September 2011: Entertainment Litigation Update

Supreme Court Strikes Down Law Prohibiting Sale of Violent Video Games to Minors: The Supreme Court ended its term by striking down a California ban on violent video games. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. __, 131 S. Ct. 2729 (June 27, 2011). The majority opinion reinforced that First Amendment protection does not depend on the medium of communication. Thus, video games are entitled to the same protection as *Grimm's Fairy Tales*, and attempts to restrict their content will be subject to strict scrutiny.

California passed a law prohibiting the sale or rental of violent video games to minors. The law defined the restricted games as those "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that is "patently offensive to prevailing standards in the community as to what is suitable for minors" and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." The definition blended two tests the Supreme Court had adopted in prior decisions, one adopting a restriction on obscene materials specific to minors (*Ginsberg v. New York*, 390 U.S. 629 (1968)), and the other governing obscenity generally and permitting the standard for restrictions on obscene material to be based on "community standards" (*Miller v. California*, 413 U.S. 15 (1973)). However, the California statute applied these standards to depictions of violence rather than depictions of nudity or sexually explicit conduct.

In striking down the law, the majority acknowledged that the government may adopt limits on materials available to minors that are more restrictive than the limits that may be applied to adults. However, it held that in doing so the government is limited to areas that traditionally have been the subject of restrictions on speech, such as obscene depictions of "sexual conduct." Relying on *United States v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010), in which it struck down a statute prohibiting violent "crush" videos, the Court held that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." The majority noted that there was no longstanding tradition in the U.S. of restricting children's access to depictions of violence, citing examples of violent material in *Grimm's Fairy Tales* and Homer's *The Odyssey*. Thus, the restriction on violent video games was subject to "strict scrutiny," the most demanding test imposed under constitutional law for the validity of restrictions on speech.

The Court concluded that California's law failed to satisfy strict scrutiny because (i) California could not show a direct link between violent video games and harm to minors; (ii) the law was under-inclusive, singling out video-game providers and not addressing other providers, such as booksellers, cartoonists and movie producers; and (iii) the law provided only marginal benefits beyond those provided by existing, voluntary regulations undertaken by the industry.

The Hurt Locker: In March 2010, just days before *The Hurt Locker* won the Best Picture "Oscar" at the Academy Awards, Master Sgt. Jeffrey Sarver sued the producers, director and screenwriter, alleging that he was the source of the main character, title and other aspects of the film. Sgt. Sarver alleged claims for defamation, breach of contract, intentional infliction of emotional distress and misappropriation of his right of publicity.

The screenwriter, Mark Boal, was embedded with Sgt. Sarver's unit in Iraq and spent a month profiling him for a *Playboy Magazine* story entitled "The Man in the Bomb Suit." Sgt. Sarver alleged that Boal had no right to use his life in drafting the screenplay for *The Hurt Locker*. Although Boal acknowledged that his character bears some resemblance to Sgt. Sarver, he argues that because the film contains numerous creative elements, it merits protection under the First Amendment.

In deciding the defendants' motion to dismiss District Judge Jacqueline Nguyen (recently nominated for appointment to the Ninth Circuit) recently issued a tentative ruling of significant consequence. She agreed that the defamation, breach of contract and intentional infliction of emotional distress claims should be dismissed, but her tentative ruling allowed Sgt. Sarver to pursue a claim for misappropriation of name and likeness.

Sarver argues that the remaining claim represents the "essence of this case." Attorneys for the defendants argue that if Judge Nguyen maintains her tentative ruling, it would have a chilling effect on future films based on real world events. The ruling will be closely watched by industry insiders.

In Re NCAA Student-Athlete Name: Former NCAA football and basketball student-athletes have filed an antitrust lawsuit against Electronic Arts, Inc. (EA), the second largest U.S. video game publisher, and against the NCAA and the Collegiate

Licensing Company (CLC). *In Re NCAA Student-Athlete Name and Likeness Licensing Litigation*, No. 09-1967, (N.D. Cal. 2009). The suit concerns EA's "NCAA Football," "NCAA Basketball" and "NCAA March Madness" video game franchises, which are distributed pursuant to license agreements with CLC, the NCAA and NCAA member institutions. The plaintiffs contend that the video games unlawfully use their images, likenesses and names by creating virtual football and basketball players that EA designed to resemble actual student-athletes. EA omits student-athletes' names in the video games but the plaintiffs allege that EA, with the knowledge of the NCAA and CLC, designed the games to allow consumers to upload rosters created by third parties that supply their names.

The plaintiffs allege that the defendants have violated § 1 of the Sherman Act's proscription on restraint of trade by participating in a (1) price-fixing conspiracy to set at zero dollars the price paid to the plaintiffs and putative class members to use their images, likenesses and names; and (2) "group/boycott/refusal to deal" conspiracy to use their images, likenesses and names.

Ruling on EA's motion to dismiss, the court held on July 28th that the allegations were sufficient to state a claim for conspiracy to restrain trade. The court also found significant the plaintiffs' allegations that, in addition to agreeing to abide by the NCAA's rules prohibiting the compensation of current student-athletes, EA also agreed not to offer compensation to *former* student-athletes. Because NCAA rules do not prohibit former student-athletes from receiving compensation for use of their images, likenesses and names, the agreement exceeded the requirements of the NCAA's rules and policies and satisfied the requirement that the plaintiffs plead the existence of a price-fixing agreement. The litigation continues.