

RIGHT OF PUBLICITY LICENSING IN A NEW AGE:
NO DOUBT V. ACTIVISION PUBLISHING, INC. ♦

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INTRODUCTION

It began with Courtney Love’s Twitter¹ tirade. Fuming, she threatened to sue Activision, makers of the *Guitar Hero* video games, for using her late husband, Kurt Cobain, as an avatar² in the new *Guitar*

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¹Twitter is a real-time information network that is a mixture of messaging, social networking, ‘microblogging’ and something called ‘presence,’ shorthand for the idea that people should enjoy an ‘always on’ virtual omnipresence ‘Twitterers’ or ‘tweeters’ send and receive short messages, called ‘tweets,’ on Twitter’s Web site, with instant messaging software, or with mobile phones. When a user is logged in through the Web or a cellphone, it asks one simple question, ‘What are you doing?’ Users answer in 140 characters or fewer. While some of these tweets have the profundity of haiku, most are mundane, like ‘Sure is pretty out tonight’ or ‘My eyes itch. I am very aggravated.’

Twitter, N.Y. TIMES, <http://topics.nytimes.com/top/news/business/companies/twitter/index.html> (last visited Oct. 5, 2010).

² An “avatar” is “a graphical image that represents a person.” Dictionary.com, <http://dictionary.reference.com/browse/avatar> (last visited Aug, 10, 2010). In a video game, an

Hero 5. In September 2009, she announced on her Twitter page:

FOR THE RECORD I DID NOT APPROVE KURTS AVATAR FOR GUYITARHERO%. i think Kurt would despise this game alone let alone this avatar³. . . . [T]his Guitar Hero . . . is breach of contract on a Bullys part and there will be a proper addressing of this and retraction . . . WE are going to sue . . . Activision we being the Trust the Estate the LLC the various LLCs Cobain Enterprises.”⁴

Activision maintained that Love not only approved Cobain’s appearance, but actually helped in the process;⁵ by providing photos and videos of her late husband and choosing the wardrobe and hairstyle of the avatar, Love both knew of and signed off on his appearance in the game.⁶

In the end, the crux of Love’s problem was not that Cobain appeared as an avatar in *Guitar Hero*. Rather, it was a feature of the game: the ability for users to “unlock” certain in-game characters, thereby enabling the characters to perform not only their own, but also other musicians’ songs.⁷ The avatar of Cobain, the “King of Grunge,”⁸ can be made to sing any other song in *Guitar Hero*, including some that he would presumably never have listened to, let alone performed.⁹ This has been more than unsettling for most who are familiar with Cobain’s music, style, and legacy and feel that making his avatar perform other artists’ songs borders on something close to defamation.¹⁰

Despite her angry Twitter posts, Love has not sued.¹¹ That eventually fell on No Doubt, a band that filed a suit against Activision in Los Angeles Superior Court in November 2009.¹² The band entered

avatar may also be referred to as an “in-game character.”

³ Dave Itzkoff, *Game Maker Says Courtney Love Approved Digital Kurt Cobain Character*, N.Y. TIMES, Sept. 10, 2009, <http://artsbeat.blogs.nytimes.com/2009/09/10/game-maker-says-courtney-love-approved-digital-kurt-cobain-character> (Spelling and punctuation in original).

⁴ Luke Plunkett, *Courtney Love Will Have her Revenge on Activision*, KOTAKU, Sept. 10, 2009, <http://kotaku.com/5356206/courtney-love-will-have-her-revenge-on-activision> (Spelling and punctuation in original).

⁵ Sean Michaels, *Courtney Love to sue over Kurt Cobain Guitar Hero Appearance*, THE GUARDIAN, Sept. 10, 2009, available at <http://www.guardian.co.uk/music/2009/sep/10/courtney-love-kurt-cobain>.

⁶ *Id.* Guitar Hero developers were reported to have said that it was, “great to work with [Love],” while Activision vice president, Tim Riley, was quoted to have said that, “Courtney supplied us with photos and videos She picked the wardrobe and hairstyle, which turned out to be the ‘Teen Spirit’ look, then we went back and forth over changes – some subtle, some not so subtle [She wanted a] sort of athletic definition but not overly so.” *Id.* (alteration in original).

⁷ Brian Crecente, *Cobain Attorney Calls For Activision To Limit Musician’s Use in GH5*, KOTAKU, Sept. 11, 2009, <http://kotaku.com/5357425/cobain-attorney-calls-for-activision-to-limit-musicians-use-in-gh5>.

⁸ DAVID COMFORT, *THE ROCK & ROLL BOOK OF THE DEAD* 253 (Citadel Press Books 2009).

⁹ See Crecente, *supra* note 7.

¹⁰ See *id.*

¹¹ Courtney Love: ‘Kurt Cobain would have enjoyed Guitar Hero,’ http://www.sfgate.com/cgi-bin/blogs/dailydish/detail?entry_id=56301 (Jan. 29, 2010, 12:24 EST) (noting that Love now says her husband would have liked Guitar Hero, but still insists on suing Activision by joining the No Doubt lawsuit).

¹² Alex Dobuzinskis, *Rockers No Doubt sue Activision over “Band Hero,”* REUTERS, Nov. 4, 2009, available at <http://www.reuters.com/article/idUSTRE5A400320091105>.

into an agreement with Activision licensing the use of its name and likeness for *Band Hero*, a new version of *Guitar Hero*.¹³ No Doubt argues that it received assurances that the band's name and likeness would be used *only* for three of their own songs, for which Activision obtained licenses.¹⁴ Claiming, *inter alia*, fraudulent inducement, breach of contract, and violations of the band's right of publicity,¹⁵ No Doubt contends that it had never approved the use of its name and likeness to play songs that were not its own.¹⁶ Like Cobain's avatar, those of the No Doubt group can also be unlocked, transforming the band members into what their lawyers call "a virtual karaoke circus act."¹⁷

Activision steadfastly denies any wrongdoing, claiming that No Doubt signed off on a broad grant of rights, including, implicitly, the game's unlock feature.¹⁸ Indeed, by providing the "worldwide right and license" to use the band's name and likeness, Activision essentially argues that No Doubt and its legal team should have known better. Activision says that it has been "publicly known" that players can unlock in-game characters and this has been a feature of *Guitar Hero* since 2005.¹⁹

This case demonstrates that the virtual world of celebrity avatars is rife with novel legal issues, particularly when publicity rights are involved. One question that looms in this debate is what the license agreement between Activision and No Doubt actually says and means. Does it mention the unlock feature at issue here? Does it suggest that the No Doubt characters would only sing and perform their own songs or does the agreement grant the unlimited right to manipulate No Doubt band members' avatars?

Licensing agreements between artists and video game publishers and developers must catch up to technology, which has been advancing at a rapid pace. A grant of rights that seemingly licenses the use of artists' songs and personas *only* in connection with their songs may, in fact, permit the manipulation of their avatars so as to make them perform other artists' songs, which they had never performed before. On the other hand, the absence of language on point may suggest non-disclosure, concealment, and other fraudulent business practices.

This article will discuss the licensing agreement at issue in *No Doubt v. Activision Publishing, Inc.*, highlighting the right of publicity concerns and a need for more detailed contract terms to lessen confusion and better protect artists. The *Band Hero* video game, the No

¹³ *See id.*

¹⁴ Complaint at 7, *No Doubt v. Activision*, No. CV09-8872 (C.D. Cal. 2009).

¹⁵ No Doubt's complaint also includes unfair business practices, injunctive relief, and rescission as causes of action. *Id.* at 1-2.

¹⁶ *Id.* at 1-2.

¹⁷ *Id.* at 1.

