

≡≡≡ *Titan Sports, Inc. v. Turner Broadcasting Systems, Inc.*  
≡≡≡ 981 F. Supp. 65 (D. Conn. 1997)

DORSEY, C.J.: . . . Titan Sports, Inc., etc., (“Plaintiff”) . . . promotes live, and on cable, syndicated, and pay-per-view television, professional wrestling under its registered service mark “World Wrestling Federation” (“WWF”).

[Defendant Turner Broadcasting Systems, Inc. (“TBS”)] owns and operates several cable networks. . . . [Defendant World Championship Wrestling, Inc., (“WCW”) is] a majority owned subsidiary of TBS. WCW competes directly with WWF in televising professional wrestling, associated merchandising, and licensing programs. . . .

Plaintiff contends that success in the professional wrestling business depends upon the development of interesting wrestling characters and story lines. Characters must have names, personalities, histories, relationships, personas, and visual appearances that appeal to consumers. Plaintiff alleges that WWF programming combines character-driven story lines with skillful wrestling while WCW has no reputation for creativity. TBS proposed interpromotional matches in order to associate WCW with WWF, but Plaintiff rejected this idea.

After wrestling unsuccessfully with WCW, Scott Hall contracted to wrestle for Plaintiff. Plaintiff created a wrestling character for Hall called “Razor Ramon,” alias “The Bad Guy,” with a distinctive Hispanic accent, slicked back hair in a ponytail with a curl in the front, a toothpick in his mouth, a vest, and multiple chains around his neck. . . . The contract provided that Plaintiff retained exclusive ownership of the character’s name and likeness and the exclusive right to distribute copyrightable materials based on the character. . . .

Plaintiff developed Razor Ramon into one of its most popular characters. He has appeared in television broadcasts, live events, a two-hour videotape, several magazines, and is the subject of merchandise devoted to the character. He won WWF’s Intercontinental Championship at least four times. The character is well-recognized by wrestling fans.

Plaintiff developed another character using wrestler Kevin Nash who wrestled unsuccessfully with defendant WCW. Nash and Plaintiff entered into a contract with provisions similar to Hall’s contract. Nash’s character was “Diesel,” alias “Big Daddy Cool.” Diesel’s trade dress included a goatee beard and moustache, black leather pants, a black leather vest decorated with

silver studs and tassels, a black low cut tank-top shirt, a black fingerless glove on the right hand, black elbow pads, black wrist bands, sunglasses, and black leather boots. Diesel is visibly different from the characters previously portrayed by Nash at WCW.

Diesel was added to Plaintiff's story lines and appeared in television broadcasts, commercial videotapes, magazines, and became the subject of merchandise. Like Razor Ramon, Diesel also became widely recognized and popular, winning the WWF Heavyweight Championship in 1995. . . .

In 1996, enticed by WCW's promise of lucrative, guaranteed contracts, Hall and Nash contracted to wrestle with WCW. [Hall and Nash subsequently appeared on WCW broadcasts, although defendants did not refer to them by any name.] . . .

In Counts I and II of the Amended Complaint, Plaintiff alleges copyright infringement of the characters Razor Ramon and Diesel. Defendants move to dismiss Counts I and II as they pertain to Plaintiff's Diesel character on the basis that Plaintiff failed to plead sufficient character development to establish a copyrightable character.

. . . The owner of a copyright in various works embodying a character can acquire copyright protection for the character itself.

A plaintiff, however, must still demonstrate that the character was "distinctively delineated in the plaintiff's work, and such delineation was copied in the defendant's work." 1 Melville B. Nimmer, *Nimmer on Copyright* §2.12, at 2-172.34 (1996).<sup>1</sup> The protection is limited to the character as defined by performances in the copyrighted works. "[O]nly a uniquely developed character with some degree of novelty is copyrightable." *Jones v. CBS, Inc.*, 733 F. Supp. 748, 753 (S.D.N.Y. 1990). "[T]he less developed the characters, the less they can be copyrighted. . . ." *Williams [v. Crichton]*, 84 F.3d [581] at 589, [(2d Cir. 1996)] (citation omitted). *Accord: Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980), *cert. denied*, 449 U.S. 841 . . . (1980) (copyright law does not protect "'characters . . . which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.'" (citations omitted).

Plaintiff does not have a registered copyright in the character Diesel. Plaintiff has obtained copyright registration in numerous broadcasts, videos, and magazines in which its Diesel character has appeared. Defendants contend, however, that Plaintiff has failed to plead that the character of Diesel exhibits the uniqueness or distinctiveness necessary to obtain copyright protection. Plaintiff sufficiently alleges that the Diesel character is a developed and distinctive character worthy of copyright protection. Plaintiff described in detail Diesel's trade dress, costumes, hair color, and style, all of which were unique among wrestlers and recognizable by wrestling fans. Plaintiff devoted almost three pages of the Amended Complaint to explaining how the Diesel character developed into a fully independent character and ultimately became integral to the story lines of many televised events. Construing all allegations in favor of plaintiff, it cannot be said that there is no set of facts upon which relief could be granted to Plaintiff. Defendants' motion to dismiss Counts I and II is denied. . . .

