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FROM PARTS UNKNOWN: WWE v. JIM HELLWIG IN THE ULTIMATE BATTLE FOR CHARACTER COPYRIGHT

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I. INTRODUCTION

The goal of a professional wrestling company, specifically World Wrestling Entertainment (WWE), is to provide explosive entertainment for its fans. While the wrestlers involved are certainly world-class athletes, the industry itself does not sell legitimate competition, but rather, it sells compelling story lines featuring intriguing characters possessing remarkable athletic prowess. Wrestling shows are akin to soap operas rather than sporting events; the audience knows that the outcomes are predetermined, but they watch to see the characters play out the plot and react to scripted obstacles. The wrestlers themselves are akin to literary characters or characters in a play individually spinning their author's character conception.

Professional wrestling companies expend tremendous effort and financial resources toward character and plot development, and they compensate their wrestlers for how they adhere to and advance their characters and their stories. A standard WWE wrestling employment contract stipulates that WWE possesses exclusive copyrights over the wrestler's character and can control when that wrestler can appear as his or her character.¹

Various courts and scholars have found that literary characters are copyrightable when they are either sufficiently detailed or delineated or they serve as the base for the story being told. This paper will argue that WWE should own the copyright for a character even when it is unclear whether the wrestler or WWE created the character. The argument will focus on the case of Jim Hellwig (Hellwig), a former WWE superstar better known as "The Ultimate Warrior" or "Warrior." Hellwig left WWE to wrestle for World Championship Wrestling (WCW) as his character, The Ultimate Warrior or Warrior. In response, WWE sued Hellwig for copyright infringement,

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1. See *Titan Sports, Inc. v. Hellwig*, 1999 U.S. Dist. LEXIS 10523, at 3-6 (D. Conn. Apr. 26, 1999).

claiming that it owned the copyright in the Warrior character and that Hellwig was not allowed to perform as the Warrior for any other company. What makes this case unique is that prior to leaving WWE, Hellwig legally changed his name to Warrior. Thus, in suing for copyright, WWE essentially tried to prohibit Hellwig from performing as himself. Nonetheless, it will be argued that WWE should retain the copyright in the Warrior character despite Hellwig's right of publicity because WWE expended effort and resources to develop the character and provided the necessary opportunity and platform for the character to succeed. Additionally, it will be argued that Hellwig's development of the Warrior character was essentially a work for hire, entitling WWE to retain its copyright in the character.

II. THE PROFESSIONAL WRESTLING INDUSTRY

For as long as humans have inhabited the earth, they have engaged in various forms of wrestling.² According to archaeological findings, ancient cultures such as the Sumerians, the Egyptians, the Greeks, the Romans, and the Jews all utilized wrestling for self-defense, competition, and camaraderie.³ By the 1860s, promoters in the United States began to recognize that wrestling possessed a commercial value and that its competitions could draw substantial crowds, entice gamblers, and garner media attention.⁴ Despite its growing popularity, wrestling events were criticized as dull because they lasted for many hours⁵ and often resulted in ties, leaving the audience displeased and unlikely to return.⁶ Because legitimate wrestling competition failed to capture audiences' attention, promoters attempted to invigorate the action without rigging matches.⁷ As a result, promoters like P.T. Barnum began employing exceptionally athletic wrestlers with colorful personalities to compete for the right to be called champion.⁸ These changes, instituted mostly by theater promoters, blurred the line between wrestling as entertainment and wrestling

2. Stephen S. Zashin, *Bodyslam From the Top Rope: Unequal Bargaining Power and Professional Wrestling's Failure to Unionize*, 12 U. MIAMI ENT. & SPORTS L. REV. 1, 4 (1995).

3. See *id.* at 4-5.

4. See *id.* at 7-8.

5. See GERALD W. MORTON & GEORGE M. O'BRIEN, *WRESTLING TO RASSLIN': ANCIENT SPORT TO AMERICAN SPECTACLE* 26 (1985). "Genuine bouts could drag on for hours of dull defensive maneuvers and stand-off counterholds." *Id.*

6. Zashin, *supra* note 2, at 8.

7. MORTON & O'BRIEN, *supra* note 5, at 26.

8. See Zashin, *supra* note 2, at 8-9. "Besides their athleticism, Barnum's wrestling depended on their colorful personalities. Each came to the ring in gaudy outfits and each day there was a 'new' champion. Their attire consisted of 'scarlet jackets, green trunks and purple tights.' Professional wrestling was born!" *Id.* at 9.

as sport.⁹

In the 1950s, wrestling's popularity increased dramatically with the advent of television. Television provided the perfect low-cost medium for promoters to show off their outlandish wrestlers.¹⁰ Television broadcasts also afforded wrestlers the opportunity, through promotional interviews, "to elaborate on their ring personas through costume and histrionics," making them national stars.¹¹ No promoter more effectively utilized television to develop unique characters and storylines than Vince McMahon, Jr. (McMahon) and his company, WWE.

