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## Avatars and Images: Personality Rights in Video Games

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### Introduction

“Avatars” are everywhere. They’re winning Academy Awards,<sup>1)</sup> captivating children in an animated TV show,<sup>2)</sup> serving as alter egos in the Second Life website,<sup>3)</sup> and standing in for entertainers in video games.

Avatars come in all shapes and sizes, but—much of the time—they bear some resemblance to actual people. Indeed, in many video games that is the point: to create a fantasy world inhabited both by famous people and their fans.

Thus arises a legal problem: what happens when avatars behave badly, or at least in ways that their human counterparts would not countenance? Gwen Stefani and her colleagues in the band *No Doubt* believe that they are entitled to a legal remedy for the

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<sup>1)</sup> The movie *Avatar*, directed by James Cameron, won Academy Awards for Cinematography, Art Direction, and Visual Effects in 2010.

<sup>2)</sup> The series originally ran on the Nickelodeon cable channel in the U.S.

<sup>3)</sup> Second Life defines an avatar in its site as “a digital persona that you can create and customize. It’s you — only in 3D. You can create an avatar that resembles your real life or create an alternate identity. The only limit is your imagination. Who do you want to be?” <http://secondlife.com/whatis/avatar/>.

avatars' misbehavior.<sup>4)</sup>

Courtney Love, a singer who is no stranger to the justice system, also believes the law should preserve the integrity of the avatar image of her deceased husband, Kurt Cobain. Like *No Doubt*, she is unhappy that his video-game avatar can be manipulated to perform songs he never would have sung.<sup>5)</sup>

Similarly, singer Axl Rose sued the same company for allowing the avatar of his estranged *Guns N'Roses* bandmate, Slash to appear on screen with a *GNR* hit song. Rose believed that \$20,000,000 would be appropriate to remedy the perceived indignity.<sup>6)</sup>

A somewhat less-known performer filed a lawsuit not because his avatar was acting badly but rather because it too closely tracked his real life story. Michael Washington, a.k.a. Shagg, a backup singer for the group *Cypress Hill*, sued the makers of *Grand Theft Auto* for allegedly misappropriating his image and biography for the game. He felt no less than \$250,000,000 would be necessary to compensate him for the value of his visage and story.<sup>7)</sup>

All of these lawsuits involve the intersection of recent entertainment technology with a long-standing priority of entertainers: to protect and profit from their personae. This article will explore the legal roots of these priorities in American law, the forms in which a persona might be presented, and earlier cases in which entertainers confronted legal difficulties regarding different forms of their images. The article will then discuss the avatar cases and will conclude with some thoughts about the applicability of laws of other jurisdictions.

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<sup>4)</sup> *No Doubt v. Activision Publishing, Inc.*, Cal. App. (2d App. Dist. 2011), available at <http://www.courtinfo.ca.gov/opinions/documents/B223996.PDF>.

<sup>5)</sup> See, e.g., Jody Thompson, *Courtney Love in Twitter Fury over Kurt Cobain use on Guitar Hero*, MIRROR (Sept. 10, 2009), <http://www.mirror.co.uk/celebs/news/2009/09/10/courtney-love-in-twitter-fury-over-kurt-cobain-use-on-guitar-hero-watch-video-of-kurt-singing-bon-jovi-on-game-115875-21663016/>.

<sup>6)</sup> Complaint, *W. Axl Rose v. Activision Blizzard, Inc.*, (Cal. Super. Ct. Nov. 23, 2010), available at <http://www.radaronline.com/sites/radaronline.com/files/Axl%20Guitar%20Hero%20doc.pdf>. See Matthew Belloni, *Axl Rose Files \$20 Million Lawsuit Against 'Guitar Hero'*, THE HOLLYWOOD REPORTER (Nov. 23, 2010, 5:57 PM), <http://www.hollywoodreporter.com/blogs/thr-esq/axl-rose-sues-activision-20m-48506>.

<sup>7)</sup> Complaint, *Washington v. Rockstar Games, Inc.*, (Cal. Super. Ct. Dec. 6, 2010), available at <http://www.gamepron.com/imagery/RockstarGamesLawsuit.pdf>. See Tyler Finfrock, *Cypress Hill Backup Singer files Lawsuit against Rockstar Games*, GOT GAME (Dec. 9, 2010), <http://gotgame.com/2010/12/09/cypress-hill-backup-singer-files-lawsuit-against-rockstar-games/>.

