

Can the First Amendment Trump the Right of Publicity?

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POSTED IN CASE STUDIES, COPYRIGHT, FAMOUS MARKS, PROTECTION & ENFORCEMENT, UNITED STATES



Many states recognize a “right of publicity,” which prohibits the commercial use of an individual’s name, likeness, or identity without consent. When aspects of a well-known person’s identity are incorporated into an expressive work, however, what emerges is a tension between the individual’s right of publicity and the artist’s freedom of expression as protected by the First Amendment.

A recent New Jersey case involved Billy Mitchell, a former Donkey Kong world record holder with long black hair and a black beard, who sued Cartoon Network for allegedly misappropriating his likeness in episodes of the animated series *The Regular Show*. Cartoon Network did not dispute that its character — a disembodied floating head from outer space — was intended to evoke Mitchell. Instead, it argued that its use was “transformative” and, therefore, protected by the First Amendment.

The court determined that Cartoon Network's use of Mitchell's persona was transformative, emphasizing the significant corporeal differences between the human plaintiff and a giant floating head, as well as the obvious parody: Mitchell's traits were exaggerated to create a cartoonishly evil character.

The *Mitchell* case contrasts sharply with the recent Electronic Arts cases in the U.S. Courts of Appeals for the Third and Ninth Circuits, which concerned the use of avatars of real college football players in a college football video game.

Like *The Regular Show* program in *Mitchell*, the video game in the Electronic Arts cases contained expressive elements that were protected by the First Amendment.

Unlike in *Mitchell*, however, these courts found the uses to be non-transformative copies or imitations because the avatars were literal representations of the football players designed to resemble them physically and accurately track their biographical details. Moreover, the digital football players did what the actual football players did while in college: they were shown playing football in college football stadiums, filled with the trappings of college football games. The game developers profited because video game users enjoyed the heightened realism associated with actual players, and the uses did not include any transformative elements that would support a First Amendment defense, the circuit courts ruled.

Takeaways

- An individual's right of publicity is not absolute, but always must be balanced against a user's First Amendment rights.
- Although a creator of an expressive work may use an individual's likeness without consent if the use is transformative, the dividing line between transformative and non-transformative uses often requires a careful analysis and judgment.

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