III. WWE VS. HELLWIG

A. *In One Corner: WWE/Titan Sports*

WWE¹² describes itself not as a professional wrestling company, but as "an integrated media and entertainment company."¹³ WWE, along with its live and televised event promotions arm, Titan Sports¹⁴ (Titan), is headquartered in Stamford, Connecticut and was founded in 1979 by Vince and Linda McMahon.¹⁵ WWE principally focuses on four business activities: (1) the production and sale of "Live and Televised Entertainment"; (2) the production and sale of "Digital Media," including online advertising and other related "ecommerce, broadband and mobile services"; (3) the development, production, and sale of "WWE Films"; and (4) the development, production, and sale of "Consumer Products," including video games, toys, magazines, home videos, and other consumer products, "through third party licensees."¹⁶

9. *See id.* at 10.

10. *Id.* at 12-13.

11. *Id.*

12. The cases and articles cited in this paper refer to WWE as the World Wrestling Federation or WWF. This is because for most of its existence the company was called WWF. However, it was forced to change its name to WWE after losing a trademark battle with the World Wildlife Fund. *See World Wrestling Federation Entertainment Drops the "F" to Emphasize the "E" for Entertainment*, WWE.COM, May 6, 2002, http://corporate.wwe.com/news/2002/2002_05_06.jsp.

13. World Wrestling Entertainment, Inc., *Business Overview*, WWE.COM, <http://corporate.wwe.com/company/overview.jsp> (last visited Feb. 3, 2008).

14. While WWE and Titan are distinct entities, they are closely aligned and share identical interests with respect to the copyright ownership of Ultimate Warrior. Though Titan is the party listed in the litigation involving Hellwig, WWE is the more recognizable entity. Thus, for the sake of clarity, only the name WWE will be referred to here, and all references to WWE should be read to include Titan as well.

15. World Wrestling Entertainment, Inc., *Executive Team Bios: Linda McMahon, C.E.O.*, WWE.COM, http://corporate.wwe.com/company/bios/le_mcmahon.jsp (last visited Feb. 3, 2008).

16. World Wrestling Entertainment, Inc., *supra* note 13.

While event production and merchandise sales are vital elements of WWE's business, WWE's success is largely predicated on its ability to develop unique characters and entertaining storylines. WWE's stated mission is to:

[D]evelop compelling content anchored by our Superstars. . . . This content . . . drive[s] television ratings, which, in turn, drive pay-per-view buys, live event attendance, WWE.com traffic and branded merchandise sales and other business initiatives. Our strategy is to capitalize on the significant operating leverage of our business model through the distribution of this intellectual property across existing media platforms, as well as new and emerging distribution platforms.¹⁷

Thus, WWE's ability to successfully conduct its business relies on its writing staff and its performers' creativity as well as its ownership of the copyrights born from such creativity.¹⁸

B. *In the Other Corner: Jim Hellwig*

Hellwig was a professional wrestler who rose to prominence shortly after entering into his first contract with WWE in 1987.¹⁹ Prior to his tenure with WWE, Hellwig wrestled as a character called "The Dingo Warrior" for a small company known as World Class Championship Wrestling.²⁰ Shortly after entering WWE, The Dingo Warrior's name was changed to "The Ultimate Warrior,"²¹ and his popularity exploded. Hellwig's impressive physique,²²

17. *Id.*

18. *See Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 981 F. Supp. 65, 66-67 (D. Conn. 1997). "[WWE] contends that success in the professional wrestling business depends upon the development of interesting . . . story lines. Characters must have names, personalities, histories, relationships, personas, and visual appearances that appeal to consumers." *Id.*

19. *Titan Sports, Inc. v. Hellwig*, 1999 U.S. Dist. LEXIS 10523, at 3 (D. Conn. Apr. 26, 1999).

20. *Warrior Central, Biography*, <http://www.warriorcentral.net/biography.html> (last visited Feb. 3, 2008).

21. *Id.* It should be noted that Vince McMahon contends that he came up with the name "Ultimate Warrior" as he believed that the "Dingo Warrior" would not resonate with fans and that it was unclear what a "Dingo Warrior" was supposed to be. McMahon also contends that he wanted to distinguish this "Warrior" from other 'Warriors' occupying the professional wrestling landscape at the time including the popular tag team, "The Road Warriors." These contentions may be found in WWE's recently released documentary video, "The Self Destruction of the Ultimate Warrior." *THE SELF DESTRUCTION OF THE ULTIMATE WARRIOR* (2005). Additionally, these contentions among others from the documentary have become the subject of another round of litigation between Hellwig

combined with his character's colorful ring attire complete with multi-colored face paint, arm tassels, and bright wrestling boots, his guitar heavy theme music, manic sprints to the wrestling ring, and crowd pleasing body slam known as the "gorilla press" made him a fan favorite.²³ All this, coupled with his maniacal ring persona, his claim to hail from "Parts Unknown," and his enigmatic, almost incoherent promotional interviews, made "The Ultimate Warrior" a wrestling superstar on par with established stars like the iconic Hulk Hogan and "Macho Man" Randy Savage. Ultimate Warrior's popularity peaked at Wrestlemania VI²⁴ in 1990 when he defeated Hulk Hogan, the reigning WWE champion, in front of over 65,000 fans at the Sky Dome in Toronto, Canada.²⁵

Despite The Ultimate Warrior's immense popularity, Hellwig's relationship with WWE soured shortly after he defeated Hogan, and by 1992, he was out of WWE.²⁶ In 1996, Hellwig and WWE rekindled their relationship for a short time;²⁷ however, the parties could not recreate The Ultimate Warrior's past success, leading to Hellwig's departure to WCW.²⁸ When WWE tried to prevent Hellwig from performing for WCW²⁹ as The Ultimate Warrior or Warrior character,³⁰ the copyright battle at issue began.

and WWE as Hellwig is now suing for defamation.

