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COURT OF APPEALS

STATE OF NEW YORK

KAREN GRAVANO,

Appellant,

-against-

NO. 23

TAKE-TWO INTERACTIVE SOFTWARE, INC.,
and ROCKSTAR GAMES,

Respondents.

LINDSAY LOHAN,

Appellant,

-against-

NO. 24

TAKE-TWO INTERACTIVE SOFTWARE, INC.,
ROCKSTAR GAMES,

Respondents.

20 Eagle Street
Albany, New York
February 7, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE PAUL FEINMAN



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Appearances:

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Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeals on the
2 calendar are numbers 23 and 24: Gravano v. Take-Two
3 Interactive Software and Lohan v. Take-Two Interactive
4 Software.

5 Good afternoon, counsel.

6 MR. FARINELLA: Good afternoon, Your Honor. May
7 it please the court, my name is Thomas Farinella, and I
8 represent the appellant, Karen Gravano. I would ask the
9 court for permission to reserve two minutes for rebuttal.

10 CHIEF JUDGE DIFIORE: You may have two minutes,
11 sir.

12 MR. FARINELLA: Thank you, Your Honor.

13 CHIEF JUDGE DIFIORE: You're welcome.

14 MR. FARINELLA: Ms. Gra - - - Ms. Gravano
15 respectfully asks this court to reverse the appellant's
16 decision - - - the Appellate Division's decision to dismiss
17 - - - the motion to dismiss - - - to dismiss the action.
18 The issues before this court are whether or not the
19 plaintiff-appellant has the right to sue under Section 51
20 of the New York Civil Rights Law. Section 51 based on
21 defendant-respondent's use of a portrait which incorporates
22 her likeness, voice, and I respectfully - - -

23 JUDGE FAHEY: Let - - - let me ask you this.
24 Where would you identify, as - - - as to Ms. Gravano, the
25 commercial exploitation of her image in - - - in this case?



1 She's part of the storyline, right? Pri - - - primarily,
2 as I went through the - - - the record, she's part of the
3 storyline in a - - - in an episode called "Burial."

4 MR. FARINELLA: That's correct.

5 JUDGE FAHEY: Am I correct in that?

6 MR. FARINELLA: You are correct in that, Your
7 Honor.

8 JUDGE FAHEY: All right, so let's assume for - -
9 - for a moment that that - - - that this is a work of
10 satire or fiction, and if that's the case, then - - - and
11 it's incorporated within the story, then I - - - the
12 question that comes to me is, how is this name, portrait,
13 or picture of her somehow commercially exploited if it's
14 part of a work of fiction?

15 MR. FARINELLA: The - - -

16 JUDGE FAHEY: In other words, it isn't being used
17 to sold it - - - sell it. No - - - nobody has a - - - a -
18 - - a DVD or a - - - or a disk of this video game to be
19 played or - - - or a poster or a mug or anything with her
20 image on it. So - - - so how is she being commercially
21 exploited here?

22 MR. FARINELLA: Well, we believe that - - - that
23 because she was a celebrity who had a reality show and
24 three million followers, that, in fact, that would be
25 something that would entice her - - - her fans and viewers



1 to - - - to purchase the game. However, that we - - - that
2 we contend is a factual - - -

3 JUDGE FAHEY: How does that take place if there's
4 no commercial exploitation of the image?

5 MR. FARINELLA: Well - - -

6 JUDGE FAHEY: Does that mean every - - - every -
7 - - every historical novel is somehow a - - - a - - - a
8 commercial exploitation of anyone who's living?

9 MR. FARINELLA: Well, we're - - - in an instance
10 when there's a substantial fictionalization and - - - and
11 the person's name is used, yes. And we are contending that
12 while - - -

13 JUDGE FAHEY: I thought the name used here is
14 Bottino.

15 MR. FARINELLA: That is correct. However, we are
16 - - - we are alleging that her portrait, in conjunction
17 with the actual words spoken by her throughout the - - -
18 the scenario in the Burial mission, is, in fact, you know,
19 her - - - a portrait - - - is her likeness. In terms of -
20 - -

21 JUDGE RIVERA: So - - - so the portrait is the -
22 - - the game's graphics.

23 MR. FARINELLA: Correct.

24 JUDGE FAHEY: So where in the context - - - where
25 was it commercially exploited? Was it used in any way to



1 sell this game?

