines puts it in

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her discussion of Warren and Brandeis, the value of privacy is actually "produced by exploitation" (190). This paradox seems true in a strictly economic sense, since the circulation of the cigar card and other mementos and souvenirs like it increased the scope of Wilde's fame and thus the value of his image. In a more abstract sense as well, the fact that Warren and Brandeis's right to privacy mutated so quickly into a right to publicity suggests that what they imagined as a defense against piracy also contained in it the legal basis for lucrative exploitation. If it was the ambition of Warren and Brandeis to increase privacy by limiting the circulation of personal images, then they failed quite spectacularly, since their essay paved the way for the current inundation of such images, of which Wilde's cigar card is the harbinger.

The image of the famous aesthete on the crass commercial souvenir thus expresses succinctly the paradox of Warren and Brandeis's essay. At the same time, the card exposes an intriguing connection between Wilde's aesthetic doctrines and the material conditions of the late nineteenth century. The primary topic of the lectures given on Wilde's tour of America was the necessity of aestheticizing every area of ordinary life, and Wilde tended to speak of this effort as if it were the work of a lonely vanguard. "The recognition of a separate realm for the artist," he says, "a consciousness of the absolute difference between the world of art and the world of real fact, between classic grace and absolute reality, forms not merely the essential element of any aesthetic charm but is the characteristic of all great imaginative work . . ." (19). Yet by the reasoning in Warren and Brandeis, a general aestheticization had already been achieved by the intervention of photography. Because ordinary expressions, poses, and gestures could now be published, they had to be conceived of and protected as potential works of art were. Other recording media, including, for example, the phonograph, would similarly alter the status of other personal expressions, turning what had heretofore been merely random acts into aesthetic property.

By the reasoning of Warren and Brandeis, then, mechanical recording media are responsible for a vast increase in the domain of art. Everything traceable to a human maker, insofar as it can be duplicated, acquires the same status as an unfinished poem or the sketch for a painting. Photography and other recording media thus come to play a role much like that of print at an earlier time, since the possibility of printing changed private literary effusions into commodities that could be bought and sold. Recording stabilizes, fixes, and alienates personal appearance, expression, movement, disposition, so that these are no longer fleeting emanations private to a self but products, transferable in time and space. Though aesthetic theory since Walter Benjamin has tended to concentrate on the difference photography makes in our relation to existing works of art, it may be that a much greater difference is made by the way that photography implicitly aestheticizes a world of things never before thought of as art.

Though the Wilde cigar card looks at first glance like a visual contradiction, a commercial appropriation of a character famous for his originality, it is in fact a perfectly appropriate representation of the complexity that mechanical reproduction brings to the world of art. According to Warren and Brandeis's argument, the card is a violation of Wilde's privacy and at the same time the currency of his value as a public figure. As an act of vulgar exploitation, it seems in utter opposition to the sort of art that Wilde was defining for his American audiences, and yet, in legal terms at least, it announces an expansion of the aesthetic wider than anything even Wilde had imagined. A distinct visual image, it is also a mere token of another kind of imagery altogether, one that comes into being as the first is circulated and multiplied. It is by this kind of commercial exploitation, and not by

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those vague, occult forces in the background of *Dorian Gray*, that the picture of Oscar Wilde acquires a life of its own.

Notes

1. Earlier in the century, Sarony had been a partner in a lithography business and had helped to produce broadsheets and trade cards much like those of Straiton and Storm (Jay 21).

2. It should be pointed out, though, that Gaines misdates *The Picture of Dorian Gray* to 1884 in her rush to establish a relation between it and *Burrow-Giles v. Sarony* (42).

3. As Nimmer et al. put it, a work "must be recorded in some manner" before it can be considered eligible for statutory copyright protection (32).

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