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## CASES OF INTEREST

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### IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

February 23, 2011

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No Doubt v. Activision Publishing, Inc.

**No Doubt v. Activision Publishing, Inc.**, California Court of Appeal, Second Appellate District, February 15, 2011

 [Click here for a copy of the full decision.](#)

- In rock band's right of publicity action, court finds videogame publisher's use of band members' likenesses to not have been transformative and affirms denial of anti-SLAPP motion.

Members of the rock band No Doubt sued a videogame publisher, alleging that the publisher's use of their likenesses exceeded the parties' licensing agreement, and thereby constituted a violation of their right of publicity under California law.

Defendant is the publisher of the videogame *Band Hero*, in which game players can assume control of avatars who play rock music. No Doubt members had agreed that the publisher could digitally develop avatars based on their likenesses, character traits and performing styles.

In the game, players could use the No Doubt avatars to play songs by both No Doubt and also other musical acts. Players could also manipulate the No Doubt characters by having the band's lead female singer sound like a man and a male singer sound like a woman. No Doubt sued, claiming that the publisher exceeded the licensing agreement by making a game in which No Doubt members could sing various songs (not just those by No Doubt) and have their voices manipulated.

Defendant filed a special motion to strike under California Code of Civil Procedure Section 425.16 (known as an anti-SLAPP motion), contending that the First Amendment protected its conduct, and that No Doubt could not demonstrate a probability of succeeding on its right of publicity claim. The trial court denied defendant's motion to strike, whereupon the defendant appealed to the Court of Appeal, which affirmed the trial court's decision.

Pursuant to its motion to strike, defendant first needed to show that its challenged activity is protected under the First Amendment. The court found that defendant could make such a showing, since videogames are generally protected by the First Amendment, and the use of celebrity likenesses is a matter of public interest.

With defendant establishing that its activity is protected by the First Amendment, the burden shifted to plaintiff to show that it could nonetheless sustain its right of publicity claim. Defendant had not argued that its licensing agreement with plaintiff permitted the uses to which plaintiff objected. Defendant argued only that the First Amendment provided a complete defense for its conduct, and specifically that it made a transformative use of the band members' likenesses.

The court rejected defendant's argument, finding that defendant's action was not transformative where it allowed players to use the realistic No Doubt avatars to play various rock songs, which is exactly what the actual band members do. Thus, the game sought to commercially exploit No Doubt's fame only, not create a new work separate and apart from the context in which the band is normally found.

The court also rejected defendant's motion to dismiss No Doubt's unfair competition claim, brought under California Business and Professions Code Section 17200. Plaintiff argued that game players' ability to use No Doubt avatars to play songs that the band would never play in real life was likely to deceive the public into thinking that No Doubt



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endorsed these songs. Borrowing from a line of Lanham Act federal trademark cases, defendant argued that plaintiff needed – and had failed – to show that defendant overtly misrepresented the public as to No Doubt's endorsement of certain songs. The court disagreed, saying that even if it were to borrow from federal trademark jurisprudence, the overt misrepresentation standard was reserved for works in which the public interest in free expression is strong. Such strong public interest did not exist here, where the No Doubt avatars were a faithful replication of the actual band members. The court declined to dismiss plaintiff's unfair competition claim, though it noted that plaintiff would need to show that defendant's use of the avatars was likely to deceive the public.

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