

Sports Litigation Alert

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Famous Athletes Lash Out at Those Who Use their Name, Likeness or Other Personal Attributes Without Permission

By Deanna Reiss

In most situations, you can be sued for using someone else's name, likeness or other personal attributes without permission, for an exploitative purpose. This means you can run into trouble when you utilize someone's name or photograph, or in this case avatar, in a commercial setting, such as advertising or other promotional activities.

There are two distinct claims that apply to these unauthorized uses: (1) invasion of the First Amendment's Right of Privacy through misappropriation of name or likeness and (2) violation of the right of publicity. Only human beings, and not corporations, have rights of publicity and privacy interests that can be invaded by misappropriation of name or likeness. You cannot invade the privacy of a dead person, so you generally cannot be sued for misappropriation of name or likeness of a dead person, unless the misappropriation took place before the person in question died. However, in many states the right of privacy survives after death, so you could be sued for violating the publicity rights of a dead person. This is most likely to come up with an athlete or celebrity.

In a claim for unlawful use of name or likeness:

1. Plaintiff must show that the defendant used an aspect of his or her identity that is protected by law;
2. Plaintiff must show that the defendant used his or her likeness for a commercial or other exploitative purpose;
3. Plaintiff must establish that he/she did not give permission for the offending use.

There have been several recent cases involving famous athletes who filed suit against the NCAA, Electronic Arts ("EA") Sports, and the College Licensing Company ("CLC"), the licensing arm of the NCAA.

The cases have turned on several different issues and therefore have garnered different results. One major case, *In Re NCAA Student Athlete Name & Likeness Licensing Litigation*, (2011 N.D. Cal., Oct. 17, 2011) (hereinafter 'Keller') is still pending. Among the numerous plaintiffs in Keller are Ed O'Bannon and William 'Bill' Keller, former NCAA and NBA marquee athletes. (In fact, Bill Keller is the model for the NBA basketball player logo.)

At issue in Keller is whether the NCAA, by its licensing arm, the CLC, has the right, in perpetuity, to license the use the name/image/likeness to another company. Moreover, when does a person's right to control his own image trump the free speech right of others to use it? Plaintiffs argue that the NCAA has deprived them of their own 'right of publicity'.

Another case, *RYAN HART*, individually and on behalf of all others similarly situated, v. *ELECTRONIC ARTS, INC.*, and *JOHN DOES*, 1-50 (Civil Action No. 09-5990), filed in the District Court of New Jersey, addresses some of the same issues and may or may not indicate which way the Keller case may be decided. Several of the issues in Hart were procedural and the Court ruled that Plaintiff was allowed to file amended papers to include additional evidence to plead their case. Even though the judge in Hart stated that First Amendment speech outweighs privacy concerns for the use of sports figures in video games, it is possible that Plaintiffs' amended filing may affect the Judge's ultimate decision.

EA Sports spends millions of dollars each year to produce the most realistic videogames possible in the areas of NCAA Basketball, NCAA March Madness,

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NCAA Football, and NCAA Tournament of Legends, among other major sports. To ensure such realism, EA Sports sends detailed questionnaires to NCAA equipment managers to glean precisely idiosyncratic individual player details, down to wristbands and visors. The only omissions are player names and jersey numbers, which seem to be minor inasmuch as EA Sports enables the gamer to attach player names and numbers without much effort.

NCAA Bylaw 12.5, specifically mutually prohibits commercial licensing of an NCAA athlete's 'name picture or license'. Before competing, Division I athletes are required to sign a contract that reflects that they have read and understand the NCAA's rules on 'prohibitions on the commercial use of their name, picture and likeness . . . and that they have not violated any amateur rules.'

If NCAA players move on to the pro leagues, where player likenesses can be used, in fact, the avatar, for all intents and purposes, remains the same, since it was so realistic in the NCAA version. However, in the pro version, when the athlete's name and number became part of the avatar, the avatar had not morphed at all from the NCAA version.

The NCAA, and its licensing arm, the CLC have a duty to its athletes to honor those same rules. It would seem that any licensing agreements between the CLC and EA Sports are expressly prohibited by NCAA Bylaw 12.5. Under the NCAA's licensing program, the CLC is required to approve every EA game before release. To that end, the CLC's approval of EA Sports' NCAA games would seem to be a de facto breach of NCAA Bylaw 12.5.

Player names, and likenesses and publicity rights are extremely valuable. EA Sports pays the NFLPA, through their licensing arm, approximately \$35,000,000 per year for such rights. Despite the prohibition on using amateur athletes' likenesses, it would

seem that the NCAA, EA Sports, and CLC have agreed between and among themselves (read: conspired) to use player names and likenesses in EA Sports video-games for their own monetary gain and without any compensation to any individual athletes.

Using the Keller case as an example, if we look to the three elements for unlawful use of name or likeness, the NCAA, the CLC, and EA Sports used, and continues to use Plaintiffs' names, images, likenesses, and distinctive appearances without their consent and in direct opposition to NCAA Bylaw 12.5.

The NCAA, the CLC, and EA Sports also use such images, etc. to market their product and solicit global sales to their own significant economic advantage. Plaintiffs all claim to have been significantly injured as a direct result of such conduct.

Plaintiffs never gave permission to utilize their names, likeness, etc. In fact, according to NCAA Bylaw 12.5, they were expressly prohibited from doing so. Since leaving the NCAA, none of the Plaintiff class has given permission to any of the Defendants in the Keller case to use their likeness, etc.

It would seem that the Keller case has the greatest chance yet of succeeding against EA Sports where others have failed. Plaintiffs seem to have met all three elements for unlawful use of name or likeness. It will now come down to weighing the interests and rights of the parties involved.

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