

Litigation Alert: California Superior Court Finds Use of Likeness of Former Panamanian Dictator Manuel Noriega in Video Game Transformative

NOVEMBER 6, 2014

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Manuel Noriega v. Activision Blizzard, Inc., No. BC 551747 (Cal Super. Ct. filed October 27, 2014)

In recent years, federal and state courts have wrestled with how to assess right of publicity claims in the video game context— when a real person’s likeness is used in a game without their consent, to what extent is the use creative expression that is protected by the First Amendment? Is the overall context and nature of the game of any relevance to the analysis? The Ninth Circuit opinion in *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013), seemed to suggest that courts should focus only on the degree to which the likeness itself had been “transformed,” and ignore the game as a whole; however, a recent California Superior Court decision has dispelled the certainty of that assessment. Dismissing with prejudice a complaint filed by former Panamanian military dictator Manuel Noriega concerning use of his likeness in the popular video game “Call of Duty: Black Ops II,” that court found the use transformative and protected under the First Amendment. In reaching this decision, the *Noriega* Court expressly rejected the Ninth Circuit’s reasoning, finding it in conflict with controlling California authority, and making clear that the overall context can be key.

The *Noriega* Case Background

Noriega sued game publisher Activision, asserting that it had violated his right of publicity under California law by making him a character in “Call of Duty: Black Ops II,” without his consent. California’s statutory right of publicity, Cal. Civ. Code § 3344, provides a cause of action for knowing use of a person’s image or likeness on or in, or in connection with advertising or selling of, products, without that person’s consent. In the game, “players assume the role of a foot soldier placed in simulated infantry and warfare scenarios,” set both during the Cold War and in a fictional future. *Manuel Noriega v. Activision Blizzard, Inc.*, No. BC 551747, slip op. at 5 (Cal Super. Ct., filed October 27, 2014) (“*Noriega* Order”). The Noriega character appears in two of eleven game

“missions” and is one of dozens of other characters, including other historical figures, featured in the game. Noriega claimed that Activision’s portrayal of him as an antagonist and criminal harmed his reputation.

Activision filed a special motion to strike under California’s anti-SLAPP statute, Cal. Civ. Code § 425.16, asserting that the video game concerned matters of public interest and was thus protected speech. The *Noriega* Court focused on the second prong of the anti-SLAPP analysis— whether Noriega met his burden of establishing a probability of success of prevailing on his claims, particularly his right of publicity cause of action —and considered whether Activision’s use of Noriega’s likeness was sufficiently “transformative” to defeat his right of publicity claim.

The Transformative Use Defense in California: The Early Cases

The California Supreme Court established the transformative use defense in *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001), which held that whether a use is transformative involves “a balancing test between the First Amendment and the right of publicity.” The “inquiry is whether [a] 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.” *Id.* at 391, 406.

In *Winter v. DC Comics*, the California Supreme Court applied the transformative use test in the context of comic books “featur[ing] brothers Johnny and Edgar Autumn, depicted as villainous half-worm, half-human offspring,” allegedly based on musician brothers Johnny and Edgar Winter. 30 Cal.4th 881 (2003). The Court found that, although the Autumn brothers were “less-than-subtle evocations of Johnny and Edgar Winter,” the comic books were “not just conventional depictions of plaintiffs but contain[ed] significant expressive content other than plaintiffs’ mere likenesses,” and were thus transformative and protected expression. *Id.* at 890-91.

A few years later, the California Court of Appeals applied the transformative use test in two video game cases, with different results. *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47 (2006), involved the use in the game “Space Channel 5” of a “fictional elongated and extremely thin female reporter named ‘Ulala,’” allegedly fashioned after Keirin Kirby, the former lead singer of musical group Deee-Lite. *Id.* at 50-52. The *Kirby* Court held that Ulala was “more than a mere likeness or literal depiction of Kirby,” rather she was a “‘fanciful, creative character’ who exist[ed] in the context of a unique and expressive video game.” The use was thus transformative and did not violate Kirby’s right of publicity. *Id.* at 59, 61.

In contrast, in *No Doubt v. Activision Publ’g, Inc.*, 192 Cal. App. 4th 1018 (2011), the Court of Appeals concluded that Activision’s use of the likenesses of the band No Doubt’s members in the game “Band Hero,” which permits players to use avatars of real or fictional rock stars to perform songs, was not transformative. No Doubt sued Activision for breach of a licensing agreement in which No Doubt had licensed use of the band members’ likenesses specifically for use in playing No Doubt songs. But “Band Hero” allowed users to “unlock” the No Doubt avatars and use them to perform songs by other artists, with members of other groups, with different voices or in contexts not authorized under the agreement. Activision argued that its use of the No Doubt avatars was permitted as transformative and protected speech.

The *No Doubt* Court disagreed, affirming denial of Activision’s anti-SLAPP motion and allowing the lawsuit to proceed. *Id.* at 1044. The court reasoned that “although context may create protected expression in the use of a celebrity’s literal likeness, the context in which Activision uses the literal likenesses of No Doubt’s members does not qualify the use of the likenesses for First Amendment protection.” The court noted that although the avatars could be manipulated by users, in essence they were used to perform songs “as literal recreations of the band members” and that the context and features of the game did not “transform the avatars into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.” Additionally, the Court emphasized Activision’s commercial motivations for using the No Doubt likenesses, seeking to capitalize on the band’s fame to market the game and encourage the band’s “sizeable

fan base to purchase the game so as to perform as, or alongside, the members of No Doubt.” *Id.* at 1034-35.