2 MR. FARINELLA: Well, we don't know that. That's
3 a factual question that we have argued, and - - - and - - -
4 and that has also been the conclusion of - - -

5 JUDGE FAHEY: Just for allegation purposes, just
6 for 3211 purposes, the - - - that's all I'm asking now.

7 MR. FARINELLA: For 3211 purposes, we - - - we've
8 properly pled that they've used her portrait. Moving on to
9 trade and advertising, we would ask that the Court would -
10 - - would look to Second Circuit cases, Ali v. Playgirl and
11 also - - -

12 JUDGE FAHEY: No, Ali v. Playgirl, that - - -
13 that was a - - - a - - - a cartoon, wasn't it, of - - - of
14 Muhammad Ali?

15 MR. FARINELLA: Right. It was caricature.

16 JUDGE FAHEY: Okay.

17 MR. FARINELLA: So we are arguing that this could
18 very - - - you know, the - - - and the key here is that - -
19 -

20 JUDGE FAHEY: So is every caricature, then, a
21 question of fact which must go to a jury? That would mean
22 every avatar in every video game in every - - - could
23 essentially become a jury question as to whether or not
24 it's commercial exploitation.

25 MR. FARINELLA: Well, we're dealing with the - -



1 - with the rec - - - whether or not the avatar is
2 recognized to be the person, in this instance, Ms. Gravano.
3 And - - - and Ms. Gravano actually was a - - - found out
4 about this particular portion because one of her fans
5 tweeted her and said that we just saved you from being
6 whacked, if you will.

7 JUDGE RIVERA: Yeah, but isn't that the point?
8 You - - - you already have purchased the game and you're
9 playing the game. It's not that - - - let's assume for one
10 moment, it is a portrait of her - - - just for one moment -
11 - - that that portrait has been distributed somewhere in a
12 way that entices someone to purchase the game - - -

13 MR. FARINELLA: It could very well - - -

14 JUDGE RIVERA: - - - or someone who bought the
15 game.

16 MR. FARINELLA: Again, that's a question of fact.
17 For example, in this day and age, they're using algorithms
18 to determine what people like on - - - on Netflix - - -

19 JUDGE RIVERA: Did you ask for discovery on that?

20 MR. FARINELLA: We're still at 3211, and the
21 defendants have resisted, you know, providing documentation
22 because of the pending mo - - - at the time pending motions
23 were dismissed, and then we - - -

24 JUDGE RIVERA: You alleged - - - you alleged that
25 it was used on a billboard or something? What - - - I know



1 that's what the other side has - - - the - - -

2 MR. FARINELLA: The - - -

3 JUDGE RIVERA: - - - Ms. Lohan's representatives
4 have alleged.

5 MR. FARINELLA: Yes. We allege that it's been
6 used for trade within the context of the game itself.

7 JUDGE RIVERA: Oh.

8 MR. FARINELLA: So - - -

9 JUDGE RIVERA: Okay, well, let me ask you that.
10 What - - - what is - - - what are you advocating is the
11 interpretation of that phrase in the statute for purposes
12 of trade?

13 MR. FARINELLA: Correct.

14 JUDGE RIVERA: What - - - what - - - what's your
15 interpretation of that?

16 MR. FARINELLA: And the interpretation is, is,
17 if, in fact, the - - - the work is commercial and - - - and
18 it entices - - - it entices solicitation of the work
19 because of that person - - - person being in the game, then
20 - - - then - - - then the case should move forward, but - -
21 -

22 JUDGE STEIN: Well, if there's a newspaper
23 article or a book or a - - - or a - - - or a - - - you
24 know, anything else - - - a comic book or whatever, and - -
25 - and there's some likeness of - - - of a real person, and

1 - - - and that - - - that is being sold, then that's enough
2 to fit it into trade or advertising?

3 MR. FARINELLA: Well, trade or - - - trade or
4 advertising has been - - - has been an issue that was - - -
5 that - - - that should require further factual findings by
6 - - - by the trier of fact. And - - - and then - - - and
7 the - - -

8 JUDGE STEIN: Well, but - - - but aren't there
9 certain circumstances under which the courts have held as a
10 matter of law that something is or isn't - - -

11 MR. FARINELLA: Not in this case.

12 JUDGE STEIN: - - - one of those things?

13 MR. FARINELLA: The Appellate Division - - -

14 JUDGE STEIN: No, not in this case, but in other
15 cases. It - - - there are circumstances under which that
16 can be determined as a matter of law without any factual
17 issues.

18 MR. FARINELLA: I - - - well, there - - - the
19 problem is that - - - that there is, you know, the case law
20 in - - - in this area is confusing, but this case is simply
21 unique because it's a video game. And - - - and that's
22 what makes it different than - - - than the other mediums.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 Counsel?

