

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-02254-CMA

WARREN MILLER ENTERTAINMENT, INC.,
a Delaware corporation

Plaintiff,

v.

LEVEL 1 PRODUCTIONS, INC.,
a Colorado limited liability company

Defendant,

and

WARREN MILLER COMPANY, LLC,
a Washington limited liability company, and
WARREN MILLER, individually,
a Washington resident,

Third Party Intervenors.

**THIRD PARTY INTERVENORS' OPPOSITION TO MOTION
FOR PRELIMINARY INJUNCTION**

Plaintiff Warren Miller Entertainment, Inc. ("WME") seeks to mislead this Court in order to obtain improper injunctive relief against Defendant Level 1 Productions, Inc. ("Level 1"). This is not a case about trademark infringement by Level 1. Rather, this is a case about legendary ski film icon Warren Miller's right to fairly use his name, voice and likeness as he chooses, including as a continuing contributor in ski films such as Level 1's *Refresh*. This is also a dispute governed not by the trademark laws of the United States or the laws of the State of Colorado, but

by the agreements between Warren Miller and WME, which include mandatory arbitration provisions, and which must be interpreted and enforced according to the laws of the State of California. These agreements make clear that since termination of the noncompete agreement between Warren Miller and WME in 1999, Warren Miller has been free to use his rights of publicity as he sees fit. And that is exactly what Warren Miller did in authorizing Level 1 to use his name, voice and likeness in the *Refresh* ski film.

I. FACTUAL BACKGROUND

For more than 60 years Warren Miller has been a ski film icon. His skiing and snowboarding films are renowned for their breathtaking photography, understated narrative, and extraordinary athletic accomplishments. Warren Miller has become world famous and a prominent figure throughout the industry and consuming public. His name, voice and likeness have become immediately recognizable to several generations of winter athletes. From 1948 until the late 1980s Warren Miller developed and managed his business franchise through Warren Miller Productions, Inc. and Warren Miller Enterprises, Inc. (Declaration of Warren Miller in Support of Third Party Intervenors' Opposition to Motion for Preliminary Injunction ("Miller Dec.") Exhibit 1 hereto, ¶ 3.)

By purchase agreements dated November 30, 1988, Warren Miller sold the rights to the business names and trademarks owned by his two companies to WME's predecessor in interest. (Declaration of Richard Alaniz in Support of Third Party Intervenors' Opposition to Motion for Preliminary Injunction ("Alaniz Dec.") Exhibit 2 hereto, ¶ 2, Ex. A & B.) Due to his personal fame and influence, it was necessary that Warren Miller himself stay with the enterprise and continue to create his unique works, and that while so involved he not engage in competition

with WME. This was accomplished through three independent contractor agreements between Warren Miller and WME, each of which included a noncompete provision.

The original January 1, 1989 noncompete set forth the restrictions on Warren Miller's use of his name, voice and likeness during term of the agreement, for a five year period, or until December 31, 1994:

6. NON-COMPETITION. MILLER is a signatory on behalf of WME and on behalf of WMP to those certain Agreements of Purchase and Sale of Assets in respect to each of said corporations, dated November 30, 1988. This Agreement is executed by MILLER as a condition to Closing in respect to the acquisition of assets in respect to both WME and WMP and will become effective upon the closing of the purchase of assets as contemplated in respect to said Agreements of Purchase and Sale of Assets dated November 30, 1988. Subject to the closing of the Agreement with WME, concurrent with the closing of the Purchase and Sale Agreement with WMP, MILLER covenants that he will not, directly or indirectly, through any firm, corporation or business, ***at any time the term of this Agreement expiring December 31, 1994***, engage in any activity related to individual enthusiast sports in the State of California, or in any other state or possession of the United States of America, or in Canada, the United Kingdom, Europe, Asia, Australia, New Zealand, or in any other part of the world which activity involves the use of any media including film, cassettes, compact discs, or other audio-visual media of any gauge or type now known or yet to be invented worldwide or elsewhere and any other media, such as magazines, books, newspapers or other publications relating to individual enthusiast sports, such as, without limitation, snow skiing, water skiing, auto racing, motorcycling, bike riding, sailing, parasailing, parachuting, windsurfing, surfing, fishing, off-road racing, hiking, jogging , swimming, sports fishing, backpacking, gliding, hang-gliding, and all other types of individual enthusiast sports and activities of whatsoever kind and nature. . . . Furthermore, except as heretofore permitted, ***during the term of this Agreement***, MILLER shall, subject to the provisions of Paragraph 7 below, exclusively perform any and all artistic and creative services and any media narrations of whatsoever kind or nature solely for INTERNATIONAL unless INTERNATIONAL gives its prior written consent to MILLER'S performing other services for other entities. . . .

