

LOHAN v. TAKE-TWO INTERACTIVE SOFTWARE, INC.: AN ANALYSIS

Khoa A. Dao

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INTRODUCTION

Earlier this year, Lindsay Lohan filed a complaint against Take-Two Interactive Software, Inc., Rockstar Games, Rockstar Games, Inc., and Rockstar North (hereafter “Take-Two”), who are the developers and publishers of the video game Grand Theft Auto Five (“GTA V”). In her amended complaint, filed in the Supreme Court of the State of New York, Lohan alleged that Take-Two violated her right of privacy under New York law by appropriating her likeness for use in GTA V and associated advertising materials.¹ Specifically, through four causes of action, Lohan alleged that Take-Two used her likeness in the form of a side character in GTA V that mirrors her physical appearance, voice, persona, and life events.² She also alleged that Take-Two used graphics of this character on the game’s disc and case jacket as well as on printed advertisement and merchandise.³

Lohan based her causes of action on the state’s statutory right of privacy, New York Civil Rights Law § 50 and § 51.⁴ She did not include a claim under common law right of publicity most likely because New York no longer recognizes such.⁵ “The New York courts have consistently refused to recognize any common law rights of either privacy or publicity, forcing plaintiffs to push and haul their claims so as to fit within the confining contours of the New York ‘appropriation

¹ Amended Complaint, *Lohan v. Take-Two Interactive, Inc.*, No. 15443-2014 (N.Y.Sup. Oct. 8, 2014).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 183 (1984).

privacy' statute.”⁶ The court in the instant case, therefore, will determine the merits of Lohan's claims within the narrow confines of the statute, “strictly limited to nonconsensual commercial appropriation of the name, portrait or picture of a living person.”⁷ New York courts have carved out some exceptions of the statute's application, including works that are newsworthy as such are not for advertising or trade purposes⁸ and, to some extent, works of fiction.⁹ The court may also apply the Transformative Use balancing test to determine if a defendant's “use in an expressive work . . . ‘transforms’ the plaintiff's identity to a sufficient degree” as to immunize liability through a free speech exception.¹⁰

A. Take-Two's use of Lohan's likeness in GTA V is not for purposes of advertising or trade.

Take-Two's alleged use of Lohan's likeness in the video game GTA V does not violate the New York statute because the use is not for purposes of advertising or trade. New York courts have recognized that certain types of work are exempt from the statute and therefore do not fall its category of advertising or trade purposes. The courts have adamantly held that the statute does not apply to works that are broadly construed as newsworthy.¹¹

The courts, however, are less clear in cases of fictionalized works.¹² The courts have held that the unconsented use of a person's identity in a work “so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception.”¹³ When a work to the public is clearly and evidently fictional, however, New York courts may allow an exception to

⁶ J. Thomas McCarthy, 2 Rights of Publicity and Privacy §8:76 (2nd ed).

⁷ *Finger v. Omni Publications International, Ltd.*, 77 N.Y.2d 138, 141 (1990).

⁸ *Messenger v. Gruner + Jahr Printing & Pub.*, 94 N.Y.2d 436, 441 (2000).

⁹ McCarthy, *supra* note 6, at § 8:76.

¹⁰ *Id.* at § 8:72.

¹¹ *Messenger*, 94 N.Y.2d at 441.

¹² McCarthy, *supra* note 6, at § 8:76.