22. Which he has since admitted is in part the product of steroid use.

23. See Warrior Central, *supra* note 20. See also Attachment A.

24. Wrestlemania is WWE's most popular televised event each year. It began in 1985 and has been offered to cable and satellite viewers through pay-per-view services ever since.

25. Warrior Central, *supra* note 20.

26. Titan Sports, Inc. v. Hellwig, 1999 U.S. Dist. LEXIS 10523, at 8 (D. Conn. Apr. 26, 1999).

27. *Id.*

28. *Id.* at 10.

29. WWE now owns WCW; however, at the time that Hellwig left WWE, the organizations were bitter rivals who both aired popular television shows during the same Monday evening time slot. See *WWE Entertainment, Inc. Acquires WCW from Turner Broadcasting: Cross-Brand Storylines to Create Intriguing Possibilities for Fans, Expected to Increase Television Ratings, PPV Buys*, WWE.COM, Mar. 23, 2001, http://corporate.wwe.com/news/2001/2001_03_23.jsp.

30. The reason why the character is referred to as "The Ultimate Warrior or Warrior" in regards to the copyright infringement case is that when Hellwig left for WCW, he often performed as and was referred to as Warrior rather than The Ultimate Warrior. *Hellwig*, 1999 U.S. Dist. LEXIS 10523, at 10-11. While the WCW version of Warrior dressed slightly different and may have acted less maniacally, he still played a very similar part to that which he played in WWE. See *THE SELF DESTRUCTION OF THE ULTIMATE WARRIOR* (2005). In fact, in his first appearance on a WCW program, he attempted to rekindle his feud with Hulk Hogan (who had since become a bad guy named "Hollywood Hogan"), by challenging Hogan to a rematch. *Id.* Hellwig even referred to the fact that he had defeated Hogan in their previous match while with WWE. *Id.* In doing so, Hellwig broke a cardinal rule of the wrestling industry that when conducting a promotional interview, a performer should never refer to past encounters with the opposing wrestler when such reference blatantly foreshadows how the next match will end. *Id.*

Not coincidentally, at around this same time, Hellwig legally changed his name from Jim Hellwig to Warrior.³¹

C. *The Contract Between WWE and Hellwig*

On September 23, 1987, Hellwig entered into his first booking contract with WWE, agreeing to wrestle and perform for the company.³² The provisions related to ownership of the intellectual property born from Hellwig's performance as The Ultimate Warrior read as follows:

2.1 WRESTLER hereby grants to PROMOTER and PROMOTER hereby accepts, the exclusive right during the term of this Agreement to video tape, film, photograph, or otherwise record, or to authorize others to do so, by any media now known or hereafter created, any or all of the Events.³³

2.2 PROMOTER may produce, reproduce, manufacture, record, perform, exhibit, broadcast, televise by any form of television (including without limitations, free, cable, pay cable, closed circuit and pay-per-view television), transmit, publish, copy, print, reprint, vend, sell, distribute and use, and to authorize others to do so, the Programs in perpetuity and in any manner or media and by any art, method or device, now known or hereafter created.³⁴

2.3 PROMOTER shall own in perpetuity all of the rights, results, products and proceeds in and to, or derived from the Programs (including without limitation, all incidents, dialogue, characters, actions, gags, routines, ideas, titles, inventions, and other material written, composed, submitted, added, improvised, interpolated and invented by WRESTLER in connection with his/her appearance in the Programs) and to obtain copyright and/or trademark protection therefor[e] in the name of PROMOTER or PROMOTER's designee.³⁵

31. *Hellwig*, 1999 U.S. Dist. LEXIS 10523, at 3, n.1.

32. *Id.* at 3.

33. *Id.* at 3-4.

34. *Id.* at 4.

35. *Id.* at 4-5.