(Alaniz Dec., Ex. C, ¶ 6; emphasis added.) The independent contractor relationship and certain noncompete restrictions between Warren Miller and WME were continued another five years, or until December 31, 1999, in a March 21, 1995 extension agreement:

3. Covenant Not To Compete

For so long as the "Independent Contractor Agreement" is in effect Warren Miller will not engage in any outside business activities that compete with WME or its sponsors. Warren Miller agrees to submit any proposed agreements that could be deemed to be a conflict with WME for its written approval. If the parties can not agree then the matter will be arbitrated by Brigante and Pittluck as provided below.

(Alaniz Dec., Ex. D, ¶ 3.)

The independent contractor relationship was renegotiated and a variation noncompete restriction agreed to between Warren Miller and WME in an April 6, 1998 extension agreement. This agreement expressly terminated and superseded the March 21, 1995 extension agreement, and was for a two-year term commencing January 1, 1998 and ending December 31, 1999. It contained a noncompete provision specifically limited to the term of this extension agreement, as follows:

3. Covenant Not To Compete

For so long as this Agreement is in effect Warren Miller will not engage in any outside business activities that compete with WME or its sponsors.

(Alaniz Dec., Ex. E, ¶ 3.) Noteworthy in the April 6, 1998 agreement was the language expressly recognizing Warren Miller's personal rights of publicity other than as specifically limited in the agreement and once the term of the agreement expired:

The intention of this Agreement is also to clarify and agree that Warren A. Miller is free to use his own name however he desires so long as he does not infringe upon the exclusive rights described in Paragraph 2, and the covenant not to compete described in Paragraph 3 below.

(Alaniz Dec., Ex. E, p.1.)

The independent contractor relationship between Warren Miller and WME expired December 31, 1999, and all noncompete provisions terminated. Since that time Warren Miller has been free to use his name, voice and likeness—his rights of publicity—as he sees fit.

Accordingly, Warren Miller entered into an agreement with Level 1 wherein he contributed to the *Refresh* ski film and gave permission to Level 1 to reference his participation in the film in Level 1's marketing of the production. (Alaniz Dec., Ex. F.) The Refresh film was the result of substantial creative development and production, and is the subject of various contractual distribution obligations. The *Refresh* film was heavily promoted in the industry and premiered at the Bluebird Theater in Denver, Colorado September 11, 2009. It was subsequently shown at a screening in Montreal, Canada on September 18, 2009 and is scheduled to be shown in various locations around the country.

II. ARGUMENT

A. WME Is Unable To Meet The High Threshold For The Extraordinary Remedy Of Injunctive Relief

WME faces an insurmountable task in meeting the requirement for the relief it seeks. A preliminary injunction is an extraordinary remedy and should only be granted when the moving party clearly and unequivocally establishes its necessity. *See United States ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888-89 (10th Cir. 1989). In the Tenth Circuit, a party seeking a preliminary injunction must establish four prerequisites:

1. The moving party will suffer irreparable injury unless the injunction issues;
2. A substantial likelihood of success on the merits;
3. The threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and
4. The injunction, if issued, would not be adverse to the public interest.

