

# Use of Athlete's Likeness in Video Game Not Protected by First Amendment

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The U.S. Court of Appeals for the Ninth Circuit Court affirmed that the First Amendment does not protect a video game developer's unauthorized use of an athlete's likeness in a college football video game, since recreating the athlete in the setting in which he acquired notoriety is not sufficiently transformative. ***In re NCAA Student-Athlete Name & Likeness Licensing Litigation***, Case No. 10-15387 (9th Cir., July 31, 2013) (Bybee, J.) (Thomas, J., dissenting).

Samuel Keller, former quarterback for Arizona State University and University of Nebraska, filed a class action suit against Electronic Arts Inc. (EA) alleging that EA violated Keller's right of publicity under California Civil Code § 3344 and California common law by including his likeness in *NCAA Football* video games without consent. The games featured an avatar with characteristics resembling Keller such as jersey number, height, weight, skin tone, hair color, hair style, handedness, home state, play style, visor preference, facial features and school year.

The district court denied EA's motion to strike Keller's complaint under California's anti-SLAPP statute (Civil Procedure Code § 425.16), which is designed, in part, to discourage suits that seek to deter a person's freedom of speech, "unless the court determines that the plaintiff has established that there is a probability the plaintiff will prevail on the merits." EA appealed.

The issue before the 9th Circuit was whether Keller established a reasonable probability of success on the merits, which required the court to analyze EA's defenses under the First Amendment. First, the 9th Circuit rejected EA's argument that the *NCAA Football* video games were sufficiently transformative under the standard adopted by the California Supreme Court in *Comedy III Productions v. Gary Saderup*, namely, "whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." The circuit court analogized EA's use of Keller's likeness to the facts in the 2011 case *No Doubt v. Activision Publishing*, which involved unauthorized uses of the musical group No Doubt's likenesses in the video game *Band Hero*. In that case, the California Court of Appeals held that No Doubt's right of publicity prevailed over Activision's First Amendment defense because the video game characters were "literal recreations of the band members" engaged in "the same activity by which the band achieved and maintains its fame."

That the video game itself contained other creative elements did not affect the court's finding that the

depiction of No Doubt was not transformative. Following this reasoning, the 9th Circuit likewise found that Keller's virtual avatar depicted his exact physical attributes and were used within the environment in which Keller achieved renown—college football. For this reason, EA's use of Keller's likeness was not sufficiently transformative to support a First Amendment defense under the *Comedy III* standard.

The 9th Circuit also rejected EA's First Amendment defense under the U.S. Court of Appeals for the Second Circuit's *Rogers* test, which is used to evaluate false endorsement claims under the Lanham Act, because the test is designed to protect against consumer confusion as opposed to protecting the economic value of one's persona under right of publicity. Lastly, the 9th Circuit rejected EA's First Amendment defenses under California state law that protect publishing and reporting matters of public interest, holding that the *NCAA Football* games were not "reporting" on Keller's career, especially when Keller's name was not used in the games.

In dissent, Circuit Judge Thomas applied the *Comedy III* test to conclude that, on balance, the creative and transformative elements of the *NCAA Football* games predominated over the commercial use of Keller's likeness, thus warranting a finding that EA's use of Keller's likeness was protected under the First Amendment.

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