

PIGGYBACKING ON GLORY

*Margit Livingston*¹

In his recent Article on the right of publicity for college athletes,² Professor Marc Edelman proves prescient in his arguments that a video game manufacturer using likenesses of college athletes violated their publicity rights and could not reasonably shelter itself behind the First Amendment. Since the publication of Edelman's Article, two Federal Courts of Appeal have decided cases in favor of the athletes, recognizing the validity of their rights of publicity while holding that the game manufacturer did not sufficiently transform the athletes' likenesses so as to qualify for a free speech defense.³ As a result, the manufacturer announced that it will not publish a new college football game in 2014.⁴

Edelman's piece rightly notes that the amateurism rules of the National Collegiate Athletic Association (NCAA) prevent college athletes from exploiting the commercial value of their likenesses.⁵ He also points out the NCAA's hypocrisy in insisting on its athletes' amateur standing while the NCAA itself earns millions from licensing broadcast rights to games to television stations.⁶ As Edelman mentions, several years ago a video game manufacturer, Electronic Arts (EA), realized that it could produce a college football video game by licensing the various college trademarks and logos from the NCAA while not paying for the publicity rights of the college athletes. Former college football players instituted suit for violations of their rights of publicity in federal court. As mentioned above, two Federal Courts of Appeal have recently rendered decisions supporting the athletes' publicity rights with strong dissents in both cases.

In *Keller v. Electronic Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litigation)*, the plaintiff Keller, a former college football player, sued the video game developer Electronic Arts for violation of his publicity rights based on EA's use of an avatar that copied Keller's height, weight, build, skin tone, hair color, home state,

1. Professor of Law, DePaul University College of Law.

2. Marc Edelman, *Closing the "Free Speech" Loophole: The Case for Protecting College Athletes' Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553 (2013).

3. *Keller v. Elec. Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1271 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (2013).

4. Cam Weber, *Update on College Football*, EA SPORTS, Sept. 26, 2013, <http://www.ea.com/news/update-on-college-football>. (last visited Sept. 28, 2013).

5. See Edelman, *supra* note 2, at 557.

6. *Id.* at 558.

and jersey number.⁷ The district court denied the defendant's motion to dismiss Keller's claim under California's anti-SLAPP statute.⁸ On appeal, the Ninth Circuit Court of Appeals affirmed and held that EA did not have a viable defense to Keller's claim under the First Amendment and, in particular, had not made a transformative use of Keller's likeness.⁹

Similarly, in *Hart v. Electronic Arts, Inc.*, the Third Circuit Court of Appeals examined the transformative use defense in a suit brought by another former college player (Hart) against EA for violation of his publicity rights.¹⁰ The lower court had granted summary judgment in favor of the defendant on the ground that the First Amendment protected its use of the plaintiff's likeness.¹¹ In reversing the district court, the Third Circuit surveyed various approaches for balancing celebrities' interests in protecting their publicity rights with First Amendment freedom of expression.¹² The court ultimately chose the transformative use test as striking the "best balance" between the competing interests and providing courts with "a flexible—yet uniformly applicable—analytical framework."¹³ In applying that standard, the court held that the defendant had insufficiently transformed the plaintiff's likeness to assert a viable First Amendment defense: "[T]he digital avatar does closely resemble the genuine article."¹⁴ The defendant's inclusion of other creative elements in its video game, such as original graphics, sound effects, and invented game scenarios, did not alter the fact that the plaintiff's likeness was only superficially modified and thus did not suffice for a transformative use defense.¹⁵

The dissents in both *Keller* and *Hart* emphasized the creative elements added by the defendant in producing the video game—elements that extended far beyond the likenesses of the college

7. *Keller*, 724 F.3d at 1271.