Schrier v. Univ. of Colo., 427 F.3d 1253, 1258 (10th Cir. 2005); *Lundgrin v. Claytor*,

619 F.2d 61, 63 (10th Cir. 1980); *Soskin v. Reinerston*, 260 F. Supp. 2d 1055, 1057 (D. Colo. 2003).

1. WME is Unable to Demonstrate Immediate Irreparable Harm

WME cites a string of cases, both published and unpublished, from various jurisdictions around the country for the proposition that irreparable harm may be presumed when improper trademark use occurs and a likelihood of confusion is established. But each of these cases necessarily turns on the facts particular the situation. And none of these cases deal directly, or even indirectly, with a person's freedom to use his own name and related rights of publicity.

Moreover, WME's reliance on the proposition that irreparable harm may be presumed is misplaced. In the context of injunctive relief, the moving party must demonstrate clearly, *with specific factual allegations*, that immediate and irreparable injury will result absent an injunction. WME's vague insinuations that it may suffer loss of goodwill are insufficient. WME refers to the crowd chanting "Warren, Warren" in anticipation of the screening for the *Refresh* film in Montreal, Canada. But this has absolutely nothing to do with WME's trademark rights. Rather, assuming this chanting even occurred, it has everything to do with Warren Miller's anticipated appearance in the film based on Warren Miller's personal reputation and fame—the rights of publicity he is free to use. WME utterly fails to provide a single specific factual allegations, let alone evidence of a tangible irreparable injury, sufficient to justify extraordinary injunctive relief.

Perhaps most significant is the fact that WME has not treated this situation as if there were any irreparable harm concern. By its very nature preliminary injunctive relief is extraordinary and justified only in limited circumstances where it is not possible to have an opportunity for full briefing and hearing on the issues. *GTE Corp. v. Williams*, 731 F.2d 676

(10th Cir. 1984) (delay in seeking relief undercuts any presumption that infringement alone has caused irreparable harm *pendente lite*; such delay may justify denial of a preliminary injunction for trademark infringement). That is certainly not the case here. As noted by the Court in its September 22, 2009 Opinion and Order Denying Motion for Temporary Restraining Order, pp. 5-6, WME has known about Level 1's Refresh film since at least as early as its September 11, 2009 premier in Denver, Colorado, yet waited ten days to file and serve its motion for temporary restraining order and preliminary injunctive relief.

2. WME is Unlikely to Prevail on the Merits

WME gives little attention to this key requirement for good reason. Warren Miller's use of his own name, voice and likeness: (a) does not constitute trademark use that creates the possibility of a likelihood of confusion; (b) even if creating a likelihood of confusion, qualifies as fair use necessary to identify Warren Miller and his contributions; and (c) is not precluded by agreement. Moreover, WME's knowledge of Warren Miller's continuous use of his name, voice and likeness on independent projects for nearly a decade undercuts WME's claims of irreparable harm and request for urgent injunctive relief—to the extent that laches does not completely preclude any trademark infringement claims whatsoever.

a. Warren Miller's uses of his name in a "non-trademark" manner

The preeminent question for establishing trademark infringement liability is whether a defendant's use of the disputed mark is likely to cause confusion amount consumers regarding the origin of goods or services offered by the parties. But the likelihood of confusion analysis involves a preliminary question: whether the defendant is using the challenged mark in a way that identifies the source of their goods. *Interactive Prods. Corp. v. A2Z Mobile Office Solutions, Inc.*, 326 F.3d 687, 694, 695 (6th Cir. 2003); *Hensley Mfg. v. ProPride, Inc.*, 2009 U.S. App.

LEXIS 19797 (6th Cir. 2009); *Madrigal Audio Laboratories v. Cello, Ltd.*, 799 F.2d 814, 816 (2d Cir. 1986).

