



Right of Publicity in Video Games

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What is the Right of Publicity?

- + Right of a person to control the use or exploitation of their name or likeness
- + Sources of law/remedies:
 - + State Law (esp. CA, NY and IN)
 - + Common Law
 - + Lanham Act

State Statutes

+ NY CLS Civ R § 51 gives a cause of action to

“[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained...”

+ CAL. CIV. CODE § 3344

“Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.”

What is Protected?

- + Images
- + "Persona"
- + Look-alikes/sound-alikes
- + Characters

First Amendment Limitations

- + The First Amendment protects the need of the public to be able to discuss, reference and repurpose the names and likenesses of celebrities
- + Protects use in “expressive works” (even if they are sold commercially for profit):
 - + Books
 - + Movies/TV
 - + Magazine/Newspapers
 - + Video Games

Scope of First Amendment Protection

- + Extends to advertising of protected content, even where the name or likeness used in the advertisement is not used in the work
- + Does NOT protect uses that falsely imply endorsement of the product or service by the celebrity

The Rogers Test

- + Introduced in Rogers v. Grimaldi, 875 F.2d 994, 1003-04 (2d Cir. 1989)
 - + Ginger Rogers sued author of a film titled "Ginger and Fred" about cabaret performers who imitated Ginger Rogers and Fred Astaire – Court found
- + Applied in Lanham Act cases
- + The Test: First Amendment protects the use of a celebrity name in the title of a work

"unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work." *Rogers at 999*.

- + 2 Prongs:
 - + 1) Does the use of the name/likeness have ANY relevance to the underlying work? If so:
 - + 2) does the use explicitly misleads consumers about the source or content of the work

Transformative Use Test

- + Introduced in Comedy III Productions, Inc. v. Gary Saderup, Inc. (2001) 25 Cal.4th 387
 - + Court held accurate charcoal renditions of The Three Stooges, sold on t-shirts, was not protected by the first amendment
- + Test: “whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. . . . [W]hether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.”

Video Game Cases – Kirby v. Sega

- + Kirby v. Sega of America, Inc. (2006) 144 Cal.App.4th 8, 47
 - + Singer/Performer from Deee-Lite claimed video game character in space, dance themed game was modeled after her likeness and on-stage persona
 - + Court deemed game character protected based on differences in style, appearance, outfit, context (the character was a space reporter from the 25th century) which rendered the work transformative, even if partially based on Kirby

Video Game Cases – No Doubt v. Activision

- + No Doubt v. Activision, Inc., 192 Cal.App.4th 1018, 1033 (2011).
- + Band signed contract to appear as playable avatars in *Band Hero* music game, but sued upon learning players could have the avatars perform songs by other bands in various locations
- + Applying transformative test, Court held Activision's use of the avatars was not protected by the first amendment because the avatars were literal depictions of the band members intended to let the players simply "be No Doubt" and were thus non-transformative

Pending Cases – Clarifying the Transformative and Rogers tests

- + Brown v. Electronic Arts, Inc (CD Cal) (2009)
 - + Former NFL player Jim Brown sued for use of a virtual character on the in-game historical version of the Browns
- + District Court applied Rogers Test to his Lanham act claim of False Endorsement
- + Use was
 - + relevant to the underlying work (game about the NFL) and
 - + unlikely to cause consumer confusion as to whether Brown had endorsed the game
 - + Brown's jersey was mis-numbered and he was not named in game
- + Currently on appeal

Pending Cases - NCAA

- + Keller v. Electronic Arts, Inc., 2010 WL 530108 (N.D. Cal 2010).
- + Hart v. Electronic Arts, Inc., 808 F.Supp 2d 757 (D.N.J. 2011).
- + Nearly identical facts: former college football players were depicted in an NCAA licensed college football themed game
 - + Their names were not used, but their likeness, teams, jersey number, initial stats, armband and gear choices were
- + Both courts applied the transformative test and reached opposite results

Pending Cases – NCAA cont.

- + The *Keller* Court found that unlike in *Kirby*, the celebrity's likeness did not add enough creative elements or context to qualify for first amendment protection
 - + Keller was used as he was, a quarterback for Arizona, playing in football stadiums
- + The *Hart* Court discussed both the transformative and *Rogers* tests, finding first amendment protection under both
 - + Transformative: The Court reasoned that while the players in the game start as close replicas of the real celebrities, people playing the game are able to modify their stats and performance to control the outcome of the game – this rendered the work transformative and protected.
 - + *Rogers*: The Court found that the use of the persona was related to the game's content and unlikely to mislead consumers as to whether Hart had endorsed the game

Potential Fallout

- + Either way, huge implications for games (especially sports and music games, which frequently use real-world celebrities)
- + If *Keller* is upheld, who will pay? The Colleges? The NCAA? Game Publishers? Will use of real celebrities in games be feasible any more?
- + If *Hart* is upheld, does EA even need to pay NCAA for a license?