

Ruling Could Play Into Video Game Case By Jean-Luc Renault

As federal appellate judges mull whether athletes' likenesses can be used without their permission in video games, they are looking for guidance in a state court decision involving similar issues for rock stars.

The entertainment industry is waiting for the 9th U.S. Circuit Court of Appeals to rule on whether game publisher Electronic Arts misappropriated college athletes' likenesses. The case was argued Feb. 15.

A California appeals court ruled the same day in a separate case that publisher Activision Blizzard overstepped legal bounds by using likenesses of members of the band No Doubt beyond what was stipulated in a contract.

At the 9th Circuit judges' request, lawyers in the EA case last week filed briefs explaining how the No Doubt decision should influence their opinion. Some legal observers said that request could mean the 9th Circuit is considering a move away from precedent.

The athletes' lawyers said the state-court decision provided a boost in what was initially an uphill battle against 9th Circuit precedent.

"There's no doubt what the No Doubt decision means - we win," said Steve Berman, a partner with Hagens Berman Sobol Shapiro LLP in Seattle and a lawyer for a former college athlete who sued EA.

Kelli Sager, a partner with Davis Wright Tremaine LLP in Los Angeles who represents EA, disagrees. "We certainly disagree with the idea that this decision should influence our case," said Sager. "The No Doubt case should have been decided on a clear contract, which doesn't exist in our case and we think it was wrongly decided."

While it's not unusual for federal judges to factor in developments from state court cases involving similar issues, attorneys said that the timing of these cases was both rare and especially opportune. The case is being hotly watched because a federal appellate decision on the matter could carry significant First Amendment implications far beyond the video game console.

Both cases pit individuals' right to control their image versus the First Amendment rights of video game makers, news outlets or entertainment studios to use a celebrity's likeness.

Former college quarterback Samuel Keller accused EA of violating his right of publicity, a state law claim, for including an unnamed virtual avatar that looked like him in its "NCAA Football" series. The class action was filed in federal court because the parties are located in separate states.

EA filed an anti-SLAPP motion to dismiss the case as a Strategic Suit Against Public Participation, arguing video games are expressive works protected by the First Amendment, but the district court denied the motion.

"The main issue is not whether it's an expressive work, but whether the use is transformative in the context of the video game," said Jennifer Rothman, a law professor at Loyola Law School who specializes in right of publicity issues.

"The question is, will the First Amendment protect against a right of publicity claim?" she added.

In the No Doubt case, judges from the 2nd District Court of Appeal found that the First Amendment does not protect the game maker because the band members' images were exactly as they appeared in real life.

In right of publicity cases, the use of someone's image is only allowed if that likeness is changed enough so as to become a whole new creation - a test that the 9th Circuit adopted from the state Supreme Court.

Rothman said the No Doubt case could cause the 9th Circuit to reinterpret the court's test for deciding if a work is transformative or not.

"I think the 9th Circuit will go out of its way to note that realistic or literal uses of names and likenesses can be transformative," Rothman said.

The 9th Circuit judges also asked the parties in a separate video game dispute between EA and former pro football great Jim Brown to file briefs explaining the weight of the No Doubt decision.

Although Brown's suit also involves First Amendment issues, the heart of the case is a trademark claim that poses separate legal questions from those raised in the No Doubt decision, lawyers said.

Judges Pamela Rymer, Jay Bybee and Gordon Quist, sitting by designation from the Western District of Michigan, are the 9th Circuit panel judges assigned to the case.