Both the Second and Sixth Circuits have addressed this precise issue in the context involving an individual's use of his personal name in dismissing claims nearly identical to those asserted by WME. In *Madrigal Audio Laboratories v. Cello, Ltd.*, 799 F.2d 814, 816 (2d Cir. 1986), the defendant, Mark Levinson, granted Mark Levinson Audio Systems, Inc., ("MLAS") the right to use MARK LEVINSON as a trade name. Levinson eventually left MLAS and founded another company, Cello, Ltd. ("Cello"). *Id.* at 817. Cello issued a promotional brochure entitled "Cello by Mark Levinson," which contained a one-page "Note from Mark Levinson" and several photographs of Levinson. *Id.* *Madrigal Audio Laboratories, Inc.* ("Madrigal") acquired the trademark and trade name rights of MLAS in bankruptcy and subsequently sued Levinson and Cello for trademark and trade name infringement. *Id.* The Second Circuit held that "[w]hen an individual sells no more than the right to use his name as a trade name or trademark," he is not precluded "from taking advantage of his individual reputation (as opposed to the reputation of the company which bore his personal name as a trade name) by establishing a company which competes against the purchaser of the trade name" or "from advertising, in a not overly intrusive manner, that he is affiliated with a new company." *Id.* at 823. He is only prohibited from "using his name in such a way as to mislead the public into believing that those products are produced by the company which purchased the trade name." *Id.* Because the use of Mark Levinson's name in Cello's materials was not likely to confuse consumers regarding the origin of Cello's products, the Second Circuit reversed the district court's order barring Levinson and Cello from advertising Levinson's relationship to Cello. *Id.* at 824.

More recently in *Hensley Mfg. v. ProPride, Inc.*, 2009 U.S. App. LEXIS 19797 (6th Cir. 2009), the Sixth Circuit affirmed denial of plaintiff Hensley Mfg.'s preliminary injunction motion and dismissal of its claims against defendants ProPride and Jim Hensley applying essentially the same logic. Hensley Mfg. manufactured and sold trailer towing products, including a trailer hitch invented and designed by Hensley. Hensley Mfg. purchased the trailer hitch business from Hensley and registered trademarks for HENSLEY and HENSLEY ARROW and Design for trailer towing products. Hensley subsequently split from Hensley Mfg., designed a new trailer hitch, and licensed it to competitor ProPride. ProPride subsequently marketed the new trailer hitch under a completely different brand ("Pivot Point Projection Hitch" or "3P Hitch"), but made repeated reference in marketing literature to "Jim Hensley" by name. The Court explained its ruling as follows:

Ultimately, the exhibits attached to the complaint describe Jim Hensley's association with ProPride, his design of the ProPride 3P Hitch, and his former association with Hensley Manufacturing. They do not identify Hensley Manufacturing, or even "Hensley," as the source of ProPride's products or suggest any current association between Hensley Manufacturing and Jim Hensley or ProPride. In fact, the advertisements make clear that Jim Hensley is no longer associated with Hensley Manufacturing. Moreover, they always refer to "Jim Hensley" and never simply use the word "Hensley" in connection with the 3P Hitch. For all of these reasons, we conclude that they do not create a likelihood of consumer confusion regarding the source of ProPride's products.

Id., 2009 U.S. App. LEXIS 19797, *16-17.

In a similar fashion, there is no likelihood of confusion in Warren Miller's use of this own name, voice and likeness in the Refresh film *because such use is properly attributed to Warren Miller*. As this Court recognized in its September 22, 2009 Opinion and Order, there is no allegation that Level 1 (or Warren Miller) is using WARREN MILLER FILMS, WARREN MILLER ENTERTAINMENT or in any way other than as a means of identifying Warren Miller, the legendary ski icon. The right to identify one's self is sacred—a given person's name, likeness,

voice, etc. even if protectable as a trademark does not mean that they cease to identify the persona of that person; rather, they continue to identify the persona of that person and also continue to be a protectable right of publicity. *See, e.g., McCarthy on Trademarks and Unfair Competition* § 28:11 (4th ed. 2009); *Brennan's, Inc. v. Brennan's Restaurant, LLC*, 360 F.3d 125, 131-32 (2d Cir. 2004) ("One's surname given at birth creates associations attached to that name which identify the individual. As a consequence, courts generally are hesitant to afford strong protection to proper names. . . . To prevent all use of [a man's personal name] is to take away his identity; without it he cannot make known who he is to those who may wish to deal with him."); *Paul Frank Industries, Inc. v. Sunich*, 502 F.Supp.2d 1094, 1098 (C.D. Cal. 2007) (courts are reluctant to forbid a person from using his or her own name even if the name has attained trademark status. This is particularly true where the individual "has spent his entire mature life working in the relevant business, and as a result possesses extraordinary experience, skill and a desire to work in his field" or when an individual has a "well-known reputation" and "preventing that individual from using his name in any commercial or business context deprives him of the ability to communicate useful information to the consuming public.").