3.2 If WRESTLER does not own, possess or use service marks, trademarks or distinctive and identifying indicia and PROMOTER develops such service marks, trademarks, and distinctive and identifying indicia for WRESTLER, they shall belong to PROMOTER and PROMOTER shall have the exclusive license and right in perpetuity, to use, and to authorize others to use, WRESTLER's ring name, likeness, voice, signatures, costumes, props, gimmicks, routines, themes, personality, character and caricatures as used by or associated with WRESTLER's performance as a professional wrestler (collectively "Name and Likeness"). It is the intention of the parties that the license with respect to Name and Likeness belongs to PROMOTER in perpetuity, even to the exclusion of WRESTLER, and the license includes the right to sublicense, promote, expose, exploit and otherwise use the Name and Likeness in any commercial manner now known or hereafter discovered.³⁶

In 1989, Hellwig and WWE agreed to the following addendum to the 1987 contract, establishing that at the time Hellwig signed the 1987 contract, his character, The Ultimate Warrior, had not yet been created:

At the time you signed your talent contract with us, your character identity as the "Ultimate Warrior" had not been established. Therefore that ring name and characterization are not listed on the contract. This letter will serve as an addendum to your contract. It acknowledges that you will be wrestling for Titan Sports, Inc. d/b/a The World Wrestling Federation under the ring name and characterization of "Ultimate Warrior" and that all rights granted to Titan under your contract with us apply to this character identity.³⁷

The purpose of this addendum was to explain why the character, The Ultimate Warrior, was not specifically mentioned anywhere in the 1987 contract.³⁸ However, the fact that Hellwig would sign off on an addendum that denied the existence of The Ultimate Warrior character prior to Hellwig's signing with WWE would strongly indicate that WWE played a significant

36. *Id.* at 5-6.

37. *Id.* at 6-7.

38. *Id.*

role in the character's creation and development.

D. The First Bout: The Arizona Trademark Dispute

When Hellwig left WWE for WCW, he did so with the intention of bringing The Ultimate Warrior character with him. However, pursuant to the 1987 contract between itself and Hellwig, WWE tried to block Hellwig's departure because it owned The Ultimate Warrior character and the trademarks associated with it. In reaction, on August 28, 1996, Hellwig and his company, Ultimate Creations, sued the McMahons and WWE in Arizona state court, alleging trademark and service mark infringement.³⁹ In so doing, Hellwig sought a declaratory judgment that he was the rightful owner of The Ultimate Warrior's trademarks, service marks, trade dress, and persona.⁴⁰ In a "minute entry"⁴¹ issued February 10, 1998, the Arizona court ruled that Hellwig:

[H]as presented sufficient evidence to demonstrate his use and ownership of the DINGO WARRIOR and WARRIOR marks, as well as the trade dress, face paint, likenesses, and persona of the inherently distinctive marks associated with WARRIOR and DINGO WARRIOR. The Court further finds that the ownership of the name ULTIMATE WARRIOR is subject to a factual dispute which must be resolved by the trier of fact. . . . [S]hould [Titan and the WWE] demonstrate their creation of the name . . . [that] would not entitle them to utilize the trade dress and other persona associated with the character DINGO WARRIOR or WARRIOR.⁴²

Thus, the Arizona court's decision was a victory for Hellwig because he was deemed to be the owner of the Warrior's trademarks. The ownership of the copyrights associated with The Ultimate Warrior was yet to be determined.

39. *Id.* at 8-9.

40. *Id.* at 9-10.

41. See The University of Arizona: James E. Rogers College of Law, *Glossary*, <http://www.law.arizona.edu/Depts/Clinics/CAC/gloss.html> (last visited Feb. 6, 2008). "[A minute entry is] [a]n official summary of the activity and court decisions that took place on a particular date, at a particular time, concerning a particular case; details any orders of the court and describes what is to happen next regarding the case." *Id.*

42. *Hellwig*, 1999 U.S. Dist. LEXIS 10523, at 11 (quoting *Warrior v. Titan Sports, Inc.*, No. CV96-15377 (Ariz. Sup. Ct. 1997)).

E. Return Match: The Connecticut Copyright Dispute

Because the Arizona case only dealt with the rights to the Warrior's trademarks and trade dress, WWE was able to sue in Connecticut state court, alleging that it possessed copyrights of the televised events that featured Hellwig portraying the Warrior or The Ultimate Warrior character.⁴³ Here, WWE claimed entitlement to copyright protection for the televised works as well as for The Ultimate Warrior or Warrior character portrayed in them because the character had been distinctively delineated in the televised works.⁴⁴ WWE sought a declaratory judgment that Hellwig's threats to appear as The Ultimate Warrior or Warrior for WCW would infringe on WWE's copyrighted works that included The Ultimate Warrior's or Warrior's performances.⁴⁵ The Connecticut court never decided the issue of copyright ownership because the case focused on whether the Arizona trademark case precluded the copyright action from being brought in the first place.⁴⁶ The court ruled that the Arizona case did not preclude WWE's copyright claims and dismissed Hellwig's motion to dismiss based on such preclusion.⁴⁷

Because the Connecticut court never decided who should own the copyrights associated with The Ultimate Warrior, the rest of this paper will analyze how the court may have ruled had it decided the case on the merits. Such analysis requires a discussion of general copyright law and how copyright law has been applied to characters within copyrighted works and copyright applications to "works made for hire." This analysis will show that The Ultimate Warrior character is indeed copyrightable and that WWE should own the copyright.