## I. The Paradox of Publicity and Privacy

Publicity and privacy are the irreconcilable twin desires of entertainers, people who have chosen a public profession. Their success depends on being widely known. Indeed, in the early stages of their careers, they often will do almost anything to generate public attention. On the other hand, once they are the objects of that attention, they often crave protection from it; in other words—privacy.

On the day these words are being written, here are the “latest” stories on a website devoted to entertainment news:

\* Actor Charlie Sheen was fired from his television show *Two and a Half Men* “following the hard-living actor’s bouts of wild partying, repeated hospitalizations and a bitter media campaign against his studio bosses.”<sup>8)</sup>

\* Former talk show host Star Jones “made her feisty debut on the Season 4 premiere of ‘The Celebrity Apprentice’ on Sunday night, an appearance which included a fight with castmate Lisa Rinna—and the former lawyer [Jones] warns there will be more drama on episodes to come.”<sup>9)</sup>

\* 18-year-old actress Demi Lovato, “the star of the Disney Channel’s *Sonny with a Chance*, has thanked fans for their support during her time in a treatment facility” for “issues she’s battled through her life.”<sup>10)</sup>

\* [T]he family of Kate Middleton has released childhood photographs of the woman who will one day become Queen [of England].<sup>11)</sup>

\* 51-year-old actress Sean Young will appear on a television program called

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<sup>8)</sup> Warner: Sheen Fired from ‘Two and a Half Men,’ (March 7, 2011, 06:30 PM), [http://news.yahoo.com/s/ap/20110307/ap\\_on\\_en\\_tv/us\\_people\\_charlie\\_sheen](http://news.yahoo.com/s/ap/20110307/ap_on_en_tv/us_people_charlie_sheen) (last visited Apr. 14, 2011).

<sup>9)</sup> Star Jones Sounds Off on Her ‘Celebrity Apprentice’ Debut, (March 7, 2011, 09:08 PM), [http://www.accesshollywood.com/star-jones-talks-the-celebrity-apprentice-im-trained-to-bait-trap-and-kill\\_article\\_44913](http://www.accesshollywood.com/star-jones-talks-the-celebrity-apprentice-im-trained-to-bait-trap-and-kill_article_44913) (last visited Apr. 14, 2011).

<sup>10)</sup> VIDEO: Demi Lovato Thanks Fans, Excited to Get Back to Work, (March 7, 2011, 08:05 PM), <http://www.tvguide.com/News/Demi-Lovato-Thanks-1030437.aspx> (last visited Apr. 14, 2011).

<sup>11)</sup> The Middleton Family Releases Childhood Photographs of Kate, (March 7, 2011, 08:02 PM), [http://www.accesshollywood.com/the-middleton-family-releases-childhood-photographs-of-kate\\_article\\_44909](http://www.accesshollywood.com/the-middleton-family-releases-childhood-photographs-of-kate_article_44909) (last visited Apr. 14, 2011).

*Celebrity Rehab*,<sup>12)</sup> a “reality” show in which a medical doctor who specializes in addiction treatment helps “celebrity patients in their quest for sobriety.”<sup>13)</sup>

The stories reveal the often strange convergence of publicity and privacy matters. Charlie Sheen was none too happy about his private life becoming a public matter. He also has complained that the facts were misstated (thus raising the possibility of defamation). Once his conduct did become public, though, he tried to seize the offensive and use his power to generate publicity to change the public perception of his extracurricular behavior. Starr Jones seemingly was seeking to generate some interest by hyping her attitude. Demi Lovato, at 18, is just barely even an adult. Even so, stories of her private problems were revealed, and she tried to make the best of it by relying on her publicity power to thank fans for their concern. Kate Middleton, who became a celebrity by virtue of becoming engaged to the heir to the British throne, may well view the disclosure of her childhood pictures as a sort of pre-emptive strike. It might be enough (although probably not) to convince tabloid newspapers not to go searching on their own for other scenes from her private life. As for *Celebrity Rehab*, the motives of those such as Sean Young who appear may be pure (to help viewers understand the reality of rehabilitation), but a cynic might suspect at least some of them are moved to appear in order to jumpstart faltering careers.

