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SPOTLIGHT ON ENTERTAINMENT AND MEDIA LAW

Football and Free Speech: Third Circuit Vidgame Decision Has Broader Implications for Reality-Based Works

42, 127 Hours, Act of Valor, Argo, Dolphin Tale, Fair Game, Green Zone, I Love You Philip Morris, Moneyball, People Like Us, Sanctum, Secretariat, Soul Surfer, The Bling Ring, The Fighter, The Runaways, The Whistleblower, Unstoppable—these are only a few of the motion pictures released since 2010 that are based, to one degree or another, on actual events and/or real people. The total number of reality-based motion pictures and television productions is staggering when one includes the myriad made-for-television movies and episodes of procedural crime dramas that are inspired by stories "ripped from the headlines."

An unintended by-product of such dramas is, well, more drama. People who believe that they are identifiable with the characters who appear in reality-based works file lawsuits. Typically they claim that their right of publicity—that is, the right to control the commercial use of one's name, photograph and likeness—has been misappropriated without their consent and without compensation. If the character has been portrayed in an unflattering manner, such claimants may also allege that they have been defamed or wrongfully placed in a negative, false light in the public eye.

As a general proposition, it is not necessary to acquire anyone's so-called life story rights in order to tell a true or even fictionalized story about events in which a real person participated. Creators of such works have a First Amendment right to tell these stories and the constitutional protections for works of entertainment are no less or different than those which protect newspaper and magazine articles, books and traditional documentaries. Although a creator must always be careful about falsely and harmfully depicting real people, or characters that reasonably could be understood to be based on real people, no consent is needed from and no compensation is required to be paid to the actual people who may be portrayed in such creative works.

Even though most people eventually lose their right of publicity and other claims, their lawsuits cause producers of entertainment works to engage lawyers, to divert time, energy and attention to litigation rather than creative endeavors, and sometimes to settle such claims as a matter of commercial expediency. And a recent decision by the US Court of Appeals for the Third Circuit involving a football video game that featured realistically depicted players may well encourage more real people to file lawsuits against producers of reality-based films and television programs, even if their chances of success remain remote.

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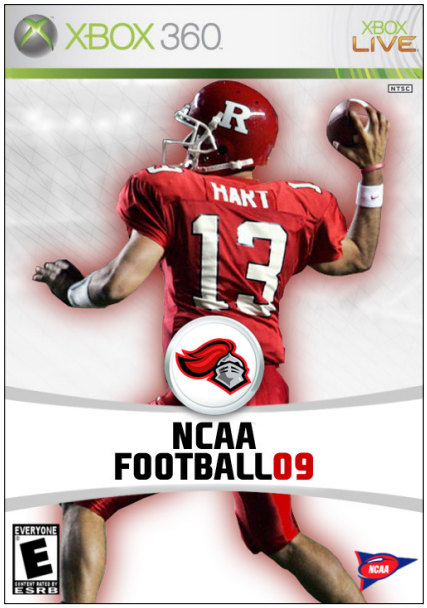
The Pre-Game Preview

On May 21, 2013, the Third Circuit issued its ruling in *Hart v. Electronic Arts, Inc.*, --- F.3d ----, 2013 WL 2161317 (3rd Cir. 2013) ("*Hart*"), which pitted a former Rutgers University quarterback against the publisher of the popular video game *NCAA Football*. In a case of first impression for both the Third Circuit and New Jersey, the appellate court surveyed the various judicial tests that other courts have used to resolve conflicts between an individual's right of publicity and the First Amendment rights of creators of "expressive works," selecting California's "transformative use" test as providing the best analytical framework for balancing these sometimes-competing rights.



But the Third Circuit then fumbled the ball by misinterpreting the test and applying it incorrectly. The court erroneously concluded that the *NCAA Football* video game violated appellant Hart's right of publicity even though it was a First Amendment-protected work, because the video game did not sufficiently transform Hart's likeness or identity. The appellate court refused to consider whether the video game as a whole was "transformative" as a result of all of the other creative elements that were combined to create the game. In reaching its conclusion, the Third Circuit gave some running room to right of publicity owners whose likenesses are woven into the fabric of creative works other than video games, while leaving content creators with an inability to reasonably predict whether any given reality-based work will be protected by the First Amendment.

The Opening Kick-Off

Appellant Hart was a quarterback with the Rutgers University's NCAA Men's Division I Football team during the 2002 through 2005 seasons. Appellee Electronic Arts, Inc. is one of the leading publishers of interactive entertainment software, including video games. It has for years published annual versions of *NCAA Football*, which incorporates realistic-looking players (in the form of virtual "avatars") and their actual physical and biographical statistics, as well as realistic stadium sounds, game mechanics, teams, logos and mascots.

