

Grand Theft Auto 5 Has Many Different Characters, But Lindsay Lohan Is Not One of Them

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by Ryan Meyer



When you play the video game Grand Theft Auto 5 (“GTA 5”), the last thing you want to see is a reflection of yourself. GTA 5 is an action-adventure game that rewards the player for stealing cars and speeding away from cops. Part of the fun is that law abiding citizens can revel in digital mayhem and interact with gang members, drug dealers, and other poor decision makers without real world consequences. But when actress Lindsay Lohan saw certain GTA 5 images, she concluded that some of those poor decision makers looked a little too much like her.

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

Ms. Lohan is a talented and accomplished performer who has been featured in TV, films, and music, as well as such litigations as *Lindsay Lohan v. Armando Christian Perez (also known as Pitbull), et al.* and a frivolous case filed by a Montana prison inmate serial complainant against Ms. Lohan, the Kardashian sisters, and Lamar Odom. Seeing a character resembling herself, strutting around the virtual, gritty streets of GTA 5 did not inspire Ms. Lohan to embark on a journey of soul searching and redemption, but instead sparked her inner Mean Girl to file a complaint in New York state court. That litigation came to an end on March 29, 2018, when the highest court of New York, the Court of Appeals, affirmed the dismissal of Ms. Lohan’s amended complaint in the case of *Lohan v. Take-Two Interactive Software, Inc.*

The defendant, Take Two Interactive Software, Inc., develops, sells, markets, and distributes video games, including GTA 5. Ms. Lohan maintained that Take Two used her likeness without permission in three instances. In one scene, the player meets a female character named Lacey Jonas, who is trying to escape from paparazzi by hiding in an

alley. The character describes herself as “an actress slash singer” and “really famous.” The second and third instances are static images used as transition screens between scenes in the game and also on the packaging, game discs, and promotional materials. One image features a young blonde woman wearing a red bikini at the beach, and the other features a young blonde woman wearing jean shorts, a white t-shirt, sunglasses and a fedora, who appears to be getting arrested by a female police officer. Ms. Lohan claims that Take Two misappropriated both her appearance and her voice to create the Jonas character, and that the two static images contain her “[i]mages, portrait[,] and persona.”

To prevail on her right of privacy claim under New York law and survive dismissal of her amended complaint, Ms. Lohan needed to prove that her name, portrait, picture or voice was used for advertising or trade purposes without consent within the State of New York. The Court first concluded that an “avatar” such as a character or image in a video game, may constitute a “portrait.” Next, the Court considered whether Ms. Lohan was capable of being identified from the avatars alone based on the “quantity and quality of the identifiable characteristics” in the avatars. The Court concluded that both the Jonas character and the two images were not recognizable as Ms. Lohan. The Court explained that the Jonas character was simply “a generic artistic depiction of a ‘twenty-something’ woman without any particular identifying physical characteristics,” and the static images were “indistinct, satirical representations of the style, look, and persona of a modern, beach-going young woman.”

In light of the Court’s ruling as to the portrait element, it did not address the other elements. This comes as a disappointment to some in the film and gaming industries who hoped that the Court would hold that New York’s right of publicity statute does not prohibit the use of real people in video games, as it does for other fictional works. Given how little the accused images resemble Ms. Lohan, this might not have been the right case to address that issue. We may have to wait until Take Two releases GTA 6 for a resolution.