1. Although the language in *Warner Bros.* suggests that if a plaintiff owns a valid copyright in a work the plaintiff automatically obtains a copyright in the characters, all characters embodied in a copyrighted work are not necessarily protected. Instead, the character still must be sufficiently developed in the work to be worthy of copyright protection. To hold otherwise would provide copyright protection to any insubstantial and undeveloped character.

## NOTES AND QUESTIONS

1. Under what §102 category of work did these courts find the plaintiffs' characters copyrightable? Were they literary works? Pictorial or graphic works? Audiovisual works? Does it matter?

2. Determining which characters are independently copyrightable is difficult. When does a character transform itself from a mere idea into expression? As is often the case, the two extremes are relatively easy to identify. Minor characters or stock characters, those necessary to tell a story of a certain time period or genre, are not protectible. On the other hand, copyright law protects highly delineated characters that are central to a story or, in the words of the *Sam Spade* case, characters that constitute the "story being told." The middle ground is where most of the disputes over copyrightability occur. Is there a difference between the two tests described and applied by the court in the James Bond case? What does the *Titan Sports* court mean when it states that "the less developed the characters, the less they can be copyrighted"?

3. The *Sam Spade* case, in which the Second Circuit articulated the "story being told" test, involved a claim by Warner Brothers against Dashiell Hammett, the author of the mystery-detective story entitled "The Maltese Falcon." *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F.2d 945, 949-50 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955). Hammett had previously assigned the copyright in the work to Warner Brothers, which made the famous movie of the same name starring Humphrey Bogart and Mary Astor. When Hammett used the characters from "The Maltese Falcon" in subsequent works and authorized others to do so, Warner Brothers sued for infringement. The court noted that "[i]f Congress had intended that the sale of the right to publish a copyrighted story would foreclose the author's use of its characters in subsequent works for the life of the copyright, it would seem Congress would have made specific provision therefor." *Id.* at 950. It was in this context that the court employed the requirement that the characters constitute the "story being told" in order to be a part of the copyright that was conveyed. Should the factual context influence which standard a court employs?

4. As described in the James Bond case, it appears that there may be a different standard for copyrightability when the character is visually depicted versus described in a literary work. Is a picture really worth a thousand words? There may even be a difference in the standard applied depending on the nature of the visual depiction. Graphically depicted characters, those that are drawn, garner a kind of graphic work protection. Visually depicted characters in movies employing actors to portray the characters may have more difficulty in obtaining protection.

Additionally, a character in a movie takes on the physical attributes of the actor portraying the character. Are those attributes then part of the character? *Titan Sports* exemplifies a situation in which a character, portrayed by a single actor, appears to have sufficient originality. In that case, the issue of copyright ownership was handled through a contract providing that the character was a work for hire (permissible under the second prong of the definition of works made for hire in §101 as a contribution to a motion picture or audiovisual work). In the absence of a contract, who is the "author" of such a character? In addition to copyright, there may be issues concerning the actor's rights of publicity. We consider these issues below.

5. Is it possible to infringe a copyrighted character without copying the general context in which the character is usually found? For example, if a James Bond-like character were hosting a cooking show, with no bad guys jumping out of helicopters to steal the filet mignon, would that still constitute infringement of the James Bond character? Can we say that setting and other accompanying characters, even ones so undelineated as to be just "bad guys," are some of the attributes that contribute to the copyrightability of literary characters? How about graphically

depicted characters? If Mickey Mouse is speeding around in a spaceship with three unsightly one-eyed slimy alien creatures, will we still recognize Mickey and find Disney's copyright infringed? Perhaps graphically depicted characters do not need the same level of, or for that matter, any contextual support for the copyrights to be infringed.

6. In the late 1990s and early 2000s online real-time interactive role-playing games such as Everquest and World of Warcraft became increasingly popular. In these games, individuals begin their life in a fantasy world by selecting a character type, for example, a sorcerer or a warrior, and as they play, their character takes on new attributes based on experiences and other actions in the fantasy world. Entrepreneurial gamers use online auction sites such as eBay to sell their characters, some of which they may have spent hundreds of hours developing. Sony Online Entertainment, the copyright owner of the Everquest game, asked eBay to halt those sales, asserting that the sale of the characters violated its copyrights, among other rights. eBay complied with the request. See Monty Phan, *Defining Their Own Reality*, Newsday, Feb. 13, 2001, at C08. Do you think Sony's copyright claim was a strong one? Why would eBay agree to halt those sales?