Publicity rights vs. the First Amendment

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The right of publicity continues to emerge as a significant intellectual property right of which businesses must be aware - not only in the context of advertising and marketing, but in the context of a company's product itself. Several recent decisions interpreting the contours of the boundary between publicity rights and First Amendment rights suggest that advertisements and products which refer to actual people, living or dead, may be more risky than their producers realize.

There is an obvious tension between the right of publicity, which allows a person to control the commercial use of their name or likeness, and the First Amendment, which guarantees the right of free expression. Courts have developed various tests to balance these competing interests. The governing test in California, which is being adopted by increasing numbers of courts outside the California state courts, was promulgated by the state Supreme Court in *Comedy III Prods. v. Gary Saderup Inc.*, 25 Cal. 4th 387 (Cal. 2001). The *Comedy III* court held that the critical factor in determining whether a defendant's First Amendment rights outweigh a plaintiff's right of publicity is whether the accused work is "transformative" - whether the plaintiff's identity is "one of the 'raw materials' from which an original work is synthesized, or ... the very sum and substance of the work in question." The court found that prints of a realistic charcoal sketch of the Three Stooges, however masterfully executed, were not sufficiently transformative to avoid the right of publicity.

In the years since, the courts have sometimes struggled to articulate a clear standard for how to measure the transformativeness of a work. Recently, the appearance of virtual characters based (to some extent) on real-world individuals in video games has become the basis for several decisions exploring this problem.

One popular genre of video game is sports simulation, which allows players to assemble teams and pit them against one another - often using real-world athletes to staff the teams. In *Keller v. Electronic Arts*, 2013 DJDAR 10071 (9th Cir. 2013), a former NCAA quarterback claimed that Electronic Arts' game "NCAA Football," which included in its extensive roster a character that allegedly closely resembled the plaintiff, violated his statutory and common law rights of publicity under California law. Electronic Arts filed an anti-SLAPP motion. The district court applied the *Comedy III* standard and found that because the game realistically depicted the plaintiff doing what he was notable for, it did not meaningfully transform the plaintiff's identity and denied the anti-SLAPP motion.

In *Hart v. Electronic Arts*, 717 F.3d 141 (3rd Cir. 2013), another former NCAA quarterback brought claims similar to Keller's under New Jersey's common law right of publicity. Rather than looking to the *Comedy III* standard in evaluating Electronic Arts' motion for summary judgment, however, the district court applied the test developed by the 2nd U.S. Circuit Court of Appeals in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1999), which spares a defendant from liability under the right of publicity as long as the defendant's use of the plaintiff's identity is artistically relevant to the overall work, and is not explicitly misleading as the source or content of the work. Applying that test, the court granted summary judgment to Electronic Arts. However, on appeal the 3rd U.S. Circuit Court of Appeals held that *Comedy III* was the appropriate test to apply, and reversed on essentially the same grounds as the decision in *Keller*. Not long after the 3rd Circuit's decision in *Hart*, the 9th U.S. Circuit Court of Appeals ruled on Electronic Arts' appeal in *Keller*, upholding the district court's application of *Comedy III*.

There is, therefore, a clear pattern of holdings that the use of a living person's likeness in a video game is unlikely to be protected by the First Amendment.

The reasoning in these decisions, however, is potentially applicable to uses of likenesses in other media as well. Most notably, both of the decisions applying *Comedy III* focused on the extent to which the plaintiff's likeness in and of itself had been transformed, not the transformative or creative content of the work as a whole. Both plaintiffs' likenesses were a very small part of the game in which they appeared, but the courts held that the rest of the game was essentially irrelevant. Because the likenesses themselves were intended to be accurate representations, they were not transformative.

This principle raises some questions as to when the use of a likeness can be transformative at all. The appellate decision in Hart, in particular, suggested that minor modifications, such as a change to hair color or playing statistics, would not be sufficiently transformative, while a larger change, such as a different body type or skin tone, would be so great that the character would no longer be a use of the plaintiff's likeness at all. If context is irrelevant, and there is no degree of change to a likeness itself which satisfies the transformative use test without falling outside the scope of the right of publicity entirely, it is not clear whether there is any point to the transformativeness inquiry in the first place.

It may be that future decisions will carve out more space for the transformative use of individuals' likenesses, as the holdings in *Hart* and *Keller* are applied to more traditional media, where the free expression interests involved are more widely understood. In the meantime, however, the current state of the law places very few constraints on the scope of individuals' publicity rights.

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