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CASES OF INTEREST

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IP/Entertainment Law Weekly Case Update For Motion Picture Studios And Television Networks

September 14, 2011

Table of Contents

- Hart v. Electronic Arts, Inc.

Hart v. Electronic Arts, Inc., USDC District of New Jersey, September 9, 2011

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- District court dismisses former college football player's right of publicity suit against videogame maker, finding defendant's use of athletes' likenesses and attributes entitled to protection under the First Amendment.

Plaintiff, a former quarterback for the Rutgers University football team, sued Electronic Arts (EA) on behalf of all similarly situated athletes, alleging that the videogame maker violated their publicity rights under New Jersey law. EA moved to dismiss or, in the alternative, for summary judgment. The court granted summary judgment in favor of EA, finding that its use of athletes' likenesses and attributes was entitled to First Amendment protection.

The videogame at issue was *NCAA Football*, which allows players to assume command of numerous college football teams, identifiable by their names, uniforms and logos – attributes EA licensed from the National Collegiate Athletic Association. The players on each team are not named, but their jersey numbers, positions, likenesses and attributes do correspond to actual players on the NCAA teams. In addition, the game's editing feature allows users to input the actual players' names and change player attributes including height, weight and playing abilities.

On a motion by EA, the court dismissed the First Amended Complaint in September 2010, finding that it failed to specify the player attributes that EA had allegedly misappropriated. Plaintiff filed a Second Amended Complaint specifying the attributes shared by Ryan Hart, a former Rutgers quarterback, and the videogame's virtual Rutgers quarterback – that both come from Florida, are 6 feet 2 inches tall, weigh about 200 pounds and have the same jersey number. EA conceded that the Second Amended Complaint stated a right of publicity claim under New Jersey law, but maintained that it should be dismissed because the First Amendment protected the company's use of player likenesses attributes in the game.

The court, citing the Supreme Court's recent decision in *Brown v. Entertainment Merchants Association*, said that videogames were entitled to the same First Amendment protection as newspapers and books. Finding little clarity on how to balance a person's right of publicity against another's First Amendment right



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to expression – with case law using at least eight difference balancing tests – the court settled on the application of two tests: the transformative use test, borrowed from copyright law, and the Second Circuit’s test enunciated in *Rogers v. Grimaldi* (1989), a Lanham Act false-endorsement case. The court concluded that EA’s use of the athletes’ likenesses and attributes were protected under both tests.

Under the transformative use test, the court contrasted EA’s use of football player likenesses and attributes with the videogame at issue in *No Doubt v. Activision* (Cal. App. 2011), which simply replicated members of the rock band No Doubt without alteration. In *NCAA Football*, by contrast, users can change the football players’ attributes and likenesses in numerous ways. For example, users can change players’ face shape, height, weight, athletic ability, playing accessories and physical abilities (e.g., speed).

Acknowledging that whether the game was transformative was a close call, since “the goal of the game is to capitalize upon the fame” of actual players such as Hart, the court found EA’s use to be sufficiently transformative since, in addition to the editing features, the game also places the college players into a unique virtual setting that includes sounds effects, music and commentary.

The court also found that EA’s use was protected under the *Rogers* test, which seeks to determine whether a creative work’s use of a person’s name, image or attributes is relevant to some aspect of the creative work, and whether consumers might mistakenly think, as a result of the use, that the person has endorsed the creative work. The court found that the use of Hart’s image and characteristics is highly relevant to the videogame, which is about college football, and that Hart did not produce any evidence indicating that users of the game would mistakenly think that he had endorsed it.

In so ruling, the court acknowledged that its analysis was in contrast to that in *Keller v. Electronic Arts, Inc.*, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010), in which the District Court for the Northern District of California held that *NCAA Football* was not sufficiently transformative. In addition to noting that *Keller* involved a motion to dismiss, rather than a motion for summary judgment, the court also stated that *Keller* failed to address that the players’ virtual image could be altered, and disagreed with *Keller’s* approach of focusing solely on the challenged image, as opposed to the work as a whole.

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