IV. BASIC REQUIREMENTS FOR COPYRIGHTABILITY

For an author's work to be considered copyrightable, The Copyright Act of 1976 requires that the work be "an original work of authorship."⁴⁸ While a copyrightable work must be original, the creativity required for such originality is not high. All that is required is that the author contribute "something recognizably 'his own'" and that the author not merely copy another's work in its entirety.⁴⁹ Additionally, courts will not judge the

43. *Id.* at 12.

44. *Id.*

45. *Id.* at 13.

46. *See id.* at 13-34.

47. *Id.* at 42-43.

48. The Copyright Act of 1976, 17 U.S.C. § 102 (2008).

49. *See Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99, 102-03 (2d Cir. 1951). "All

aesthetic quality of the author's work when determining its copyrightability.⁵⁰

The Copyright Act also requires that a copyrightable work must be fixed in a "tangible medium of expression."⁵¹ A work is deemed to meet this fixation requirement "when its embodiment . . . is sufficiently permanent . . . to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration."⁵²

Recorded television events, such as those that WWE produces, are copyrightable because they fulfill the Copyright Act's requirements for originality and fixation. WWE's televised events are original because they are not direct copies of other wrestling programs and contain novel storylines and characters. WWE's televised events are fixed in "a tangible medium of expression" because they are recorded on film and can easily be copied and widely distributed. Whether the characters contained in the recordings can be copyrighted is more complicated and requires an overview of the idea/expression dichotomy.

A. *The Idea/Expression Dichotomy*

The Supreme Court has held that while copyright law may protect an author's expression of ideas, it does not protect the author's ideas themselves.⁵³ This differentiation is commonly known as "the idea/expression dichotomy" and is rooted in the Copyright Act's prohibition against protection for an author's "idea, procedure, process, system, method of operation . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work."⁵⁴ Judicial application of this dichotomy occurred in *Baker v. Selden*, where the Supreme Court asserted that while an author may copyright a mathematics text book, the author may not copyright the specific formulas and methods utilized within the text book.⁵⁵

that is needed . . . is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' Originality in this context 'means little more than prohibition of actual copying.'" *Id.*

50. *See id.* at 103 (stating "[n]o matter how poor artistically the 'author's' addition, it is enough if it be his own."); *See also* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (judging the artistic quality of the work when considering its originality "would be a dangerous undertaking for persons trained only to the law").

51. 17 U.S.C. § 102 (2006).

52. § 101.

53. *Baker v. Selden*, 101 U.S. 99, 103-04 (1880).

54. § 102(b).

55. *See Baker*, 101 U.S. at 103. (stating that "[t]he copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them.").

The dichotomy exists because one of the copyright laws' primary purposes is "to promote the Progress of Science and the useful Arts" rather than to reward authors' labor and creativity.⁵⁶ The *Baker* Court reasoned that extending copyright protection to the mathematical formulas would prevent an engineer from legally applying the formulas whenever necessary, frustrating the copyright laws' primary purpose to further scientific progress.⁵⁷

The idea/expression dichotomy is significant when determining whether characters like *The Ultimate Warrior* should be copyrightable. When extending copyright protection to characters, courts must analyze whether the character constitutes an undeveloped idea or whether the character is sufficiently expressed to attain protectable status.⁵⁸

B. How Courts Analyze Character Copyrightability

While characters are generally entitled to copyright protection,⁵⁹ three distinct characteristics determine a character's copyrightability: its name, its visual appearance, and its personality traits.⁶⁰ When analyzing these characteristics, courts must balance between setting too low a copyrightability threshold, permitting authors to copyright common character types like heroes or villains, and setting too high a bar, precluding authors from copyrighting even the most novel characters.⁶¹ Courts have produced and utilized two tests, the "delineation test" and the "story being told test," to determine character copyrightability and whether infringement has occurred when

56. See *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8, cl. 8).

57. See *Baker*, 101 U.S. at 103. (stating that "[t]he very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.").

58. Mark Bartholomew, *Protecting The Performers: Setting A New Standard For Character Copyrightability*, 41 SANTA CLARA L. REV. 341, 343 (2001).

59. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12 (2007) (citing *Walt Disney Prods., v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir. 1982), cert. denied, 459 U.S. 880, 103 S. Ct. 176, 74 L. Ed. 2d 145 (1982); *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24 (2d Cir. 1982)). "In those cases recognizing such protection, the character appropriated was distinctively delineated in the plaintiff's work and such delineation was copied in the defendant's work." *Id.*

60. David B. Feldman, Comment, *Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 CAL. L. REV. 687, 690 (1990) (citing Michael V.P. Marks, *The Legal Rights of Fictional Characters*, 25 COPYRIGHT L. SYMP. (ASCAP) 35, 37-38 (1980)).

61. Bartholomew, *supra* note 58, at 343-44. See also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). "[T]he less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly." *Id.*

another author employs a similar character.⁶² WWE based its argument for copyright ownership of The Ultimate Warrior character on the notion that the character had been distinctively delineated within WWE's televised works.⁶³ Thus, only the delineation test will be discussed here.

