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Core 4: Critical Inquiry into Free Speech

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Image Rights vs. Free Speech in Videogame Production

The First Amendment and freedom of speech are issues which are at the core of the American value set. There is no absolute interpretation of the First Amendment as it pertains to freedom of speech; higher court opinions and their legal stances are constantly shifting and changing as our country's ever evolving popular culture demands new interpretation. As new technologies and the mediums which emerge from them offer new modes of expression, new questions of how far the First Amendment can go in protecting that expression emerge alongside them.

A recent lawsuit filed by former Arizona State quarterback Sam Keller has brought to light just such an issue. In 2009, Keller filed a class action law suit on behalf of himself and other college athletes against EA Sports, a popular videogame publisher, the National Collegiate Athletic Association and the Collegiate Licensing Company for illegally profiting from the use of the athletes' likenesses in their videogames (Thomas 2010). This suit represents the convergence of two issues: free speech and celebrity image or publicity rights, or the level of ownership which public figures have over their images (Hudson 2010).

While public figures generally have the right to prevent their images from being used for commercial gain without their consent or without receiving compensation for that use, courts have generally denied that right when works of entertainment are in question, asserting that the First Amendment protects the use of that image as freedom of expression ("Comic-book villains"

2003). However, no fine line exists and no one case clearly establishes a precedent that can be applied to all such cases. The case in question represents several variables which demonstrate why.

In the following pages this paper will demonstrate that Sam Keller does indeed have a viable case, that his image rights were violated by Electronic Arts, and that he is due compensation in some form from both past and future sales of the videogame in question. This assertion will be made focusing on the arguments that while the videogame in which his likeness was portrayed is indeed a work of entertainment, it does not qualify as creative and artistic expression. The digital rendering of Sam Keller and other college athletes in EA Sports videogames are created with financial gain as a primary intention, not the conveyance of an expressive message. Furthermore, the athletes' depictions are a mere replication of reality rather than a creative and transformative representation.

Before delving into both sides of the argument in question, some background on this case as well as the delegates involved must be provided.

Sam Keller, at the time the videogame in question was created, was a quarterback for Arizona State University. When he began his NCAA career, he knew full well that he would not be able to profit from his participation as an amateur student athlete; all players are made to sign an agreement stating that they would not be able to benefit from their name during their time as non-professional college athletes (Thomas 2009). However, at some point, Keller became uncomfortable with the way others were profiting from the use of his image.

In 2005, EA Sports released NCAA Football '05, the version of the game which contained Keller's likeness. While his name was not used in the game, his near identical likeness was. In the game, Keller's likeness was portrayed wearing the same jersey number and playing

the same position for the same team (Wieberg 2009). His digital representation also had the same weight and height as his real life self and even had the same playing style (Thomas 2009). And if this wasn't enough, Keller's virtual avatar was from the same state and hometown as Keller himself (Wieberg 2009). The only thing missing was the player's name, which does not appear on the back of his jersey as a pre-programmed part of the game. However, owners of the game are able to download player rosters through their gaming consoles' internet connection via Electronic Arts, and, once this action is taken, players' names automatically appear on their respective jerseys (Thomas 2009). This feature, in turn, eliminates any shadow of a doubt about who these avatars are meant to represent.

EA Sports as well as the NCAA have received countless undisclosed millions from the sale of an estimated 2.5 million copies of this game, which Sam Keller has come to view as a wrongful exploitation of his image and likeness (Wieberg 2009). In fact, one survey conducted by the International Licensing Industry Merchandisers' Association, independent of the NCAA, reported that "video-game royalties represented the second-largest category in earnings from collegiate licensing deals, behind apparel (Thomas 2009)." In other words, while Keller and other NCAA athletes receive absolutely no compensation from the use of their images in EA Sports' videogames, at least two other parties are profiting considerably.

