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Courts, Sports And Videogames: What's In A Game?

Law360, New York (January 04, 2012, 12:42 PM ET) -- Although one of the clearest legal thinkers, Louis Brandeis, conceived the modern right of publicity,[1] "unclear" would be an adjective all lawyers would apply to the current state of right of publicity law, regardless of which side of the issue they usually argue. Indeed, although the right of publicity concept was further developed by another very clear legal thinker, William Prosser,[2] he himself alluded to it as the concept "that launched a thousand lawsuits,"[3] few of which can be reconciled with one another.

The most extreme recent example of this lack of clarity is that two courts on opposite sides of the country have rendered diametrically opposed decisions on the rights of football players whose avatars appear in the same videogame,[4] leaving lawyers in a difficult position when advising their clients on rights of publicity in the very active videogame space. This contradiction is not surprising: U.S. courts have used at least eight different tests to balance the individual's right to control his or her own image against the First Amendment.[5]

One reason for the lack of clarity is that courts have tended to make overbroad statements rather than focusing on the facts of the particular case before them. Even the U.S. Supreme Court has categorized all videogames similarly,[6] despite there being a material difference between videogames that are expressive and those that focus on physical dexterity.

This article makes a modest proposal about one subject very prevalent in videogames, athletic performance. The premise is that because athletic performance in an athletic contest per se is not expressive, such performance is not protected by the First Amendment in a videogame. If scoring a touchdown in a football game, for example, is not protected by the First Amendment, then the simulation of that act in a videogame that is itself just a simulation of the game of football does not have the protection of the First Amendment.

For good reason, there are no cases providing First Amendment protection to athletic feats per se in an athletic competition. No court has held that such acts are expressive.

Perhaps that will change when the recently filed complaint about mixed martial arts (MMA, also known as cage fighting) is decided.[7] Paragraph 112 of that complaint, which challenges New York's banning of live cage fighting, alleges, "Regulating MMA because of its supposedly violent message is unconstitutional, as the Supreme Court made clear this past term in Brown."[8]

Until the day, however, when a punch in the mouth in a cage fight garners First Amendment protection, it is a modest proposal to say that the simulation in a videogame of an athletic performance in a game is no more than a game and not at all expressive. Therefore, such a videogame is not deserving of First Amendment protection.

Right of Publicity Law Regarding Athletic Performance Is Unclear Because Courts Have Made Overbroad Statements Re Concepts Crucial To A First Amendment Analysis

Overbroad Definition Of Expressive Videogames

The 2011 U.S. Supreme Court case cited in the introduction, Brown v. Entertainment Merchants Association, contains a prime example of overbroad judicial statements leading to confusion and bad results. The case does not concern sports but rather a California statute attempting to protect minors from extremely violent videogames, which the Supreme Court held could not be done consistent with the First Amendment. In the course of making this ruling, Justice Antonin Scalia made the following statement about videogames:

> Like the protected books, plays, and movies that preceded them, videogames communicate ideas — and even social messages — through many familiar literary devices (such as characters, dialogue, plot and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.[9]

Justice Scalia's sweeping references to character, plot and social messages are completely irrelevant to such videogames as Pong, which has as its only object getting a moving dot past a moving line. Pong expresses nothing. It's just a game and, as such, has no claim to First Amendment protection.

As would be expected, however, Justice Scalia's overbroad statement was quickly picked up in a federal district court case, Hart v. Electronic Arts Inc,.[10] one of the recently decided diametrically opposed cases referenced in the introduction. That case involved videogame maker Electronic Arts' game entitled NCAA Football, which portrayed actual players without their names (which could easily be inserted by the videogame player) but in ways that were easily recognizable from their teams, positions, height, weight, athletic ability, accessories (like wrist bands) and hometowns.

The Hart court ruled that Electronic Arts' First Amendment rights trumped the right of publicity of Ryan Hart, the quarterback for Rutgers University, because, citing Justice Scalia above,[11] videogames receive as much protection as books, movies and other entertainment. The fact that Hart did nothing in the game but perform nonexpressive athletic feats like scoring a touchdown did not figure into the court's opinion.

That fact, however, was crucial in the diametrically opposed opinion in which the right of publicity of the player, Sam Keller, the quarterback for Arizona State University, trumped Electronic Arts' First Amendment rights:[12]

> [Plaintiff Keller] is represented as what he was: the starting quarterback for Arizona State University ... the game's setting is identical to where the public found Plaintiff during his collegiate

> career: on the football field.
>
> EA [Electronic Arts] enables the consumer to assume the identity of various student athletes and compete in simulated college football matches.

Because no court has ever decided that athletic performance in an athletic competition, e.g., scoring a touchdown, is an expressive act, in both Hart and Keller the player's right of publicity should have trumped the videogame manufacturer's First Amendment rights. Because only nonexpressive athletic acts were performed in the videogame NCAA Football, there were no expressive acts protected by the First Amendment against which to balance the right of publicity.

Overbroad Judicial Statements Re Transformativeness

One of the key issues in right of publicity cases is transformativeness. Basically, the more an individual has been transformed (e.g., turning well-known musician brothers into creatures that are half man and half worm[13]), the more likely it is that the First Amendment rights of the creator of an expressive work will prevail and vice versa. Although in the abstract this generally makes sense, it can become confusing when courts create balancing tests from overbroad statements.

The California Supreme Court has not been immune to overbreadth when analyzing transformativeness, which is the test that that court uses to balance rights of publicity with freedom of speech. In its first case on that subject, which has been very influential,[14] the court decided that lifelike charcoal drawings of the Three Stooges were not sufficiently transformative to merit First Amendment protection.

