

Client Update

Game Over: New York's Highest Court Rejects Right of Publicity Claims Against Grand Theft Auto V

New York State's highest court last week rejected a pair of right of publicity lawsuits in which former child actress Lindsay Lohan ("Mean Girls") and public figure Karen Gravano ("Mob Wives") sued over fictional characters in the video game Grand Theft Auto V ("GTA V"). These victories for our client, Take-Two Interactive Software, affirming dismissal at the pleading stage, are the first cases in New York to protect video games against right of publicity claims.

GTA V is an interactive video game that allows players to experience over 100 hours of gameplay set in a parody version of Southern California. The game is like an interactive movie, rich with an intricate plot, dialogue, animated sequences, still-image visual artworks, and music. Ms. Gravano claimed that an animated fictional character in GTA V named "Antonia Bottino" resembled her and thus violated her publicity rights. Ms. Lohan claimed that her publicity rights were violated by an animated character named "Lacey Jonas," and by two visual artworks that appear in the game and also were used in related advertising.

New York's right of publicity statute prohibits the unauthorized use of "name, portrait, picture or voice" for "advertising" or "trade" purposes. Take-Two moved to dismiss both cases because the GTA V characters did not use either plaintiff's "name, portrait, picture or voice." Take-Two also argued that creative and expressive works like GTA V simply are not "advertising" or "trade" under New York law and the First Amendment. In 2016, the [Appellate Division](#) accepted both arguments and granted Take-Two's motions to dismiss both cases at the pleading stage. That reversed the trial court, which erroneously held that the purported resemblance between the characters and the plaintiffs created an issue of fact.

In affirming the dismissals, the Court of Appeals held that the digital avatars were not recognizable images of the plaintiffs and therefore not "portraits" as a matter of law. As the Court of Appeals said in its [Lohan](#) decision:

[These] artistic renderings are indistinct, satirical representations of the style, look, and persona of a modern, beach-going young woman. It is undisputed that defendants did not refer to [Lohan] in GTA V, did not use her name in GTA V, and did not use a photograph of her in that

game. . . . Moreover, the ambiguous representations in question are nothing more than cultural comment that is not recognizable as plaintiff and therefore is not actionable

The Court of Appeals thus provided crucial protections for creative works:

- The decisions confirm that judges can and should decide the issue of resemblance as a matter of law at the motion to dismiss stage. Otherwise, as one judge observed during [oral argument](#), “we’d have fifteen different people claiming they were one avatar.” Dismissal at the motion to dismiss stage means early case resolution without discovery – a major benefit to the creative community.
- The court’s emphasis on “cultural comment” makes clear that context matters in assessing resemblance. Creative works have long been protected in New York on the basis that they are not “trade” or “advertising” under the statute. Creative works now also enjoy added protection under the statute’s “portrait [or] picture” element.
- The decisions make clear that the statute will be strictly construed to cover only “name, portrait, picture or voice.” The plaintiffs argued that GTAV made use of their life stories, personas, catch phrases and styles of speech, and mode of dress. These efforts to expand the statute got no traction with the Court of Appeals.
- The Court of Appeals also left undisturbed the Appellate Division’s holding that GTAV, as a creative work, simply is not “trade” or “advertising” under New York law and the First Amendment.

New York has a long tradition of rejecting right of publicity claims that target creative works. *Lohan* and *Gravano* extend that tradition of protection to video games. The decisions also strongly bolster the role of New York judges, ruling on motions to dismiss, as gatekeepers against meritless right of publicity claims.

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Our Intellectual Property and Media team, led here by Jeremy Feigelson and Jared Kagan, litigated the cases for Take-Two. We would be pleased to discuss these issues with our clients and friends.

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