¹⁸ Answer and Counterclaims at 2-7, *No Doubt v. Activision*, No. CV09-8872 (C.D. Cal. 2009).

¹⁹ *Id.* at 6-7.

Doubt – Activision license agreement, and the lawsuit are introduced in Part I. Also in Part I, the language of the agreement is presented, and arguments on both sides are evaluated. In Part II, a historical backdrop and definition of the right of publicity are provided, while the licensing of intellectual property rights, and the right of publicity in particular, are discussed in Part III. Lastly, in Part IV an argument against unlockable in-game characters is made. The contract in this case is interpreted and an analysis of why the terms of the license agreement do not give Activision the unbridled right to exploit No Doubt’s name and likeness in *Band Hero* is presented. Further, a policy reason for prohibiting unlockable characters without the artists’ explicit consent is offered, taking into account rapid changes in modern technology.

I. NO DOUBT V. ACTIVISION

A. *The Game*

Activision Blizzard, Inc. (Activision) is the publisher of a popular series of music video games.²⁰ Their “Hero” series of games include *Guitar Hero*, *Band Hero*, and *DJ Hero*, in addition to several band-centric games with titles such as *Guitar Hero Metallica*, *Guitar Hero Aerosmith*, and *Guitar Hero Van Halen*.²¹ The original *Guitar Hero* game itself has been released in several different versions and various expansion games like *Guitar Hero Smash Hits* and *Guitar Hero Encore: Rocks the 80s* have also been published and distributed.²²

The game in the present dispute is *Band Hero*, released in early November 2009.²³ Like the most recent version of *Guitar Hero*, *Band Hero* also allows game users to sing or play the guitar, bass, or drums and pretend that they are in a band.²⁴ The game comes equipped with instrument-shaped game controllers and game users are to play along with popular songs using these controllers or their voice.²⁵ The object of the game is to hit the correct notes on the controller in time with the song that the user is playing.²⁶ If using a guitar controller, an extended guitar neck is shown on the screen.²⁷ As the song progresses, small colored “gems” move towards the player on the guitar neck.²⁸ When a gem crosses a line appearing at the bottom of the neck on the screen, the player has to hold down the corresponding fret button and strum the

²⁰ Activision Blizzard, Our Company, <http://www.activisionblizzard.com/corp/b/aboutUs/ourCompany.html> (last visited Aug. 10, 2010).

²¹ *Guitar Hero Games*, <http://hub.guitarhero.com/games/overview/bh> (last visited Aug. 10, 2010).

²² *Id.* (showing that to date, there have been eighteen versions of “Hero” games).

²³ *Id.*

²⁴ *Guitar Hero Learn*, <http://hub.guitarhero.com/learn-en-US> (last visited Aug. 10, 2010).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

strumming bar on the controller.²⁹ The drum controller works in a similar fashion: players hit the appropriate drum pad or step on the bass drum pedal when the colored gem passes the line on the screen.³⁰ If playing a vocal track, the player has to match the pitch and pacing of the lyrics.³¹ No matter what medium is chosen (i.e., vocals, guitar, bass, or drums), the goal is to hit the correct notes to score points.

While playing, the background visuals on the screen depict the game user's chosen avatar and the rest of the band.³² Players have the option of choosing their own pre-created avatar or selecting other characters.³³ Some real-life artists are also playable avatars in the game.³⁴ These artists presumably agree to perform motion and performance capture to generate their in-game characters.

B. *The License Agreement*

On May 21, 2009, the musical group No Doubt entered into a professional services and character license agreement with video game publisher Activision.³⁵ The agreement grants Activision the use of No Doubt's name, likeness, and musical works in the publisher's *Band Hero* game.³⁶ The "Grant of Rights" clause in the agreement provides the following:

Artists [*sic*] grants to Activision the non-exclusive, worldwide right and license to use the Licensed Property (including Artist's likeness as provided by or approved by Artist) solely in the one (1) Game for all gaming platforms and formats, on the packaging for the Game, and in advertising, marketing, promotional and PR materials for the Game.³⁷

"Licensed Property," as included in the contract, refers to the "[a]rtist's name(s), likeness(es), logo(s), and associated trademark(s) and other related intellectual property rights."³⁸ As stated under the general provisions, the rights granted "relate solely to the group 'No Doubt' and not the individual members' activities apart from the group."³⁹ Band members include Gwen Stefani, Tom Dumons, Tony Kanal, and Adrian Young.⁴⁰ The license acknowledges that these four,

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Andrew Dobrow, *Guitar Hero 5 Track List and Playable Characters Unleashed*, GEARFUSE, Jul. 8, 2009, <http://www.gearfuse.com/guitar-hero-5-track-list-and-playable-characters-unleashed/>. For example, in *Guitar Hero 5*, Matt Bellamy, Johnny Cash, and Kurt Cobain were featured as playable characters. *Id.*

³⁵ Complaint, *supra* note 14, at 3.

³⁶ *Id.* at 3-4.

³⁷ Complaint, Ex. A, Professional Services and Character License Agreement, No Doubt v. Activision, No. CV09-8872 (C.D. Cal. 2009), at ¶ 5.1. [Hereinafter *License Agreement*].

³⁸ *Id.* at ¶ 1.2.

³⁹ *Id.* at ¶ 1.1.

⁴⁰ *Id.* at ¶ 1.1.

collectively making up the band No Doubt, “own[] and control[] the personality rights (name and likeness rights) to the musical artist professionally known as No Doubt, including the band name and the name and likeness rights to each of the individual band members”⁴¹

As argued by No Doubt, the band approved only three of its own musical works to be used in the game.⁴² Accordingly, a “Music Licensing” clause reads, “Activision shall use commercially reasonable efforts to license no more than three (3) Artist songs (master/composition) for incorporation and use in the Game.”⁴³ The provision further adds, “[a]rtist shall have approval over the songs to be used, not to be unreasonably withheld.”⁴⁴

In addition to production services, the band also agreed to provide marketing services. Marketing services include participating in “three (3) entertainment oriented, gaming enthusiast press or online media interviews”; allowing “Band Hero promo materials approved by Artist to be placed on such of Artist’s community website(s) as Artist shall determine”; taking part in a press day or a “Press Satellite Tour”; and providing two recorded video “shout-outs.”⁴⁵ The agreement differentiates between the digitized images and motion data to be used in the game and the b-roll footage and photography to be used for marketing purposes.⁴⁶ Ownership of the former is to rest with Activision, while No Doubt retains rights to the latter.⁴⁷

The agreement further includes an “Approval Rights” clause, providing in relevant part that:

Artist’s likeness as implemented in the Game (the ‘Character Likeness’), any use of Artist’s name and/or likeness other than in a ‘billing block’ fashion on the back of the packaging for the Game, and the b-roll and photography or other representation of the Services or of the Artist, shall be subject to the Artist’s prior written approval.⁴⁸

C. *The Lawsuit*

No Doubt filed suit against Activision on November 4, 2009.⁴⁹ Among other things,⁵⁰ the band sued for fraudulent inducement, breach

⁴¹ *Id.*

⁴² Complaint, *supra* note 14, at 4. *See also* Answer and Counterclaims, *supra* note 18, at 4 (admitting that the parties entered into an agreement on May 21, 2009, but denying the truth of the allegation that No Doubt approved the use of three of its own works, stating merely that the “agreement speaks for itself”).

⁴³ *License Agreement*, *supra* note 37, at ¶ 4.

⁴⁴ *Id.*

⁴⁵ *Id.* at ¶ 3.

⁴⁶ *Id.* at ¶ 5.2.

⁴⁷ *Id.* at ¶ 5.2.

⁴⁸ *Id.* at ¶ 6.1.