In Anglo-American law, unlike the law of Japan, privacy and publicity are two different matters. And defamation is something else altogether. Defamation involves saying something about someone that is untrue and which lowers his or her reputation. Damages are based on the economic effect of the reduced reputation. In other words, what *other* people think about the plaintiff. Invasion of privacy is concerned with statements that are true but which the subject did not wish to be disclosed. Damages are based on the *plaintiff's* personal distress over the information becoming known. Publicity is an economic right, with damages reflecting monetary loss.

Of all three, defamation is the one with the longest pedigree. It extends back to colonial America, and further still to early English common law. A 19th century British

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<sup>12)</sup> *Sean Young Joins Celebrity Rehab*, (March 7, 2011, 07:54 PM), <http://www.tvguide.com/News/Celebrity-Rehab-Young-1030436.aspx?rss=breakingnews> (last visited Apr. 14, 2011).

<sup>13)</sup> *CELEBRITY REHAB 4*, [http://www.vh1.com/shows/celebrity\\_rehab\\_with\\_dr\\_drew/season\\_4/series.jhtml](http://www.vh1.com/shows/celebrity_rehab_with_dr_drew/season_4/series.jhtml) (last visited March 8, 2011).

court decision even traced its roots to the Roman republic in the days of Cicero.<sup>14)</sup>

Infringement of privacy is a tort that came to be recognized after the publication of an article by Samuel Warren and Louis Brandeis (later to become an associate justice of the U.S. Supreme Court).<sup>15)</sup> They complained about the intrusiveness of the media and asserted that people have a right “to be let alone.”<sup>16)</sup>

Privacy, thus, is a personal right to be free of exploitation. Publicity, on the other hand, is an economic right, based on the idea that famous people have a right to profit from the exploitation of their names and likenesses.<sup>17)</sup>

Both privacy and publicity are creatures of state law. Not surprisingly, states such as California and New York that have an abundance of celebrities also have well-developed laws on these matters.<sup>18)</sup> California has even enshrined the right to privacy in its state constitution.<sup>19)</sup>

To the extent that similar concepts exist in Japan, they are grouped together under article 723 of the Civil Code under the rubric of “meiyo kison.”<sup>20)</sup> The “Japanese Law Translation” project of the Ministry of Justice translates “meiyo kison” as “defamation.”<sup>21)</sup> However, as applied, the concept covers both defamation and privacy-type complaints.<sup>22)</sup> As for publicity rights, courts have recognized celebrities’ claims to profit from the use of their personae,<sup>23)</sup> but no statute speaks directly to such a

<sup>14)</sup> *The King v. Sir Francis Burdett, Bart.* [1820] 4 B & A 95, 106 E.R. 873 (King’s Bench).

<sup>15)</sup> Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>16)</sup> *Id.* at 195 (citing THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888)).

<sup>17)</sup> See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (television station violated rights of “human cannonball” by broadcasting his “entire act” without permission); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) (exclusive licensee of baseball player’s image could prevent others from also using the player in advertising).

<sup>18)</sup> See, e.g., CAL. CIV. CODE § 3344 (2008), N.Y. CIV. RIGHTS LAW §§ 50, 51 (2008) (publicity rights).

<sup>19)</sup> CAL. CONST. art. I, § 1.

<sup>20)</sup> See generally Dan Rosen, *Private Lives and Public Eyes: Privacy in the United States and Japan*, 6 FLA. J. INT’L L. 141 (1990).

<sup>21)</sup> “Recovery in Defamation Article 723 The court may, at the request of the victim, order a person who defamed others, to effect appropriate measures to restore the reputation of the victim in lieu of, or in addition to, damages.” *Civil Code*, JAPAN LAW TRANSLATION, <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=0&y=0&co=01&ky=名誉毀損&page=2> (last visited March 8, 2011).

<sup>22)</sup> See generally Dan Rosen, *Fact or Fiction?*, 1 DOSHISHA J. OF MEDIA AND COMMUNICATION RESEARCH 70 (2004).

