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Third Circuit Reverses Summary Judgment In Favor of Video Game Maker In Important Right of Publicity Case

By Stacy Allen

In a much-anticipated opinion, the Third Circuit Court of Appeals yesterday reversed a New Jersey lower court decision granting summary judgment in favor of video game giant Electronic Arts against putative class representative and former Rutgers star quarterback Ryan Hart on his claim that EA misappropriated his identity and that of thousands of other collegiate players in its popular *NCAA Football* video game franchise in violation of their right of publicity. The decision is likely to have far-reaching consequences for video game makers and authors of any works containing characters which are thinly-disguised clones of sports stars or other celebrities.

In *NCAA Football*, the player avatars are virtually identical to their real-life athlete counterparts, down to their physical appearance, jersey number, home town, unique playing style, even their wrist bands, visors and gloves. EA obtains no licenses from and pays no royalties to the ex- and current college players, citing the First Amendment's protection of creative expression. The players counter that inclusion of their life-like avatars adds the realism that makes EA's games so popular, and constitutes commercial exploitation of their identities without their consent.

In *Hart v. Electronic Arts, Inc.*, No. 11-3750 (3rd Cir., May 21, 2013), the Third Circuit squarely addressed a split between federal district courts in the Third and Ninth Circuits applying state right of publicity laws in New Jersey and California to EA's *NCAA Football* video game, reaching opposite results. The majority began by determining (as had District Judge Wolfson below) that only the "transformative use" test (developed by California appellate courts and borrowed from copyright law's fair use defense) adequately balanced the conflicting interests of First Amendment protected expression and the common law right of a person to control the commercial exploitation of his or her persona. The question then turned to whether a court should consider only the celebrity likeness, or the work as a whole, when determining whether the non-permissive use of the likeness is transformative enough to invoke the First Amendment's protection.

Siding with recent decisions construing California law, including *Keller v. Electronic Arts, Inc.* (also involving *NCAA Football*, on appeal to the Ninth Circuit) and *No Doubt v. Activision, Inc.* (involving use of the rock band No Doubt's likenesses and voices in Activision's *Band Hero* game), the Third Circuit held that the celebrity likeness itself – not other creative aspects of the game when taken as a whole – should be the focus of the court's inquiry. The *Hart* court easily concluded that player Ryan Hart's "digital avatar does closely resemble the genuine article." When considering the context within which Hart's digital avatar exists to determine if it had been adequately "transformed" by EA, the Third

Circuit concluded that "[t]he digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums.... This is not transformative; the various digitized sights and sounds in the video game do not alter or transform the Appellant's identity in a significant way." The dissent, along with the lower court, found that other creative elements of *NCAA Football*, including the ability of gamers to alter a player avatar's appearance, and the equally detailed reproductions of college football stadiums, uniforms, fight songs, mascots, coaches and cheerleaders were, when taken as a whole, sufficiently transformative to shield EA within the protection of the First Amendment.

Yesterday's decision in *Hart* continues a trend toward narrowly limiting the transformative use test to examination of the celebrity likeness and its fictional *raison d' etre*, without reference to other elements of the work as a whole. While it may now be inevitable that the Ninth Circuit will affirm this approach (and the rulings of the Northern District of California decisions it is now reviewing), there seems little reason for video game designers to wait until the other shoe drops before carefully considering whether unlicensed inclusion of life-like celebrity avatars in their games is a smart play.

If you have any questions regarding this e-Alert, please contact **Stacy Allen** at 512.236.2090 or **stacyallen@jw.com**.

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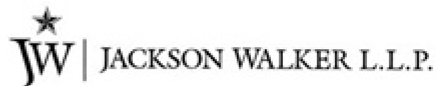

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