Thus there are questions that arise at the heart of this case: At what point, if at any, does the right for celebrities to control their image outweigh the right of others to use it? And perhaps more to the point: should this kind of use of another's image be considered expressive speech and, in turn, be protected by the First Amendment?

In the case of Sam Keller and EA Sports, the courts have not yet answered these questions. The defendants filed a motion to dismiss the case which was subsequently denied by a San Francisco district court judge and the case is still an open matter (Garcia 2010).

EA Sports' argument in this case revolves around the idea that videogames should be considered protected speech, much like other creative works. While the game does portray the likenesses of real life individuals, the game as a whole, they say, is a creative and original work. Furthermore, EA Sports has cited numerous cases in which famous individuals have been incorporated into expressive works in order to demonstrate that with celebrity status comes publicity and that these sorts of image uses are to be expected. Nathan Siegel, who represents the conglomerate of media companies that has unified in support of EA Sports, summarized this portion of their argument: "Treating the right of publicity as if it were a copyright — as if you could copyright your name and face — goes too far, and it would give people too much power to control the First Amendment speech of others (Thomas 2010)."

Keller, and those who have aligned with him, see several loopholes in these arguments. While other courts have, in the past, ruled that videogames do in fact count as protected speech, Keller and his supporters argue that sports videogames should be thought of differently. This argument stems from the assertion that sports games aim only to replicate reality and are thus not inherently creative and should not be thought of as such. Perhaps more importantly, however, is the argument that EA Sports has used athlete images in their works with the sole intention of producing profits. Keller and his supporters fear that if EA Sports triumphs in this suit, a door will be opened allowing for others to profit from using celebrity images in similar ways. Duncan Crabtree-Ireland, the general counsel of SAG, or the Screen Actors Guild, which has publicly aligned alongside Keller, spoke of the consequences which are unanimously feared among public

figures who have worked hard to cultivate their careers and images: “the real-life consequence would be that anybody making anything other than a television commercial or a print ad — what is very clearly commercial speech — would essentially have the right to use people’s names and likenesses in those projects without any consultation (Thomas 2010).”

After the evaluation of the above arguments and the careful consideration of evidence, it seems that Keller and his associates and the arguments they present have greater merit than those of their opponents.

First and foremost, the argument that EA Sports’ series of NCAA football and basketball videogames should be considered and henceforth treated as expressive speech protected under the First Amendment must be addressed. While it is agreed that some videogames do in fact constitute expressive and original works, all videogames should not be labeled as such (Mitchell and Clarke 2007; 255-58). Some videogames, such as the popular videogame Halo which pits humans against aliens fighting each other for the survival of their respective races, depict fictional characters interacting with other fictional characters in fictional settings. Such examples are largely works of fantasy and without question represent creative, expressive, and original works. Other videogames such as war games or racing games represent examples where fantasy and reality converge—some elements may be based on reality; however the game still contains original elements with absolutely no basis in reality, and the convergence of the two ultimately represent a new and original idea. Other videogames still, such as those in question, seek only to depict and replicate reality. They depict characters that are based on real life people interacting in real life settings. This is where EA Sports’ argument begins to fall apart—for in what sense does depicting reality constitute an original, creative work?

Two equally important elements must be considered when attempting to determine whether or not EA Sports' game constitutes an original work: the game as a whole and the depiction of individual athletes' likenesses within the game. For even if individual likenesses, such as Sam Keller's, were depicted virtually exactly but in an original context, say, for instance, not playing football, than the game as a whole would be more likely to be considered an original work. While EA Sports contends that their game, in its entirety, is in fact a creative, expressive, and original work, the game seems to lack that which would make it so.

It is true that the videogame giant created the game from scratch, and surely it took dozens, if not hundreds, of creative minds to accomplish such a monumental task. This alone, however, does not establish much. Just because creative minds are put to a task does not mean that the results of their efforts are necessarily creative. Take the example of a "cover song," for instance. A cover song is created when one or more musicians recreates, or "covers," another group or individual's original work. The resulting song is certainly the product of creative minds, and may even take a creative twist on the original; however, it is still hard to argue that that song represents a creatively original work when it is based on the words and music of another artist.