<sup>23)</sup> Tōkyō Kōtō Saibansho [Tōkyō App. Ct.] Sept. 26, 1991, 1400 HANREI JIHŌ [HANJI] 3 (Japan) (recognizing a right of celebrities, such as Onyanko Club, to control the commercial use of their names and images).

right, and the Supreme Court has said recovery, if any, must be found in other laws such as copyright, trademark, and unfair competition.<sup>24)</sup>

## II. Beyond Names and Faces

Publicity cases involving actual names and faces of well-known people are easy to come by. They often turn on whether the use is not simply for commercial gain but rather has some informative value protected by the U.S. Constitution's guarantee of freedom of speech and press.<sup>25)</sup> For example, the estate of a former model sued *Hustler* magazine over the publication of nude photos of her from 20 years before. In 2007, the model was killed by her husband, a professional wrestler, thus creating a public interest in news coverage of the story. Despite the First Amendment overtones, the 11th Circuit Court of Appeals ruled in favor of the estate on a right of publicity theory, and the Supreme Court declined to hear the case.<sup>26)</sup> The reason the estate could sue, by the way, was because of the economic nature of right of publicity.<sup>27)</sup> Her name and image were assets to which the estate was entitled. A lawsuit for invasion of privacy almost certainly would have been dismissed, because privacy is a personal interest that expires with the death of the person.

The more intriguing questions arise when something other than the actual name or face is used but people associate the use with the actual person. This, of course, is

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<sup>24)</sup> Saikō Saibansho [Sup. Ct.] Feb. 13, 2004, 1156 HANREI TAIMUZU [HANTA] 101 (Japan) (no direct economic right of publicity in names in the absence of such a statute). The case involved a complaint over the use of the names of famous racehorses in video games. See Dan Rosen, *A New Stage for Legal Education: Entertainment Law as a Model for Client-Based Teaching*, 1 CHUO L.J. 143, 147-49 (2004).

<sup>25)</sup> U.S. CONST. amend. I.

<sup>26)</sup> *Toffoloni v. LFP Publ'g Group*, 572 F.3d 1201 (11th Cir. 2009), *cert. denied*, 78 U.S.L.W. 3500 (2010).

<sup>27)</sup> An ongoing question is to what extent the right of publicity survives death. One common approach is to conclude that it does, if the person involved made use of the right while alive. California has recently expanded the right to include people whose images do not become valuable until their death. It states: "[D]eceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, *or because of his or her death*, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise, or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services. CAL. CIV. CODE §3344.1 (h) (emphasis added).

similar to the nature of avatars.

In *Midler v. Ford Motor Co.*,<sup>28)</sup> singer Bette Midler complained about the use of a sound-alike vocalist in a car commercial. The car company was hoping to appeal to its target group of buyers by reminding them of their college years, and it chose the hit record *Do You Want to Dance?* as the vehicle. Midler had sung the song on the record. The problem was she was not interested in doing a commercial. So, the advertising agency hired one of her backup singers and told her to sound as much like Midler as possible.

Midler sued, but what of hers had been taken? The commercial did not mention her name, and it did not show her face. It did not even use her voice. Nevertheless, the Ninth Circuit ruled that “when the distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.”<sup>29)</sup>

What was taken was an attribute of Midler’s identity. People who heard the commercial would think of Bette Midler, and perhaps even think it was Bette Midler who was singing. “Its value,” the court said, “was what the market would have paid for Midler to have sung the commercial in person.” In other words, the offense was economic, not personal.

A decade earlier, bandleader Artie Shaw had filed a similar lawsuit under New York law against Time-Life records. The company had released a series of “Swing Era” music from the 1930s and 1940s. It had used studio musicians to record more than 20 recreations of Shaw’s previously-released records. Unlike the *Midler* court, however, the New York Court of Appeals ruled that Shaw did not have any property interest in the Artie Shaw “sound.” Time-Life, thus, was entitled to sell the recreations so long as it did not mislead consumers into thinking they were buying Shaw’s actual recordings.<sup>30)</sup>

In fact, Shaw had entered into a project with the Reader’s Digest Record Album Service to issue a four-volume set of records entitled “Swing with Artie Shaw.” Unlike the Time-Life set, the Reader’s Digest project involved the original Shaw recordings,

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<sup>28)</sup> 849 F.2d 460 (1988).

