

Celebrity Entertainer Sues Over Video Game Avatar

Article By:

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As real-world celebrities continue to expand the reach of their persona into the digital realm, the potential benefit for advertisers, game developers and esports event promoters is exceedingly high. But with increased opportunity comes increased risk.

A New York Supreme Court recently addressed this risk when it construed the State's right of publicity statute^[1] in a dispute over an NBA 2K18 video game avatar. In [Champion v. Take Two Interactive Software, Inc.](#), celebrity basketball entertainer Phillip "Hot Sauce" Champion sued the video game developer, alleging violation of his right to privacy for Take-Two's use of his name and likeness. The Court ultimately dismissed the lawsuit, but not before it provided a helpful discussion of New York's publicity statute and its modern application to the esports industry.

A Primer on New York's Publicity Statute

New York publicity law allows both criminal charges and civil liability for use of a person's "name, portrait or picture" for advertising or trade purposes without prior written permission. This right to publicity extends to *any recognizable likeness* that has a "close and purposeful resemblance to reality." Courts have already held that video game avatars are within the scope of the statute's reach.

However, while seemingly broad at first pass, this statutory right is actually more narrow than similar rights in other states where the right to publicity is recognized only at common law (*i.e.*, in states that have no black-letter publicity statute). For example, in New York, neither "incidental" use of a person's name or likeness, nor use that is protected under the First Amendment, are violations.

Further, unlike the words "portrait" and "picture," the word "name" in the statute is construed literally. In fact, New York courts find liability only for uses involving an individual's *full name*, and not just a surname, nickname, or business name. The statute does, however, protect certain "stage names" in limited situations, such as when the individual has become known by a stage name virtually to the exclusion of his or her real name.

The Plaintiff and the Video Game

Phillip Champion is a prominent street basketball entertainer known professionally as "Hot Sauce."

Champion claims that he is widely recognized as both “Hot Sauce” and “Hot Sizzle” in social media, and is regularly depicted on television and in blogs, movies, YouTube videos, sports magazines and live halftime shows. As a result, Champion is able to license his celebrity persona through sponsorships and endorsement deals with prominent consumer brands like AND1.



Photographs of Champion filed with the Court.

Take-Two created the NBA 2K18 basketball simulation video game, which realistically depicts the on-court competition and off-court management of the National Basketball Association. Users can create a custom player avatar, or select from existing player avatars modeled after real-life professional athletes. The game’s “MyCareer” mode allows the user to create a custom basketball player, and then design and play through the character’s entire career, competing in games and participating in off-court activities. The “Neighborhoods” option, which ties to the off-court activities in the MyCareer mode, lets users explore an off-court urban world while interacting with other basketball players—most of which are non-playable characters controlled by the computer—in scenarios like exercising in public gyms and playing casual basketball games on city courts.

Champion’s Claims

Champion’s lawsuit stems from one of the non-playable characters in the game’s Neighborhood mode, who is depicted as a young, African-American male with a mohawk, wearing all-white hi-top sneakers, a tank-top, and black shorts with white piping. On the front and back of the tank-top is the

numeral “1,” and on the back are the words “Hot Sizzles.”

Images of the “Hot Sizzles” avatar filed with the Court.

Champion alleged that the look of the “Hot Sizzles” avatar incorporated numerous personal aspects of his life and identity in violation of the New York publicity statute, and further that the avatar’s “Hot Sizzles” name was itself a violation because Champion is “ubiquitously” known as “Hot Sizzle.” Take-Two responded that its “Hot Sizzles” avatar does not sufficiently resemble Champion, whether in name or image, under New York law.

On Champion’s claims to his likeness, the Court found no physical resemblance between Champion and the “Hot Sizzle” avatar, and determined that the only reasonable commonalities are that “both are male, African-American in appearance, and play basketball.” The Court compared this case to two similar cases ([*Lohan v. Take-Two Interactive Software, Inc.*](#) and *Gravano v. Take-Two Interactive Software, Inc.*), both involving Take-Two’s Grand Theft Auto video game, in which the avatars exhibited many closer similarities to the plaintiffs in clothes, hair, poses, voice, and life stories. Finding no similar likenesses in this case, the Court ruled that, at least from a visual perspective, the Hot Sizzles avatar in NBA 2K18 is not recognizable as Champion as a matter of law.

On Champion’s claim to the name “Hot Sizzles,” the Court recognized that the use of a person’s celebrity or “stage” name with a video game avatar could aid in recognition of the avatar as that person’s likeness. However, the Court determined that Champion’s “primary performance persona” is actually “Hot Sauce,” which is entirely distinct from the NBA 2K18 avatar’s name, “Hot Sizzles.” Champion was not able to show that he is widely known as “Hot Sizzle” to the public at large—as opposed to just in the sporting or gaming circles—so the Court ruled that, without this level of

connection between Champion and the name “Hot Sizzle,” Take-Two’s use of “Hot Sizzles” does not aid in the visual recognition of the NBA 2K18 avatar as Champion.^[2]

Incidental Use and the First Amendment

Take-Two also defended against Champion’s claims by alleging that the “Hot Sizzles” character falls within the “incidental use” exception to liability under New York’s statute. After reviewing the NBA 2K18 game content and related advertising, the Court seemed to agree that the avatar “is a peripheral non-controllable character” that “adds nothing of true substance to a user’s experience in the game.” However, the Court declined to make an affirmative ruling on this component of the lawsuit.

Finally, Take-Two argued that its NBA 2K18 game is protected speech under the First Amendment, and as such, it does not constitute “advertising or trade” under New York’s law. In response, the Court declared that, while video games may conceptually qualify for free speech protection, not every video game constitutes “free speech” fiction or satire. In comparing NBA 2K18 to games that contain a detailed story with pre-defined characters, dialogue and unique environments created entirely by the game designers, the Court determined that here, the *users* create their own basketball career and completely define their character. Accordingly, the Court found that categorizing NBA 2K18 as “protected fiction or satire” under the First Amendment is “untenable.”

What it Means

As novel sponsorship and endorsement opportunities are created through the advent of esports, advertisers, game developers, and event promoters must be certain they have the appropriate content and publicity licenses in place. However, because publicity laws, in particular, are enforced at the state level, doing this without expert guidance can be daunting. Using the right tools and a proactive licensing and review strategy, brands and marketing agencies can capture (and keep) a broader share of the esports industry’s revenues, and keep the competition on the court, not in it.

[1] New York Civil Rights Law, §§ 50-51.

[2] The Court determined that “Hot Sizzle” is, at best, Champion’s secondary “nickname.”

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National Law Review, Volume IX, Number 234

Source URL: <https://natlawreview.com/article/celebrity-entertainer-sues-over-video-game-avatar>