⁴⁹ Complaint, *supra* note 14, at 1.

⁵⁰ *Id.* at 1-2. Other causes of action included unfair business practices, injunctive relief, and rescission.

of contract, and violations of the band's right of publicity under California Civil Code § 3344 and under the common law right of publicity.⁵¹ The band alleges that Activision "knowingly misappropriated No Doubt's name, performance, and likeness for commercial purposes."⁵² Their main grievance centers on what they term the game's "Character Manipulation Feature," an option that players can exercise to unlock certain in-game characters in order to play other artists' songs using the unlocked characters.⁵³ In the version of *Band Hero* released for sale in November 2009, No Doubt's four members' in-game characters can be unlocked and made to perform the songs of other artists appearing in the game.

The band first requested that their grant of rights be limited so as not to allow game-players to unlock their in-game characters in mid-September of 2009.⁵⁴ No Doubt argues that Activision's President and Chief Executive Officer, Dan Rosensweig, admitted that "Activision is fully capable of disabling the 'Character Manipulation Feature' relating to No Doubt, but refuses to do so in order to commercially exploit No Doubt's name and likeness for its own financial interest."⁵⁵ Activision admits that it had the capacity to disable the feature.⁵⁶ Nevertheless, it states that by the time the band made its request, *Band Hero* programming had been finalized, "submitted to all of the U.S. console manufacturers for approval and . . . approved for manufacture by most console manufacturers."⁵⁷

In its complaint, No Doubt emphasizes the language of the license agreement in particular, calling attention to the agreement's express provisions relating to the band's required approval of proposed uses of No Doubt's songs and likeness.⁵⁸ Specifically, No Doubt argues that the "Music Licensing" clause of the agreement⁵⁹ requires that Activision obtain express approval from the band prior to the use of each song.⁶⁰ In the same vein, according to No Doubt, the "Approval Rights" clause⁶¹ requires Activision to get the band's written approval prior to *any* use of the band's name or likeness in the game.⁶²

The complaint also lists several potentially harmful effects of the

⁵¹ *Id.* at 9.

⁵² *Id.* at 8.

⁵³ *Id.* at 8-9.

⁵⁴ Notice of removal of action from the Superior Court of the State of California to the United States District Court pursuant to 28 U.S.C. § 1441(b) at 2, *No Doubt v. Activision*, No. CV09-8872 (C.D. Cal. 2009).

⁵⁵ Complaint, *supra* note 14, at 6.

⁵⁶ Answer and Counterclaims, *supra* note 18, at 7.

⁵⁷ *Id.*

⁵⁸ Complaint, *supra* note 14, at 4-6.

⁵⁹ See *supra* Part I.B.

⁶⁰ Complaint, *supra* note 14, at 4.

⁶¹ See *supra* Part I.B.

⁶² Complaint, *supra* note 14, at 4.

“Character Manipulation Feature.”⁶³ Game-players can, for instance, create “awkward and distorted visual performances by No Doubt’s avatar characters of musical works in genres not associated with, and never performed by, No Doubt.”⁶⁴ The band argues that some of these songs could “contain lyrics that are potentially harmful to the reputation and public persona of No Doubt.”⁶⁵ As an example of inappropriate character manipulation, the complaint describes that lead singer Gwen Stefani’s in-game character can be made to sing “Honky Tonk Woman” by the Rolling Stones.⁶⁶ This can result in Ms. Stefani’s character singing in a male voice and “boasting about having sex with prostitutes.”⁶⁷ The band argues that such manipulation enables *Band Hero* users to control its members’ in-game characters in “unrealistic” and “unapproved” ways.⁶⁸ Furthermore, No Doubt maintains that Activision did not disclose the manipulation feature to the band members before they entered the agreement.⁶⁹ According to the complaint, No Doubt would not have entered into the agreement if it had known that Activision intended to use the band’s likeness in the “Character Manipulation Feature.”⁷⁰

The band’s complaint also highlights the provision of the agreement specifically acknowledging and agreeing that the rights granted “relate solely to the group ‘No Doubt’ and not the individual members’ activities apart from the group.”⁷¹ The band points out that despite this language, each of the band members’ in-game characters can be unlocked and manipulated to perform other songs.⁷² To achieve lifelike representations of the band members, No Doubt accuses Activision of hiring actors to impersonate the No Doubt members so that it could create the “unapproved representations of No Doubt’s performances of the unauthorized additional musical works.”⁷³

Activision’s first order of business was to remove the action from state to federal court pursuant to 28 U.S.C. § 1441(b) (federal question).⁷⁴ Activision argued that because No Doubt’s right of publicity claim depended on the inclusion of its likeness in the copyrighted *Band Hero* game, the state law right of publicity claim was preempted by federal copyright law.⁷⁵ After No Doubt filed an ex parte

⁶³ *Id.* at 5-7.

⁶⁴ *Id.* at 4-5.

⁶⁵ *Id.* at 5.

⁶⁶ *Id.* at 5-6.

⁶⁷ *Id.*

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 7-8. The band goes so far as to say that Activision “concealed its plan to use No Doubt’s name and likeness for the Character Manipulation Feature.” *Id.* at 7 (emphasis added).

⁷⁰ *Id.* at 8.

⁷¹ See *License Agreement*, *supra* note 37, at ¶ 1.1.

⁷² Complaint, *supra* note 14, at 5.

⁷³ *Id.*

⁷⁴ Notice of Removal, *supra* note 54.

⁷⁵ *Id.* at 2.

application to remand to state court, however, the band ultimately prevailed.⁷⁶ Activision's subsequent motion to strike pursuant to California's anti-SLAPP statute⁷⁷ was also unsuccessful.⁷⁸ The state court found that as Activision is alleged to have contracted to limit its use of No Doubt's avatars, it effectively waived anti-SLAPP protections.⁷⁹

Activision has argued that ever since the first version of the *Guitar Hero* games – dating back to 2005 – players have been able to unlock in-game characters.⁸⁰ Indeed, according to the video game publisher, this feature has been “publicly known” since *Guitar Hero* games first hit the shelves and the “Character Manipulation Feature” is a standard option in many video games.⁸¹ In the words of Activision's legal counsel, this dispute could be summed up as follows:

What this case boils down to is not a violation of the right of publicity, but rather No Doubt's failure to request that their grant of rights to Activision be limited to use of their likenesses *only in connection with No Doubt songs*. With sophisticated management and legal representation, extensive contract negotiations and meeting to go over any and all questions about the Game, No Doubt had every opportunity to request that the broad grant of rights to Activision be restricted.⁸²

Although Activision is correct in saying that this case is more about licensing than anything else, whether the grant of rights is as “broad” as Activision argues is highly questionable. There is no doubt that with more sophisticated and defensive lawyering from the get-go, the band would now find itself in a more favorable position. However, as an exercise in contract interpretation will reveal, Activision may not have an unlimited license to exploit the band members' publicity rights. Before turning to the contract, however, a brief introduction to right of publicity law is provided below.

II. RIGHT OF PUBLICITY

The right of publicity is a unique legal concept that is most aptly described as “the inherent right of every human being to control the commercial use of his or her identity.”⁸³ Though it is similar to and overlaps with other intellectual property rights, such as trademark and

⁷⁶ No Doubt v. Activision Publishing, Inc., 702 F. Supp. 2d 1139 (C.D. Cal. 2010) (finding that No Doubt's image and likeness were not copyrightable subject matter, not subject to copyright law, and therefore such a publicity claim is not preempted).

⁷⁷ CAL. CIV. PROC. CODE § 425.16 (2010).

