

Ohm's Law: The Real World in the Virtual World

By Hun Ohm*

You're a start-up video game developer as well as a keen follower of all things sports-related, and you think you've stumbled across an opportunity: jai-alai is poised to make a comeback. The recent emergence of a slew of handsome and charismatic players has captured the hearts of fans beyond Florida, including a few hipster celebrities who have developed a high-profile attachment to the sport and are lauding its merits on late-night television. There is even talk of a major jai-alai feature film in the works.

You're ready to take advantage of the nascent resurgence of the sport by creating an ultra-realistic jai-alai smartphone game where players will be able to utilize in-game avatars that correspond to real-life jai-alai athletes. Your game will include real-time statistics for these real-life athletes, and the avatars will religiously resemble each athlete's unique characteristics. While the avatars will also be adjustable by the game players, you know that being able to play real-life jai-alai athletes, with a focus on realism and detail, will be the big selling point for your game. Time to cash in, right? According to a recent string of federal court decisions, maybe not.

One case involved a former college athlete named Ryan Hart, who was a quarterback at Rutgers University from 2002-2005. Without Hart's permission, the video game maker Electronic Arts included an avatar in its *NCAA Football* video game series that utilized Hart's number, height, weight, biography, and other statistics for an "unnamed" quarterback on the Rutgers team. Hart filed suit, and last spring, the United States Court of Appeals for the Third Circuit gave Hart a W in his win/loss column, finding that Electronic Arts may have violated Hart's right of publicity, *i.e.*, his right to control the commercial use of his name, image, likeness and identity.

Electronic Arts had tried to block Hart's right of publicity blitz by claiming protection under the First Amendment, a common play in right of publicity cases. In evaluating Electronic Arts' position, the Third Circuit considered a number of tests before deciding that the appropriate test in this situation was the so-called transformative use test. This test endeavors to strike a balance between First Amendment interests and right of publicity interests, focusing on whether Electronic Arts' use of Hart's likeness and other indicia in the game altered or transformed Hart's identity in a significant manner so that it reflected Electronic Arts' own creative expression and contributions.

The Third Circuit concluded that it did not. The digitized Hart simply, and closely, tracked the real Hart's appearance and biographical information, among other indicia; in essence, the digitized Ryan Hart was the actual Ryan Hart doing exactly what he had been known for - playing college football in a realistic, albeit digitized, environment. Notably, in reaching its conclusion, the Third Circuit rejected arguments that merely digitizing Hart was in itself somehow transformative. The Third Circuit likewise was not impressed by the functionality in the game that enabled players to alter the avatars. Neither aspect was transformative enough to run around Hart's right of publicity claim.

This summer, in another case involving a former college football player (Samuel Keller) and Electronic Arts, the United States Court of Appeals for the Ninth Circuit similarly threw a penalty flag against Electronic Arts, finding that its use of Keller's likeness in the *NCAA Football* game

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series was insufficiently transformative to escape Keller's right of publicity claims. These cases suggest that the courts could be edging toward a semblance of consistency when evaluating right of publicity claims against First Amendment considerations, at least in the context of athletes appearing in video games. While video games are protected expressive speech under the First Amendment, these cases indicate that the protection is not bulletproof, and at times other protected rights such as the right of publicity could outweigh it.

So for the time being, it might be wise for our video game developer to hit the pause button on that new jai-alai game, especially if it utilizes the identities and information of real-life athletes without their permission. While the enormous success of realistic sports video games makes clear that enhanced and accurate simulation appeals to video game consumers, the recent developments with the *NCAA Football* video game series suggest that our video game developer should exercise caution in the pursuit of verisimilitude, as the virtual reality created in a game could sometimes lead to a real life dispute.

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