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Keller v. Elec. Arts, Inc. - No. C09-1967 CW, 2010 U.S. Dist. LEXIS 10719 (N.D. Cal. Feb. 8, 2010)

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RIGHT OF PUBLICITY

KELLER V. ELEC. ARTS, INC.

No. C 09-1967 CW, 2010 U.S. Dist. LEXIS 10719 (N.D. Cal. Feb. 8, 2010)

The United States District Court for the Northern District of California held that borrowing the likeness and biographical data of college athletes for inclusion in a sports video game is neither transformative nor a protected public interest use and, if not consented to, is actionable as a violation of California's right of publicity.

Defendant Electronic Arts, Inc. (EA) produces the "NCAA Football" series of video games which enables consumers to simulate and play football matches between college teams. The plaintiff, a former college football player, filed a class action complaint alleging, in part, that designing virtual athletes to closely resemble real-life college football players violated California's statutory and common law rights of publicity. EA moved to dismiss the claims, arguing that the plaintiff's right of publicity claims are barred under both the First Amendment and California law.

The court denied EA's motion to dismiss, holding that the First Amendment does not shield a video game developer from right of publicity claims when the depictions share many of the plaintiff's characteristics, without much transformative modification by the defendant. The court further held that the fact that the video game as a whole contained transformative elements was irrelevant. Instead, the focus is on the depiction of the plaintiff, which includes the representation of the plaintiff themselves and the environment in which they are represented—here, the football field. Using two California Supreme Court cases, *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) and *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003), as guideposts, the court found that EA's depiction of the plaintiff was not sufficiently transformative to grant EA's motion to dismiss. The player in the game shared many of the plaintiff's traits, including the same position, height, weight, and jersey number.

The court also rejected EA's public interest defense as well as their statutory defense under Cal. Civ. Code § 3344(d). The court concluded that EA is not entitled to these defenses because its use of the plaintiff's image and likeness extends beyond reporting or publishing his statistics; rather, it offers a depiction of athletes' physical traits and allows consumers to control the virtual players on a football field.