The delineation test was established in *Nichols v. Universal Pictures*, where the court determined whether a motion picture's use of characters similar to those found in a copyrighted play constituted copyright infringement.⁶⁴ Here, the court concluded that character copyrightability hinged on the character's delineation or "in what detail the character has been described by its creator,"⁶⁵ and it determined that copyright protection will not be extended to stock fictional characters.⁶⁶ The delineation test has been restated as a two step inquiry: (1) is the character distinctively and thoroughly developed by the original author so as to command copyright protection; and (2) if so, did the alleged infringer copy the specific character as developed by the original author as opposed to utilizing a broad outline of such character?⁶⁷

The Ultimate Warrior character would most certainly fulfill the delineation test requirements as he possessed the distinct physical attributes and persona to constitute a copyrightable character.⁶⁸ According to WWE, it was responsible for changing the character's name from The Dingo Warrior to The Ultimate Warrior, so as to make the character more distinct and recognizable to fans.⁶⁹ However, the question becomes whether Hellwig or WWE was the author and owner of The Ultimate Warrior character and thus, entitled to copyright protection for the character.

62. Bartholomew, *supra* note 58.

63. Titan Sports, Inc. v. Hellwig, 1999 U.S. Dist. LEXIS 10523, at 12 (D. Conn. Apr. 26, 1999).

64. *Nichols*, 45 F.2d 119 (2d Cir. 1930).

65. Bartholomew, *supra* note 58, at 345-46. In this case, the court utilized the following famous example to illustrate the delineation test:

If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's "ideas" in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.

Nichols, 45 F.2d at 121.

66. Bartholomew, *supra* note 58, at 346.

67. NIMMER, *supra* note 59.

68. See Attachment A.

69. See Warrior Central, *supra* note 20.

V. WHY WWE SHOULD BE DEEMED TO HAVE AUTHORED THE ULTIMATE WARRIOR

In order for WWE to successfully claim that Hellwig committed copyright infringement by performing as The Ultimate Warrior or Warrior character for WCW, WWE must prove that it owned the character's copyright. Precedent exists to support WWE's contention that because The Ultimate Warrior was a copyrightable character who appeared in copyrightable televised works, WWE owns the copyright in the character. For example, in *Warner Brothers v. American Broadcasting Companies*, the Second Circuit recognized that because Warner Brother's owned copyrights in various works embodying the character, Superman, it had obtained copyright protection in the Superman character itself.⁷⁰ However, not until 1997, in *Titan Sports v. Turner Broadcasting*, would a court address copyright ownership of professional wrestling characters.⁷¹

In many ways, the factual scenario present in *Turner Broadcasting* is similar to the dispute between Hellwig and WWE.⁷² Here, WWE sued WCW for copyright infringement after two of WWE's most popular wrestlers, Kevin Nash, a.k.a. "Diesel," and Scott Hall, a.k.a. "Razor Ramon," left WWE for WCW.⁷³ Like Hellwig, both Hall and Nash had contracted with WWE, agreeing that WWE would retain exclusive ownership of their characters' names and likenesses as well as the right to distribute all copyrightable materials based on their characters.⁷⁴ Like Hellwig, neither Hall nor Nash had achieved significant professional wrestling success until they joined WWE and adopted their WWE-created characters.⁷⁵ Like Hellwig, both Hall and Nash were lured to WCW, where WCW did little to resolve consumer confusion as to whether Hall and Nash had joined WCW as their WWE characters.⁷⁶ In addition, the court did not rule on the merits of WWE's copyright infringement claim.⁷⁷ However, the court did deny WCW's motion to dismiss WWE's claim because WWE "sufficiently alleg[ed] that [the characters were]

70. See *Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 235 (2d. Cir. 1982).

71. See generally *Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 981 F. Supp. 65 (D. Conn. 1997). This is the same court that would hear *Hellwig* just two years later.

72. The major difference in these two cases is that in *Hellwig*, WWE sued a performer for copyright infringement; whereas, in *Turner Broadcasting*, WWE sued another wrestling company.

73. *Turner Broad.*, 981 F. Supp. at 67.

74. *Id.*

75. *Id.*

76. *Id.*; See also THE SELF DESTRUCTION OF THE ULTIMATE WARRIOR, *supra* note 30.

77. *Id.* at 68-69.

developed and distinctive character[s] worthy of copyright protection.”⁷⁸ The court was particularly persuaded by the fact that WWE devoted much of its amended complaint to detailing how it developed the characters and how the characters were integral to its televised story lines.⁷⁹

Though the court in *Turner Broadcasting* did not rule on the merits of WWE’s copyright infringement, its denial of WCW’s motion to dismiss strongly evidences that WWE was entitled to copyright protection and ownership of the characters.⁸⁰ Considering the similarities between *Turner Broadcasting* and *Hellwig*, it would appear that the court would rule in favor of WWE in *Hellwig* for the same reasons as it likely would have in *Turner Broadcasting* had it addressed the merits. However, there is one significant difference between these cases: unlike Hall and Nash, who could be clearly differentiated from their characters, Hellwig legally changed his name to Warrior, blurring the line between the character, The Ultimate Warrior, and the person, Hellwig. In so doing, Hellwig may assert that his right of publicity prevents WWE from owning a copyright in The Ultimate Warrior. This is because Hellwig is literally The Ultimate Warrior, and permitting WWE to own the copyright would essentially prevent Hellwig from appearing as himself.⁸¹

