NEWS ANALYSIS

When It May Not Pay to Be Famous

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WASHINGTON — RYAN HART played quarterback for the Rutgers football team from 2002 to 2005. These days, he works in the financial services industry.

But a version of Mr. Hart on the playing field lives on, along with those of thousands of other athletes, in a video game called “NCAA Football.” The game allows players to manipulate the actions of more than 100 college teams in fantasy matchups. An unnamed avatar in the game shares Mr. Hart’s number, height, weight, biography and playing statistics.

Mr. Hart sued the game’s manufacturer, Electronic Arts, saying it should have gotten his permission and paid him a fee. Last month, in a decision that tried to reconcile free speech and commerce, a divided three-judge panel of the federal appeals court in Philadelphia said the company had violated Mr. Hart’s right to control the commercial use of his image — his “right of publicity.”

“There’s a lot at stake here, and a lot in play,” said Mr. Hart’s lawyer, Timothy J. McIlwain, who is asking that the case be treated as a class action. Mr. McIlwain said economists have told him that his clients may be entitled to billions of dollars in damages.
Jake Schatz, a lawyer with Electronic Arts, agreed that the case is exceptionally important, but for a different reason. “The reach of this decision extends far beyond video games,” he said in a statement. “If it stands, all creators of expressive works that depict real individuals, including filmmakers, biographers and journalists, would face a stark choice: liability or self-censorship.”

Mr. Schatz said the company will ask the full appeals court to reconsider the panel’s decision.

The Screen Actors Guild and several players’ unions have filed briefs supporting Mr. Hart, saying that athletes, actors and other celebrities must have the right to control the use of their identities and to harvest the financial fruits of their fame. The movie industry, book publishers and news organizations, including The New York Times, have lined up on the other side, saying that allowing celebrities to control speech about them runs afoul of the First Amendment.

The dueling briefs cited a grab bag of cases that are hard to wrestle into a coherent legal framework.

The courts have, on the one hand, rejected right-of-publicity suits arising from a painting of Tiger Woods, a comic book evoking the musicians Johnny and Edgar Winter, parody baseball trading cards and a fantasy baseball game that used the names, statistics and biographies of Major League players. But courts have allowed suits over the broadcast of a human cannonball’s entire act, a comic book using a hockey player’s nickname, an ad evoking Vanna White’s skill at turning letters on “The Wheel of Fortune” and a reference to Rosa Parks in a song.

If there is a legal principle that unites these rulings, it is hard to discern. What is clear, though, according to an expansive 2011 Supreme Court decision, is that video games deserve full First Amendment protection.
Most lawyers and scholars say there is little question that journalists, biographers, novelists and filmmakers can say what they like about famous people if it is truthful and does not invade their privacy. That is why Mark Zuckerberg, the founder of Facebook, was not entitled to a cut of the profits of the film “The Social Network” or to prevent its makers from depicting his rise.

At the other extreme, there is broad consensus that the right of publicity requires companies to obtain permission before they say a celebrity has endorsed their products.

But that leaves a vast gray area in the middle.

In 2001, in what may be the most important right-of-publicity case, the California Supreme Court proposed a test to decide when celebrities should be allowed to insist on payments or suppress expression depicting them. It is the test the appeals court in Philadelphia used to rule in favor of Mr. Hart.

The California case concerned Gary Saderup, an artist who sold charcoal sketches of the Three Stooges on lithographs and T-shirts. The court started by acknowledging that some depictions of celebrities deserve protection as free speech because “the appropriation of their likenesses may have important uses in uninhibited debate on public issues.” First Amendment protection, the court went on, does not depend on whether an image of a celebrity was mass produced, in a picture rather than in words, sold for money or put on T-shirts.

But then the court took a turn. Mr. Saderup’s sketches, it said, were not artistic enough to warrant protection. They were “literal, conventional depictions of the Three Stooges” and lacked any “significant transformative or creative contribution.”

By contrast, the court said Andy Warhol’s portraits of famous people were “a form of ironic social commentary on the dehumanization of celebrity itself.”
In another age, Justice Oliver Wendell Holmes Jr. wrote that judges might want to stick to legal judgments. “It would be dangerous,” he wrote in 1903, “for persons trained only in the law to constitute themselves the final judges of the worth of pictorial illustrations.”

Courts now confront not “pictorial illustrations” but digital facsimiles. Some are free: witness the recent initiative from the Rijksmuseum in Amsterdam to make downloads of high-resolution copies of more than 100,000 works in its collection freely available. Others are protected, for a time, by copyright laws. But copyright applies to expression, not identity.

In 1936, the critic Walter Benjamin wrote that the age of mechanical reproduction had transformed the way art was perceived. If a former college football player has his way, the rise of the age of digital reproduction may have a similar effect on the law.