¹³ *Messenger*, 94 N.Y.2d at 446 (discussing *Binns v. Vitagraph Co. of America*, 210 N.Y. 51 (1913) and *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124 (1967)).

the statute.¹⁴ “Works of fiction do not fall within the narrow scope of the statutory definitions of ‘advertising’ or ‘trade.’”¹⁵ New York courts have also carved out an exception for incidental use such that in order for the statute to apply, the plaintiff must be “the sole or primary subject of the allegedly fictitious work” and not a mere minor character.¹⁶

As a video game, GTA V is an expressed work of fiction.¹⁷ The game features a main storyline that runs for 50 hours with 80 simulation “missions” taking place in a facsimile of the state of California.¹⁸ During gameplay, a player may control one of three main characters to act out a simulation comporting to the overall storyline.¹⁹ One of the simulations involves a minor character named “Lacey Jonas,” who Lohan alleges to be a deliberate depiction of her portrait, voice, and life events.²⁰ During this five-minute simulation, a player is tasked with driving the Jonas character away from chasing paparazzi, making gameplay decisions that affects the outcome as well as the character’s responses and reactions.²¹

As with the entire game overall, though, the simulation as gameplay is implied to be a work of fiction. It seems unlikely that a player would construe any simulation of the game or the game itself as a true story. As long as Take-Two does not represent the simulation and the game to be true and that a player “would certainly know that the circumstances involved therein were fictitious,” then the court will not find Take-Two’s use in a work of fiction as one for advertising or trade purposes.²² Further on that line, because the Jonas character is a minor one in the overall storyline of the game, the court will find that the incidental use exception prevents the application of the statute.

¹⁴ *Hicks v. Casablanca Records*, 464 F.Supp. 426, 433 (S.D.N.Y. 1978).

¹⁵ *Costanza v. Seinfeld*, 719 N.Y.S.2d 29, 30 (2001).

¹⁶ McCarthy, *supra* note 6, at § 8:76 (citing *Ladany v. William Morrow & Co.*, 465 F. Supp. 870, 882 (S.D.N.Y. 1978)).

¹⁷ Defendant’s Memorandum in Support of Motion to Dismiss the Complaint at 2, *Lohan v. Take-Two Interactive Software, Inc.*, No. 15443-2014 (N.Y.Sup. Oct. 8, 2014).

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 6.

²⁰ Amended Complaint, *supra* note 1.

²¹ Defendant’s Memorandum, *supra* note 16, at 7.

²² *Hicks*, 464 F.Supp. at 432.

Moreover, regardless of how closely Jonas may or may not resemble Lohan, a New York court may not find that her identity is actually used, even in a work of fiction based on a real life event. “The New York high court has affirmed the rule that a thinly disguised use of identity in a fictional tale based upon an actual event is not actionable under the New York statute because the actual ‘name’ or ‘picture’ of the person is not used.”²³ While Lohan alleges that Take-Two appropriated her portrait, likeness, and voice in forming the Jonas character, from physical appearance to attire to mannerism, Jonas still exists in a patently fictional realm. Jonas in GTA V is not an actual portrait of Lohan but rather is a computer-generated avatar based on a model; Jonas’s voice is also not Lohan’s actual voice but rather an imitation of her accent.²⁴ Although the Jonas simulation in the game may take place in a parodied location similar to that of Lohan’s residence, and that Lohan has been involved in encounters with the paparazzi like Jonas, these locations and events in GTA V are still fictional, even if based on reality. Even if Jonas is a thinly disguised Lohan in her physical appearance, voice, and mannerisms, Lohan’s actual name, actual portrait, and actual voice are not used in GTA V. Take-Two’s use of the Jonas character, therefore, does not give sufficient rise to an actual “use” of Lohan’s identity for narrow purposes of the statute.

Accordingly, a New York court, seeing GTA V overall as a work of clear fiction, will find that Take-Two did not use Lohan’s name, portrait, picture, or voice for an advertising or trade purpose as defined by the statute. While this may be sufficient grounds for the court to dismiss Lohan’s claim under the statute, Take-Two’s thinly disguised Jonas character may not pass the transformation test to invoke a First Amendment defense.

²³ McCarthy, *supra* note 6, at § 8:76 (noting *Wojtowicz v. Delacorte Press*, 395 N.Y.S.2d 205 (1977)).