In 2009 Hart sued EA, alleging that the game publisher replicated his likeness in the 2004, 2005 and 2006 editions of *NCAA Football*, which included (among hundreds of other players) a Rutgers University quarterback wearing the same uniform number as Hart, with the same vital statistics and biographical background as Hart, who had the same speed, agility and passer rating as Hart, and who even wore certain distinctive athletic accessories (a left wrist band and helmet visor) that Hart wore during games. Hart alleged violations of his right of publicity under New Jersey law. EA filed a motion for summary judgment in which it conceded for purposes of the motion that *NCAA Football* made use of Hart's likeness and identity, but argued that such use was protected by the First Amendment. The US District Court for the District of New Jersey agreed that EA's use of Hart's likeness was protected by the First Amendment and granted summary judgment in EA's favor. Hart appealed.

The Second Half

The Third Circuit observed that neither the New Jersey courts nor the Third Circuit itself had previously established "a definitive methodology for balancing the tension between the First Amendment and the right of publicity." So the court began its analysis by surveying the tests applied by courts in other jurisdictions. It rejected the so-called predominant use test adopted by the Supreme Court of Missouri, finding it to be "subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics." *Hart, supra*, 2013 WL 2161317 at *9. The court also rejected the so-called Rogers test developed by the Second Circuit, calling it "a blunt instrument, unfit for widespread application in cases that require a carefully calibrated balancing of two fundamental

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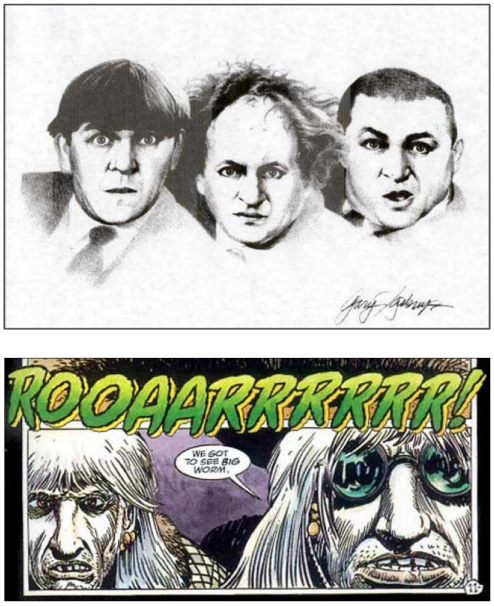
protections: the right of free expression and the right to control, manage, and profit from one's own identity." *Id.* at *12.

The appellate court settled on the "transformative use" test that was fashioned by the California Supreme Court in *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387 (Cal. 2001), and followed by that court in *Winter v. DC Comics*, 30 Cal.4th 881 (Cal. 2003). The transformative use test asks "[w]hether 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 in question." In other words, the question is "whether the product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness." The court of appeals in *Hart* found that this test "appears to strike the best balance because it provides courts with a flexible—yet uniformly applicable— analytical framework."



Although this panel of the Third Circuit unanimously agreed that the transformative use test should be adopted, the judges disagreed about how the test should be applied to Hart's claims. The two-judge majority concluded that the appropriate analysis was to focus only upon whether the video game somehow transformed Hart's identity; the dissent asserted that the court was required to consider all of the elements of the video game to determine whether it was a transformative work in which Hart's identity was merely one of the "raw materials." *Id.* at *19 and *23

Moving the Goalposts

Given its extremely limited inquiry, the majority readily concluded that the video game did not significantly transform Hart's identity: the digital avatar closely resembled Hart's actual likeness; the avatar's physical accessories matched those worn by Hart; and the avatar's statistics matched Hart's physical, biographical and game-performance data. Digitizing Hart's appearance by itself did not constitute a transformative use; neither did the context in which Hart's avatar appeared. According to the majority, "[t]he digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game." The fact that users of the video game had the ability to alter Hart's appearance did not transform his identity, either. Id. at *19-20.

The majority expressly rejected as irrelevant the many other elements of creative expression that were incorporated into *NCAA Football* that did not directly alter or affect Hart's digital avatar, such as original graphics, videos, sound effects and game scenarios. According to the majority, "wholly unrelated elements" simply do not bear on "how the celebrity's identity is used in or is altered by other aspects of a work." Were this not so, the majority continued, "[a]cts of blatant misappropriation would count for nothing so long as the larger work, on balance, contained highly creative elements in great abundance." *Id.* at *21-22.

