

Litigator of the Week: A Video Game Blowout (Sorry Lindsay Lohan)

Debevoise & Plimpton partner Jeremy Feigelson takes top honors this week for a win that's likely to reverberate throughout the \$100 billion video game industry.

By Andrew Denney

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When Debevoise & Plimpton partner Jeremy Feigelson was tasked with arguing about avatars in the video game “Grand Theft Auto V,” he had an inspiration: Loan the court an Xbox. Let the New York Court of Appeals judges play the game themselves.

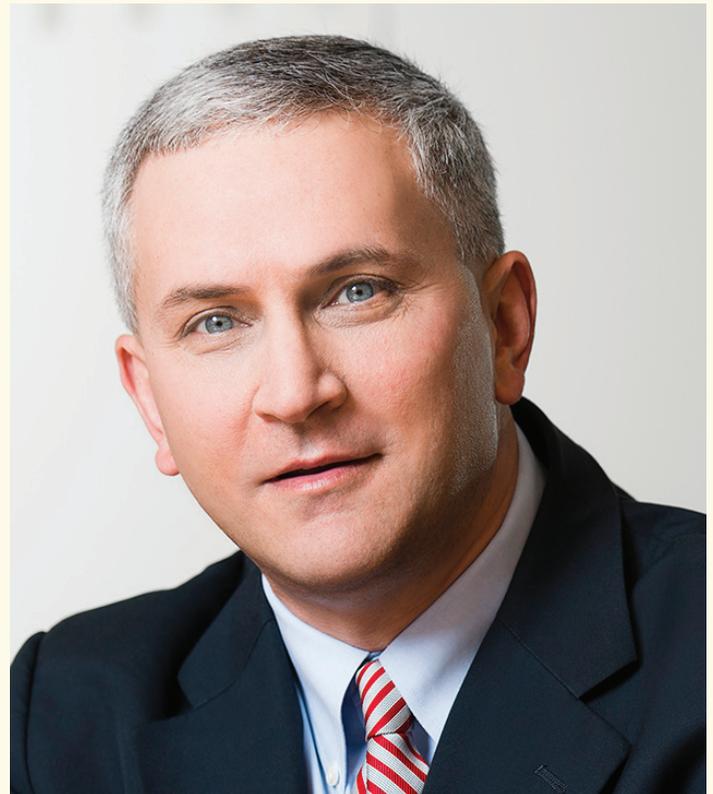
Apparently, it worked. Feigelson convinced the court that the likenesses of celebrity plaintiffs Lindsay Lohan and Karen Gravano were not misappropriated as characters, scoring a big win for video game maker Take-Two Interactive and its subsidiary Rockstar Games.

It's a decision that's likely to reverberate throughout the \$100 billion video game industry, and earned Feigelson the mantle of litigator of the week.

“One of the judges at oral argument made a point of saying, thanks for the Xbox,” Feigelson said, referring to a statement by Judge Jenny Rivera at oral arguments in the case, held in February. “She had actually spent time with it and played Grand Theft Auto V, which we thought was great.”

(For the record, the court is returning the Xbox.)

Lohan, an actress and singer, alleged that her likeness was the basis of a character in the game called “Lacey Jonas,” a blonde actress and singer who is first seen hiding in an alley to avoid paparazzi.



Jeremy Feigelson, partner with Debevoise & Plimpton.

Lohan claimed she was also the basis of two still images in the game, also used in promotional materials. The images show “Lacey Jonas” getting frisked by a female cop and taking a selfie on a beach.

Gravano, the daughter of ex-mob underboss Sammy “The Bull” Gravano who formerly starred

in the reality show “Mob Wives,” says her likeness was copied for a character in the game named “Andrea Bottino” who is identified as the daughter of a mobster-turned-government witness.

The plaintiffs brought their suits under provisions of New York’s Civil Rights Law that establish the so-called “right to publicity,” which is intended to protect individuals from having their name, identity or likeness used for advertising or trade without consent.

The suits came at a time when artists and celebrities have become increasingly concerned about being replaced by ever more-convincing avatars and holograms. The Screen Actors Guild-American Federation of Television and Radio Artists is advocating for the passage of legislation that would expand New York’s right to publicity protections to make the right transferable to heirs and remove the domiciliary requirement for parties bringing suit under the law.

The plaintiffs in the Grand Theft Auto V suit had some early success at the trial court stage: Manhattan Supreme Court Justice Joan Kenney denied Take-Two’s motion to dismiss Lohan and Gravano’s suits.

But the Appellate Division, First Department, one of New York’s mid-level trial courts, reversed Kenney, finding that the game did not feature either of the plaintiffs’ “name, picture or portrait,” which is required to bring an action under New York’s right to publicity law.

The Court of Appeals, New York’s high court, agreed with the First Department, but went further in interpreting the law, finding that the word “portrait” in the law includes digital avatars.

Thomas Farinella of the Law Office of Thomas A. Farinella, who appeared for Gravano, said in an interview following the Court of Appeals’ ruling

that, while he was disappointed that his client’s suit was tossed out, he took solace in the fact that it did not rule on Take-Two’s argument that creative works are afforded total protection under the First Amendment.

But Feigelson said the outcome was a “100 percent win,” not only for his clients, but for the “creative community” as a whole.

“That’s a huge win for our client,” Feigelson said. “It’s a huge win for the creative community generally to say that judges should have the power to decide the issue of resemblance as a matter of law right up front on a motion to dismiss. It’s going to save the creative community a lot of headaches and a lot of litigation expense going forward.”

Debevoise associate Jared Kagan worked on the case as well.

With respect to the First Amendment issue, Feigelson noted that before the case made it to the high court, the First Department, citing a 2011 ruling by the U.S. Supreme Court, said that video games should be protected by the First Amendment.

And Feigelson doesn’t think that the Court of Appeals’ expansion of the definition of “portrait” could invite a wave of new lawsuits from plaintiffs alleging that they were turned into digital avatars without their say-so, noting that his client prevailed in two separate appellate courts against two high-profile clients.

“I don’t think that plaintiffs’ lawyers are going to look at that and say ‘my turn,’” Feigelson said.