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Did the 9th Circuit Drop the Ball? Court Rules in Favor of College Athlete for Video Game Likeness

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It's 10 p.m., do you know where you children are? Given today's vast popularity of both video games and college sports, it is likely that your children are playing NCAA Football video games. While this activity helps keeps your children safe at night, recent controversy has emerged regarding whether the companies who produce these games are violating the athletes' protected publicity rights.

In the NCAA Football video game series, collegiate football players are represented by avatars, and are used by the gamers to re-enact simulated football games. Gamers carry out football plays by choosing from a variety of pre-selected plays then manually switch controls on the field from player to player. Although gamers enjoy playing the game as their favorite college players, what rights do these college players have regarding the use of their likeness in the game? Do college football players have a legal right that prevents an avatar exhibiting his or her likeness from being published in artistic works such as video games? Or do collegiate players have no protections because the video game is purchased not for the individual avatar, but rather for the game as a whole, in order for everyday people to play out their love for football in a simulated format? Furthermore, where do the video game developers' First Amendment rights fit in?

These questions are very similar to those raised in a recent 9th Circuit case, *Keller v. Elec. Arts Inc.*[1] A former Arizona State University and University of Nebraska quarterback, Samuel Keller ("Keller"), brought a publicity action against a gaming company, Electronic Arts, Inc. ("EA"), for using his likeness in the NCAA Football video game series. Although each avatar features a college football player without his name on the back of the jersey, the game does include many other identifiable attributes, including the player's actual jersey number, height, weight, skin and hair color, and home state. The avatars also mimic the player's highly identifiable playing behaviors and styles, which EA ascertained by distributing detailed questionnaires to team managers.

In his lawsuit, Keller alleged that the 2005 and 2008 NCAA Football video games contained an avatar of him as a quarterback for Arizona State and Nebraska, respectively, without his consent, thus violating his publicity rights. EA rebutted the action by asserting a transformative defense, which requires "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."[2]

In assessing whether EA satisfied the transformative defense, the court balanced the following five factor test: (1) Whether the "celebrity likeness" has been created from "raw materials" (thereby transformative) or a mere "imitation of the celebrity"; (2) whether the "expression" is primarily the defendant's own work (transformative)

and the purchaser of the expression is buying it for that work as opposed to the celebrity likeness in the work; (3) "whether the literal and imitative or the creative elements predominate the work"; (4) whether "the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted"; and (5) whether the "artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame."[3]

In weighing these factors, the court placed great emphasis on the third factor and found that the literal embodiment of Keller in the video game was enough to reject EA's arguments.

Contrastingly, the dissent stated that the NCAA Football game should be a piece of work viewed from the whole. The dissent argued that from this perspective, it is evident that any use and likeness of Keller was minimal as compared to the grand scheme of the game. The dissent was also concerned with the potentially broad implications that the majority's decision may have on the world of expressive art, writing that:

> [t]he stakes are not small. The logical consequence of the majority view is that all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of the creative context. This logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings. Absent the use of actual footage, the motion picture *Forrest Gump* might as well be just a box of chocolates.[4]

Only time will tell whether the dissent's fear is warranted. Either way, it will be interesting to see how courts throughout the nation interpret this decision, and whether Keller's case will ultimately be a true game-changer for First Amendment rights.

If you or your institution would like more information regarding education related issues, email Hayley B. Dryer at hdryer@cullenanddykman.com or call her at 516-357-3745.

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[1] 724 F.3d 1268 (9th Cir. 2013).

[2] *Id*. at 1273 (quoting *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001)).

[3] *Keller*, 724 F.3d at 1274.

[4] *Id*. at 1290.