⁷⁸ Tentative Ruling at 1, No Doubt v. Activision, No. BC425268 (Cal. Super. Ct. L.A., 2010).

⁷⁹ *Id.*

⁸⁰ Answer and Counterclaims, *supra* note 18, at 3-4.

⁸¹ *Id.*

⁸² *Id.* at 2 (emphasis in original).

⁸³ 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.3 (2d ed. 2008).

copyright, it is a distinct category of its own.⁸⁴ The right of publicity dates back to just a few decades ago, as it is an offshoot of an earlier common law right: the right of privacy.⁸⁵ This legal principle was first formulated by Professors Samuel D. Warren and Louis D. Brandeis more than one hundred years ago.⁸⁶ Arguing that some things should be kept from “popular curiosity,” the two professors made a case for protecting the sanctity of private life.⁸⁷ Specifically, they sought to protect individuals’ private lives, habits, acts and relationships from scrutiny and disclosure in the press.⁸⁸

The impact of the Warren and Brandeis article was felt almost immediately. In the early 1900s, a New York state court rejected the right of privacy as a legal theory, claiming that a common law right would lead to unrestricted litigation.⁸⁹ Nevertheless, it invited the New York legislature to act if it wished to pass a statute on this point.⁹⁰ The legislature soon responded by enacting a privacy statute, which made it a misdemeanor and a tort to use a person’s name, portrait, or picture in advertising without written consent.⁹¹ Other states eventually followed suit and developed their own statutes.⁹² By the mid-century, the right of privacy had developed to protect against four types of torts, as articulated by Professor William Prosser: (1) the intrusion upon a person’s seclusion so as to gather private facts; (2) the public disclosure of private and embarrassing facts about a person; (3) publicity of false or misleading representations that place a person in a false light; and (4) the appropriation of a person’s name or likeness for another’s benefit.⁹³ Publicity rights are related to this fourth category.⁹⁴

The first court to recognize and coin the phrase “right of publicity” was the Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*⁹⁵ In this case, Judge Jerome Frank laid down the rule that people have a right to prevent the commercial use of their identity without their consent and the right to grant an exclusive privilege to the use of their identity to a firm in a given market.⁹⁶ With this, a person’s right of publicity sounded in property law, becoming an enforceable interest capable of being both assigned and licensed.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARVARD L. REV. 193, 215 (1890).

⁸⁷ *Id.* at 216.

⁸⁸ *Id.* at 195.

⁸⁹ *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 539 (N.Y. 1902).

⁹⁰ MCCARTHY, *supra* note 83, at 24.

⁹¹ *Id.* at 25 (quoting 1903 N. Y. Sess. Laws ch. 132, §§ 1 to 2).

⁹² *Id.*

⁹³ William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

⁹⁴ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (acknowledging the right of publicity as a separate commercial tort from the right of privacy).

⁹⁵ 202 F.2d 866, 868 (2d Cir. 1953).

⁹⁶ *Id.*

Following *Haelan Laboratories*, the notion of publicity rights as distinct from privacy rights, gained considerable traction.⁹⁷ In 1977, the Supreme Court had the first, and only, opportunity to decide on a right of publicity issue. In *Zacchini v. Scripps-Howard Broadcasting Co.*,⁹⁸ the Court stressed the commercial nature of the right of publicity, stating that the “commercial stake” an entertainer has in his reputation cannot be appropriated without consent.⁹⁹ Right of publicity as a legal concept was beginning to be taken more seriously.¹⁰⁰

One of the biggest problems regarding right of publicity law, however, is that there is currently no federal legislation regulating it.¹⁰¹ Instead, publicity rights are protected by state law, with each jurisdiction taking a different stance. There are twenty-eight states that recognize this right either by statute, as common law, or both.¹⁰² Eighteen states have enacted statutory protection of publicity rights, although they differ as to the extent of protection, its application to non-celebrities, its descendability, the length of postmortem protection (if any), and remedies for violations.¹⁰³ Statutes adopted by New York and California¹⁰⁴ were the first to codify the misappropriation of a person’s name and likeness as an actionable tort, and in both statutes, violations of the right of publicity hinge on unauthorized commercial exploitation.¹⁰⁵ New York protects against the unlawful use of a

⁹⁷ MCCARTHY, *supra* note 83, at 61 (“The decade of the 1970s marked the coming of age of the right of publicity. Most courts readily appreciated the commercial property interest in human identity protected by the right of publicity as being quite different from the traditional human dignity interest protected by the appropriation type of privacy.”).

⁹⁸ 433 U.S. 562 (1977).

⁹⁹ *Zacchini*, 433 U.S. at 578.

¹⁰⁰ MCCARTHY, *supra* note 83, at 61.

¹⁰¹ Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 49 J. COPYRIGHT SOC’Y U.S.A. 441, 516 (2001) (“There is no federal right of publicity and no likelihood of enactment of such legislation in the near term.”).

¹⁰² Scott Jon Shagin & Matthew Savare, *The Right of Publicity: Bailing the Haystack*, in ADVANCED SEMINAR ON COPYRIGHT LAW 641, 641 (2004).

¹⁰³ RICHARD RAYSMAN ET AL., INTELLECTUAL PROPERTY LICENSING: FORMS AND ANALYSIS § 7.02(1)(b) (2006). Some of the eighteen states that have codified right of publicity law are California (CAL. CIV. CODE § 3344 (West, Westlaw through 2009)), Florida (FLA. STAT. ANN. § 540.08 (West, Westlaw through 2010 Chapter 274)), Illinois (765 ILL. COMP. STAT. ANN. 1075/1 *et seq.* (West, Westlaw through 2010 Reg. Sess.)), Kentucky (KY. REV. STAT. ANN. § 391.170 (West, Westlaw through 2010 legislation)), Massachusetts (MASS. LAWS ANN., Ch. 214, § 3A (West 1999 & Supp. 2009)), Nebraska (NEB. REV. STAT. ANN. §§ 20-201 – 20-211, 25-840.01 (2009)), Nevada (NEV. REV. STAT. ANN. §§ 597.770 – 597.810 (West, Westlaw current through 2009 Reg. Sess.)), New York (N.Y. CIV. RIGHTS LAW §§ 50-51; N.Y. GEN. BUS. LAW § 397 (McKinney 2009)), Ohio (OHIO REV. CODE ANN. § 2741.01 *et seq.* (West, Westlaw through 2010 File 54)), Oklahoma (OKLA. STAT. ANN. tit. 21, §§ 839.1 -839.3; OKLA. STAT. tit. 12, §§ 1448-1449 (2002 & Supp. 2010)), Rhode Island (R.I. GEN. LAWS § 9-1-28 (1997 & Supp. 2008)), Tennessee (TENN. CODE ANN. §§ 47-25-1101 – 47-25-1108 (West 2010)), Texas (TEX. PROP. CODE ANN. § 26.001 *et seq.* (Vernon, Westlaw through 2009 Reg. Sess.)), Utah (UTAH CODE ANN. § 45-3-1 (West, Westlaw through 2010 Legis. Sess.)), Virginia (VA. CODE ANN. §§ 8.01-40, 18.2-216 (West 2007 & Supp. 2009)), Washington (WASH. REV. CODE ANN. §§ 63.60.030 – 63.60.037 (West, Westlaw through 2010 legislation)), Wisconsin (WIS. STAT. ANN. § 895.50 (West, Westlaw through 2009 Act 406)).

¹⁰⁴ New York (N.Y. CIV. RIGHTS LAW §§ 50-51; N.Y. GEN. BUS. LAW § 397); California (CAL. CIV. CODE § 3344).