Where, as here, there is no evidence that Level 1 (or Warren Miller) is using the Warren Miller name in a trademark way to indicate the source of Level 1's products or to suggest any current association between Level 1 and WME, there is no likelihood of confusion.

b. The doctrine of fair use is an absolute defense

Even if WME could make a showing of likelihood of confusion, the affirmative defense of fair use applies to bar the trademark infringement claims. A defendant may raise the affirmative defense of fair use by establishing that:

the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, of the party's individual name in his own business, or of

the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin.

15 U.S.C. § 1115(b)(4); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118-22 (2004). Under the fair use doctrine, "the holder of a trademark cannot prevent others from using the word that forms the trademark in its primary or descriptive sense." *Herman Miller, Inc. v. Palazzetti Imports and Exports, Inc.*, 270 F.3d 298, 319 (6th Cir. 2001).

Rather:

[t]he only right of exclusion that trademark law creates in a descriptive word is in the secondary, new, 'trademark' meaning of the word that plaintiff has created. The original, descriptive primary meaning is always available for use by others to describe their goods, in the interest of free competition.

Id. (quoting J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 11:45 (4th ed. 1996)); *see also Car-Freshner Corp. v. S.C. Johnson & Son, Inc.*, 70 F.3d 267, 270 (2d Cir. 1995) ("[F]air use permits others to use a protected mark to describe aspects of their own goods, provided the use is in good faith and not as a mark."). The fair use defense contemplates and tolerates "some possibility of consumer confusion." *KP Permanent*, 543 U.S. at 121.

Warren Miller (and Level 1) has used his name, voice and likeness in good faith to identify himself as the person appearing in the *Refresh* ski film. Warren Miller appeared as himself for approximately three minutes out of a fifty-eight minute film. The film's mention of Warren Miller is descriptive of his name and role as a commentator in the film for the sole purpose of attribution. In addition to being contractually unrestricted from use of his own rights of publicity (see below), even if Warren Miller's contribution in the *Refresh* film triggered trademark issues, it qualifies as fair use exempt from Lanham Act liability. *Accord Hensley Mfg.*, 2009 U.S. App. LEXIS 19797 at *19-21.

c. **Warren Miller's use is not precluded by agreement**

There is no dispute that Warren Miller used his name, voice and likeness as a contributor on the *Refresh* film. But this is not a traditional infringement case where the dispute is focused on trademark ownership rights. Rather, this dispute is centered on the independent contractor agreements—now expired—between Warren Miller and WME that control the terms of the noncompete provisions. By the specific terms of the agreements between Warren Miller and WME, since at least as early as January 1, 2000, Warren Miller has been free to use his rights of publicity—his name, voice and likeness—in whatever manner he chooses, including as a contributor to such ski films as the *Refresh* production by Level 1 in direct competition with WME.

WME continues to own rights to use the name, personal endorsement, voice and likeness of Warren Miller, but absent continued contractual arrangements between Warren Miller and WME, these rights are nonexclusive. As made clear in the April 6, 1998 extension agreement, WME's ownership rights were limited "*only* when used with its *existing* business, and the fruits of its related efforts." (Alaniz Dec., Ex. E, ¶ 2; emphasis added.) In other words, while WME is free to use Warren Miller's name, personal endorsement, voice and likeness in perpetuity and exclusively as it appeared in all productions existing through the termination of the April 6, 1998 extension agreement, it has no rights to control Warren Miller's rights of publicity on new projects such as the *Refresh* film.

d. **Laches bars WME from any relief**

Additionally, to the extent that WME has any trademark claims based on use of the Warren Miller name, they are barred by the doctrines of laches. Laches has been described as "an equitable time limitation on a party's right to bring suit." *Prince Lionheart, Inc. v. Halo*

Innovations, Inc., 2008 U.S. Dist. LEXIS 25147 (D. Colo. 2008) (citing *Boone v. Mech. Specialties Co.*, 609 F.2d 956, 958 (9th Cir. 1979)). Application of the doctrine requires "two elements: (1) inexcusable delay in instituting suit; and (2) resulting prejudice to defendant from such delay." *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 523 (10th Cir. 1987); accord *Creative Gifts, Inc. v. UFO*, 235 F.3d 540, 548 (10th Cir. 2000).