8. *Id.* at 1272. The California statute subjects "strategic lawsuits against public participation" (SLAPP) to a special motion to dismiss on the basis that such suits, if frivolous, tend to inhibit individuals from exercising their free speech rights for fear of being sued. CAL. CIV. PROC. CODE § 425.16(b)(1) (2012). Litigants are allowed to raise SLAPP defenses in federal court. *Keller*, 724 F.3d at 1272.

9. *Id.* at 1284.

10. 717 F.3d 141, 145 (3rd Cir. 2013).

11. *Id.* at 147.

12. The court noted that the case law has developed three tests for balancing the player's right of publicity against free speech interests: the predominant use test, the *Rogers* test derived from trademark law, and the transformative use test borrowed from copyright law. *Id.* at 153.

13. *Id.* at 163.

14. *Id.* at 166.

15. *Id.* at 169.

players.¹⁶ They also noted that the consumer users of the game—i.e., the game players—could alter the players’ likenesses and add many of their own imaginative elements to the game’s look and feel.¹⁷ Further, the dissents worried that a narrow focusing of the transformative use defense on whether the celebrity’s likeness had been transformed without consideration of the other elaborations, additions, and manipulations made by the defendant would threaten the “creative use of historic figures in motion pictures, books, and sound recordings.”¹⁸

Professor Edelman’s article makes persuasive points in favor of a narrowly cabined application of the transformative use defense, which two Courts of Appeals have now adopted. His view of the celebrity athlete as the golden nugget embedded in EA’s video games is accurate to a large extent. Although EA typically adds many other elements to the final product, the game would lose considerable value without the athletes’ likenesses. Gamers seek the fun of taking their real-life heroes and possibly altering them and then pitting them against traditional or nontraditional foes.

Although I largely agree with Edelman’s thesis, I view matters differently at a couple of points. First, typical celebrity singers, models, or actors likely have spent a tremendous amount of time and effort developing their talents and perfecting their personas—often working in isolation and without outside support. When they finally achieve fame, they can justifiably claim any unauthorized use of their likenesses for commercial purposes as a direct deprivation of earnings and an insult to their struggle to achieve prominence. College athletes obviously have spent time in developing their skills, but those skills arguably do not have much value without collegiate-level coaching and without the framework of intercollegiate athletic competition created by the NCAA and its participating colleges and universities. In addition, the most successful college athletes theoretically are compensated for their efforts through thousands of dollars of free education, food and travel, and public exposure. If they have the talent to succeed beyond college, they can press publicity claims as professional athletes.

Second, I am not sure that Edelman’s apportionment-of-damages theory¹⁹, where an athlete’s image is moderately but not completely transformed, is workable. If the unique characteristics of a celebrity athlete are muted or stripped away, what remains would seem to bleed over into *scenes-à-faire*—in other words, stock and predictable

16. *Keller*, 724 F.3d at 1284 (Thomas, J., dissenting); *Hart*, 717 F.3d at 175 (Ambro, J., dissenting).

17. *Keller*, 724 F.3d at 1286; *Hart*, 717 F.3d at 175.

18. *Keller*, 724 F.3d at 1290; *See also Hart*, 717 F.3d at 173–74.

19. *See Edelman*, *supra* note 2, at 583–84.

representations of individuals in particular situations.²⁰ For example, most quarterbacks tend to be tall so that they can see over the offensive line. Defensive linemen are usually broad-shouldered and husky. Many players might have close-cropped haircuts and tattoos—depending on the current fashions. College football players may often have hometowns relatively close to the university that they are attending. Hence, it may be difficult, if not impossible, to determine to what extent a stripped down or altered avatar owes its identity to an existing player as opposed to a generic depiction of a particular type of football player. I do not know how Professor Edelman would respond to this observation, but I would be interested to find out, given the thoughtful and forward-looking work that he has already done in exploring the publicity rights of college athletes.

20. See Margit Livingston, *Inspiration or Imitation, Copyright Protection for Stage Directions*, 50 B.C.L. REV. 427, 465–68 (2009) (discussing *scenes-à-faire* and the merger doctrine).