Challenging the Call on the Field

The dissent argued that the myriad expressive elements of EA's video game that do not alter or directly affect Hart's likeness cannot be simply disregarded under the transformative use test. To the contrary, "it is necessary to review [Hart's] likeness in the context of the work in its entirety." In the dissent's view, this is the only way to strike an appropriate balance between "an individual's right to benefit financially when others use his identifiable persona for their own commercial benefit versus the First Amendment interest in insulating from liability a creator's decision to interweave real-life figures into its expressive work." *Id.* at *23. Under the correctly applied test, the dissent concluded that as used in *NCAA Football*, Hart's "likeness is one of the 'raw materials' from which [the] original work is synthesized . . . [rather than] the very sum and substance of the work in question." *Id.* at *26-27.

The dissent's analysis of the transformative use test comports with *Comedy III* and *Winter*. The California Supreme Court could not have made clearer that the relevant inquiry is *not* whether the work transforms the individual's likeness or identity, but whether *the work itself* is transformative. For example, the Supreme Court explained that "when *a work* contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity." *Comedy III, supra*, 25 Cal.4th at 405 (emphasis added). The court took pains to "emphasize that the *transformative elements or creative*

contributions that require First Amendment protection are not confined to parody and can take many forms." *Id.* at 406 (emphasis added). It deliberately described the relevant inquiry as "whether *a product* containing a celebrity's likeness *is so transformed* that it has become primarily the defendant's own expression rather than the celebrity's likeness." *Id.* (emphasis added). Nowhere in *Comedy III* does the high court suggest that proper inquiry is limited to whether the plaintiff's likeness has been transformed.

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Likewise, in *Winter*, the California Supreme Court reviewed the work at issue and found that it contained "significant expressive content other than plaintiffs' mere likenesses" and that "plaintiffs are merely part of the raw materials from which *the comic books* were synthesized." *Winter, supra*, 30 Cal.4th at 890 (emphasis added). Finding irrelevant the evidence that DC Comics may have used the plaintiffs' likenesses to increase sales, the court reiterated that "[t]he question is whether *the work* is transformative, not how it is marketed. . . . If *the challenged work* is transformative, the way it is advertised cannot somehow make it nontransformative." *Id.* at 891. Again, the Supreme Court's focus is on the transformative character of the work, not whether the plaintiff's identity was transformed by the work.

Into Overtime

The Third Circuit's incorrect and narrow interpretation of the transformative use test could lead to unpredictability and problematic consequences for content creators and right of publicity owners alike. It may be clear how the Third Circuit would evaluate other uses of lifelike avatars and personal information in video games, such as those featuring professional wrestlers, soccer teams or rock bands, in which the avatars do exactly what their real-life counterparts did in order to achieve their celebrity. Far less clear is how the Third Circuit would apply its own test to other, more traditional expressive works.

Suppose a film producer develops a motion picture about the life of a famous baseball player. In her quest for verisimilitude, the producer makes every effort to duplicate actual events as realistically as possible, including key moments in memorable ballgames. She uses actual team uniforms, logos and mascots; she casts actors who are "dead ringers" for their real-life counterparts, and she uses the actual names of the people involved in the baseball player's life. And because certain aspects of the athlete's life have been well-documented in newspaper articles, public speeches and (unfortunately) court transcripts, a substantial portion of the film's dialogue is taken verbatim from such sources. Under the Third Circuit's narrow test, have the names, likenesses or identities of the individuals portrayed in the film been sufficiently transformed such that the filmmaker's First Amendment rights trump the individuals' rights of publicity? Or to ensure First Amendment protection, was the producer required to change the names of the real people involved in these true events, or to engage actors with markedly different physical characteristics, ethnicities, national origins or even gender if possible and, in the process, completely change the work from one that depicts actual events to one that is only loosely inspired by reality?

Consider a television docudrama about a tragedy "ripped from the headlines." The production dramatizes interactions that likely occurred but of which there is no confirmed account, adds events that did not occur in real life and fictional characters who speak made-up lines of dialogue. Do these expressive elements transform the identities of the real people who were involved in the actual events or are they irrelevant creative contributions?

And in the assessment of whether an individual's likeness is either merely one of the raw materials from which an original work has been synthesized or the sum and substance of the work, of what relevance are the expressive, original contributions of the director, cinematographer and film editor, among others? Do these creative contributions count at all in the assessment of whether the work is transformative? Many if not all of these elements would not transform a real person's likeness or identity under the Third Circuit's construct, but they most certainly contribute to the synthesis of an original work that is primarily the creator's own expression rather than any individual's likeness.

Films and television productions based upon real events and actual people are being developed on a daily basis. The Third Circuit's dropped pass therefore could have a profound effect on the creative process. More litigation is likely to result, which could increase the cost of creating expressive works by forcing producers to acquire "rights" that they do not actually need, to pay more for the production insurance that covers right of publicity claims and to defend against such claims. And if this potential for litigation does not chill expressive speech altogether, it may limit the creative freedom of storytellers in all of their many forms, to the detriment of everyone.

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