

Accurately Depicting Athletes in Video Games: The Royal Rumble Continues

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If you are a fan of legal decisions about professional wrestlers, tattoos, video games or video games about professional wrestlers with tattoos, 2020 has been an exciting year for you. This past Spring, in *Solid Oak Sketches, LLC v. 2K Games, Inc.*, Judge Laura Taylor Swain dismissed a copyright claim filed by a tattoo owner against 2K Games for its realistic depiction of several tattooed NBA players in the NBA 2K series of video games. While that decision ticked off the boxes for tattoos and video games, professional wrestlers were conspicuously absent. Fortunately, two courts have recently issued decisions to fill that void.

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

The first is a non-precedential, but still interesting Third Circuit decision, and it's worth stating its colorful name in full: Lenwood Hamilton a/k/a Hard Rock or Skip Hamilton v. Lester Speight, a/k/a Rasta the Urban Warrior, a/k/a Augustus "Cole Train" Cole; Epic Games, Inc., Microsoft, Inc., a/k/a Microsoft Corp.; Microsoft Studios; and The Coalition.



With so many aliases and nicknames, one would be forgiven for incorrectly assuming the mafia or superheroes were involved in this case. In fact, plaintiff Lenwood Hamilton is a professional wrestler and former football player, as is one of the defendants, Lester Speight, who is also the voice actor for Augustus Cole, an alien-fighting soldier in the Gears of War series of video games published by Microsoft. Microsoft also received an alias, but presumably has never wrestled professionally. Like other celebrities have sometimes done, Hamilton saw a character in a video game, in this case Augustus Cole, and felt like he was “looking in a mirror.” Accordingly, he filed a complaint alleging that the defendants had violated his right of publicity by using his likeness without his authorization.

The district court granted summary judgment in the defendants’ favor, holding that their use of the character was protected by the First Amendment. On appeal, the Third Circuit considered whether the alleged depiction of Hamilton “is the very sum and substance of the work in question” or “whether the product containing [the plaintiff’s] likeness is so transformed that it has become primarily the defendant[s]’ own expression.” The Court held that while there were similarities between Hamilton and Cole (e.g., skin color, facial features, hairstyles, etc.), no reasonable jury could conclude that Hamilton is the “sum and substance” of Cole. Other differences (e.g., Cole serves in the military and fights exotic aliens, but Hamilton has apparently done neither of those things) showed that Hamilton is at most one of the “raw materials from which [Cole] was synthesized.” Thus, the defendants pinned Hamilton’s claims to the mat and walked away victorious, metaphorically waving an absurdly large belt over their heads.

The second case, Alexander v. Take-Two Interactive Software Inc., et al., relates to the full trifecta of legal topics: professional wrestlers, video games, and tattoos. Plaintiff Catherine Alexander filed suit against the defendants, which include, among others, video game company Take-Two and World Wrestling Entertainment, Inc. (“WWE”) for their roles in creating the WWE 2K series of video games. Alexander is a former tattoo artist responsible for six tattoos on professional wrestler Randy Orton. Ms. Alexander has registered copyrights for five of the tattoos. The WWE 2K games contain realistic depictions of WWE wrestlers, including Orton and his tattoos. Take-Two has a license

from WWE to depict WWE wrestlers in its games, and the license permits WWE to reject character designs if they are inaccurate. Thus, had Take-Two inaccurately depicted Orton's tattoos, WWE would have rejected his character design. However, Alexander never licensed her tattoo designs to anyone, and negotiations in 2009 between WWE and Alexander for rights to the tattoos fell through. When Alexander saw her designs being used in the WWE 2K games, she sued for copyright infringement.

Alexander moved for summary judgment as to copying, which the court granted since there was no real question that Take-Two had accurately copied the designs from Orton. Defendants also moved for summary judgment, arguing that three affirmative defenses apply: (1) implied license, (2) fair use, and (3) *de minimis* use. The court found that there were triable issues of material fact regarding the scope of any implied license, as it was unclear whether Alexander and Orton discussed permissible forms of copying, distribution, and sublicensing. In addition, the court found that there were disputes of material fact precluding summary judgment as to fair use, including the defendants' purpose in using the tattoo designs, whether defendants' use was sufficiently transformative, and whether there was market harm to Alexander. Finally, the court denied summary judgment as to the *de minimis* use defense because (1) the defendants provided no authority showing that *de minimis* use is a viable defense in the Seventh Circuit and (2) the defendants had copied the tattoos in their entirety.

The *Alexander* court's conclusion seems to be at odds with the *Solid Oaks Sketches* decision, which had very similar facts and legal issues. Surprisingly, despite the similarities and recentness of the *Solid Oaks Sketches* decision, the *Alexander* decision does not mention it. *Alexander* was previously set for trial during the week of October 19, 2020, but it has been rescheduled to February 16, 2021 due to COVID-19. That means that we will need to wait at least a few more months to find out whether there could be a budding split between the Second and Seventh Circuits with respect to realistic depictions of tattooed celebrities in video games.