Here, WME has known about Warren Miller's use of his name for various business enterprises since at least 2001. (Miller Dec., ¶ 4.) Those business enterprises include Warren Miller Company, LLC formed in 2001 and the Warren Miller Freedom Foundation formed in 2006, both of which WME has known about well before the instant case and has acquiesced to their existence. Moreover, Warren Miller has an official website registered and maintained at *www.warrenmiller.net* since 1998 where apparel, ski movies and other memorabilia have been sold. (Miller Dec., ¶¶ 5 & 6.) Notably, some of the ski videos sold at *www.warrenmiller.net* were provided to the Warren Miller Company by WME's predecessors in interest, Time Inc. (Miller Dec., ¶ 7.) Additionally, Warren Miller has lent his name, voice and/or likeness to a number of films since at least as early as 2001, including ski-related films, without objection by WME. (Miller Dec., ¶¶ 9-11.)

What little objection there has been to Warren Miller's use of his name has been unsustainable, and only demonstrates WME's acquiescence. In September 2006, WME's predecessor in interest, Time Inc., sent a letter specifically objecting to Warren Miller's use of his name associated with the Warren Miller Freedom Foundation. (Alaniz Dec., ¶ 7.) Warren Miller responded defending his right to continued use of his name, voice and likeness. (*Id.*) Nothing more was heard on the matter (*Id.*), and Warren Miller acted in reliance on his continued belief that with the termination of the independent contractor agreement, he was free to use his

name, voice and likeness as he pleased. (Miller Dec., ¶ 13.) WME's acquiescence to Warren Miller's use of his name, voice and/or likeness for at least a decade has resulted in their inexcusable delay in instituting suit and any restraint would result in prejudice to defendant Warren Miller as well as authorized third parties such as Level 1.

Accordingly, WME is unlikely to prevail on the merits of trademark infringement. On this basis alone, as well as in combination with WME's failure to meet the other factors for injunction, WME's motion should be denied. *E.g., Fed'n Internationale de Football Ass'n v. Nike, Inc.*, 285 F.Supp.2d 64 (D. Col. 2003) (trademark owner's motion for temporary restraining order was denied where owner failed to show extent or dimension of public recognition of its trademark and whether it had sufficient fame under 15 USCS § 1125(c)).

3. Balance of Hardships Caused by an Injunction Weighs Strongly Against WME

WME is completely incorrect in its balance of hardships analysis. Warren Miller—and Level 1 pursuant to the parties' agreement—has the right to use Warren Miller's name, voice and likeness in the *Refresh* production. As confirmed by the terms of agreements between Warren Miller and WME, WME has absolutely no right to prevent Warren Miller from contributing to the *Refresh* production, or to prevent Level 1 from honest marketing of the film by referring to Warren Miller's participation. Accordingly, WME has no rights that are impacted by the *Refresh* film or related marketing and thus can suffer no hardship.

In contrast, Level 1, as the producer and distributor of the *Refresh* film, and Warren Miller, as a contributor, stand to suffer significant injury and hardship if it is precluded from scheduled distribution of the film. Level 1 (and Warren Miller) has made significant investment in the film in its creation, production and distribution. There are existing contractual obligations to meet regarding distribution of the film and there would be substantial hardship and expense

involved in altering and redistributing the film. Even if WME had a recognizable right to prevent Warren Miller's contribution to the film, and could establish a likelihood of confusion as to the source or sponsorship of the film—which is cannot—any potential loss of licensing fees or diminishment of speculative goodwill pales in comparison to Level 1's and Warren Miller's tangible losses. *See, e.g., Yoko Ono Lennon v Premise Media Corp., L.P.*, 556 F.Supp.2d 310 (S.D.N.Y. 2008) (holders of copyrighted song, which was used without their permission in movie, were not entitled to Fed. R. Civ. P. 65 preliminary injunction against distribution of movie because they failed to show that balance of hardships favored them because movie producers faced expenses from altering and redistributing film, while holders' hardship from loss of licensing fees and fact that lack of injunction would engender perception that it was permissible to use copyrighted works without permission were intangible losses, which failed in face of producers' fair use defense to copyright infringement).

