

NOTES

Titan Sports, Inc. v. Hellwig: Wrestling with the Distinction Between Character and Performer

I.	OVERVIEW	155
II.	BACKGROUND	156
	A. <i>Character Protection</i>	156
	B. <i>The Right to Exploit One's Own Likeness and Name</i>	158
	C. <i>Association of Character and Performer</i>	160
III.	ANALYSIS.....	161
V.	CONCLUSION	163

I. OVERVIEW

This case presents issues regarding the border between the right of publicity and copyright protection. The defendant is a well-known professional wrestler. While his given name is James Hellwig (Hellwig), the name that he chose to live by professionally, and now legally, is “Warrior.” In 1987, Hellwig entered into his first contract with the plaintiff, better known as the World Wrestling Federation (WWF), to perform in wrestling shows.¹ The contract provided that any distinctive and identifying indicia for the wrestler, which were developed by the WWF, would be their exclusive property.² This would grant exclusive license to the WWF for the creation of any characters, names, costumes, themes or gimmicks used by the wrestler in his performance. Under this contract, Hellwig wrestled as the “Ultimate Warrior.” The parties amended the 1987 contract to name the Ultimate Warrior as the character name under which Hellwig would wrestle.³

The parties continued their business relationship until 1996, when their initial legal battles began. Hellwig and his company, Ultimate Creations, brought suit in Arizona, in conflict with a venue selection clause in the contract which prescribed Connecticut as the appropriate forum in which to bring a claim. In the interim, between his last WWF performance and the Arizona lawsuit, Hellwig had legally changed his name to Warrior. The case in Arizona essentially sought to establish the ownership of the Warrior or Ultimate Warrior

1. See *Titan Sports, Inc. v. Hellwig*, 1999 U.S. Dist. LEXIS 10523, at *4 (D. Conn. Apr. 26, 1999).

2. See *id.* at *6.

3. See *id.* at *7.

character. The Arizona Superior Court for Maricopa County held in a minute entry that the mark Warrior or another variation “Dingo Warrior” as well as all dress and persona aspects were property of Hellwig, aka Warrior. A factual issue still remains as to the ownership of Ultimate Warrior.⁴

Following the partial resolution of Hellwig’s claims in Arizona, Titan Sports brought suit under the forum selection clause in the United States District Court for Connecticut. The district court was not barred from considering Titan’s claims by the earlier Arizona decision because it was not a final judgment.⁵ Further, Titan raised a claim under the Copyright Act of 1976 which is under the exclusive jurisdiction of the federal judiciary.⁶ The Titan claim alleged that they had acquired ownership of the Warrior or Ultimate Warrior character through the character’s portrayal in its works and seeks a declaratory judgment, preventing Hellwig from appearing as Warrior in other shows.⁷ The Connecticut court denied Hellwig’s motion to dismiss, leaving the case pending.⁸

With litigation pending in two cases, the battle for ownership of the Warrior character raises an issue of the limits of character copyright versus performer right of publicity. The Warrior is a character in a performance; yet, he is also the person performing. Where do the rights to protect a character and to exploit one’s own image and name meet? Can the WWF prevent Hellwig from appearing as himself?

II. BACKGROUND

A. Character Protection

The first issue to be examined is under what circumstances ownership of a character as intellectual property can be established. Registration of a copyright in the character is prima facie evidence of ownership.⁹ However, absent the actual registration of a copyright, there are other means by which a party may establish a copyright in the character. Owning the copyright to works in which the character

4. See *id.* (quoting *Warrior v. Titan Sports, Inc.*, No: CV 96-15377 (Ariz. Sup. Ct. 1997)).

5. See *id.* at *32. A minute entry is only a “final judgment” if it is written, signed by the judge, and filed with the clerk of the court. The minute entry in this case was not signed and had not disposed of all the issues in the case.

