

Chicago Daily Law Bulletin®

Volume 157, No. 87

Tuesday, May 3, 2011

Sporting Judgment

The licensing conundrum: If it's in the video game, it might be illegal

By Timothy L. Epstein

Despite unwavering profit margins and admittedly high product quality, Electronic Arts Inc. (EA) is facing myriad legal challenges stemming from its widely popular sports video games. EA manufactures best-selling titles such as "Madden NFL Football," "NCAA Football" and "NCAA March Madness." EA has exclusive licenses to produce NFL and NCAA video games and in 2008 its net revenue was about \$3.7 billion. With catchy advertisements and a die-hard fan base, the company has become synonymous with sports video games. However, if EA does not prevail in a series of lawsuits, it could be game over.

The seminal case is *In Re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. 09-cv-01967 (N.D. Cal. filed Mar. 10, 2010). This case is a consolidation of two class-action suits brought against EA, the NCAA and Collegiate Licensing Corp. (CLC). One class, headlined by former UCLA basketball player Ed O'Bannon, alleges various antitrust violations stemming from "a price-fixing conspiracy and a group boycott/refusal to deal that has unlawfully foreclosed class members from receiving compensation in connection with the commercial exploitation of their images, likenesses, and/or names ..." *Id.* at 4. The second class, headlined by former Nebraska and Arizona State quarterback Sam Keller, alleges violations emanating from a misappropriation of the plaintiffs' rights of publicity for commercial gain.

Timothy L. Epstein is a partner and chairman of the sports law practice group at SmithAmundsen LLC. He also serves as an adjunct professor at Loyola University Chicago School of Law, teaching courses in sports law. His sports law practice is all-encompassing, but focuses on the litigation needs of players, coaches, teams and schools. He can be reached at tepstein@salawus.com.

The commonality between the classes is the allegation of EA's use of likenesses without remuneration. As it stands, current and former collegiate athletes do not receive any compensation despite the fact that the NCAA is a multibillion-dollar a year business that would cease to exist, but for the services of these athletes. The NCAA contracts with EA, but the players receive nothing.

The 157-page, photograph-laden complaint compares numerous depictions of former student athletes' likenesses to their real life characteristics. A simple glance at these side-by-side photographs makes it abundantly clear that EA models its digitized players to mirror their living counterparts, save the players' actual names. An EA spokesperson admitted as much in a 2006 interview with the Indianapolis Star, stating, "OK, how far can we go?" Even the players' names are easily downloadable by any gamer with an Internet connection. Ironically, EA's technological advancement could be its downfall.

A similar class-action suit has been filed in the Northern District of California by retired NFL players seeking compensation for the use of their likenesses in "historic" and "all-time" teams. See *Davis v. Electronic Arts, Inc.*, 10-cv-03328 (N.D. Cal. filed July 29, 2010). The retired players' suit alleges a violation of the right of publicity as well as unjust enrichment. Like current and former collegiate athletes, retired players are not privy to the licensing agreement between the former NFL Players' Association (NFLPA) and EA and, therefore, will never directly receive any of the \$35 million paid annually to active players as part of EA's exclusive license with the NFLPA.

Finally, EA is facing an ongoing antitrust challenge from consumers. See, *Pecover et. Al. v. Electronic Arts, Inc.* 633 F. Supp. 2d 976 (N.D. Cal. 2009) (Manufacturer's Motion to Dismiss denied). The consumer class action alleges that EA foreclosed competition in

violation of antitrust law by entering into exclusive licensing agreements with various leagues and players' associations. The class asserts that exclusive licensing agreements lead to excessively high prices for EA video games. Interestingly, lead counsel for the plaintiffs in this case is Hagens, Berman, Sobol, Shapiro LLP, the same firm representing Keller and others in *In Re NCAA Student Athlete*. This suit differs from those brought by athletes, but the crux of the allegations are the same: EA is profiting at the financial expense of others.

While it is possible and perhaps likely that the parties will settle, an analysis of right of publicity jurisprudence in California suggests that EA may be facing an uphill battle. Given that California is the epicenter of celebrity, the 9th U.S. Circuit Court of Appeals has adopted an expansive view of this right. The 9th Circuit has found violations in numerous instances in which the person was not actually depicted. See e.g. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (depiction of stock car racer's car constituted misappropriation of his likeness); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (imitation singer used to sound like famous artist was misappropriation of an attribute of her identity); and *White v. Samsung*, 971 F.2d 1395 (9th Cir. 1992) (robot wearing wig and gown to look like famous game show host constituted misappropriation). Clearly the facsimile depiction of football players fits within this line of reasoning.

The presumption of the plaintiffs' success on the merits is strengthened by the court's denial of EA's motion to dismiss prior to consolidation. *Keller v. Electronic Arts, Inc.*, 2010 U.S. Dist. LEXIS 10719. (N.D. Cal. 2010). The court rejected EA's defenses including transformative use, public interest and allowance for use in public affairs under California Civil Code § 3344(d). The

Continued...

depictions were not transformative enough; the players were shown as exactly what they were: college football players. *Id.* at 17. Also, the game went beyond mere reporting of players' stats and, therefore, was not considered in the public interest. *Id.* at 23.

If EA loses *In Re NCAA Student Athlete*, it could be immensely damaging to the company's earnings potential. First, unless EA negotiated with the NCAA to pay out damages from the money it paid to the NCAA, EA would almost certainly be forced to compensate former collegiate athletes. Second, EA would also likely have to compensate retired players in addition to former collegiate athletes, as similar claims have been raised in *Davis*. Third, if EA and the NCAA are forced to

compensate former student athletes, it could increase the cost of licensing agreements, which would lead to even higher consumer prices, affecting the consumer class-action suit and perhaps allowing competitors back into the market. Finally, EA could be forced to make its sports video games more transformative, resulting in an inferior product and consequently lower sales. The cumulative effects would be a huge blow to EA's dominance in the sports video game field.

These potential business consequences do not even take into account the potential ramifications related to the NCAA, student athletes and the concept of amateurism as we know it.

Amateurism and the perceived exploitation of student athletes is a hot

issue right now. Almost defiantly, the NCAA Division I Amateurism Cabinet has sponsored an amendment to the bylaws (Prop. 2010-26), which would actually increase the scope of permissible uses of student athletes' likenesses, while still not compensating student athletes. Though the classes in this case are limited to former student athletes, a holding in their favor could open the door for similar suits by active collegiate athletes seeking to enjoin the NCAA from profiting off the use of their likenesses. We may still be a long way from a system of professionalized student athletes, but such an outgrowth is not outside of the realm of possibility with the amount of money at stake in the battle over the digital likenesses of student athletes.