¹⁰⁵ RAYSMAN ET AL., *supra* note 103, at § 7.02(1)(b).

person's name, portrait, picture, or voice, while California offers somewhat broader right of publicity protection; its statute protects a person's interest in his name, voice, signature, photograph, or likeness.¹⁰⁶

Common law protection of the right of publicity is more liberal than its statutory counterpart. For example, in *White v. Samsung Electronics America, Inc.*,¹⁰⁷ the defendant company advertised its electronics products by featuring a robot resembling Vanna White standing next to a game board eerily similar to the popular Wheel of Fortune board.¹⁰⁸ Although the Ninth Circuit affirmed the lower court's dismissal of a statutory right of publicity claim, it upheld the common law right of publicity claim.¹⁰⁹ The court stated that "[i]t is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so."¹¹⁰ Other courts have adopted a similar view, and a common law right of publicity is now well-established in several states.¹¹¹

III. LICENSING

A. *Licensing in General*

A license is the permission to do something that would otherwise be unlawful.¹¹² A more precise definition, however, really unpacks what a license is and what much of licensing law entails:

A license is an agreement that deals with, and grants or restricts, a licensee's contractual right, power privilege or immunity with respect to uses (including allowing access to) information or rights in information made available by a licensor. The agreement includes a focus on what rights, immunities, or uses are given or withheld in reference to use of the information as well as what the licensee has agreed to do or not do with respect to the information.¹¹³

Thus a license is, above all, a contract.¹¹⁴ One of its main purposes is to waive a licensor's right to sue a licensee for actions that would otherwise infringe the licensor's rights – commonly, intellectual property rights.¹¹⁵ Provided that the licensee does not take action outside the scope of the license, the licensor cannot sue for infringement.¹¹⁶ However, as noted by Justice Brandeis, "any use

¹⁰⁶ New York (N.Y. CIV. RIGHTS LAW §§ 50-51; N.Y. GEN. BUS. LAW § 397); California (CAL. CIV. CODE § 3344).

¹⁰⁷ 971 F.2d 1395 (9th Cir. 1992).

¹⁰⁸ *Id.* at 1396.

¹⁰⁹ *Id.* at 1398.

¹¹⁰ *Id.*

¹¹¹ RAYSMAN ET AL., *supra* note 103, at § 7.02(1)(b).

¹¹² BLACK'S LAW DICTIONARY 938 (8th ed. 2004).

¹¹³ 1 RAYMOND T. NIMMER & JEFF C. DODD, MODERN LICENSING LAW 4-5 (2009).

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.* at 8.

¹¹⁶ *Id.* at 8-10 (explaining that the view that a license is only the waiver of lawsuit for

beyond the valid terms of a license is, of course, an infringement . . .
.”¹¹⁷

Modern licenses also contain provisions beyond the mere waiver of suit. In fact, some scholars suggest that a license is better viewed as a “commercial relationship that entails reciprocal performance obligations.”¹¹⁸ A license may therefore be more appropriately characterized as an active transfer of rights where a property owner (i.e., the licensor) grants rights to another (i.e., the licensee) so that she may exploit those rights.

Licensing arrangements are, on the whole, rather uniform. In any licensing agreement, the licensor and the licensee must be named.¹¹⁹ In addition, the licensed property, the licensed rights to exploit the licensed property, and the scope and restrictions should be clearly delineated.¹²⁰ Agreements lacking in specificity run the risk of putting the entire licensing relationship at stake. Therefore, licensing agreements must be carefully drafted with the utmost attention to every detail.

B. *Licensing Rights of Publicity*

Like any other license, an intellectual property license gives the licensee the permission to exploit the licensor’s intellectual property.¹²¹ For instance, intellectual property holders can license their name and likeness (i.e., their right of publicity) as they wish. Indeed, musicians appearing in video games do just that, giving their licensees the right to use their likeness in the game. As with any other contract, the language of a right of publicity license agreement should be as clear and precise as possible.¹²² All of the parties to the license should know what intellectual property rights exist and what rights are at the heart of the deal.¹²³

The two types of license agreements on the right of publicity include releases and endorsement agreements.¹²⁴ Releases grant a licensee the right to use the licensor’s name and likeness in content, but not in the promotion of a product or service.¹²⁵ An endorsement agreement gives the licensor the right to use the right of publicity in content *and* in the promotion of goods and services.¹²⁶ The No Doubt –

infringement of property rights is considered the “passive” view of licenses; in recent years this has become inadequate for understanding license transactions and a more “active” view that treats licenses as a “more complete, active, commercial transaction” has taken hold instead).

¹¹⁷ *General Talking Pictures Corp., v. Western Electric Co.*, 305 U.S. 124, 126 (1938).

¹¹⁸ NIMMER & DODD, *supra* note 113, at 11 (explaining that this is the “active” view of licenses).

¹¹⁹ COMMITTEE ON INTELLECTUAL PROPERTY, *INTELLECTUAL PROPERTY DESKBOOK FOR THE BUSINESS LAWYER* 87 (2d. ed. 2009).

¹²⁰ *Id.*

¹²¹ *Id.* at 85.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ RAYSMAN ET AL., *supra* note 103, at § 7.02.

¹²⁵ *Id.*

¹²⁶ *Id.*

Activision license agreement is an endorsement agreement: the band granted Activision the rights to use its name and likeness in *Band Hero* while at the same time agreeing to promote the game.¹²⁷

The issue of exclusivity is another important consideration when drafting a license. Non-exclusive licenses give the licensee the right to use the attributes of the licensor's name and likeness in a specified way, but also permit the licensor to allow others to exploit the same right.¹²⁸ An exclusive license allows only the licensee to use the licensor's name and likeness; during the terms of an exclusive license, not even the licensor can make use of those same publicity rights.¹²⁹ No Doubt and Activision have a non-exclusive license agreement with respect to the band's publicity rights. However, in regards to other music-rhythm based video games, the license agreement provides exclusivity for a period of five years.¹³⁰

Exactly what attributes of a person's right of publicity are being licensed is an important question that must be set out with painstaking detail in any license agreement.¹³¹ Every state defines the elements of a person's right of publicity differently.¹³² Some states list right of publicity protection in a statute, while others do so only under common law.¹³³ There are several states that define right of publicity by means of both statutory and common law and other states have no definition at all.¹³⁴ In the general clause of the No Doubt – Activision license agreement, the "Licensed Property" includes the band's "name(s), likeness(es), "logo(s), and associated trademark(s) and other related intellectual property rights."¹³⁵

Along with the grant of rights, the scope of use provision is probably the most important clause in a right of publicity license agreement.¹³⁶ This provision lays out the scope of use of the licensor's name and likeness.¹³⁷ Here, the licensee's main goal is to ensure that the license contains language broad enough not to limit its intended

¹²⁷ *License Agreement*, *supra* note 37.

¹²⁸ RAYSMAN ET AL., *supra* note 103, at § 7.03(1).

¹²⁹ *Id.*

¹³⁰ See *License Agreement*, *supra* note 37, at ¶ 7:

For a period of five (5) years from the Effective Date, Artist shall not license or otherwise authorize or permit any other party to use the Artist name, likeness, logos, or trademarks in or in connection with any other music-rhythm based video game (including advertising or promotion related thereto). The foregoing shall not restrict: (i) any of the members of No Doubt from any individual activity, or (ii) any music licensing, and the limited use of Artist's name where customary as part of credits related thereto.

Id.

¹³¹ RAYSMAN ET AL., *supra* note 103, at § 7.03(1).

¹³² *Id.*

¹³³ See discussion in Part II *infra*.

¹³⁴ RAYSMAN ET AL., *supra* note 103, at § 7.03(1).

¹³⁵ *License Agreement*, *supra* note 37, at ¶ 1.2.