<sup>29)</sup> *Id.* at 463. The court spoke of her remedies at common law, as the case did not exactly fit the statutory definitions of using a person’s “name, voice, signature, photograph, or likeness.” CAL. CIV. CODE §3344.

<sup>30)</sup> *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 341 N.E.2d 817 (1975).

electronically modified to simulate stereo. Both products were marketed at approximately the same time. Thus, Shaw was essentially forced to compete against a ghost version of himself. Adding to Shaw's distress, the court ruled that he could not recover for defamation either if the new Time-Life recordings were as good or better than the originals.<sup>31)</sup>

Shaw was livid about the situation. He is quoted as telling music writer Leonard Feather:

I recognize only one Artie Shaw version, and that's my own. If they want to say 'Time-Life Imitation of the Artie Shaw Version,' that's all right; but not those whole booklets where you have to wade through page after page before finding, way in the back of the book, that it's some modern musicians redoing it in stereo . . . In words of one syllable, I hate them! . . . I don't give a damn who's playing the clarinet [Shaw's instrument]. If they want a re-creation let them get in touch with me! . . . It's my right to imitate me.<sup>32)</sup>

### III. Gamesmanship

Jim Brown is a member of the NFL Hall of Fame who later became an actor and an activist. It is in his role as a retired football player that he claimed to have been damaged by the Electronic Arts video game *Madden NFL*.<sup>33)</sup> In the game, some 1,500 virtual players from as many as 170 teams compete in virtual circumstances. Virtual players from contemporary teams wear the numbers of actual players. Historic players go only by number and roster position.

Brown complained that Electronic Arts had misappropriated his name, identity,

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<sup>31)</sup> 38 N.Y.2d at 207.

<sup>32)</sup> TOM NOLAN, THREE CHORDS FOR BEAUTY'S SAKE: THE LIFE OF ARTIE SHAW 320 (2010), *citing* Shaw's comments in Leonard Feather, *Artie Shaw: Mr. Swing in Spite of Himself*, L.A. TIMES, Feb. 6, 1972.

<sup>33)</sup> *Madden* refers to John Madden, a former NFL coach who became a well-known football commentator on television.

and likeness by including him in two historic teams in the game. Although the virtual player's number (37) was slightly different than his (32), Brown said the player's "statistics" were almost the same as his. Football fans would presumably be familiar with this information. Thus, he believed, the company was profiting by an uncompensated association with him.

Under the logic of the *Midler* case, Brown's argument was not specious. The kind of people who would buy the game would be led to think about Jim Brown when playing with a virtual Cleveland Browns team, where he was a star. As in *Midler*, even if Brown's actual name and likeness did not appear, the company was profiting from his persona. Nevertheless, the Federal District Court in California felt otherwise. It dismissed his complaint, ruling that consumers would not be led to believe that Brown had endorsed the game.<sup>34)</sup> The court also said that even if the game did use his likeness, it was a use that was protected by the First Amendment because the game is a form of creative expression.<sup>35)</sup>

Thus, while the claims of Brown and *Midler* may be similar, the uses by the companies they sued are different. As a form of expression, video games qualify for full speech rights. Advertisements, on the other hand, are considered to be "commercial speech," whose protection is somewhat diminished.<sup>36)</sup> The main purpose of commercial speech is not to be appreciated for itself but rather to convince consumers to buy *another* product. Its object is promoting a business transaction. Thus, a video game such as *Madden's NFL* qualifies for full First Amendment protection, but an advertisement for the game would not. The ad would be commercial speech, which is subject to greater restrictions and regulations. Brown might prevail if he claimed his persona was used in the advertisement, even though he lost in his claim concerning the game itself.

This leads us to the current crop of cases making their way through the courts.

*Washington v. Rockstar Games, Inc.* involves a backup singer and stage performer for

<sup>34)</sup> Brown v. Electronic Arts, Inc., 722 F. Supp. 2d 1148 (C.D. Cal. 2009).

<sup>35)</sup> Cf. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 958 (9th Cir. 2009) ("video games are a form of expression protected by the First Amendment."), cert. granted sub nom. Schwarzenegger v. Entertainment Merchants Ass'n, 130 S.Ct. 2398 (2010).

