The right of publicity in college sports

Intellectual Property and Technology News

4 SEP 2013

By: Melissa A. Reinckens | Matthew Ganas

The sports-media industry has recently experienced a proliferation of litigation involving right-of-publicity claims asserted by student-athletes for the unauthorized use of their names, images and likenesses. The most highly publicized cases have been brought by former college athletes concerning sports videogames. Recent activity in two currently pending federal cases – *Hart v. Electronic Arts, Inc.* and *Keller v. Electronic Arts, Inc*. – demonstrates that college athletes' right-of-publicity claims have the potential to dramatically alter current business models.

Hart, a former Rutgers quarterback, brought his right-of-publicity claim against Electronic Arts (EA) in October 2009, alleging that EA intentionally used his avatar in some of its "NCAA Football" videogames and promotions. The New Jersey district court granted summary judgment in EA's favor, finding that the use of Hart's likeness was sufficiently transformative to warrant First Amendment protection and that EA's First Amendment interests outweighed Hart's right of publicity in his likeness.

In May 2013, the Third Circuit reversed, holding the First Amendment does not shield EA from liability for the alleged right-of-publicity violations. The Third Circuit applied the so-called transformative use test to find EA's football videogames did not sufficiently alter Hart's identity to provide EA with First Amendment protection. In part, the court reasoned that the videogame avatar possessed many of Hart's physical attributes and contextual similarities, such as hair color, skin tone and Rutgers accessories. Consequently, the Third Circuit remanded the case to the district court.

Keller also involves right-of-publicity claims asserted by a former college quarterback regarding EA's "NCAA Football" videogame series. In 2009, the California district court denied EA's motion to dismiss, finding EA's use of player likenesses insufficiently transformative to warrant First Amendment protection. Prior to the Third Circuit's opinion in *Hart*, the two lower court decisions were viewed as inconsistent, and arguably irreconcilable, given the near factual identity of the right-of-publicity claims asserted. Now *Hart* and *Keller* stand on relatively equal footing from a right-of-publicity standpoint.

Keller's right-of-publicity claims represent only one aspect of a broader consolidated California district court action, *In re NCAA Student-Athlete Name and Likeness Licensing Litigation,* which includes a substantial antitrust component. Led by former UCLA basketball star Ed O'Bannon, the antitrust plaintiffs allege defendants NCAA, EA and the Collegiate Licensing Company violate federal antitrust laws against price fixing and group boycotts by conspiring to set licensing fees for college athletes' names, likenesses and images at zero.

The *O'Bannon* case has garnered considerable attention in response to the antitrust plaintiffs' pending motion for class certification asking the district court to certify a class that includes both former and current student-athletes. The *O'Bannon* plaintiffs seek to extend their theory of antitrust liability to encompass activity related to the defendants' use of current student-athletes' names, images and likenesses in live game broadcasts. Soon after holding a hearing on the motion for class certification, the court granted the plaintiffs leave to amend their pleadings to include conspiracy

allegations related to the license and sale of game footage, and six current student-athletes from major NCAA conferences.

Although the *In re NCAA Student-Athlete Name and Likeness Licensing Litigation* is still in the preliminary phases, if District Judge Claudia Wilken certifies a plaintiff class consistent with all the plaintiffs' antitrust liability and damage theories, then a multitude of additional plaintiffs will likely join the lawsuit. Undoubtedly, there will also be an increase in the number of lawsuits involving student-athlete right-of-publicity claims. Moreover, if the courts ultimately find that former or current student-athletes are entitled to compensation for the use of their names, images and likeness in videogames, live game broadcasts or both, there would be far-reaching implications.

The NCAA has already announced its intention not to renew its agreement with EA for the NCAA videogame franchise. Furthermore, if current student-athletes are deemed to possess publicity rights in live telecasts, this could significantly increase the contract price for highly sought after broadcast rights. Under the current model, sports-media networks generally negotiate for broadcast rights with NCAA conferences and in some cases individual member institutions. If the court finds current student-athletes are entitled to a portion of this revenue, then NCAA conferences and institutions will likely drive up the price for these lucrative broadcast rights in an effort to sustain current revenue levels.

With the *Hart* and *Keller/O'Bannon* cases still pending, the lasting implications of recent college athlete right-of-publicity actions are uncertain. It is clear, however, that if the plaintiffs in these cases are successful in bringing their right-of-publicity claims, the college athletic media landscape as we know it would significantly change.

For more information about right-of-publicity claims, please contact:

Melissa Reinckens

Matt Ganas

Follow this story and other new developments in media law on our blog Sports, Media and Entertainment Online.

FROM THE ARCHIVE

Broadcasters strive to halt Aereo: the next episode

IN CASE YOU MISSED IT

Intellectual Property and Tehnology News US - Q3 2013

AUTHORS

Melissa A. Reinckens
Partner
San Diego (Downtown) | T: +1 619 699 2700
melissa.reinckens@dlapiper.com

Matthew Ganas
Associate
New York | T: +1 212 335 4500
matt.ganas@dlapiper.com