

Review of Recent Video Game Right of Publicity Cases

By Chrissie Scelsi, Esq.

- I. History of Right of Publicity Cases in Video Games
 - a. Likeness Rights Typically Granted
 - i. Use for production, marketing services
 - ii. Motion capture rights- work made for hire
 - iii. Approval rights
 - iv. Can be additional permissions that need to be obtained for use of certain instruments, clothing, marks in game
 - b. Music
 - i. *Romantics v. Activision*, 574 F.Supp.2d 758, August 2008.
 1. Use of their song was held not to be an infringement of the band's right of publicity
 2. Different from a soundalike case, i.e. Midler or Waits cases
 3. Company also had permission to use song in game
 4. Not using likenesses of band members for game avatars
 - ii. Kurt Cobain
 1. Not a lawsuit, but there was a lot of publicity when Courtney Love realized Kurt Cobain's avatar could be unlocked in Guitar Hero 5
 2. Jon Bon Jovi said he had been approached to license his rights, unlock feature was not mentioned to him
 3. Love then changed her tune, later said "Kurt would think it's funny, even if it were five Kurts singing Spice Girls"
 - iii. *No Doubt v. Activision*, 702 F.Supp.2d 1139, C.D. Cal 2010
 1. Band had granted use of their likeness rights to Activision, as well as rights to songs
 2. Suit over the unlock feature of the game and possible uses of avatars to sing non-No Doubt songs, which "transformed NO Doubt band members into a virtual karaoke circus act."
 3. Claims
 - a. Infringement of right of publicity
 - b. Breach of contract
 - c. Fraudulent inducement
 - d. Injunctive relief
 - e. Recall
 4. Band had approval rights in the contract
 5. Activision's answer- that unlock feature is public knowledge, management should have been aware of it
 6. Activision's counter claims
 - a. Breach of contract

b. Unjust enrichment

7. Ethical Implications

a. Diligence- Professional Conduct Rule 4-1.3

i. Comment "lawyer is not bound to press for every advantage that might be realized for a client"

b. Competence- Professional Conduct Rule 4-1.1

i. Can study, research

8. Case has been remanded to state court after being removed to federal court

9. Federal court found that claim was not preempted by copyright law

iv. Axl Rose v. Activision

1. \$20 million suit not about use of his likeness but that of Slash in Guitar Hero III

2. Also claim that songs were used for games outside that mentioned in the license

3. Claims include

a. Fraud- Intentional Misrepresentation

b. Fraud-Concealment

c. Negligent Misrepresentation

d. Unjust Enrichment

e. Breach of Contract

f. Promissory Estoppel

4. Awaiting response from Activision, scheduled for trial in 2012

II. Considerations for Representing Clients Licensing Content for Uses in New Technology

a. Understand what type of uses your client is okay with licensing content for, what uses are unacceptable

b. Understand the capabilities of the new technology that content will be placed on, what that may mean for client and content

c. Be forward looking in drafting, consider what will happen to content when license expires or is terminated