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Body

In February, former Mob Wives star Karen Gravano filed a *right-of-publicity* lawsuit against the makers of Grand Theft Auto V, claiming that they misappropriated her image and life story for a character in the popular video game. Being a colorful story, even the New York tabloids took notice:

The hit video game "Grand Theft Auto V" is illegally imitating life, according to a former "Mob Wives" star.-Daily News¹

The makers of "Grand Theft Auto" better hope they don't wake up next to a horse head.-New York Post²

Media lawyers were interested too. Not because Ms. Gravano is a reality star, or because she's the daughter of Salvatore (Sammy the Bull) Gravano, a famous mobster who turned state's evidence. Not even because Grand Theft Auto is one of the most successful videogame franchises around. Media lawyers took notice because this case is one more in a string of recent cases raising a significant common question: To what extent does the law protect the rights of content creators-writers, filmmakers, musicians, visual artists, photographers, and yes, videogame makers-to draw on real-life individuals and events to create expressive works? For years this was a relatively settled issue particularly in New York, and creators took comfort that they were largely protected from *right-of-publicity* claims. This status quo has been upended with a growing spate of successful suits against expressive works elsewhere in the country. Will Gravano's action introduce the same confusion to New York's relatively settled law?

Right of Publicity in New York

The *right of publicity* protects a person's name, likeness and other indicia of identity from commercial exploitation. It was originally regarded as a privacy right, but, starting in the 1950s,³ courts began to treat it as a separate property right available to celebrities, athletes, and others who seek out the public eye. In New York, the *right of publicity* is governed by Section 51 of the Civil Rights Law, which courts still refer to as the "statutory right of privacy":

Any person whose name, portrait, picture, or voice is used within this state for advertising purposes or for the purposes of trade without written consent first obtained as above provided [in Section 50 of the Civil Rights Law] may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name,

¹ Oren Yaniv, Former 'Mob Wives' star says 'Grand Theft Auto V' ripped off her life story for character in game: suit, Daily News, Feb. 25, 2014, at <http://www.nydailynews.com/entertainment/games/mob-wivesstar-grand-theft-auto-v-ripped-life-story-suit-article-1.1701292#ixzz2wRDDMLzU>. Full disclosure: Davis Wright Tremaine represents the Daily News.

² Julia Marsh, 'Mob Wives' star files \$40M lawsuit against 'Grand Theft Auto V', New York Post, Feb. 25, 2014, at <http://pagesix.com/2014/02/25/mob-wives-starfiles-40m-lawsuit-against-grand-theft-autov/.Ditto>.

³ The seminal case is [Haelen Laboratories v. Topps Chewing Gum](#), 202 F.2d 866 (2d Cir. 1953).

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portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use.⁴

The New York Court of Appeals has emphasized that the statute must be "narrowly construed" and "strictly limited to nonconsensual commercial appropriations."⁵ New York courts have almost uniformly held that the use of someone's likeness in expressive works of fiction, art, and entertainment is not actionable, either because the use is not for "trade" or "advertising," or because these works are independently shielded as a matter of free expression. For example, the First Department upheld dismissal of a claim that the defendants "used the name, likeness and persona of Plaintiff to create the character of George Costanza" on *Seinfeld*, reasoning that "works of fiction do not fall within the narrow scope of the statutory definition of 'advertising or trade.'"⁶ Likewise the Second Department held that an accountant could not recover against NBC for using his name in a Saturday Night Live skit.⁷

In 1978, a federal court applying New York law held that Section 51 did not apply to a fictionalized biography of Agatha Christie, stating that "the *right of publicity* does not attach here, where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie...."⁸ More recently, a state trial court dismissed a claim based on the use of a model's photograph on a fictitious brochure in the movie *Couples Therapy*,⁹ and a federal district dismissed the Section 51 claim of a hapless pedestrian featured in *Borat*.¹⁰ Just last year, Lindsay Lohan's claim against the rapper Pitbull for using her name in a song got the boot, with the court reasoning that Section 51 "does not apply to works of art."¹¹

'Gravano v. Take-Two'

Gravano filed her complaint against Take-Two Interactive Software, Inc. and Rockstar Games on Feb. 24, 2014, in New York Supreme Court. It alleges that the defendants used her "name, likeness, image and personal life story" in *Grand Theft Auto V* without permission, but provides little in the way of factual details.

Take-Two and Rockstar moved to dismiss the complaint on March 17, arguing that the Section 51 claim fails to state a cause of action. Their motion papers fill in some of the gaps in the factual background. *Grand Theft Auto V* is set in a fictional state that evokes Southern California, and the plot takes place in a fictional city called Los Santos which evokes Los Angeles. Players move freely around this virtual world, exploring different fictional plotlines and activities. Players can choose to control one of three different main characters, who have different personalities and different experiences as they explore the virtual world. In one of 60 "random events" featured in the game, the player finds a woman tied up by the side of the road with two men preparing to bury her alive. The player can kill the two men and drive the woman to safety.

During the drive, the woman shares facts about herself that resemble some aspects of Gravano's real-life identity, including that (1) her name is "Antonia Bottino," (2) she is the daughter of "Sammy Sonny' Bottino," who was in the "Gambetti" family until he took a plea deal; and (3) she was asked to appear on a reality show called "Wise Bitches."

⁴ [N.Y. Civil Rights Law §51](#).

⁵ E.g., *Messenger v. Gruner + Jahr Printing & Publ'g*, 94 N.Y.2d 436, 441 (2000).

