



# Quarterback takes on college athletics and video game manufacturer

Banner & Witcoff's **Richard S Stockton** discusses a lawsuit filed by a student athlete in the US that may flower into a multi-billion dollar war against the National Collegiate Athletic Association and college amateurism

**T**he student athlete plaintiffs in a putative class action lawsuit<sup>1</sup> against Electronic Arts, Inc (EA), the National Collegiate Athletic Association (NCAA) and the Collegiate Licensing Company (CLC) have a lot to be thankful for this Thanksgiving. Or do they?

Their pilgrimage began in May 2009, when Sam Keller, a former starting quarterback for Arizona State University and University of Nebraska, sued video game maker EA, the NCAA and the CLC for using student athlete names and likenesses in EA's NCAA Football, NCAA Basketball and NCAA "March Madness" series video games. The video games simulate NCAA athletic competitions, and depict a cornucopia of collegiate realism, including team branding, uniforms, stadiums and mascots.

The video games also feature players of course, and therein lies the root of Keller's beef. NCAA bylaws generally prohibit the commercial use of any NCAA student athlete's name, picture or likeness.<sup>2</sup> While EA never released video games with players having actual student athlete names, player game characteristics like position, height, weight, team number, home state and school year uncannily coincide with actual student athlete characteristics.

The complaint, for example, compares Kent State Golden Flashes running back Eugene Jarvis (No 6) to his alleged virtual twin, "HB #6," in the NCAA 2009 Football video game. Among other things, both Jarvis and HB #6 are listed as five-foot five-inch, 170-pound redshirt juniors from Pennsylvania, although they have different hometowns.

The complaint alleged other intriguing facts, including that EA sent detailed questionnaires to team equipment managers. Student athlete idiosyncrasies such as arm bands, playing styles and athletic ability matched video game players, and that more recent video game editions allowed importing of third-party-generated supplemental roster data that included actual student athlete names.

Although a class has not been certified yet, 26 co-plaintiffs have joined Keller, including six current student athletes, former UCLA basketball star Ed O'Bannon and National Basketball Association Hall of Fame entrants Oscar Robertson and Bill Russell. The plaintiffs also expanded their claims to include other alleged name and likeness uses, including live and re-broadcast television uses and antitrust violations.

On the defendants' side, fissures formed. In July 2013, the NCAA declined to renew its NCAA Football video game licensing agreement with EA, adding in a press release that "[t]he NCAA has never licensed the use of current student-athlete names, images or likenesses to EA." On September 26, to the delight of video gamer spouses and significant others, EA announced that it would not make a new college football game in 2014 (it had not made a college basketball game since 2010), adding that "[w]e have been stuck in the middle of a dispute between the NCAA and student-athletes who seek compensation for playing college football."

A few hours later, EA and CLC announced a settlement with the Keller plaintiffs and former Rutgers quarterback Ryan Hart, who was pursuing a separate case against EA,<sup>3</sup> leaving the NCAA to fight alone. The settlement

terms are currently confidential, but ESPN reported that EA and CLC would pay \$40m.<sup>4</sup> As of January 2013, plaintiffs' legal fees had already gobbled up more than \$20m.<sup>5</sup> As of mid-October 2013, presiding Judge Wilken must still approve the settlement, and is likely scrutinising settlement fund allocation.<sup>6</sup>

Plaintiffs' lawyers proclaimed that "[t]oday's settlement is a game-changer because, for the first time, student athletes suing up to play this weekend are going to be paid for the use of their likenesses." While grandiose at this juncture, the statement may foreshadow future events.

## What's next?

Forty million buys a lot of cornbread and stuffing, but will Judge Wilken grant their class certification motion, which was argued in June and is ripe for decision? Judge Wilken's past class certification history and statements on the record in this case suggest to some observers that she will certify. For example, in granting leave for defendants to file further motions to dismiss on September 10, Judge Wilken wrote that "[d]efendants may intend to seek an interlocutory appeal of any class certification order, and the Court does not wish to leave open a claim that they were not allowed to present all of their arguments."

Assuming Judge Wilken finds sufficient similarities and certifies a class, hundreds of thousands of student athletes could sit at Keller's table, and his video game spat will have evolved into an all-out assault on the NCAA and college amateurism. Whereas video game royalties from EA to the NCAA likely do not exceed \$10m annually, the NCAA anticipates receiving almost \$800m in media revenue

this year alone, mostly from television rights to the NCAA men's basketball tournament.<sup>7</sup> With plaintiffs undoubtedly eyeing lucrative additional media revenues of college conferences not yet named as defendants, class certification would put billions of dollars on the table.

### The right of publicity?

For IP practitioners, *Keller* offered to establish significant legal precedent for the right of publicity. Early in the case, EA moved to strike Keller's right of publicity claims on the ground that First Amendment interests in creating a college football video game outweighed Keller's right of publicity-based economic interests. The United States Court of Appeals for the Ninth Circuit controlling precedent established a "transformative use" test when balancing these interests, involving "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesised, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."<sup>8</sup>

Judge Wilken rejected EA's transformative use argument. The ninth circuit affirmed 2-1, with Judge Thomas dissenting that "[t]he majority confines its inquiry to how a single athlete's likeness is represented in the video game, rather than examining the transformative and creative elements in the video game as a whole. In my view, this approach contradicts the holistic analysis required by the transformative use test."<sup>9</sup>

In the separate *Hart* case, presiding Judge Wolfson ruled for EA on a similar motion, applying (like Judge Thomas) the transformative use test to the overall context of the video game. The United States Court of Appeals for the Third Circuit reversed 2-1. While the ninth and third circuit decisions are reconcilable, the dissents and other circuits' varying tests indicate that rulings that balance right of publicity and First Amendment interests can be as different as cranberries and casserole – especially for video games.

