Sporting chance

Conflicting opinions over two video games are driving an overdue clarification of publicity rights, says Manatt, Phelps, & Phillips' **Ronald S Katz**

Conceived in a *Harvard Law Review* article by Louis Brandeis in 1890,[1] the right of publicity has been the subject of only one US Supreme Court opinion in the intervening 123 years.[2] Considering that that opinion was rendered 36 years ago regarding an old-fashioned human cannonball act and considering all of the changes in technology since 1890 (including widespread use of videogames), a clarification of this difficult legal concept is long overdue.

Not that there is any shortage of lower court opinions on the issue, but the problem is that these cases have produced a plethora of different judicial tests and contradictory conclusions, most recently two federal district court cases that came to opposite conclusions on the same facts.[3] Now, however, two important US circuit courts of appeal (the Third and the Ninth) are considering these contradictory district court opinions.

If the two circuit courts render similar opinions of substance, they are likely to have a clarifying influence over this very unclear legal area. If the two circuit courts disagree, the stage would be set for the first Supreme Court review since 1977, which should also bring clarification.

The cases on appeal

The facts of the district court cases in New Jersey and California are identical, both involving the collegiate football videogames of Electronic Arts (EA). The player/avatars in these games are recognisable college players. Although they are not identified by name, they share the same jersey numbers, have similar physical characteristics and come from the same home state as their real-life counterparts. These images can be changed, but they always start out as recognisable players.

The players sued because they received no compensation for the use of their images. EA claimed a First Amendment right to use these images.

Unhelpful precedent

The 1977 *Zacchini* case does not provide guidance on the facts above. The nightly news showed all 15 seconds of Zacchini's human cannonball act, which led to a Supreme Court ruling for Zacchini on the following reasoning:

> . . [T]he broadcast of petitioner's entire performance, unlike the unauthoried use of another's name for purposes of trade . . . goes to the heart of petitioner's ability to earn a living as an entertainer.[4]

EA's videogames do not directly raise the issue above because they are new games that have never been played.

Reasons for differing results

Both courts used the so-called transformative test, which confers First Amendment protection on images that have been sufficiently transformed.[5] The California district court ruled for the players, holding that sufficient transformation did not occur because "EA does not depict Plaintiff in a different form; he is represented as what he was: the starting quarterback for Arizona State University."[6]

The New Jersey Court ruled the opposite, focusing on the creativity of the videogame as a whole:

> . . . in my view, it is logically inconsistent to consider the setting in which the character sits, which [the California district court] does in its analysis, yet ignore the remainder of the game.[7]

How to advise clients

Videogames vary from those that are completely non-expressive, like *Pong*, to those which tell a complicated story (like *Grand Theft Auto*). The US Supreme Court has held that the First Amendment applies to videogames;[8] on the other hand, no court has applied the First Amendment to sports activities *per se* (as opposed to the broadcast of those activities). Therefore, advising clients to make their videogames as expressive as possible would be much more likely to lead to First Amendment protection. Pure athletic feats, on the other hand, are much less likely to receive First Amendment protection. Scoring a touchdown, however skillful, is not expression, and no court has ever conferred one with First Amendment protection.

If the videogame re-enacts an actual historical event, however, it will be protected by the First Amendment. History is in the public domain and is a subject of public interest. When one is simply creating a new, fictional game on a video player, however, it is difficult to justify using an actual player rather than generic players. It would seem that the only reason to use an actual player in that circumstance is to sell more videogames, not to express anything. If that is the case, it will be hard to justify not paying the player for the value added by his image.

The First Amendment protects free expression, but not athletic feats. Hopefully the pending circuit court cases will harmonise these concepts in the multi-billion dollar market for sports-related videogames. If the circuit courts are not harmonious, however, there will likely be a Supreme Court holding in the next few years to harmonise them.

Footnotes

1. Samuel D Warren and Louis D Brandeis, The Right to Privacy, 4 Harv Law Review 193 (1890).
2. *Zacchini v Scripps-Howard Broadcasting*, 433 US 562 (1977).
3. *Hart v Elec Arts*, 808 F. Supp 2d 757 (DNJ 2011); *Keller v Elec Arts*, No. C09-1967 CW, 2010 WL 530108 (ND Cal Feb 8, 2010).
4. *Zacchini, supra*, at 575-576.
5. See *Comedy III Prods Inc v Saderup*, 25 Cal. 4th 287 (2001).
6. *Keller, supra*, at *5.
7. *Hart, supra*, at 787.
8. *Brown v Entertainment Merchants Association*, 131 S Ct 2729 (2011).

Author

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