²⁴ Amended Complaint, *supra* note 1, at 9

B. Take-Two's use of Lohan's likeness in GTA V is not sufficiently transformative.

The court may agree with Lohan's claim²⁵ that Take-Two's use of her likeness in GTA V is not sufficiently transformative and therefore Take-Two cannot invoke free speech protection. Although the United States Supreme Court has held that video games may qualify for protection under the First Amendment,²⁶ a court must balance a plaintiff's claim against the policy of free speech.²⁷ New York courts have adopted the transformative use balance test from the California courts for appropriation claims in works of expression.²⁸ If the court finds the use of a plaintiff's identity is sufficiently transformative, then the First Amendment immunized the allegedly infringing work from her claim.²⁹

Cases involving appropriation in video games are sparse in New York. The California courts, however, have dealt with such matters and have applied the transformative use test in video game cases.³⁰ In applying the test, the court looks to several factors. A conventional "literal depiction or imitation" that does not add "significant creative elements" does not give rise to transformation.³¹ The court, however, also looks to "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."³² "If the 'product containing the celebrity's likeness is so transformed that it has become primarily the defendant's own expression' of what he or she is trying to create or portray, rather than the celebrity's likeness, it is protected."³³

²⁵ *Id.* at 14 ¶78.

²⁶ *Brown v. Entm't Merchants Ass'n*, 131 S.Ct. 2729, 2733 (2011).

²⁷ McCarthy, *supra* note 6, at § 8:76 (noting *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 149 (3d Cir. 2013)).

²⁸ McCarthy, *supra* note 6, at § 8:72.

²⁹ *Id.*

³⁰ *Id.* at § 8:73.

³¹ *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 405 (2001).

³² *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 58 (2006) (quoting *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 400 (2001)).

³³ *Id.*

The court would turn to comparing the physical appearance, attire, and mannerisms of Lohan and the Jonas character in GTA V, as well as how Jonas as depicted was composited. Based on the visual exhibits Lohan offered in her amended complaint, the Jonas character does bare some resemblance to Lohan.³⁴ The court will have to determine if Jonas is a literal depiction or imitation of Lohan. Both Lohan and Jonas bare much resemblance in physical appearance, attire, and mannerism, and both are celebrities of the same notoriety in their respective realms. The court may not see enough differences between the two and find that asides from having different names, Jonas is a mere literal depiction of Lohan.

Further, if the court looks to the Jonas character alone and not in context of the game in its entirety, then the court may find that she lacks sufficient elements to be transformative.³⁵ Instead, however, if the court looks at Jonas in the context of the game in its entirety, then it may find that some transformation exists in that Lohan served as raw material to synthesize a larger piece of work. Indeed, given that Jonas is featured only for five minutes in a storyline spanning 50 hours,³⁶ the court cannot sustain that she is the very sum and substance of GTA V. In that regard, then, the court may find that transformation exists. If the New York courts follow the latest trend in the California courts, however, then the aforementioned proposition of looking at Jonas alone stands and therefore will not find sufficient transformative use. Consequently, the court would agree with Lohan's claim that Take-Two cannot invoke First Amendment free speech protection.

C. Advertising is ancillary and therefore not a use of Lohan's likeness.

Although Lohan's amended complaint also claims that the advertising materials and merchandise that Take-Two has produced for GTA V containing depictions of Jonas violates the New York statute as a use for advertising and trade purposes, such advertising is ancillary and therefore not a use of Lohan's likeness

³⁴ Amended Complaint, *supra* note 1.

³⁵ *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018 (2011).

³⁶ Defendant's Memorandum, *supra* note 16, at 7.

under the statute. The printed advertising material and merchandize, along with the disc and jacket covers of the game itself, pertain to GTA V and depicts a character of the game, Jonas. The use of Jonas's image on these materials is incidental to the use of her image in the game, which the court will find permissible as discussed above.³⁷

³⁷ *Costanza v. Seinfeld*, 719 N.Y.S.2d 29, 30 (2001); *Velez v. VV Publ'g Corp.*, 524 N.Y.S.2d 186 (1988).