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Lawsuits over signature dances latest effort at athletes' oneness

SPORTS MARKETING PLAYBOOK

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A new twist in the ongoing debate over athletes' right of publicity may be on the way. Lawsuits over the alleged theft of dance moves were filed in courts last month against the makers of popular video games, including the NBA 2K video game series.

If the connection with dance doesn't seem obvious, think end-zone choreography and other celebratory moves that athletes break out to express themselves and entertain fans.

An individual's right of publicity is the right to control the commercial use of his or her own identity, including their names and likenesses. Athletes — who are attaining celebrity status more than ever — are discovering that their names, photos and images are increasingly in demand by their leagues, daily fantasy sports operators and sports video game developers.

Celebratory dances created by real-life pop culture figures that are being used in the NBA 2K video game series are now at issue in a number of recently filed suits.

Terrence Ferguson, a rapper who performs as 2 Milly, sued Take-Two Interactive Software Inc. in December, alleging the game developer stole his dance moves. Ferguson maintains Take-Two used his dance called the Milly Rock in its NBA 2K series without permission.

Ferguson says in his complaint filed in a California federal court that he's been performing the Milly Rock dance since 2014 when he released his hit song of the same name and the accompanying music video that demonstrates the dance.

Take-Two capitalized on the popularity of the Milly Rock dance, particularly with 2 Milly's African-American audience, by offering not one, but five versions of his dance in its 2018 release of NBA 2K series, Ferguson argues. He says Take-Two failed to get his permission to reproduce, sell or create a derivative work based on his Milly Rock dance or his likeness in the 2K18 or 2K19 games.

For those unfamiliar with the game, NBA 2K players can use in-game "virtual currency" to acquire items such as clothing for their characters to personalize their experience, which are known as "microtransactions."

In 2014, the game developers gave players the ability to purchase virtual currency with real money. When microtransactions became a lucrative source of revenue for Take-Two, the game developers started offering other personalization options, including dance moves, according to Ferguson.

If the NBA 2K series was just another video game, Ferguson's suit might not be so noteworthy. But the basketball simulation game is sold in 122 countries and is considered one of the most popular sports video games in the world. Take-Two announced in August that the series has sold more than 80 million units internationally since it was launched in 1999.

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Ferguson also isn't the only one suing Take-Two for lifting dance moves. Alfonso Ribeiro, the actor who played Carlton Banks on the 1990s "The Fresh Prince of Bel-Air" sitcom starring Will Smith, is arguing that the NBA 2K game developer is illegally using the character's well-known Carlton Dance.

Both Ferguson and Ribeiro have brought similar copyright infringement claims against Epic Games Inc. for using their signature dances in its blockbuster video game Fortnite without their consent. A third plaintiff is also suing Take-Two and Epic: 15-year-old Russell Horning, who shot to online fame for his dance known as The Floss.

Infringement of dance moves has real potential to spread to real-life athletes' signature moves and poses. On-field dances and poses in professional football in particular have a tendency to stick in the public's minds, possibly because touchdown celebrations have been around for more than 50 years.

According to ESPN, Homer Jones, a wide receiver for the New York Giants, threw down the first end zone spike in 1965. Since then, players' moves have gotten more coordinated, from the Cincinnati Bengals' Ickey Woods' Ickey Shuffle in the 1980s to the Denver Broncos' quarterback Tim Tebow's Tebowing by getting down on one knee with an elbow on the knee and fist against his forehead in 2011. It's worth noting that Tebow trademarked the pose in 2012.

Of course, athletes have been going to court for some time to protect their names, likenesses and statistics from being exploited without permission. The new dance-related lawsuits follow the conclusion of closely watched litigation in federal court in Indiana brought by former University of Illinois football players against Draft Kings and FanDuel alleging that the daily fantasy sports giants used their names, likenesses and stats without consent and profited from the theft. The former players sought to represent a class of more than 2,000 college football and basketball players.

Ultimately, the 7th U.S. Circuit Court of Appeals sided with the daily fantasy sports companies but arguably left room for the

dispute to be revisited. After asking the Indiana Supreme Court to weigh in, the 7th Circuit affirmed a lower court's dismissal of the case, concluding that Indiana's publicity rights statute allows Draft Kings and FanDuel to use college athletes' names and images because such information is considered newsworthy.

The court of appeals also rejected the athletes' request to argue that the defendants were running a criminal gambling enterprise in the state, pointing out that the legality of daily fantasy sports was for the state prosecutor or state high court, which had already decided not to address the issue.

In a case concerning the use of athletes in video games, the U.S. Supreme Court in 2016 refused to consider whether Electronic Arts Inc. had the right to use the images of retired football players in its Madden NFL video games. It let stand a 9th Circuit ruling that EA could not use the First Amendment to duck a putative class action arguing that EA violated the retired players' state law rights of publicity by including them without permission on Madden NFL's "historic teams."

The litigation is now proceeding in a California federal court, which in September declined to revisit its refusal to certify the retired players' claims as a class due to the differences between the players' identities.

At least 22 states have right of publicity statutes on the books, but most states recognize a common-law right of publicity. Indiana's right of publicity law is broader than most because it protects an individual's name, photograph and likeness as well as his or her voice, signature and mannerisms.

In California, where the dance-move complaints were filed, the state's right of publicity statute covers a person's name, photograph, likeness, voice and signature.

Illinois' right of publicity statute has the potential to be very broadly applied. It covers uses of an individual's "identity" and defines identity as "any attribute of an individual that serves to identify that individual." While the statute lists an individual's name, signature, photograph, image, likeness or voice as attributes, significantly, it does not limit the list to those attributes only. It's unclear how such litigation would be addressed by courts in states with only a common-law right of publicity.

The 7th Circuit ruling ended the Indiana litigation, but professional and college athletes may be encouraged to raise new arguments to protect their publicity rights. In addition, the legalization of sports gambling this year and the continuing popularity of daily fantasy sports will likely spark new ways to use and monetize athletes' names, likenesses and other identifiable attributes.

What's certain is that current and former professional and collegiate athletes need to be proactive to ensure their rights of publicity are protected in an age when the impact of digital technology on the sports business is constantly evolving and up for monetization.