6. See Copyright Act of 1976, 17 U.S.C. § 101 (1997).

7. See *Hellwig*, 1999 U.S. Dist. LEXIS 10523, at *12.

8. See *id.* at *42.

9. See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

appears may be a means to establish ownership of the character itself.¹⁰

The *Warner Bros., Inc. v. American Broadcasting Co.*, case involved the ownership of various works depicting Superman through which Warner Brothers acquired a copyright to the Superman character. Merely featuring a character in a piece of work is not sufficient to establish a copyright in that character. The character must be “distinctively delineated” in the work.¹¹ The character must be uniquely developed and novel in some way to be capable of copyright protection.¹² The more general, less developed, and commonplace the character is, the less likely that the character will be afforded copyright protection.¹³

The *Titan Sports, Inc. v. Turner Broadcasting System (TBS)* case was also a dispute over wrestling characters brought by Titan (WWF) against the TBS owned competitor World Championship Wrestling (WCW). The case dealt with the allegation that WCW had used former WWF wrestlers in their broadcasts portraying characters owned by the WWF. The WWF did not have any registered copyright in characters, such as “Diesel,” but they had exclusive rights to the works in which the characters had appeared. The court applied the “distinctly delineated” test in determining the viability of the plaintiff’s claim. The “distinctively delineated” test does impose a restriction to ensure that only unique and well developed characters will receive copyright protection. This avoids the problem of generic, nondescript, or universal characters from being property of one party. Such characters would be considered part of the public domain, the literary stock upon which all authors may freely draw.

The court discussed the detail in which the WWF went in describing the appearance, dress, mannerisms, and personality of the character as an example of a character that may be unique and sufficiently developed to receive copyright protection. The *New Line Cinema* case also deals with a character whose copyright was not registered. The court held that the plaintiff, who had the exclusive rights to the *Nightmare on Elm Street* film series, had established a copyright in the “Freddy Kreuger” character in the movie, as well. The *TBS* and *New Line Cinema* cases clearly explain that a lack of a

10. See *Warner Bros., Inc. v. Am. Broad. Co.*, 720 F.2d 231 (2d Cir. 1983); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517 (S.D.N.Y. 1988).

11. See *Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 981 F. Supp. 65, 68 (D. Conn. 1997).

12. See *id.*

13. See *Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996).

registered copyright in a character does not bar the actual establishment of a copyright.

B. The Right to Exploit One's Own Likeness and Name

While the character portrayed in a work can be protected as intellectual property, the actor also has rights arising out of his appearance in the public light. Derived from the right of privacy, celebrities have a right to publicity in themselves.¹⁴ Essentially, the right of publicity is a quasi intellectual property right in one's self. The right of publicity can be characterized as the right of a public figure to exploit his or her name, appearance, or likeness for a commercial purpose and to prevent others from doing so without permission.¹⁵ While at one time a contested right, there is now widespread acceptance of the concept.¹⁶

The court in *Lugosi* reasoned that the right of publicity comes from the commercial opportunities created by the careful management of public reaction to the celebrity.¹⁷ *Lugosi* featured an action by Bela Lugosi to gain further rights to the Dracula character. The court reasoned that adoration of the public creates substantial economic benefit for those who can exploit it. The appropriation of that benefit without permission robs the celebrity of that benefit and dilutes the value of the publicity.¹⁸

Similarly, the *Palmer* case involved the unauthorized use of Arnold Palmer and many other professional golfers' names and career statistics in the marketing of a game. The producer of the game derived economic benefit from the use of numerous professional golfers without their permission or without any compensation to them. Further, the *Allen* case is indicative of the traditional model of right of publicity cases.¹⁹ *Allen* involved the use of a celebrity look-alike to mimic Woody Allen, possibly creating the impression that Allen had endorsed the defendant's business.²⁰ The right of publicity protects public figures from such a misappropriation of the economic benefits derived from celebrity and public acclaim.

14. See *McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994).

15. See *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981).

16. See Angela D. Cook, *Should Right of Publicity Protection Be Extended to Actors in the Characters Which They Portray*, 9 J. ART & ENT. LAW 309 (1999).

17. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979).

18. See *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. 1967).

19. See *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985).

20. See *Groucho Marx Prod., Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975) (representing other similar cases featuring the imitation of Groucho Marx and Laurel & Hardy).

While the original purpose envisioned for the right of publicity was to protect against the misappropriation of the actual name or image of the celebrity, it has since been greatly expanded. Several cases arose which expanded the right of publicity to include protection against the invocation or elusion to the image or person of the celebrity. The first such expansion occurred in the *Carson* case.²¹ In *Carson*, the court held that simply using a catch phrase, “Here’s Johnny,” violated Carson’s right of publicity despite the fact that it was not Carson himself who used the phrase. The mere act of reminding the public of the celebrity is sufficient to be a violation. The court stated that had the defendant titled the product the John Carson Toilet, it would not have invoked Carson’s identity, while the catch phrase, “Here’s Johnny,” was unmistakably an appropriation of his celebrity.