¹³⁶ RAYSMAN ET AL., *supra* note 103, at § 7.03(4).

¹³⁷ *Id.*

business uses of the licensor's publicity rights.¹³⁸ However, the licensor must also be careful not to sign off on a limitless grant of her publicity rights.

It is possible in right of publicity licenses to provide for either a narrow or broad grant of rights. In general, when drafting a license agreement, the parties should keep in mind the rule of thumb that if a use is not granted, it is precluded.¹³⁹ Therefore, a license agreement with very specific language may be straightforward with few complications. For example, a software licensor who wants to limit the grant of rights to the software's code would include only this in the contract terms.¹⁴⁰ Ideally, if there is no ambiguity in the language of the license agreement, such a contract will be clear-cut and easy to implement.¹⁴¹ However, things can get more complicated when other intellectual property rights are at stake. No Doubt licensed its right of publicity.¹⁴² A much fuzzier concept than a software code, it can be quite difficult to delineate the scope of the rights being licensed with precision. A license that is confusing or ambiguous generally requires a judge to interpret the contract terms to determine the effect of two parties' agreement (because when ambiguity results in problems, it often, though not always, ends in litigation).

IV. THE NO DOUBT – ACTIVISION LICENSE AGREEMENT: A CASE AGAINST UNLOCKABLE IN-GAME CHARACTERS

A seemingly broad grant of rights may not be so broad after all. No Doubt argues that the contract terms did not warrant the broad grant of rights that Activision assumed to have obtained. Activision, on the other hand, maintains that the "agreement speaks for itself"; that is, the contract terms indicate that Activision secured an apparently unlimited grant to use the band's right of publicity for its game.¹⁴³

In the following sections this Note will argue that, first, the terms of the license agreement do not provide Activision with a limitless right to exploit No Doubt's right of publicity in *Band Hero*. Secondly, even if the license is found to grant Activision the right to use the band's name and likeness to perform songs other than their own, it should be forbidden from doing so on policy grounds. This case represents the need for increased protection for artists in a new digital age. The contract terms in the No Doubt – Activision agreement seem, at first blush, to lay out the rights being granted in an unequivocal manner. However, with advances in technology, video game publishers can

¹³⁸ *Id.*

¹³⁹ JIM E. BULLOCK, *THE IP LICENSING LAWYER'S JOB* 60 (2008).

¹⁴⁰ *Id.* at 62.

¹⁴¹ *Id.*

¹⁴² *License Agreement*, *supra* note 37.

¹⁴³ Answer and Counterclaims, *supra* note 18, at 3.

exploit the ignorance of artists and their lawyers to make a more exciting and profitable game. Under the guise of authority, Activision has been able to essentially prey on unsuspecting artists (or perhaps their unsophisticated lawyers) for its own commercial gain.

A. *Contract Interpretation*

As mentioned above, one of the major concerns in negotiating and drafting license agreements for the use of an artist's right of publicity is including a clear description of what aspects of the artist's name and likeness are being licensed. As the No Doubt suit was filed in California state court, California right of publicity law governs. In California, the protectable identity of a person is rather broadly defined. Under § 3344 of the California Civil Code governing the right of publicity, a person's "name, voice, signature, photograph, or likeness" constitute one's identity.¹⁴⁴ In addition, under California's common law right of publicity "[a] cause of action for common law misappropriation of a plaintiff's name or likeness may be pled by alleging: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (3) resulting in injury."¹⁴⁵ The licensed property in the No Doubt – Activision agreement includes the band's name, likeness, logos, and other associated trademarks and intellectual property.¹⁴⁶ Under California statutory and common law, such publicity rights are protected, and indeed, they are provided for in the present contract.¹⁴⁷

Thus, the contested part of the No Doubt – Activision contract lies primarily in its *scope*. No Doubt argues that in allowing certain *Band Hero* players to unlock its members' in-game characters, Activision exceeded the scope of its license.¹⁴⁸ As this analysis is meant to demonstrate, No Doubt may have a valid claim.

¹⁴⁴ CAL. CIV. CODE § 3344(a):

Any person who knowingly uses another's name, voice signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising, or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.

Id.

¹⁴⁵ *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (Ct. App. 1995). But other states do things differently. For instance, in New York, another state with large numbers of celebrities and hence more nuanced right of publicity laws, the statutory right of publicity lists a person's name, portrait, picture, or voice as the attributes of identity. N.Y. CIV. RIGHTS LAW § 51 (McKinney's 2009). However, in New York, there is no common law right of publicity. See Michael Decker, *Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity's Transformation at Death*, 27 CARDOZO ARTS & ENT. L. J. 243, 252 (2009).

¹⁴⁶ *License Agreement*, *supra* note 37, at ¶ 1.2 ("This Agreement sets out the terms upon which Artist has agreed to grant to Activision certain rights to utilize Artist's name(s), likeness(es), logo(s), and associated trademark(s) and other related intellectual property rights . . .").

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2-13.

1. Non-disclosure

Music licensing for the game consisted of only three original No Doubt songs, which the band was to perform through its in-game characters in *Band Hero*.¹⁴⁹ The band participated in a day of production services so as to capture its name and likeness for these three songs, and as it argues, *only* for these songs.¹⁵⁰ One could draw the conclusion that if Activision used No Doubt's name and likeness for songs other than their own three recordings, it infringed the band's right of publicity by exceeding the scope of the license.

On the other hand, the contract is ambiguous with respect to No Doubt's name and likeness rights when it comes to *other* artists' songs. Nowhere in the agreement is there a provision addressing this issue – an issue that Activision was likely aware of, but failed to include, in the contract. Activision argues that “since the first version of the ‘Guitar Hero’ video games, going back as early as 2005, players have been able to ‘unlock’ in-game characters in a variety of ways.”¹⁵¹ This feature allows users to “use those in-game characters to play songs they choose once they are ‘unlocked’ as part of the game-play.”¹⁵² According to Activision, No Doubt and their attorneys should have known better. They could have realized what Activision attempts to frame as common knowledge: *of course* in-game avatars can be unlocked; it is up to the artist to provide for this in the agreement if it does not want its publicity rights trampled upon.¹⁵³

Surely, one could argue that if No Doubt's legal counsel had done its due diligence, it would have discovered that the nature of these games is such that characters may be unlocked and made to perform other musicians' songs. This is precisely what Activision states in its answer. Support for this assertion may also be found in the Restatement (Second) of Contracts § 161 on non-disclosure. Comment d of Section 161 provides that “a party need not correct all mistakes of the other and is expected only to act in good faith and in accordance with reasonable standards of fair dealing, as reflected in prevailing business ethics.”¹⁵⁴ Therefore,

[a] party may . . . reasonably expect the other to take normal steps to

¹⁴⁹ Complaint, *supra* note 14, at 7.

¹⁵⁰ Complaint, *supra* note 14, at 4. It is interesting to note that the license agreement does not specifically state that the band's name and likeness will be used *only* for the three No Doubt songs licensed to be included in the game.

¹⁵¹ Answer and Counterclaims, *supra* note 18, at 3.

¹⁵² *Id.* at 3-4.

¹⁵³ On this issue, No Doubt's manager, Jim Guerinot was reported to have stated, “[w]ith respect to the ‘[e]verybody knows’ defense they’re putting forth: [e]verybody doesn’t know, or we wouldn’t be here today. Our contract specifically states what is required regarding this issue, and we relied on the written contract we had with them, not the ‘Everybody knows’ rule that they’re asserting.” Randy Lewis, *Activision fires back at No Doubt in Court*, L.A. TIMES, Dec. 10, 2009, available at <http://articles.latimes.com/2009/dec/10/business/la-fi-ct-activision10-2009dec10>.

