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Real People in Video Games: When Does the 1st Amendment Trump the Right of Publicity?

by Sean F. Kane

As a general rule, the name, image or likeness of a living person—not necessarily just a celebrity—cannot be used for commercial purpose without his/her written consent. Some jurisdictions have extended the coverage to provide additional protection to such elements as signature, voice, mannerisms or even expressions. Unauthorized use of an individual's name, likeness or image may violate his/her right of publicity, which is currently recognized by statute, common law, or a combination of both in 31 states.[1] *However, as each state's law evolved separately, there are often significant differences in the coverage provided. Specifically, New York and California, the key states for rights of publicity due to their many celebrity residents, protect different rights and are diametrically opposed on whether these rights extend beyond death.*

In the past few years we have seen a paradigm shift in the technology used to create video games. The current video game iterations allow for nearly photo-realistic imagery and, in some cases, use this to allegedly depict real people in the games. However, not all of these video games have entered into licensing arrangements with the parties allegedly depicted. From this we have witnessed the commencement of a new body of case law involving right of publicity claims against video game makers. The video game companies have countered the claims by alleging, among other things, that video games are creative works and protected by the First Amendment. The courts have generally been supportive of the video game industry's argument, culminating in the recent Supreme Court decision in *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729 (2011).

The First Amendment

To judge a video game right of publicity allegation against First Amendment protection it is necessary to analyze the type of use. The First Amendment may allow the use of a name or likeness when it is not

[1] The following states have not yet considered the right of publicity: Alaska; Arkansas; Colorado; Delaware, Idaho; Kansas; Maine; Maryland; Mississippi; Montana; New Mexico; North Carolina; North Dakota; Oregon; South Carolina; South Dakota; Vermont and Wyoming.

intended solely to attract attention "to a work that is not related to the identified person" or used for "appropriating an individual's commercial value as a model rather than as part of a news or other communicative use." Restatement (Third) of Unfair Competition §47, Cmt. c (1995). In order to balance whether the use at issue is merely a blatant attempt to capitalize on a likeness or name, in violation of the right of publicity, or a protected First Amendment use, the courts have used the *Rogers* test and the "transformative use" test.

In *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), the Second Circuit created a test which questioned (a) whether the product at issue is wholly unrelated to any underlying work incorporated therein; and (b) whether the use of the individual's name is merely a disguised commercial advertisement. This test sought to review whether use of a likeness in a product creates a misleading impression that the depiction demonstrated an endorsement of a product. The "transformative use" defense, as discussed in *Comedy III Prods. Inc. v. Gary Saderup Inc.*, 25 Cal. 4th 387, 407 (2001), hinges on a determination of whether the central use in the work at issue merely exploits the name or likeness of a party for monetary purposes or whether it contributes distinctive and expressive content. While this may seem complex, in reality it comes down to whether the product's main value is based on the creativity, skill, and reputation of the creator. If this can be demonstrated then the transformative elements should warrant First Amendment protection.

Protection for Video Games

Historically there has been some question as to whether video games are subject to First Amendment protections. Some of the early case law found that games like Pong did not contain sufficient creative elements to warrant First Amendment protection. As video games advanced and their narrative elements became more complex, the decisions in the case law likewise changed. Finally, this question was put to bed by the Supreme Court in *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729 (2011). In invalidating a California statute that prohibited the sale of violent video games to minors, the Supreme Court strongly held that video games qualify for First Amendment protection and that the "basic principles of freedom of speech…do not vary" with the creation of a new and different communication medium. Specifically, the Court stated that "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection."

While *Brown* specifically clarified the issue, it was not the only court to extend First Amendment protection to video games. In the *Dillinger, LLC v. Electronic Arts Inc.*, 2011 WL 2446296 (S.D. Ind. June 15, 2011) matter, the court reviewed the allegations that John Dillinger's publicity rights had been violated in a gangster-themed video game. In granting EA's motion to dismiss, the court opined that Dillinger could not take advantage of the right of publicity protections as he had died before they became effective and, additionally, EA's use of Dillinger's name was protected as use in a "literary work" under the First Amendment.

Transformative or Exploitive

While First Amendment protection for video games is now beyond dispute, to avoid liability there is still the question of whether a particular use of a individual's image in a video game is sufficiently transformative as balanced against merely exploitative in violation of the individual's right of publicity. However, while most cases have found video game uses transformative, there is a split in certain circuits.

The music industry has seen its fair share of video game right of publicity cases. One of those, *No Doubt v. Activision Inc.*, 192 Cal.App.4th 1018 (Cal. App. 2011), contained authorized and licensed characters that were literal recreations of the members of the band No Doubt. Ultimately, the band members felt that the

video game feature which allowed the No Doubt characters to perform the songs by other artists exceeded the scope of the license and violated their right of publicity. On appeal the court concluded that there was a likelihood that the No Doubt band members would succeed in their right of publicity claims and rejected a defense based on First Amendment protection. This decision was founded on the basis that Activision's literal recreations of the individuals were not sufficiently transformative. The court felt that the depicted characters were nothing more than the band members engaging in the same activity they are best known for. Therefore, the court opined that the creative elements included in the video game did not tip the scale in Activision's favor and the No Doubt band members should have the right to control and exploit their images. Others including Adam Levine, of Maroon 5 fame, have alleged similar claims which have yet to be decided by the court. The *No Doubt* decision was of particular interest in light of the previous ruling in *Kirby v. Sega of America Inc.*, 144 Cal.App.4th 47 (Cal. App. 2006). In the *Kirby* case Sega included a character with hairstyle, outfit, and catch phrases similar to those used by the lead singer of Deee-Lite. The court ultimately found that the inclusion of imaginative settings and unique character dance moves in the video game were sufficiently transformative and *Kirby's* right of publicity claim was barred by Sega's First Amendment protection.

The sports industry has also had its share of lawsuits. In *Brown v. Electronic Arts Inc.*, No. 09-1598 (C.D. Cal. Sept. 23, 2009), former football great Jim Brown filed a suit against EA based on unauthorized video game use of his image and player statistics. In granting EA's motion to dismiss the court opined that EA's use was protected by the First Amendment. Similarly, in *Hart v. Electronic Arts Inc.*, 2011 WL 4005350 (D.N.J. Sept. 9, 2011), EA was again alleged to have violated the right of publicity of a sports figure. The district court found that the game was sufficiently transformative and ruled that EA was entitled to First Amendment protection. However, in a similar dispute another district court opined that a former college athlete's unauthorized appearance in a video game was not sufficiently transformative to defeat his right of publicity claims. *Keller v. Electronic Arts Inc.*, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010). The court found that EA's use of Keller's image was not sufficiently transformative because the video game depicted characters basically identical to their human counterparts including allowing for upload and use of the actual football team rosters and players' names.

Conclusion

It would seem that while the question of whether First Amendment protection extends to video games as an art form has been definitely answered by the Supreme Court, there is still a question of when it trumps an individual's right of publicity. Given the relevant court rulings, it would be unadvisable for a video game developer/publisher to rely on First Amendment protection when it has merely depicted an individual engaging in the type of conduct and in the settings which the individual is best known for in the real world. However, while the cases have not identified where the bright line ultimately lies, it does seem that First Amendment will protect a more creative, imaginative and transformative use of an individual in a video game. Therefore, it would be wise to properly license any intended individual depictions or to design video games to include such fantastical storylines, elements and features to avoid any allegation that they merely usurp an individual's publicity right for monetary gain without any other transformative intent.

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