In so doing, the court defined transformativeness so broadly as to make it completely subjective. On the one hand, the court said that when

> artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.[15]

In contrast, the court also stated:

> Another way of stating the inquiry is 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.[16]

Not surprisingly, the diametrically opposed Hart and Keller courts referenced above used these quotes in diametrically opposed ways. The Hart court, where the First Amendment triumphed, focused not on the individual but on the work as a whole:

> while the player image may not be fanciful ... it is one of the "raw materials" from which an original work is synthesized [and] the depiction or imitation of the celebrity is [not] the very sum and substance of the work in question.[17]

The Keller court, on the other hand, focused on the individual, citing precedents, including the half-man, half-worm Winter, supra,[18] that "show that this Court's focus must be on the depiction of Plaintiff in 'NCAA Football,' not the game's other elements."[19] Using these different guideposts from the Three Stooges case, Comedy III, supra, it is not at all surprising that the Keller and Hart courts completely disagreed with one another.

Overbroad Judicial Statements Re First Amendment Protection For Entertainment

The courts were surprisingly late in conferring First Amendment rights on entertainment. It was not until 1952 that movies received First Amendment protection from the Supreme Court:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. This may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in Winters v. People of State of New York, 1948, 333 U.S. 510, 68 S. Ct. 665, 667, 92 L. Ed.: "The line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine."[20]

Perhaps because of their lateness in recognizing that expressive entertainment merits First

Amendment protection, the courts may be overprotective of entertainment now. But entertainment/nonentertainment is not where the line should be drawn. Expressive/nonexpressive should be the only boundary line relevant for First Amendment protection. As entertainment, some videogames can, as noted above, merit First Amendment protection if they are expressive. That, however, does not mean that, as entertainment, all videogames must receive such protection.

Some entertainment (e.g., athletic contests and videogames like Pong) is not expressive in any way and therefore merits no First Amendment protection. In short, although expressive videogames (e.g., "Grand Theft Auto," which has a complicated story line about the Los Angeles underworld)[21] merit First Amendment protection, nonexpressive games, like Pong or like those that merely simulate athletic contests) have no claim to such protection.

The game NCAA Football, as an example, is not about Sam Keller or Ryan Hart expressing anything. It is about a videogame player "being" those players for the purpose of scoring points to win a game. Like all athletic competition, which the videogame is simulating, NCAA Football is nonexpressive entertainment.

Conclusion

The genius of the common law is the incremental formulation of rules through case-by-case analysis in order to cover the infinite variety of human behavior. As Brandeis said in his seminal article on the right of publicity, that genius "in its eternal youth, grows to meet the demands of society."[22] That genius is blunted when, as in the case of videogames simulating athletic events, overly broad rules are applied.

Scoring a touchdown, for example, can be many things: thrilling, skillful, ingenious, etc. It is not, however, expressive. It simply is a way of scoring six points by crossing a line. No style points are given, regardless of the artfulness of the score.

Therefore, courts should not confer First Amendment protection on nonexpressive athletic acts in an athletic competition or in the simulation of one. Although in some cases it is not an easy task, our courts should not shrink from distinguishing nonexpressive from expressive videogames.

With all due respect to the cage fighting complaint referenced in the introduction, cage fighting is not expressive in any way that is protected by the First Amendment. For any court to hold otherwise trivializes that amendment.

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Ron Katz is a partner in Manatt Phelps' Palo Alto, Calif., office, where he heads the firm's sports law practice group. He is currently representing NFL Hall-of-Famer Jim Brown in an appeal that is not mentioned in this article but which deals with many of the issues raised in this article.

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[1] Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, 4 HARV.L.REV. 193 (1890).

[2] William L. Prosser, Privacy, 48 CAL.L.REV. 383 (1960).

[3] Id. at 423.

[4] Cf. Ryan Hart v. Electronic Arts Inc., No. 09–cv–5990, __ F. Supp. 2d __, 2011 (D.N.J.) with Samuel Michael Keller v. Electronic Arts Inc., No. 09-cv-1967, 2010 (N.D. Cal.).

[5] Hart, supra, at *13.

[6] Brown v. Entertainment Merchants Association, ___U.S.___, 131 S. Ct. 2729, 2733 (2011).

[7] Jon Jones et. al. v. Eric T. Schneiderman, in his official capacity as attorney general of the state of New York, and Cyrus Vance Jr., in his official capacity as district attorney for the county of New York, United States District Court for the Southern District of New York, No. 11 CIV 8215, filed Nov. 15, 2011.

[8] See footnote 6 above.

[9] Brown, supra, at 2733.

[10] See footnote 4 above.

[11] Hart, supra, *7.

[12] Keller v. Electronic Arts Inc., et al., 2010, *5, 6 (N.D. Cal.)

[13] Winter v. DC Comics, 30 Cal. 4th 881, 890 (2003):

Although the fictional characters Johnny and Edgar Antumn are less than subtle evocations of Johnny and Edgar Winter, the books do not depict plaintiffs literally. Instead, plaintiffs are merely part of the new materials from which the comic books were synthesized.

[14] Comedy III Prods. Inc. v. Saderup, 25 Cal. 4th 387 (2001).

[15] Id. at 405.

[16] Id. at 406.

[17] Hart, supra, at *24 (brackets in Hart, which is in part a quote (without the brackets) from Comedy III, supra, at 406).

[18] "In Winter the court focused on the depictions of the plaintiffs, not the content of the other portions of the comic book." Keller, supra, *5.

[19] Id.

[20] Joseph Burstyn Inc. v. Wilson, 343 U.S. 495, 501 (1952).

[21] E.S.S. Entertainment 2000 Inc. v. Rock Star Videos Inc., 547 F.3d 1095 (9th Cir. 2008).

[22] Warren & Brandeis, supra note 1, at 193.