EA Sports' NCAA Football and NCAA Basketball are simply cover songs, without the creative twist. The games as a whole present no new or original ideas, nor do they seek to send any kind of expressive message. Rather, they are nothing more than extremely realistic simulations of reality. The virtual player rosters of real college teams are made up almost entirely of characters based on real college athletes, who play each other in virtual versions of real college arenas, based on the rules of real college sports! It would seem that the only variable

here is the outcome of the games, which of course are left for the deftness of the game's player to decide.

Based on the nature of the games in question, it would appear that EA Sports might have a difficult time in making a court agree with their assertion that their works are inherently creative and original. Videogames that contain no message and are not expressive should be considered popular culture rather than art (Mitchell and Clarke 2007; 257-58).

The depiction of individual likenesses in these games must be looked at as well. For just as the context or setting in which an individual is depicted can affect whether or not a work should be considered protected speech, so can the manner in which that individual is depicted affect this outcome.

In two similar cases, in fact, the manner in which individuals' likenesses were depicted turned out to be deal breakers.

In the first, brothers and renowned blues musicians John and Edgar Winter sued DC Comics for using their likeness in one of their comic books without their consent. In the end, however, DC Comics prevailed—the court ruled the use of the brothers' images in the comic book as protected speech. While this decision may at first seem to work in favor of EA Sports, in the court's reasoning we instead find support for Sam Keller. In the comic book the Winter brothers were depicted as “half-human, half-worm creatures with green tentacles sprouting from their chests.” Furthermore, while the characters' first names remained true to life, the brothers' last name was changed from Winter to Autumn (“Comic-book villains” 2003).

While it is nonetheless clear that DC Comics meant to depict the Winter brothers, it is how they were depicted that mattered. Justice Ming Chin described in his decision how this affected the court's decision: “Although the fictional characters Johnny and Edgar Autumn are

less-than-subtle evocations of Johnny and Edgar Winter, the books do not depict plaintiffs literally. They are distorted for purposes of lampoon, parody, or caricature (“Comic-book villains” 2003).” In other words, DC Comics’ use of the Winter brothers’ images was transformative.

David L. Hudson Jr., a First Amendment scholar for the First Amendment Center describes the term transformative in its legal context: “Transformation is a First Amendment based-defense that asserts a defendant has so transformed the plaintiff’s likeness or image that it becomes the defendant’s own expression (Hudson 2010).”

In the second case, Paris Hilton sued the Hallmark Corporation for what she believed to be the illegal use of her image on one of their greeting cards. The case, however, was thrown out for the same reason: the court determined that Hallmark’s use of Hilton’s image, even though it was without her consent, was transformative and thus its suppression would violate the First Amendment (Hudson 2010).

In both cases arguments that can be found come as unlikely sources of support for Sam Keller’s case. The only reason the defendants in these cases prevailed was because they both significantly transformed the plaintiffs’ images; EA Sports, however, made no such effort in their depictions of NCAA athletes. Actually, in most cases, and certainly in Sam Keller’s, they made every effort to achieve the exact opposite—the players are depicted as true to form as possible, right down to their physical appearance, attributes, and playing styles (Wieberg 2009). This fact would certainly and effectively bar EA Sports from using a transformation defense in court. Also, this provides further support for the assertion that in no way do these games represent original and creative works—again, EA Sports is not transforming elements of reality into something else that would represent an altogether new work. Instead, they are simply

digitally replicating the experience of NCAA sports, and by providing such an extensive level of player detail they are coming one step closer to simulating game play nearly exactly as it is in reality.