EA petitioned the US Supreme Court for a writ of *certiorari* regarding the Ninth Circuit decision and the balance between First Amendment and right of publicity interests. The petition offered the chance for the Supreme Court to evaluate the right of publicity for only the second time, and more than 35 years after the Supreme Court rejected a news service's First Amendment defence to rebroadcasting Hugo Zacchini's entire 15-second human cannonball act.<sup>10</sup> However, EA settled three days later (some believe the petition was a mere settlement ploy), although the petition will likely remain on the Supreme Court docket at least until EA is dismissed,

with plaintiffs' time to file a response recently extended to January 2014. Still, the settlement probably means the Supreme Court ship has sailed on this issue.

### Antitrust

Due to legal and practical limits on the right of publicity, alleged antitrust violations based on the NCAA restricting student athletes' ability to license their rights of publicity are now the *Keller* case's centrepiece. Among other things, the NCAA has steadfastly argued that it is not actually *using* student athletes' names and likenesses in video games and television. Accordingly, and given a dearth of inducement-type right of publicity statutes and case law, plaintiffs were relegated to asserting generic civil conspiracy and breach of contract causes of action against the NCAA for right of publicity violations. Moreover, the state law-based right of publicity is not homogenous. Some states recognise the right of publicity by statute, some by common law, some by both, and some not at all. States like California exempt news and sports broadcasts by statute,<sup>11</sup> and some states extinguish the right at death. Antitrust causes of action enable the plaintiffs to paint with a broader brush while increasing the likelihood of class certification.

However, the right of publicity continues to undergird the antitrust case. For example, a key NCAA counterargument in its most recent motion to dismiss is that the right of publicity is not recognised in broadcasts of sporting events, and therefore, that an antitrust cause of action based on a restraint of these rights is improper. Clear precedent is scant because blanket assignments of professional athletes' rights of publicity previously nullified this issue and also because of the state law differences discussed previously.

NCAA General Counsel Donald Remy has hired additional counsel and vowed to take the *Keller* case "all the way to the Supreme Court," reaffirming that the NCAA is "not prepared to compromise."<sup>12</sup> Given that the college amateurism model and billions of dollars are potentially at stake, and that plaintiffs' lawyers may be about to harvest some very thankful settlement cash, Keller's leftovers may be litigated for years to come.

### Footnotes

1. In re NCAA Student-Athlete Name & Likeness Licensing Litigation, Docket No 4:09-CV-1967-CW, United States District Court for the Northern District of California (J Wilken).
2. NCAA Bylaw 12.5.1 prohibits, for example, the sale of "[i]tems that include an individual student-athlete's name, picture or likeness (eg, name on jersey, name or likeness on a bobble-head doll), other than informational items

(e.g., media guide, schedule cards, institutional publications)." 2013-14 NCAA Division I Manual, Bylaw 12.5.1.1(h).

3. *Hart v Electronic Arts Inc*, Docket No. 3:09-CV-5990-FW, United States District Court for the District of New Jersey (J Wolfson).
4. Players to Receive \$40 Million, ESPN.com, September 28, 2013 [http://espn.go.com/college-football/story/\\_/id/9731696/ea-sports-clc-settle-lawsuits-40-million-source](http://espn.go.com/college-football/story/_/id/9731696/ea-sports-clc-settle-lawsuits-40-million-source).
5. NCAA Athletes Can Pursue TV Money, ESPN.com, January 30, 2013 [http://espn.go.com/espn/otl/story/\\_/id/8895337/judge-rules-ncaa-athletes-legally-pursue-television-money](http://espn.go.com/espn/otl/story/_/id/8895337/judge-rules-ncaa-athletes-legally-pursue-television-money).
6. By contrast, approximately 2,000 former National Football League athletes reached a \$26 million settlement in 2009 with the NFL Players Association, mostly regarding EA's use of their likenesses in its "Madden" series video games. *Parrish et al v Nat'l Football League Players, Inc*, Docket No 3:07-CV-0943-WHA, United States District Court for the Northern District of California (J Alsup).
7. NCAA Consolidated Financial Statement, 2011-12, [www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/NCAA+consolidated+financial+statements](http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/NCAA+consolidated+financial+statements).
8. *Comedy III Prods, Inc v Saderup*, 25 Cal 4th 387, 406 (2001) (rejecting a purported First Amendment right to print the Three Stooges' likenesses on t-shirts).
9. In re NCAA Student-Athlete Name & Likeness Licensing Litig, 107 USPQ2d 1629, 1641 (9th Cir July 31, 2013) (Thomas, J., dissenting).
10. *Zacchini v Scripps-Howard Broadcasting Co*, 433 US 562 (1977).
11. See, eg, Cal Civ Code § 3344(d).
12. NCAA Vows to Fight O'Bannon Suit to the Supreme Court, *USA Today*, September 26, 2013 <http://www.usatoday.com/story/sports/ncaab/2013/09/26/ncaa-ed-obannon-ea-sports-lawsuit-supreme-court/2877579/>.

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