VI. THE RIGHT OF PUBLICITY AS A DEFENSE FOR HELLWIG

The right of publicity refers to a public figure’s right to exploit and to prevent unauthorized exploitation of his or her name, likeness, and appearance for commercial purposes.⁸² This right stems from the notion that a public figure’s name and likeness are valuable and that unauthorized exploitation dilutes this value and prevents the public figure from receiving compensation.⁸³ The right of publicity has been extended to actors in cases where the character the actor plays has been misappropriated under the belief that actors may create a character so distinctive that the public may actually

78. *Id.* at 68.

79. *Id.* at 68-69.

80. *See id.*

81. *See* Eric Lee, Note, *Titan Sports, Inc. v. Hellwig: Wrestling with the Distinction Between Character and Performer*, 3 TUL. J. TECH. & INTELL. PROP. 155, 156 (2001). “Where do the rights to protect a character and to exploit one’s own image and name meet? Can the WW[E] prevent Hellwig from appearing as himself?” *Id.*

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

83. *See* *McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994). “Where an actor’s screen persona becomes so associated with him that it becomes inseparable from the actor’s own public image, the actor obtains an interest in the image which gives him standing to prevent mere interlopers from using it without authority.” *Id.* at 920.

confuse the actor for his or her character.⁸⁴ In such cases, the actor may have a proprietary interest in the character if the character is an original creation of, and exclusively played by, the actor.⁸⁵ However, scholars have argued that characters are developed by writers, producers, studios, and audiences rather than by the actor who plays the character, no matter how distinct the character may be.⁸⁶

Whether an actor's right of publicity extends to the character he or she plays was the issue in *McFarland v. Miller*.⁸⁷ George McFarland was a child actor who portrayed "Spanky" on the television show, "Our Gang."⁸⁸ McFarland had earned the nickname before he ever appeared on "Our Gang," and the show's producer liked the name so much that he used it for McFarland's character.⁸⁹ After his run on "Our Gang" ended, McFarland went on to appear in other films and television shows as "Spanky McFarland," rather than as his given name, George.⁹⁰ McFarland sued Miller based on right of publicity for Miller's unauthorized use of McFarland's name in connection with a restaurant called "Spanky McFarland's."⁹¹ While the court did not decide the case on the merits, it did find a "triable issue of fact as to whether McFarland had become so inextricably identified with Spanky McFarland that McFarland's own identity would be invoked by the name Spanky."⁹² The court distinguished McFarland's case from that of an actor like Adam West, who became known almost exclusively for playing the role of Batman on the television series of the same name.⁹³ It reasoned that West's identity was not indistinguishable from that of Batman, while "McFarland . . . may have become indistinguishable in the public's eye from his stage persona of Spanky."⁹⁴

84. Angela D. Cook, Comment, *Should Right of Publicity Protection be Extended to Actors in the Characters Which They Portray*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 309 (1999) (citing *McFarland*, 14 F.3d at 920).

85. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 432 (Cal. 1979) (Mosk, J. concurring).

86. Cook, *supra* note 84, at 311 (citing Rosemary J. Coombe, *Authorizing the Celebrity: Publicity Rights Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 368 (1992). "Market values arise only after property rights have been established and enforced; the decision to allocate particular property rights is a prior question of social policy that requires philosophical and moral deliberations and a consideration of social costs and benefits." *Id.*

87. See *McFarland*, 14 F.3d at 912-13.

88. *Id.* at 914.

89. *Id.* at 915.

90. *Id.*

91. *Id.* at 916.

92. *Id.* at 921.

93. *Id.* at 920-21, n.15.

94. *Id.*

Using the court's rationale in *McFarland* as a guide, it is unlikely that Hellwig's right of publicity would extend to The Ultimate Warrior. While Hellwig was the only person ever to portray The Ultimate Warrior,⁹⁵ it is doubtful that the public would have trouble distinguishing Hellwig from The Ultimate Warrior considering the character's intricate costume. However, Hellwig may still have a strong argument that his right of publicity extends to the character because by virtue of changing his name to Warrior, he has become indistinguishable from the character. Even if a court were to accept this argument, The Ultimate Warrior was likely not Hellwig's sole creation, and even if he were the character's driving, creative force, the character was still a work made for hire, entitling WWE, as Hellwig's employer, to copyright ownership.