Additionally, the concept of transformation and its application has already taken a heavy toll on the case, thwarting the defense's efforts to stop the case before it started. In February, 2010, EA Sports filed a motion to have the case dismissed based on the fact that the game in question should count as protected speech. Claudia A. Wilken, however, the U.S. District Court Judge who presided over the hearing, denied the motion because she felt that EA Sports failed to adequately transform player images in such a way that would constitute original and creative expression (Thomas 2010). This came as a major blow to the defense, whose team of lawyers will now be left to fight this case in continuing legal battle.

It should be noted, however, that EA Sports has never attempted to use a transformation defense in this case. Furthermore they have never attempted to deny that many of the characters in their NCAA games are depictions of real life student athletes. Instead, they address the issue directly, arguing that famous people have been incorporated into the expressive works of others for generations (Thomas 2010). In turn, EA Sports is asserting that this is simply one of the hazards of leading a public life—this sort of image use should come to be expected by celebrities.

To drive their point home, EA Sports cited two examples in a recent brief they filed: the first is a Paul Simon lyric from the song "Mrs. Robinson" which mentions the famous baseball player Joe DiMaggio, while the second is the movie "Forest Gump" in which the main character is digitally inserted into real footage of important historical events and appears to be interacting with several famous figures (Thomas 2010).

However, two things seem to separate these examples from the videogames EA Sports is defending: the purpose for which the works were created and their respective expressive values. “Mrs. Robinson” and “Forest Gump” are both works that were likely created with the goal of generating profit, however, it would be a gross misnomer to suggest that this was the sole purpose for their creation. Each of these works serves another equally important purpose as well: to act as a vehicle for their authors’ creative expression. This is exactly why the First Amendment would protect such a work as free speech, these examples are not just works of entertainment; they are works of art—to attempt to deny the creative and expressive value of these works would be a feeble and foolhardy effort.

However, to compare EA Sports’ NCAA videogames to these works is an incredible stretch. These games contain no new ideas and do not aim to convey any kind of message; there is very little evidence to support the idea that these games are expressive works in any sense of the term. And if they contain no expression and no message, their purpose can obviously not be to convey that which does not exist. Without question the purpose of the games are to entertain, but not uniquely, creatively, and expressively so; and to the CEO of Electronic Arts, it is likely that financial gain trumps entertaining. In turn, these games are nothing more than the result of a massive corporation’s efforts to generate equally massive profits.

In making the argument that the depictions of athlete likenesses in their videogames are equal to the depiction of famous figures from the above mentioned works, EA Sports did anything but make their case stronger. Instead, this argument only serves to more clearly illustrate what does and does not constitute an expressive work and, in turn, the fair use of another’s image.

The above arguments clearly establish that the games in question, as a whole, do not qualify as original, expressive, and creative works, and nor do they sufficiently transform athletes' images in such a way that would constitute original expression. Thus, it should be fairly concluded that EA Sports' NCAA videogames should not be considered or treated, for legal purposes or otherwise, as speech protected under the First Amendment. This being the case, it must also be concluded that EA Sports' use of Sam Keller's likeness, as well as the likenesses of hundreds of other NCAA athletes, was unfair and in violation of the athletes' publicity rights, and furthermore, that both EA Sports and the NCAA illegally profited from these actions.

That NCAA amateurism regulations prevent student athletes from profiting from their names and images does not make it right for others to do so in their place. Many NCAA football and basketball players' were wrongly exploited; their images were used to generate millions of dollars in profits and the players themselves received absolutely nothing in the way of compensation, monetary or otherwise. This is a wrong that EA Sports and the NCAA must both correct. This does not necessarily mean that NCAA amateurism regulations need to be completely disregarded, but it does mean that they might need to be reworked in order to fairly compensate the athletes who put in countless years of hard work and effort to cultivate their talents and images. Keller's lawyers have proposed some creative solutions for this problem that would not violate the athletes' amateur status, one of which suggested that student athletes be compensated with tuition credits for graduate education (Thomas 2009). It seems then, that for Sam Keller, this case is less about money than it is about giving credit where credit is due. Hopefully, the courts will give that credit to those who deserve it; Sam Keller may be vindicated yet.

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