

## Ohm's Law: Game Over?

By Hun Ohm\*

Last month, we looked into the curious case of a hypothetical video game developer who was hell-bent on creating a new, ultra-realistic jai alai smart phone game to sate the video game consumers' appetite for games with a high level of verisimilitude. The potential for a runaway hit was there, as evidenced by the wild success of realistic sports video games. However, we also explored some of the potential pitfalls our video game developer might face if it decided to utilize the identities and information of real-life athletes, without permission, in its game. Indeed, a slew of federal court cases was reason enough for our video game developer to hit the pause button and rethink its strategy. A recent settlement suggests that this decision may have been wise.

To refresh your recollection, the cases involved a number of college athletes who objected to the use of their likenesses, statistics, and other indicia as avatars in a popular series of video games, *NCAA Football*. The maker of the video games, Electronic Arts, faced federal lawsuits on both coasts in which the athletes claimed, among other things, that Electronic Arts had violated their right of publicity, *i.e.*, their right to control the commercial use of their names, likenesses and identities. The disputes were classic hotly contested, back and forth battles between determined participants; however, a series of legal setbacks in both cases suggested that Electronic Arts' playbook may have been flawed, and its unauthorized use of the players' identities left it exposed to a great deal of uncertainty and potential liability.

Rather than continuing the battle through additional bruising rounds of legal proceedings for these lawsuits as well as additional lawsuits brought by other former student-athletes (such as the former basketball star Ed O'Bannon), Electronic Arts and the Collegiate Licensing Company (another defendant in some of the litigations), appear to have thrown in the proverbial towel. Late last month, they entered into a proposed settlement agreement with the athletes to dispense with the claims between them.

While the terms of the settlement are confidential, and the settlement is subject to court approval, several hundred thousand former and current athletes could be entitled to receive some portion of the settlement. Although the actual per athlete payment will likely not be enormous (possibly in the range of a few hundred dollars per athlete), the total amount of the settlement is reportedly \$40,000,000. A perhaps more striking development is that Electronic Arts separately announced that it would not be producing an installment for the *NCAA Football* series next year, citing the ongoing legal battles as one of the factors weighing on this decision. Most likely, the fact that the NCAA and several major collegiate conferences recently severed ties with the franchise was also a major factor in Electronic Arts' evaluation of the staid franchise's ongoing viability. While the ultimate future of this franchise has not yet been announced, it may in fact be "game over."

Interestingly, the NCAA, which is also a party to the California litigation, has elected to remain in the game, so to speak, and is not part of the settlement. In fact, it has vowed to take its case all the way to the U.S. Supreme Court, if necessary. One of the driving reasons for this could be that there is a larger game at stake – television, and the billions of dollars of revenue generated through television deals involving college sports; a negative result for the NCAA could be extremely costly, and could upend some of the NCAA's very foundations, with student-athletes potentially receiving compensation and other additional benefits for their participation in college sports. In

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other words, amateurism as we know it for college athletics could be poised for some radical changes in the coming years; the changes to the virtual and real worlds of sports video games featuring college athletes have already commenced.

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