¹⁵⁴ RESTATEMENT (SECOND) OF CONTRACTS § 161 cmt. d (2009).

inform himself and to draw his own conclusions. If the other is indolent, inexperienced or ignorant, or if his judgment is bad or he lacks access to adequate information, his adversary is not generally expected to compensate for these deficiencies.¹⁵⁵

Activision may well argue that No Doubt and their attorneys were inexperienced or careless in signing off on the band's publicity rights without informing themselves of all of *Band Hero's* game features, particularly those that could have a bearing on the rights being licensed. As a quick Google search will show, some gamers and fans have opined that No Doubt, Courtney Love, and their legal counsel should have been more familiar with the *Guitar Hero* games before agreeing to contract away their publicity rights. One commentator, responding to an article on the Huffington Post website, writes that “[i]f No Doubt had picked up any of the five avatar-enabled Guitar Hero games that predated Band Hero, they’d know that their own avatars would be manipulated . . . and could either seek alternate negotiations for their appearances or opt out altogether.”¹⁵⁶

Although this argument is persuasive, there is something deeply unsettling about allowing license agreements like this to stand. Restatement Section 161(b) provides that,

[a] person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist . . . where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.¹⁵⁷

Furthermore, as the title of comment d of the Restatement Section 161 indicates, when there is a “known mistake as to a *basic* assumption,” the party in the know is “expected to disclose the fact that would correct the mistake.”¹⁵⁸ No Doubt's understanding that the publicity rights licensed to Activision would be used for only the purposes provided for in the agreement must qualify as a “known mistake as to a basic assumption.” The contract states that Activision would license no more than three of No Doubt's songs and remained silent on the use of the artists' characters for other songs. While licensors and their lawyers generally have a duty to be well-informed, neither the band, nor their attorneys, were game makers or developers. Even if they had picked up one of the *Guitar Hero* or *Band Hero*¹⁵⁹ games and played a few times, they may not have played long enough,

¹⁵⁵ *Id.*

¹⁵⁶ Patti Millett, *No Doubt Sues Activision, Avatar Sings to a Different Song*, Nov. 12, 2009, HUFFINGTON POST, http://www.huffingtonpost.com/patti-millett/no-doubt-sues-activision_b_354659.html.

¹⁵⁷ RESTATEMENT (SECOND) OF CONTRACTS § 161(b) (2009).

¹⁵⁸ *Id.* at § 161 cmt. d (2009) (emphasis added).

¹⁵⁹ Note, however, that *Band Hero* actually debuted with the version that No Doubt participated in; therefore, it was impossible to play that particular game in advance.

or known the necessary code, to ever unlock in-game characters. One cannot expect artists and lawyers to become video game players or experts. With the license agreement as it stood, Activision knew, but deliberately failed to disclose the fact that the No Doubt characters could be unlocked and manipulated to perform other artists' songs.

Given the language of the agreement, it is reasonable to assume that No Doubt's basic assumption was that their in-game characters would be used only for their own songs. Moreover, because artists' and celebrities' most important assets are their names and likenesses, Activision must have known that by failing to mention the unlock feature to the band and its attorneys, it would be able to exploit those rights for commercial gain. No Doubt was mistaken as to the scope of the agreement and what its avatars could be made to perform. Activision's failure to correct that mistake may have been "equivalent to an assertion that the fact does not exist."¹⁶⁰ Activision therefore might have made a misrepresentation to No Doubt, effectively breaching its duty to act in good faith and in accordance with reasonable standards of fair dealing.

2. Likeness as Implemented in the Game

A textual argument No Doubt *has* made is based on the "Grant of Rights" and "Approval of Rights" clauses of the license agreement. The former provision, stating that the band licensed the use of its likeness for the game, also provides that No Doubt's name and likeness was to be licensed only "as provided by or approved by Artist."¹⁶¹ The "Approval Rights" clause contains similar language, stating that, "[a]rtist's likeness *as implemented in the Game* . . . shall be subject to Artist's prior written approval."¹⁶²

No Doubt certainly agreed to the use of its name and likeness for the three songs that Activision was licensed to include in the game. It participated in a day-of-game production services to photograph and scan its name and likeness and to capture the band's motion-capture data as it related to the three songs that they licensed to Activision.¹⁶³ But No Doubt contends that it did not agree to Activision's use of its in-game characters for other songs.¹⁶⁴ In the complaint, the band explains that, "Activision represented to No Doubt that its name and likeness would only be used in conjunction with three selected No Doubt songs within Band Hero."¹⁶⁵ In addition, it goes on to say that, "No Doubt would never have entered into the Agreement if it had known of

¹⁶⁰ RESTATEMENT (SECOND) OF CONTRACTS § 161(b) (2009).

¹⁶¹ *License Agreement*, *supra* note 37, at ¶ 5.1.

¹⁶² *Id.* at ¶ 6.1 (emphasis added).

¹⁶³ Complaint, *supra* note 14, at 3-4.

¹⁶⁴ *Id.* at 7-8.

¹⁶⁵ *Id.* at 7.

Activision's acts and intentions."¹⁶⁶

Given that the contract is silent on the use of No Doubt's in-game characters for *other* artists' songs, the only controlling provision on this matter is the "Approval Rights" clause. As mentioned above, this provision requires Activision to obtain written consent for No Doubt's likeness "*as implemented in the game.*"¹⁶⁷ However, precisely what this phrase means is unclear.¹⁶⁸ On the one hand, the band's likeness as implemented in the game could be taken to mean the way that the band's avatars look (i.e., simply the band's appearance).¹⁶⁹ On the other hand, it could mean not only the way the avatars look, but also what they can be manipulated to do (i.e., sing other songs, have a different voice, etc.).¹⁷⁰ If this phrase refers only to appearance, as Activision would likely argue, No Doubt has no leg to stand on. If the band's likeness, as implemented in the game, includes not only its appearance, but also what it can be made to do, No Doubt will have a stronger case.

Evaluating both possibilities, it seems likely that the latter is a better interpretation of the phrase "as implemented in the game." A primary objective of music-rhythm based video games is to provide not only an image of an artist, but for the player to feel that he is making the artist move – in essence, to feel like the artist himself. Therefore, a major component of the *Guitar Hero* games must be the ability to *manipulate* avatars, not only the player's ability to *look* at an image of the avatar. Indeed, what makes these video games enjoyable is that new technology now permits players to feel that they are artists too, through their ability to make on-screen avatars sing and perform songs of their own choosing.

When it comes to contract interpretation, the parol evidence rule ordinarily precludes parties from introducing evidence of oral statements to vary the terms of a written contract.¹⁷¹ Nevertheless, courts agree that if a term is found to be ambiguous, extrinsic evidence is allowed to be admitted and evaluated by the jury.¹⁷² In addition, under California law, evidence of oral statements made before the execution of an agreement can be introduced to help explain the terms of a contract if that contract is ambiguous.¹⁷³ In this case, the contract certainly appears to be ambiguous as to the meaning of the phrase, "as implemented in the game." Therefore, if No Doubt has evidence that

¹⁶⁶ *Id.* at 8.

¹⁶⁷ *License Agreement*, *supra* note 37, at ¶ 6.1. (emphasis added).

¹⁶⁸ Millet, *supra* note 156, at 1.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See generally RESTATEMENT (SECOND) OF CONTRACTS § 213(1) (2009) ("A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.").

¹⁷² JEAN FITZGERALD & LAURENCE M. OLIVO, FUNDAMENTALS OF CONTRACT LAW 100 (2005).

¹⁷³ CAL. CODE CIV. PROC. § 1856 (Deering's 2010) ("This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates . . . or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.").