<sup>36)</sup> See, e.g., Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (ads about gambling); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (ads about lawyers' services); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (ads about prescription drug prices).

the rap group *Cypress Hill*. He claims to have been interviewed by developers of the video game *Grand Theft Auto* and asked about his street life.

His complaint admits having led a troubled life and says he revealed some of the details. He alleges that the game ended up misappropriating his ideas, his identity, and his image for a character, CJ. He believes that one-fourth of the game's profits are attributable to him, an amount he estimates at \$250,000,000.<sup>37)</sup>

\$250,000,000 is surely several hundred times more than the value that the name and image of Michael Shagg Washington have earned to date. Theoretically, however, his request for damages is not based on a market-based price for the participation of an established celebrity (such as the court spoke about in *Midler*) but rather on the resulting commercial success. The game company, on the other hand, would dispute Washington's high assessment of his value to the success of the project. It would contend that the creativity of the writers, artists, designers, animators, technicians, and marketers are far, far more important than any reference to him, if such a reference even occurred at all.

Washington's complaint involved allegations of misappropriation as well as fraud, for not having entered into negotiations with him to appear in the game after interviewing him. Put simply, Shagg wanted a contract. Other recent lawsuits by musicians involve contracts that were entered into but which turned out differently from what they expected.

Axl Rose was the lead singer in *Guns N'Roses* (*GNR*), a band that had its peak in the 1980s and 1990s. As often happens in successful bands, personal relationships among the players became frayed, in particular between Rose and the guitar player Slash. Slash went on to form another band, *Velvet Revolver*, with two other *Guns N'Roses* alumni as well as a former member of *Wasted Youth* and another from *Stone Temple Pilots*.

Rose is the only original member of *Guns N'Roses* still performing with a band under that name. In 2009, the band's reputation was revived with the release of an album that had long been in the making, *Chinese Democracy*. So, Axl Rose once again enjoyed a position of prominence in hard rock/metal music. It was *GNR*'s roots, however, that

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<sup>37)</sup> Complaint, *Washington v. Rockstar Games, Inc.*, *supra* note 7.

the producers of the *Guitar Hero* video game series wanted to reach. In 2007, it sought permission from GNR's licensing representative to use the hit song *Welcome to the Jungle* in *Guitar Hero III: Legends of Rock*.

Rose was wary that the game might associate the song with the avatar of Slash, who played on the GNR record of *Welcome to the Jungle*. Their estrangement was no secret, and Rose wanted to maintain the distance between them in both the real and virtual worlds, personally and professionally. Rose contends GNR agreed to the license only after being reassured by Activision, the game's producer, that Slash and *Velvet Revolver* would not be involved.

According to the complaint, an avatar of Slash (wearing his signature top hat) does appear on screen when *Welcome to the Jungle* is performed. None of the other avatars apparently resembles actual GNR members. Slash is also one of the main characters/avatars throughout the entire game. A player can select his avatar and use it to play in time with *Welcome to the Jungle*.<sup>38)</sup>

Like Shagg, in the *Grand Theft Auto* litigation, Rose and *Guns N'Roses* believe they were misled, but unlike Shagg they actually did have a contract. So, their lawsuit alleges breach of contract, fraud, misrepresentation, and promissory estoppel.

Promissory estoppel is an equitable remedy that is the approach-of-last-resort for lawsuits over matters not included in a contract. It involves a notion of justifiable reliance on a defendant's promises, even though those promises were not contractual. One well-known case involved the singer Aretha Franklin, who was involved in ongoing negotiations to appear in a musical play. Although a formal contract had not been concluded, she assured the producer that she would participate. The producer relied on the promise and spent the necessary money to get the show ready for rehearsals. In the end, however, Franklin did not show up. The producer sued and won on a promissory estoppel theory.<sup>39)</sup>

Rose's complaint says he and the game producer "entered into a written agreement through a series of emails." He contends that the exclusion of Slash was part

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<sup>38)</sup> Complaint, *W. Axl Rose v. Activision Blizzard, Inc.*, *supra* note 6.