Archetypal of these expanded rights of publicity cases is the *White* case.²² There, an advertiser depicted a robot performing the same function, turning letters in a game show, that Vanna White performs on the *Wheel of Fortune* television show. The court held that beyond use of actual name and likeness, anything that evokes the identity or personality of the individual is an evisceration of their rights.²³

This logic was mirrored in the *Wendt* case, where an allusion to the “Norm” and “Cliff” characters from the television series *Cheers* violated the actors’ right of publicity.²⁴

Justice Mosk’s concurrence in *Lugosi* drew a sharp distinction between the right of publicity and the rights associated with ownership of a character. Playing a character does not grant an ownership interest in that character.²⁵ The dissent of Chief Justice Bird, however, reasoned that the right of an actor to exploit their likeness and name in a performance was identical to the right to exploit their natural appearance.²⁶

Neither of these opinions is reflected in the majority, as the decision turned on an unrelated issue. The *Wendt* case follows in part Justice Bird and represents a further expansion of the publicity right. While *Carson* and *White* allowed protection to venture beyond the actual use of name or likeness, *Wendt* allows publicity rights to reach

21. See *Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983).

22. See *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

23. See *id.* at 1398.

24. See *Wendt v. Host Int’l, Inc.*, 125 F.3d 806 (9th Cir. 1997).

25. See *Lugosi v. Universal Pictures*, 603 P.2d 475, 432 (Cal. 1979).

26. See *id.* at 444.

characters portrayed. The robotic faux of Norm and Cliff did not resemble their human counterparts, and, despite finding that there was no similarity of likeness, the fact that the robots identified the actors was enough for the court to find a misappropriation of their identity.²⁷ If it can remind someone of the celebrity, it may be a violation of their right to publicity.

C. *Association of Character and Performer*

While *Wendt* held that its extension of the publicity right did not create actual rights in the character for the actor,²⁸ it is part of a possible movement toward that result. The advertisement was a parody of television characters, yet actors who are said to have no right in the characters are harmed by the parody. This seemingly incongruous result is representative of the intersection between character rights ownership and the right of publicity. Finding a clear rule of law in this area was once described as finding a “haystack in a hurricane.”²⁹ While it has been decades since that comparison was written, clarity in this area is still elusive. It has long been established that an actor retains rights in the characters that he creates.³⁰

While it is claimed that actors possess no proprietary interest in the characters they merely play, the recent case law in the area at least somewhat supports the opposing idea. Additionally, this line becomes more blurred when there is an overlap between fiction and reality.

The decision in the *McFarland* case presents a new dimension to the right of publicity.³¹ The case involved the use of the name and image of “Spanky McFarland” from the *Our Gang* television show in the operation of a restaurant. Spanky McFarland was a character played by George McFarland, who had come to be known by the name Spanky due to his playing of the character as a child. The Third Circuit found that the identity of George McFarland had merged with Spanky so that the two were inseparable.³² The key to allowing an actor to have an interest in the characters they play is the association between the character and the actor.³³ The court built on the logic of the *White* and *Carson* cases in creating this associational test. Since McFarland and Spanky are indistinguishable, any reference to Spanky

27. See *Wendt*, 125 F.3d at 811.

28. See *id.*

29. See *Ettore v. Philco Tel. Broad. Corp.*, 229 F.2d 481, 485 (3d Cir. 1956).

30. See *Goldstein v. California*, 412 U.S. 546 (1973).

31. See *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994).

32. See *id.* at 921 n.15.

33. See *id.* at 919.

naturally invokes McFarland's identity due to the complete association between the two. As the studio owning the actual copyright to the Spanky character was not involved in the litigation, the court declined to decide who would have prevailed between the studio and McFarland.³⁴ However, despite the fact that the restaurant had informed the actual copyright holder of their use of the character image and name, it did not clear the restaurant to proceed due to McFarland's interest.

The *McFarland* decision is unique in that it is the only case to allow an actor to have a proprietary interest in a character.³⁵ Not only can actors gain an interest in a character with respect to third parties, the court did not reject the possibility of the actor being able to acquire greater interest in the character over the copyright holder. However, while the *Wendt* court disclaimed the proprietary interest of actors in their characters, the actual result of the two cases is identical. The associative test may represent the next step in right of publicity jurisprudence.