Activision “represented . . . that its name and likeness would only be used in conjunction with three selected No Doubt songs,” it could potentially have a strong claim against Activision.¹⁷⁴ Specifically, with such evidence, the band could prove that Activision breached the agreement by not obtaining prior written permission to use the No Doubt avatars for different songs.

3. Solo Performances

Yet another issue that arises as a consequence of the unlock feature is that each individual No Doubt member’s in-game character can be unlocked and made to perform solo acts. As an example, the band’s complaint describes how bassist Tony Kanal’s avatar can be made to individually sing, in a female voice, one of No Doubt’s songs (the original vocalist, as with all other No Doubt musical works, was lead singer Gwen Stefani).¹⁷⁵ The complaint adds that Kanal “has never performed as a lead vocalist of the group . . . [but] in the game his avatar can be manipulated to provide the lead vocals in a woman’s voice.”¹⁷⁶ This stands in direct contradiction to the text of the license agreement, which states in the general clause that “[i]t is specifically acknowledged and agreed that the rights granted herein relate solely to the group ‘No Doubt’ and not the individual members’ activities apart from the group.”¹⁷⁷ In this respect, Activision seems to have breached a clause in its contract with No Doubt.

B. *Policy Behind Prohibiting Unlockable Characters Unless Artists Explicitly Consent to the Practice*

Although the contract-based arguments above may be persuasive, Activision could nevertheless prevail. As discussed above, Activision may – and indeed, *has* – claimed that it should not be held responsible for No Doubt and its legal team’s oversight. According to the video game publisher, their games have contained the unlock feature since 2005, and the fact that it would allow game players to use it on No Doubt’s avatars should have come as no surprise. In its notice of removal to federal court, Activision asserted that, “with sophisticated management and legal representation, extensive contract negotiations and meeting [*sic*] to go over any and all questions about the Game, No Doubt had every opportunity to request that the broad grant of rights to Activision be restricted.”¹⁷⁸ Thus, a jury could possibly find for

¹⁷⁴ Complaint, *supra* note 14, at 7.

¹⁷⁵ *Id.* at 6.

¹⁷⁶ *Id.* In this illustration, the complaint references No Doubt’s popular song, “Just a Girl,” stating that Kanal can be made to sing potentially defamatory lyrics such as, “Oh, I’m just a girl, Guess I’m some kind of freak./’Cause they all sit and stare with their eyes./Oh I’m just a girl. Take a good look at me./Just your typical prototype.”

¹⁷⁷ License Agreement, *supra* note 37, at ¶ 1.1.

¹⁷⁸ Notice of Removal, *supra* note 54, at 2.

Activision with respect to this issue.¹⁷⁹

From a policy standpoint, however, No Doubt's fraudulent inducement and breach of contract claims should be successful. Video game makers should be prohibited from allowing players to unlock artists' in-game characters unless these same artists explicitly consent to the practice in their license agreements. In a seminal right of publicity case, *White v. Samsung Electronics*,¹⁸⁰ the Ninth Circuit held that the right of publicity extends to anything beyond a name and likeness that invokes the identity of a celebrity.¹⁸¹ The court intimated that in applying right of publicity law, courts ought to be flexible and make sure to protect "those plaintiffs most in need of its protection."¹⁸² Calling for a more lenient right of publicity standard, the court stated that, "[a] rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth."¹⁸³

A similar phenomenon exists here: with the advent of new technologies, video game publishers, and developers and publishers of any other form of media, can devise ways to exploit celebrities' identities unknown to those celebrities and their lawyers at the time of contracting. No Doubt and its legal team claim that they were not aware of the unlock feature of *Band Hero* when they signed a license agreement that was silent on the issue of unlockability and seemingly granted rights only to use the band's three songs.¹⁸⁴ However, even if they *had* been aware of the feature, the license agreement appeared to indicate that the feature would not apply to the No Doubt characters.

Activision argues that the unlock feature is common knowledge and any well-informed artist or lawyer should have been aware of it. But it seems as though Activision is only fishing in troubled waters.¹⁸⁵ The fact that this is not the first time Activision has been involved in a

¹⁷⁹ However, if No Doubt does have evidence that Activision represented to the band that it would use its name and likeness only in conjunction with the three No Doubt songs to be used in *Band Hero* (see discussion *infra* Part IV.A) it is quite likely that No Doubt would succeed on its fraudulent inducement and other claims.

¹⁸⁰ 971 F.2d 1395 (9th Cir. 1992).

¹⁸¹ *Id.*

¹⁸² *Id.* at 1399.

¹⁸³ *Id.* at 1398.

¹⁸⁴ Of course, the contract also did not explicitly provide that it would use the No Doubt avatars *only* for their own songs. However, if No Doubt can present evidence that they received representations to this effect, then Activision is clearly in the wrong.

¹⁸⁵ Or, in the words of another commentator:

As Activision begins to ruffle feathers more frequently with respect to likeness rights . . . one has to wonder whether the company is in danger of killing a proverbial golden goose. If developers continue the recent trend of making controversial use of celebrity likenesses, at what point will the consequences of the backlash outstrip the revenues generated by those uses?

Ryan Moshell, *Activision Sued by Rock Band No Doubt Over In-Game Avatars*, <http://www.lawyersinagamersworld.com/2009/11/activision-sued-by-rock-band-no-doubt.html> (Nov. 6, 2009, 10:34 EST).

spat with an artist (e.g., Courtney Love) should indicate that perhaps this is not common knowledge or that something is missing in the contracts. With technology advancing rapidly, it should not be assumed that new technologies are “common knowledge” and can be left out of a contract. Doing so, as Activision did in this case, not only hurts unsuspecting artists’ rights of publicity, but encourages dubious, if not downright fraudulent, business practices. Especially with regard to right of publicity licensing, the licensee should be encouraged to divulge certain information that a licensor may not be aware of, even if the parties are dealing at arms’ length. In the end, technology may change the landscape of traditional contract law so as to make honesty not only a virtue, but perhaps a duty.

CONCLUSION

It is not clear what will happen in the No Doubt – Activision suit; Courtney Love may join and create even more negative publicity for Activision.¹⁸⁶ The publishing company certainly appears to have engaged in questionable business practices in order to entice customers and increase profit. Although we will have to wait until trial to discover whether Activision actually made assurances to No Doubt that their characters would only sing and perform their own songs, we do already know one thing: the license agreement said nothing about unlockable characters. If it is true that this feature is “public knowledge,” perhaps it should have been included. It seems that Activision could have avoided this suit if it had only been more upfront about its game features – which may no longer include celebrity avatars. The next game in the Guitar Hero series, *Guitar Hero 6: Warriors of Rock*, was released on September 28, 2010 in the United States; however, the game features only eight non-celebrity characters.¹⁸⁷ While this change may indicate Activision’s tacit acceptance of responsibility, it might also signal a new direction in music-rhythm based video games.

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¹⁸⁶ Since the debacle with Courtney Love, some fans of both musicians and *Guitar Hero* have been disappointed with the unscrupulous business practices of Activision, which has tried to do some damage control of its own. For example, several bloggers have commented on Activision’s decision to remove a video of Kurt Cobain singing a Bon Jovi song – arguably, to control bad publicity. See Activision Attempts to Control Bad Publicity, <http://signalsin.blogspot.com/2009/10/activision-attempts-to-control-bad.html> (Oct. 27, 2009, 5:17 EST).

¹⁸⁷ Chris Barth, *Video: Rush on Bringing “2112” to “Guitar Hero,”* Jul. 20, 2010, ROLLING STONE, available at <http://www.rollingstone.com/music/news/17386/183022>.

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