<sup>39)</sup> *Elvin Associates v. Franklin*, 735 F. Supp. 1177 (S.D.N.Y. 1990).

of the agreement for the use of the song.<sup>40)</sup> Reading between the lines, it seems that he is proposing that the emails (which probably discuss the Slash issue) be considered as part of the final contract. The inclusion of the promissory estoppel claim suggests that the exact terms of what constituted the actual contract may be less than clear.

So, even if Rose prevails in proving any of his theories, what harm has he suffered? Even though his image does not appear in *Guitar Hero III*, he believes players will almost certainly associate the song with the singer. And then, they can see Slash, the guitarist, on the screen. But again, what is the harm? Slash was, in fact, the guitarist on the song.

For Rose, the harm is found in the virtual re-association of him and Slash. His complaint says that they parted ways in 1996 and that Slash has had nothing to do with *GNR*'s popularity since then. Thus, "to avoid confusion and dilution of the [*GNR*] brand, Rose resists any attempts to revive or strengthen this past association."<sup>41)</sup>

Understood, but that past association is revived any time anyone buys the original record. Moreover, the song was licensed for a game on *Legends of Rock*, suggesting that the past was part of the appeal. Beyond that, the game is *Guitar Hero*, and Slash was the guitar player. Even if Rose is able to prevail on the merits of the case, he is likely to face difficulties in proving that he suffered \$20,000,000 or more in damages.

The litigation involving the band *No Doubt* also involves a contract. In this case, they actually appeared as avatars in the game *Band Hero*, a relative of *Guitar Hero*. However, the game allows players to manipulate the avatars in ways that the actual performers did not expect and do not like. They complain about the songs that they can be made to virtually perform.

*No Doubt* authorized Activision to use their images in *Band Hero* along with two of their songs. The members also participated in a motion capture photography session so that their avatars would accurately reflect them. What they did not realize, until shortly before the game's release, was that players could use the "unlocking" feature to manipulate their avatars to perform any of the 60 songs in the game, not just the two

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<sup>40)</sup> Complaint, *W. Axl Rose v. Activision Blizzard, Inc.*, *supra* note 6, ¶ 76.

<sup>41)</sup> *Id.* ¶ 24.

actual *No Doubt* songs. For example, players could make lead singer Gwen Stefani's avatar sing like *the Rolling Stones*' Mick Jagger in, *Honky Tonk Woman*, and the male band members' avatars could be manipulated into singing like women. This is all part of the fun of the game or the cause of offense, depending on one's perspective.

The band asked Activision to change this feature of the game, but the company refused, saying the programming had been finalized and manufacturing was ready to begin. *No Doubt* then sued, claiming it was the victim of fraudulent inducement, violation of statutory and common law right of publicity, breach of contract, unfair business practices. Activision responded that its game was protected by the First Amendment and moved to strike the right of publicity and unfair competition claims. The California Superior Court denied the motion, and Activision appealed.

The state Court of Appeals upheld the Superior Court's decision<sup>42)</sup> after considering the relationship of an entertainer's right to control the commercial use of his or her image with a game producer's right of expression. It looked for guidance to the state Supreme Court's decisions in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,<sup>43)</sup> in which the Supreme Court set out a "transformative use" test. Under that test, a court inquires into whether the work adds significant creative elements in a way that transforms it into something more than just a likeness or imitation.<sup>44)</sup>

When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.<sup>45)</sup>

...

We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's

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<sup>42)</sup> *No Doubt v. Activision Publishing, Inc.*, *supra* note 4.

<sup>43)</sup> 25 Cal. 4th 387 (2001).

<sup>44)</sup> *Id.* at 391.

<sup>45)</sup> *Id.* at 405.

own expression rather than the celebrity's likeness.<sup>46)</sup>

Applying the test to the facts of the *No Doubt* case, the Court of Appeals concluded that the elements added by the game producer, such as graphics and background content, were secondary to the goal of profiting from the fame of the members through a conventional representation.<sup>47)</sup>

This does not mean that *No Doubt* has won its lawsuit. Rather, it simply means that the plaintiffs can go forward to try to prove their case. That will involve convincing a jury of their factual contentions, showing that the unlocking feature was beyond the scope of what they had agreed to in the contract, and demonstrating that they suffered damages as a result.