III. ANALYSIS

The WWF and Hellwig have unresolved suits in Arizona and Connecticut, which revolve around the property rights associated with the Ultimate Warrior or Warrior characters.³⁶ The area of law invoked by the facts of these cases is unclear. This case presents a unique scenario in an area in which the relevant authority is sparse. There is a possibility of further expanding the right of publicity, or else reaffirming the previous standard.

The first issue facing the court in the copyright case is the potential for protecting the Ultimate Warrior or Warrior character. The WWF has no registered copyright in the character at issue. However, they still may have acquired a copyright in the character through its use of Warrior in its works. As established in the *TBS* case, the court must determine whether the character is clearly delineated in WWF productions.³⁷ If the court determines that the Warrior was clearly delineated and developed as part of WWF performances, and possesses the uniqueness required to receive protection,³⁸ Titan may have acquired a copyright in the character.

34. See *id.* at 921.

35. See Cook, *supra* note 16, at 309.

36. See Titan Sports, Inc. v. Hellwig, 1999 U.S. Dist. LEXIS 10523 (D. Conn. Apr. 26, 1999).

37. See Titan Sports, Inc. v. Turner Broad. Sys., Inc., 981 F. Supp. 65 (D. Conn. 1997).

38. See *id.*

Titan claims to have invested heavily in the development of the character as part of its shows.³⁹ This will be important in the determination of whether Titan can protect the character at all.

While Titan may be able to show that they have a copyright in the character through its development of the character as a part of its production, whether they can use this to stop Hellwig from appearing as Warrior is a different matter. Under traditional understanding of the right of publicity, a public figure has the supreme proprietary interest in the exploitation of his name and likeness for commercial purposes.⁴⁰ While the right to use the specific works in which the actor appeared may belong to a copyright holder, the right to the actor's identity itself rests with the actor. While Hellwig could have possibly changed his name in an effort to circumvent the potential copyright held by Titan, it would appear that he would be technically within his rights to use his legal name Warrior for business purposes. Even though the Ultimate Warrior name and accompanying costume could be determined to be the property of Titan, it would not preclude a differently dressed Warrior from appearing in wrestling shows.

This case also presents a possible opportunity to apply or reject the decision in *McFarland*.⁴¹ The *Wendt* decision allowed a similar result to *McFarland* without going as far as allowing a proprietary interest in characters.⁴² However, *Wendt* lacked the level of association between character and actor that is present here. Disregarding the right of publicity claim expressed above for the use of the name Warrior, the present case appears to be a very similar scenario to *McFarland*. Hellwig and Warrior can be argued to have become indistinguishable to the extent that Hellwig is now named Warrior.

McFarland purposely stopped short of determining the potential rights of the completely associated actor/character as against the copyright holder,⁴³ just as the *Lugosi* court had previously declined to decide a scenario that could have resulted like *McFarland*.⁴⁴ With the general trend moving toward greater rights of publicity for actors in the works they produce, and with the *McFarland* court not rejecting the possibility of the actor superseding the copyright holder's interest, it may be inevitable that a case will grant what the *McFarland* court

39. See *Hellwig*, 1999 U.S. Dist. LEXIS 10523, at *8.

40. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979).

41. See *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994).

42. See *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997).

43. See *McFarland*, 14 F.3d at 921.

44. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979).

declined. The case at hand presents a perfect opportunity to test that possibility, by finding that Hellwig has a proprietary interest in the Ultimate Warrior or Warrior character over that of Titan or by rejecting the idea of extending publicity rights further.

Under either a name exploitation or a *McFarland* rationale, there is a strong basis for a decision that would effectively negate any copyright that Titan might be able to prove. One rationale would allow Hellwig to use Warrior as the name under which he is professionally known. The other scenario would possibly allow Hellwig to supersede a Titan copyright. Looking at the two options combined, it is conceivable that the result would leave Titan unable to enforce a copyright it may hold in the character against Hellwig in an effective way.

V. CONCLUSION

The present case invokes a consideration of the borders of copyright protection of characters and the right of publicity. Under either a straight right of exploitation of one's name for commercial purposes or an extension of the publicity right to *McFarland* and beyond, Titan may be unable to block Hellwig from using the Warrior name or character in professional wrestling. With the trend being an extension of the right of publicity to allowing proprietary interests in characters, the court in the present case has the opportunity to make an effective statement in extending or limiting the right. The pending litigation could lead to a strong statement of where the law lies regarding publicity rights.

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