4. An Injunction Would Have a Deleterious Effect on the Public Interest

Once again, WME's premise is wholly incorrect. There is no issue whatsoever of likelihood of confusion or trademark infringement. The relevant public knows full well that it is Warren Miller's name, voice and likeness in the *Refresh* film. The issue is whether WME has the right to prevent Warren Miller from utilizing the right of publicity associated with his famous ski icon status to contribute to and participate in Level 1's *Refresh* film through use of his name, voice and likeness. To the extent any such right exists, they derive from the agreements between Warren Miller and WME. Because all such noncompetition provisions have expired, WME has no such right.

As WME readily admits, Warren Miller is intimately associated with the development of snow sports, and his contributions remain significant in advancing the sport. Accordingly, the

public interest and First Amendment rights strongly favor Warren Miller and Level 1's freedom to use Warren Miller's name, voice and likeness in the ski film, and the public would be severely deprived an important topic of discussion in the sport if WME's injunction were successful. *E.g., Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536, 543-46 (1993) (First Amendment a complete defense to a famous surfer's statutory and common law publicity rights claim against the producer of a surfing documentary, because surfing was a matter of public interest and public affairs and the plaintiff's contribution to the development of the sport was "the point of the program."). Indeed, and conversely, the public has a right to avoid the confusion that would ensue if Warren Miller and authorized agents are not allowed to use his name to identify him to the public!

B. The Agreements Between Warren Miller And WME Control Any Dispute, California Law Applies, And The Arbitration Clause Is Triggered

To the extent there exists any legitimate dispute involving Warren Miller's use of his name, voice and likeness, it is governed by the independent contractor agreements between Warren Miller and WME. These agreements must be interpreted and enforced according to the laws of the State of California. (See Alaniz, Dec., Exs. A-E.) Both the purchase agreements and original independent contractor agreements specify California as the controlling law. (Id., Ex. A, ¶ 24; Ex. B, ¶ 27; Ex. C, ¶ 14.) This term was not modified, and was therefore continued in the two later independent contractor agreements. (Id., Exs. D-E.) The Warren Miller Productions, Inc. purchase agreement and each of the independent contractor agreements likewise included an arbitration clause. The two independent contractor extension agreements included a preliminary "meet and confer" requirement between Rich Brigante and Harvey Pittluck that was binding on the parties if resolution was reached, following by finding arbitration. (Id., Ex. A, ¶ 22; Ex. C, ¶ 12; Ex. D, p. 2; Ex. E, p. 2.)

Accordingly, the requirements of the agreements between Warren Miller and WME must be interpreted according to California law. And to the extent any legitimate dispute is raised, in light of the mandatory alternative dispute resolution provisions, resolution efforts must fulfill the "meet and confer" and arbitration requirements.

III. CONCLUSION

WME has no right to prevent Warren Miller from using his fame and status to identify himself and to participate in Level 1's *Refresh* ski film. There is no likelihood of confusion because there is no trademark use of Warren Miller's name associated with the *Refresh* film. To the extent that any trademark rights are implicated, fair use provides a complete defense. Further, any right to preclude Warren Miller's use of his own name, voice and likeness expired with the independent contractor agreements between Warren Miller and WME. To the extent a legitimate dispute pertaining to Warren Miller's right to fairly use his name, voice and likeness exists, it is subject to agreements governed by California law and mandatory "meet and confer" and arbitration provisions.

WME has failed to make the required showing necessary to justify the extraordinary remedy of a preliminary injunction and, accordingly, its motion should be denied.

DATED: September 25, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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