25 MR. DELLE DONNE: Good afternoon, may it please



1 the court, my name is Frank Delle Donne, of counsel to the
2 Law Office of Robert Pritchard, attorneys for Plaintiff-
3 Appellant Lindsay Lohan in this case. I'd like to reserve,
4 with the permission of the court, two minutes for re - - -
5 rebuttal.

6 CHIEF JUDGE DIFIORE: You may, sir.

7 MR. DELLE DONNE: Thank you, Your Honor.

8 CHIEF JUDGE DIFIORE: You're welcome.

9 MR. DELLE DONNE: First of all, the First
10 Department erred. Whether something is a portrait,
11 picture, or voice under the statute is a question of fact.
12 Cohen v. Herbal Concept, 1984 - - -

13 JUDGE FAHEY: Is it - - - it's always a question
14 of fact?

15 MR. DELLE DONNE: Unless it's just so out of the
16 - - - where no reasonable juror could ever possibly find
17 that it's - - - that it - - -

18 JUDGE FAHEY: Does our case law say that?

19 MR. DELLE DONNE: Well, Cohen v. Herbal Concepts
20 specifically says it's a question of fact - - -

21 JUDGE FAHEY: Yeah - - -

22 MR. DELLE DONNE: - - - in that - - -

23 JUDGE FAHEY: Now, in Co - - - Cohen, was the - -
24 - was that the - - - the portrait of the woman with her
25 daughter? That was a direct photograph, wasn't it? In



1 other words, the person?

2 MR. DELLE DONNE: Right, Your Honor.

3 JUDGE FAHEY: So the circumstances are a little
4 bit different here, aren't they?

5 MR. DELLE DONNE: Oh, they're much - - -

6 JUDGE FAHEY: Substantially - - -

7 MR. DELLE DONNE: Substantially, but - - -

8 JUDGE FAHEY: Right, right.

9 MR. DELLE DONNE: - - - in - - - in Cohen v.
10 Herbal Concepts they cited Loftus v. Greenwich - - -

11 JUDGE FAHEY: But they didn't - - - they didn't -
12 - - they didn't say an avatar in a video game is - - -

13 MR. DELLE DONNE: No, no, but they did say
14 artistic representation, citing Loftus v. Greenwich - - -

15 JUDGE STEIN: But weren't they also talking about
16 - - -

17 MR. DELLE DONNE: - - - Lithograph.

18 JUDGE STEIN: - - - the fact that you couldn't
19 necessarily see any features in that picture?

20 MR. DELLE DONNE: In Cohen?

21 JUDGE STEIN: In Cohen, yeah.

22 MR. DELLE DONNE: Other than - - - well, the
23 faces weren't - - - you could see the - - - the backs of
24 the - - - of the - - - of the - - -

25 JUDGE STEIN: Exactly.



1 MR. DELLE DONNE: - - - females but not the - - -
2 not the face. But - - -

3 JUDGE FAHEY: One of the things I struggle with
4 here, and - - - and probably most of the courts do as
5 technology changes is what - - - what would be the - - -
6 what would the language be - - - what would you recommend
7 to us as an objective matter-of-law test that we could
8 apply in deciding when an avatar or a caricature is so
9 similar to a - - - a - - - a petitioner or the portrait of
10 a petitioner that - - - that it's - - - as a matter of law,
11 either goes - - - goes forward or doesn't go forward? How
12 - - - how are we to make that determination, or is it
13 always a question of fact? Because you seem to be arguing
14 it's always a question of fact.

15 MR. DELLE DONNE: Well, it - - - it's the - - -
16 the case law based on Loftus v. Greenwich Lithogam - - -
17 Lithographing and Cohen - - -

18 JUDGE FAHEY: What - - - what language would - - -
19 - would you use as - - - as an objective, not a subjective
20 test that I think it looks this way, but - - - but some
21 form of objective reasonable person test?

22 MR. DELLE DONNE: Well, if it - - - if it could -
23 - - if a reasonable person could identify that as a
24 portrait, picture, or voice of the plaintiff, I - - - I
25 think it's a question of fact for a jury to make one - - -



1 CHIEF JUDGE DIFIORE: So any young blonde woman
2 who wears a red bikini and carries a cell phone can get
3 beyond?

4 MR. DELLE DONNE: Well, Loftus v. Greenwich
5 Lithographing also - - - it had the costume, which the - -
6 - the actress in that photograph was - - - in Lith - - - in
7 - - - in Greenwich - - - in Loftus - - - Loftus v.
8 Greenwich Lithographing, the - - - the artist took a
9 picture and painted a movie advertisement poster, which con
10 - - - he changed her face but used the same pose and the
11 same red costume, which everybody knew this actress from,
12 and he intended the portrait to look like her; so
13 therefore, the - - - the court said, because he
14 deliberately tried to paint a portrait from the picture - -
15 -