The Keller Decisions: Minimizing the Relevance of the Work as a Whole

The *No Doubt* decision featured prominently in a series of federal court opinions addressing college football players’ claims under the California statutory right of publicity over use of their likenesses in Electronic Arts’ “NCAA Football” game series. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) (*Keller II*), *aff’g sub nom. Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010) (*Keller I*). In affirming the district court’s decision, the Ninth Circuit held that the games’ realistic depiction of the college athletes playing the game for which they were known, despite other creative aspects of the games, was not sufficiently transformative to bar Keller’s claim. The district court had reasoned that prior California cases had focused on the degree to which the *specific depictions of claimants*, rather than the elements of the work as a whole, were transformative. The Ninth Circuit held that the district court did not err in “focusing primarily on Keller’s likeness and ignoring the transformative elements of the game as a whole,” against the urging of the dissent. See *Keller II*, 724 F.3d at 1276. Concluding that the likeness itself was not sufficiently transformative to bar Keller’s right of publicity claims, the Ninth Circuit affirmed denial of Electronic Arts’ anti-SLAPP motion. See *id.*; also *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir.2013) (applying similar reasoning to a challenge to the “NCAA Football” game series under New Jersey’s right of publicity law).

The *Keller* decisions left the state of the transformative use defense under California law at best unclear, suggesting that only the alleged depiction of the claimant, and not the overall creative work in which the claimant was featured, was relevant to the analysis. What impact would this ruling have on depictions of real people in creative works? Would this mean that they could maintain right of publicity claims irrespective of the context of the creative work?

The Noriega Opinion: Applying Prior California Case Law and Rejecting Keller As Inconsistent

Not long after the *Keller II* decision, former dictator Noriega took issue with Activision’s depiction of him in its very popular “Call of Duty: Black Ops II” game,

relying heavily on the *Keller II* Court's reasoning. However, the California Court quickly dispelled, in a footnote, any notion that California courts should disregard the context and elements of a work and instead focus solely on the depiction of a plaintiff in that work. *Noriega* Order, at 6, n.4. Noting Noriega's express reliance on the *Keller* cases, the *Noriega* Court observed that the case was not binding on it, and concluded succinctly that, "to the extent that *Keller* suggests that the entirety of the disputed work should not be considered under the second prong of the anti-SLAPP analysis, such reasoning is in conflict with the controlling California authorities cited herein and relied upon by this Court." *Id.* (emphasis added).

Concentrating instead on California case law, including the *Comedy III*, *Winter*, and *No Doubt* decisions, the Court held that Activision's use of Noriega's likeness was transformative. "Noriega's depiction was not the 'very sum and substance' of the work," but, instead, "[t]he complex and multi-faceted game is a product of defendants' own expression, with *de minimis* use of Noriega's likeness." *Id.* at 6. The Court cited to several game features to support this conclusion, including: the game comprises an entirely fictional narrative, in which a player assumes the role of a fictional soldier moving through various missions; Noriega's character is a small fraction of the game's narrative, appearing in only two of the missions among many other characters, including other historical figures; and players cannot assume the role of Noriega or manipulate the Noriega avatar in any manner. *Id.* at 5. Finally, the Court noted in dicta that, unlike in *No Doubt* where the commercial advertising and marketing of the "Band Hero" game prominently featured the No Doubt band member likenesses, the Noriega character appeared nowhere in marketing for "Call of Duty." Accordingly, "the marketability and economic value of the challenged work in this case comes not from Noriega, but from the creativity, skill and reputation of defendants." *Id.* at 5 & n.3.

Implications

This opinion, while expressly departing from the *Keller* line of reasoning, stays true to prior California transformative use cases. Indeed, the *Winter*, *Kirby*, and *No Doubt* decisions do not stand for the proposition that the entirety of a work may be ignored, as *Keller I* and *II* seem to suggest. To the contrary, the *Kirby* Court, noting similarities to *Winter*, held that use of the likeness in that case was transformative,

not only because the character was creative, but also because the character appeared in "the context of a unique and expressive video game." 144 Cal. App. 4th at 61. Moreover, the *No Doubt* Court did not hold that the context and the work as a whole was irrelevant but instead concluded that the context and creative elements of the *Band Hero* game were insufficient to render use of the No Doubt avatars in that game transformative.

The *Noriega* decision could signal a shift in transformative use cases, bringing back into play the context and elements of the work as a whole, in the effort to balance "the tension between a public figure's right of publicity and the First Amendment right of free expression." See *Noriega* Order, at 3. Acknowledging the difficulty of striking this balance, the *Noriega* Court noted California Supreme Court Justice Bird's "thoughtful analysis" on the issue when analyzing a more traditional form of creative work, books: "Contemporary events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers... . No author should be forced into creating mythological worlds or characters wholly divorced from reality." *Id.* (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.3d 860 (1979)). In pointing to this language, the *Noriega* Court suggests that it has never been California law that infusing a creative work with realistic or even literal depictions of well-known individuals will automatically render a work non-transformative. The extent to which a work's creative context can tip the balance in favor of protected expression in any given case remains to be seen.

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