The Use of Student-Athlete Likeness in Sport Video Games: An Application of the Right of Publicity

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Legal aspects
Abstract 2009-021

May 28, 2009
11:15 AM
25 minute oral
(Richland A)

The video game industry is a powerful and popular segment of the entertainment industry with video game sales reaching in excess of $8 million in the United States in 2007 [Entertainment Software Association (ESA), 2008]. Sport video games (SVGs) are among the top selling genres within the video gaming industry and comprise about 14.1% of the total game sales (ESA, 2008). Gaming corporations publish numerous sport related video games that span a wide range of sports appealing to a traditional sport demographic of 18-34 year old males (Kim, Walsh, & Ross, 2008). These games are popular for many reasons, including their interactive and fantasy based nature and visual authenticity in replicating a sport. Partnerships between sport organizations and SVG publishers enhance and allow the likeness and realism in the games (e.g., the NFL and EA Sports for Madden series, and the NCAA, the CLC, and EA Sports for the NCAA Football and Basketball series). The growing popularity of SVGs and high profile stakeholders has interested sport managers and spurred recent research on the topic. SVGs have been examined in sport literature for their influence as a marketing tool for the sport (Kim, Walsh, & Ross, 2008), the motives that drive a gamer to play SVGs (Kim, Ko, & Ross, 2007), and the effectiveness of SVG in-game advertising (Cianfrone, Zhang, Trail, & Lutz, 2008). The importance of SVGs in the sport industry is apparent, yet the topic of collegiate SVGs raises a glaring issue that has rarely been addressed. The use of student-athlete likeness in the collegiate games is an area of concern for both the NCAA and student-athletes and has provoked many discussions on the current state of the NCAA Bylaws and potential legal action by student-athletes.

The use of NCAA student-athletes in SVGs raises the issue of likeness and the student-athlete's right to publicity. The NCAA Bylaw 12.5.1(h) prohibits the use of student-athlete likeness for promotional or commercial purposes. When this bylaw was established approximately 20 years ago, the technological advances of SVGs and fantasy football were not likely a consideration by the NCAA. Instead, promotions involving specific athletes and sales of jerseys with student-athlete names on the back, and more recently bobblehead dolls, were of concern. However, with the technology and authentic nature of recent SVGs, the likeness of student-athletes within the games has become an important topic.

In 2007, three NCAA Proposals (2007-25, 2007-26, and 2007-28) suggested amending the current NCAA Bylaws (Christianson, 2007). As a response, NCAA Commissioner Myles Brand established a Division I presidential task force to examine the issue of student-athlete likeness in December 2007. This tabled the three amendments until the committee examines the issue. The topic has come under fire as recently as October 2008 with the Knight Commission on Intercollegiate Athletics meeting on the topic (Reardon, 2008). The Knight Commission argued the student-athletes' rights of publicity are violated. The NCAA may face future litigation on this topic if no action is taken. The following cases would substantiate a student-athlete lawsuit based on the right of publicity. The purpose of this study was to examine the legal issues surrounding the use of student-athlete likeness in collegiate sport video games by presenting the relevant case law associated with the right of publicity that could provide legal basis for a student-athlete. Practical implications and potential precautionary measures for the NCAA are discussed.

First, it is critical to understand the relationship between the CLC and EA Sports, which allows EA Sports the rights to use NCAA logos, teams, fight songs, stadiums, coaches, etc. within the NCAA video games. The realism stops just short of using the players' names, although the athlete names can be added to the game by the gamers. At issue is the authenticity in the electronic creation of the student-athletes. Three major areas help personify the digital football and basketball players into a realistic depiction, and likeness, of the student-athlete: personal profile (e.g., height, weight, hair and skin color, hometown, and uniform number), audio commentary (e.g., game commentators stating, "Tebow to pass"), and player skill set (e.g., tendencies in the game for a given player to pass or run at a certain skill level or movement characteristics). These areas may also be used as proof of likeness for a student-athlete against the NCAA in a potential lawsuit.

Second, it is important to understand the common law doctrine of right of publicity and how it is applied. This study examined the right to publicity and its relationship with the right to privacy. In this examination, specific focus was given to the right to the extension of the right to publicity doctrine to include "other indicia of identity" (Restatement (Third) of Unfair Competition § 46, 1995). Indicia of identity can include the imitation of a person's voice or performing persona as well as any other identifying characteristics. However, the appropriated identifying characteristics must be "so closely and uniquely associated with the identity of a particular individual that use entitles the defendant to appropriate the commercial value of the person's identity" (Restatement (Third) of Unfair Competition § 46, comment d, 1995). This study also examined the existing body of case law...
applying the right to publicity. These cases provided insight into how courts identify situations in which a person’s indicia of identity has been appropriated. Particular attention was paid to the Ninth Circuit Court of Appeal's decisions in Motschenbacher v. R.J. Reynolds Co. (1974) and White v. Samsung Electronics America, Inc. (1992).

The results of this study revealed that the Knight Commission was correct in its determination that the NCAA and its licensees are exposed to legal liability through the usage of player likeness in video games. However, the NCAA cannot remove the risk of liability unless it agrees to pay student-athletes for the usage of their likeness. This study discusses the possibility of compromise between student-athletes and the NCAA that would limit the NCAA’s liability. Although, the study also revealed that there is no legal incentive for the NCAA to reach such a compromise unless a class of student-athletes challenge the current usage. Therefore, the most pertinent question is not whether student-athletes have a legitimate cause of action for appropriation against the NCAA and its licensees like EA Sports. The most pertinent question is whether student-athletes will ever assert such an action.