VII. THE ULTIMATE WARRIOR CHARACTER AS A WORK MADE FOR HIRE

For the purposes of copyright protection, a work made for hire is a work prepared by an employee within the scope of his or her employment.⁹⁶ If a work is deemed to be made for hire, the employer is considered the work's author and copyright owner.⁹⁷ An employee's copyrightable work is created within the scope of his or her employment if three elements are present: (1) the work falls within the type of work that the employee is hired to perform; (2) the production of the work substantially occurs within authorized time and space limitations; and (3) the work is produced, at least in part, to serve an employer.⁹⁸ In *Community for Creative Non-Violence v. Reid*, the Supreme Court expanded on these elements when determining whether a non-profit organization possessed the copyright when it commissioned an artist to create a sculpture.⁹⁹ The Court concluded that the sculptor was the author and owner of the sculpture's copyright because he was an independent contractor, rather than an employee, when he created the sculpture.¹⁰⁰ The Court utilized numerous factors when analyzing the case, including whether the employer provided the tools necessary to create the work and the location where the work was created.

Applying the Restatement elements, as well as the Supreme Court's additional factors discussed in *Reid*, to the dispute between WWE and

95. This came much to the surprise of many wrestling fans, who erroneously believed that Hellwig had died and that several wrestlers had taken turns playing The Ultimate Warrior.

96. § 101.

97. § 201(b).

98. RESTATEMENT SECOND OF AGENCY § 228 (1958).

99. See generally *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

100. *Id.* at 753.

Hellwig, Hellwig's creation of The Ultimate Warrior would constitute a work made for hire, entitling WWE to copyright ownership because Hellwig was the WWE's employee by virtue of his contract with the company.¹⁰¹ Certainly, Hellwig's creation of The Ultimate Warrior character falls within the type of work he was hired to perform. As stated above, WWE attributes its success to its ability to craft intriguing story lines featuring characters possessing unique names, personalities, histories, relationships, personas, and visual appearances that appeal to consumers.¹⁰² As such, it was Hellwig's responsibility, as a WWE employee, to create a unique character that would appeal to fans.

While Hellwig may have crafted the initial idea to be some sort of Warrior (a Dingo Warrior to be exact), WWE provided the necessary tools for his Warrior to become "Ultimate," including its writers, wardrobe, and makeup departments. Though Hellwig may have created The Ultimate Warrior in the comfort of his home or mind, the character was truly born in a WWE supplied wrestling ring. Had WWE not provided Hellwig with a venue to perform in or expended tremendous promotional resources on The Ultimate Warrior, the character would never have attained the popularity that made its copyright ownership worth fighting for.

VIII. IMPACT OF WWE'S COPYRIGHT OWNERSHIP ON HELLWIG

In light of the fact that Hellwig has recently changed his name to Warrior, it is reasonable to wonder how WWE owning the copyright for The Ultimate Warrior would impact Hellwig's ability to be himself. Among the rights that copyright ownership affords is the exclusive right to publicly perform and display the copyrighted work.¹⁰³ The Copyright Act prohibits a non-owner from public performances, displays, or otherwise electronically transmitting the copyrighted work in public places or at any place "where a substantial number of persons outside of a normal circle of a family and its social acquaintances [are] gathered."¹⁰⁴ Thus, Hellwig would be precluded from appearing as The Ultimate Warrior or Warrior wrestling character in public places or in front of large crowds that are not made up of his family or friends. However, he could still be Warrior the man and is not precluded from using his legal name by virtue of his right of publicity. For example, Hellwig is still able to appear as Warrior in the various speaking engagements he makes

101. See *Titan Sports, Inc. v. Hellwig*, 1999 U.S. Dist. LEXIS 10523, at 3-6 (D. Conn. Apr. 26, 1999).

102. See *World Wrestling Entertainment, Inc.*, *supra* note 13.

103. § 106(4)-(5).

104. § 101.

because he does not appear as the character, but as the man. Were WWE deemed to own the copyright, such rights would only extend to The Ultimate Warrior or Warrior wrestler, and Hellwig would not be in violation simply by being himself.

IX. CONCLUSION

Because Hellwig's creation of his character, The Ultimate Warrior, occurred during the course of his employment with WWE, the character was essentially a work made for hire, entitling WWE to copyright protection for the character. The fact that Hellwig legally changed his name to Warrior may entitle him to use that name for promotional purposes not connected to wrestling as he possesses a right to publicity for his own name. However, this right does not allow him to appear as the wrestling character, The Ultimate Warrior or Warrior, because those characters were works made for hire during the course of his employment with WWE.

While performers inject tremendous effort into their characters and personas, their employers also expend a great deal of energy and expense into promoting and developing these characters for audience consumption. Employers provide the performer with the platform to present his or her character and compensate the performer handsomely for exceptional performance. In return for this investment and compensation, the company should retain the character's copyright so as to protect its investment. Thus, to avoid extensive legal battles and to establish stability within the law of character copyrightability, future courts should rule that characters like The Ultimate Warrior are works made for hire. Doing so would encourage employers to continue investing in their performers and would promote innovative character development in the spirit of copyright law. However, such a ruling would not leave the performers without recourse. If performers wish to retain copyright in their characters, they should negotiate for it in their employment contracts rather than attempting to acquire it after their character has achieved popularity. While this will require foresight, such foresight is not unreasonable considering the ever increasing value of character copyrights and in light of the legal battles between Hellwig and WWE.