⁶ *Costanza v. Seinfeld*, 279 A.D.2d 255, 255 (1st Dept. 2001). See also *Hampton v. Guare*, 195 A.D.2d 366, 366 (1st Dept. 1993).

⁷ *Frank v. NBC*, 119 A.D.2d 252, 256 (2d Dept. 1986).

⁸ *Hicks v. Casablana Records*, 464 F.Supp. 426, 433 (S.D.N.Y. 1978).

⁹ *Krupnik v. NBC Universal*, 2010 WL 9013658 (Sup. Ct. N.Y. Cty. June 29, 2010).

¹⁰ *Lemerod v. Twentieth Century Fox Film Corp.*, 2008 WL 918579 (S.D.N.Y. March 31, 2008).

¹¹ *Lohan v. Perez*, 924 F.Supp.2d 447, 454 (E.D.N.Y. 2013). See also *Hoepker v. Kruger*, 200 F.Supp.2d 340, 349 (S.D.N.Y. 2002); *Nussenzweig v. DiCorcia*, 2006 WL 304832 (Sup. Ct. N.Y. Cty. Feb. 8, 2006), *aff'd*, 9 N.Y.3d 184 (2007).

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Defendants maintain that Gravano's name is not used in the game, that no picture of Gravano appears, and that the "Antonia Bottino" looks nothing like her.¹²

Based on the New York precedent outlined above, it's hard to imagine a New York court holding that Gravano's claim can survive. Even if it was found that her likeness was used, New York law does not permit right-of-publicity claims targeting fictional expressive works like *Grand Theft Auto*. To the extent any exception is recognized, it is only in extreme circumstances, where the defendant's use "has no real relationship" to the work or the work amounts to "an advertisement in disguise."¹³

Confusion from Beyond?

Unfortunately, courts around the country do not take such a predictable approach, employing a proliferation of competing First Amendment tests that permit right-of-publicity claims to proceed against expressive works based on a number of different, and often subjective, criteria. Two recent federal cases applying California's "transformative-use" test to video games have created even more uncertainty. The transformative-use test is "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."¹⁴

In *Hart v. Electronic Arts*,¹⁵ the U.S. Court of Appeals for the Third Circuit held that a right-of-publicity claim brought by former Rutgers quarterback Ryan Hart could go forward against Electronic Arts, based on the use of realistic virtual players in EA's NCAA football games. The court found that EA's video games were not "transformative" because of their realism: "[t]he digital Ryan Hart does what the actual Ryan Hart did while playing at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game."¹⁶ The U.S. Court of Appeals for the Ninth Circuit reached the same conclusion in *Keller v. Electronic Arts*, holding that NCAA Football "does not qualify for First Amendment protection as a matter of law because it literally recreates [plaintiff Samuel Keller] in the very setting in which he has achieved renown."¹⁷ The authors' firm represents EA in these cases. Petitions for certiorari are pending.

These cases and other video game decisions have injected a new layer of confusion for content creators, because they simultaneously (1) express agreement with the Supreme Court's holding in *Brown v. Entertainment Merchants Association* that video games are entitled to the same First Amendment protection as "the protected books, plays, and movies that preceded them,"¹⁸ and (2) outline a test that seemingly would permit right-of-publicity claims to proceed against works based on or inspired by real events and real-life individuals like documentaries, docudrama, and biographies. A long line of cases recognizes that the First Amendment protects the use of real-life figures in creative works based on fact.¹⁹

Conclusion

¹² All details of the game are from defendants' memorandum in support of their motion to dismiss, *Gravano v. Take-Two Interactive Software*, No. 151533/2014 (N.Y. Sup. Ct. N.Y. Cty. March 17, 2014) (ECF No. 5).

¹³ [Finger v. Omni Publications Int'l](#), 77 N.Y.2d 138, 142 (1990); see Lemerond, 2008 WL 918579, at *3 (applying "real relationship" test to a fictional movie).

¹⁴ [Comedy III Prods. v. Gary Saderup](#), 21 P.3d 797, 799 (Cal. 2001).

¹⁵ [717 F.3d 141 \(3d Cir. 2013\)](#).

¹⁶ [Id. at 166](#).

¹⁷ *In re NCAA Student-Athlete name & Likeness Licensing Litg.*, 724 F.3d 1268, 1271 (9th Cir. 2013).

¹⁸ [131 S.Ct. 2729, 2733 \(2011\)](#).

¹⁹ See, e.g., [Guglielmi v. Spelling-Goldberg Prods.](#), 25 Cal.3d 860, 869 (1979) (Bird, C.J., concurring) (Valentino docudrama); [Tyne v. Time Warner Entm't](#), 901 So.2d 802, 809 (Fla. 2005) (Perfect Storm); [Seale v. Gramercy Pictures](#), 949 F.Supp. 331, 336-37 (E.D. Pa. 1996) (docudrama and book based on Black Panthers).

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To be sure, while there is no basis for a New York court to apply a California test to her claim, should it do so, the tenuous link between "Antonia Bottino" and Karen Gravano may be such that a court would be compelled to find Grand Theft Auto V's alleged use of her "life story" transformative. It is more likely that Gravano's action will be a helpful reminder that, in contrast to the unpredictability that exists elsewhere, consistent with the state's position as a media bastion, New York courts have staked out a strong and clear line for creators of expressive works to take refuge in the *right-of-publicity* context.

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