

# Court Rules Against EA Sports' "First Amendment Rights" Defense

by Anthony Caruso on August 5, 2013

A federal court struck down Electronic Arts' First Amendment rights defense of artistic expression for a second time in a controversial lawsuit relating to the use of college athletes' likenesses without their permission.

The case, which may have far-reaching implications for college sports and videogame makers, was originally brought against EA Sports by former Arizona quarterback Sam Keller in 2009. He alleged that the game manufacturer used his likeness without his permission, a charge that was also levied against EA Sports by Ed O'Bannon later in 2009. The cases have now been consolidated.

Although the game maker has alleged that it is protected by the First Amendment, the 9th U.S. Circuit Court of Appeals agreed with a lower court ruling that EA was not protected by free speech because the company created the likeness of Keller "in the very setting in which he has achieved renown." The court also noted that the EA game had the "same height, weight, skin tone, hair color, hairstyle, handedness, home state, play style (pocket passer), visor preference, facial features, and school year as Keller."

"Given that NCAA football realistically portrays college football players in the context of college football games, the district court was correct in concluding that EA cannot prevail," Judge Jay Bybee wrote in the decision.

However, the dissenting opinion in the case may have given hope to those who agree that game makers can use player images under federal law. In an argument that may be used to further EA Sports' appeal, dissenting judge Sidney Thomas wrote that the games have creative and transformative elements that "predominate over the commercial use of the athletes' likenesses," according to Yahoo Sports.

"We believe the reasoning in Judge Thomas' dissent in that decision will ultimately prevail as we seek further court review," said EA spokesman John Reseburg.