No user will believe that Gwen is actually singing *Honky Tonk Woman*, but perhaps some will believe that she is OK with being put in the position of singing a man's song about a woman with questionable morals.<sup>48)</sup> That perhaps would lower her reputation and ability to profit from it, a degradation of *quality*. Or is the purported damage simply a matter of *quantity*: a commercial use of the image that exceeds the use authorized in the contract?

Whatever the outcome of the lawsuits, any celebrity who enters into such a contract from now on will know, or should now, that avatars may behave in ways that their human models would not. Of that, there is no doubt.

#### IV. A Few Words About Jurisdiction

The cases discussed in this article, for the most part, have been litigated in the United States. However, many of the products are played and marketed around the world. That raises the question of whether plaintiffs could sue in other jurisdictions where, perhaps, the laws would be more favorable to them or damage awards higher.

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<sup>46)</sup> *Id.* at 406.

<sup>47)</sup> *No Doubt v. Activision Publishing, Inc.*, *supra* note 4, at 21.

<sup>48)</sup> On the other hand, apparently the band has no problem with singing "Trapped in a box, my life becomes void," the lyrics from one of its own songs, *Trapped in a Box*.

Thus, for example, Japanese celebrities might wish to sue in California. The chance of winning there may be lower than in Japan, but the damage award—if one does win—is likely to be higher.

An exhaustive discussion of court jurisdiction is beyond the scope of this article. However, it is worth noting that Activision/Blizzard, the defendant in several of these cases, has operations not only in the U.S. but also in Argentina, Australia, Brazil, Canada, China, Denmark, France, Germany, Ireland, Italy, Mexico, the Netherlands, Norway, Singapore, South Korea, Spain, Sweden, Taiwan, and the United Kingdom.<sup>49)</sup> Five of the 11 members of the board of directors are from France.<sup>50)</sup> In its current form, the company was created through a merger of Activision and Vivendi Games, part of the empire of the French media firm Vivendi.<sup>51)</sup>

Notions of reputation and honor differ widely from country to country. In France, for example, offense to these values can be the subject of a criminal prosecution, under the Freedom of the Press Act of 1881.<sup>52)</sup> Across the Channel, Britain has become a haven for defamation litigation by public figures as a result of its plaintiff-friendly libel law.<sup>53)</sup>

The United States has acted to protect American defendants found responsible for such matters abroad. The SPEECH act prevents plaintiffs from enforcing damage awards gained abroad within the United States unless the foreign law was at least as protective of expressive rights as that of the U.S.<sup>54)</sup>

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<sup>49)</sup> LOCATIONS ACTIVISION/BLIZZARD, <http://www.activisionblizzard.com/corp/lo/aboutUs/locations.html>.

<sup>50)</sup> BOARD OF DIRECTORS ACTIVISION/BLIZZARD, <http://www.activisionblizzard.com/corp/ml/aboutUs/boardOfDirectors.html>.

<sup>51)</sup> Activision/Blizzard 2009 Annual Report, *Selected Financial Data*, at 1, [http://files.shareholder.com/downloads/ACTI/1194031381x0x378110/4212EB1E-FD74-47F7-8ABF-2DE6AD88B9D3/ATVI\\_2009\\_Annual\\_Report\\_-\\_FINAL2.pdf](http://files.shareholder.com/downloads/ACTI/1194031381x0x378110/4212EB1E-FD74-47F7-8ABF-2DE6AD88B9D3/ATVI_2009_Annual_Report_-_FINAL2.pdf).

<sup>52)</sup> Loi du 29 juillet 1881 sur la liberté de la presse, art. 29.

<sup>53)</sup> Defamation Act 1996. *See generally Editorial: Libel Tourism, R.I.P.?*, N.Y. TIMES (March 22, 2011), <http://www.nytimes.com/2011/03/23/opinion/23wed3.html>.

<sup>54)</sup> 28 U.S.C. § 4101, *et seq.*

On-line games, by definition, exist anywhere and everywhere. They will be especially susceptible to worldwide lawsuits, assuming that the defendants have sufficient presence in the jurisdictions for courts there to assert jurisdiction. Entertainers' fame is often global. The companies that license the use of their personae are also often global. As a result, courts around the world are likely to be increasingly involved as arbiters of avatars.