16 CHIEF JUDGE DIFIORE: Is that not different than
17 creating an avatar?

18 MR. DELLE DONNE: Well, it - - - I would argue
19 that's the exact same thing. If you - - - you can create
20 an avatar; you're using a computer to do it, but it's like
21 painting - - - it's - - - it's - - - you're still making
22 something, however you make it. The technology changed in
23 that circumstance. I don't see any relevance - - -

24 JUDGE RIVERA: So - - - so if I'm under - - - so
25 if I'm understanding you, your - - - your argument is that,



1 although portraits may appear to be what we have
2 surrounding us - - -

3 MR. DELLE DONNE: Correct.

4 JUDGE RIVERA: - - - it's the exercise of the
5 artist in rendering an image, and they may do that
6 digitally or however they do that for this particular game,
7 but this is what they're trying to do.

8 MR. DELLE DONNE: Correct.

9 JUDGE RIVERA: And that's a portrait for purposes
10 of the statute?

11 MR. DELLE DONNE: I would agree with you.

12 JUDGE RIVERA: The next question is, I take it
13 you're saying, whether or not that image now really looks
14 like, in your case, your client, Ms. Lohan, goes to the
15 jury, unless it's so obviously - - - no one could think
16 that that is her. Am I understanding your argument?

17 MR. DELLE DONNE: Yes. I think that that's - - -
18 that that's - - - that's correct, Your Honor. I think it's
19 a question of fact. Based on - - - on the case law that we
20 have at this point - - -

21 JUDGE FAHEY: Well, the second question would be,
22 let's say, even if it looks like her, was there commercial
23 exploitation here?

24 MR. DELLE DONNE: That's - - -

25 JUDGE FAHEY: You've got - - - you've got three



1 sources. There's - - - there's a scene called "Escape from
2 Paparazzi" - - - I don't even see her face in that.

3 MR. DELLE DONNE: Her face is not in the avatar.
4 Her face is only on the transition screens. The av - - -

5 JUDGE FAHEY: All right, so there's two - - -
6 there's two transition screens, right - - - the stop-and-
7 frisk and the beach weather scene is - - - is I think - - -

8 MR. DELLE DONNE: Correct.

9 JUDGE FAHEY: - - - referred to.

10 MR. DELLE DONNE: Correct, Your Honor.

11 JUDGE FAHEY: Right.

12 MR. DELLE DONNE: That's the bikini pose and the
13 arrest pose.

14 JUDGE FAHEY: Okay. And you're saying - - - and
15 you're saying that that's where the question of fact is.

16 MR. DELLE DONNE: Well, I'm saying that those are
17 - - - those are the two portraits - - - beach weather and
18 the stop-and-frisk - - - the two portraits that are being
19 used.

20 JUDGE FAHEY: And it's somewhat different from
21 Ms. Gravano because those are used as covers for the items
22 being sold?

23 MR. DELLE DONNE: Ms. - - - Ms. Lohan, the - - -
24 the - - - the beach weather and stop-and-frisk images are
25 on the disk covers. They're on the packaging - - -

1 JUDGE FAHEY: Right.

2 MR. DELLE DONNE: - - - DVD covers; they're used
3 on billboards. They're used - - - they're - - - they're
4 definitely used for commercial purposes. There's - - - I
5 don't think there's any issue as to that. But getting back
6 to that portrait picture of - - -

7 JUDGE RIVERA: But if they're not, aren't they
8 commercial exploitation anyway? I mean, isn't the point of
9 this game that someone's going to buy it and use it?

10 MR. DELLE DONNE: That's a trade purpose - - -

11 JUDGE RIVERA: I mean, advertising has a
12 different - - - has a different meaning.

13 MR. DELLE DONNE: That - - - that - - - that's
14 correct, Justice Rivera. I - - - I - - -

15 JUDGE FAHEY: And you have a - - - you have a - -
16 -

17 JUDGE RIVERA: I mean, I could advertise
18 something and offer it for free.

19 MR. DELLE DONNE: That's - - -

20 JUDGE RIVERA: Is that enough?

21 MR. DELLE DONNE: Yes, you could, but that - - -
22 if once it's in the game and they sell the game and it's on
23 the game itself, it becomes a trade purpose - - -

24 JUDGE RIVERA: But I - - - but I'm saying - - -

25 MR. DELLE DONNE: - - - there's a trade purpose



1 at this stage.

2 JUDGE RIVERA: Could not one advertise and offer
3 something for free?

4 MR. DELLE DONNE: Sure, you can.

5 JUDGE RIVERA: Do you need to be making money off
6 the image?

7 MR. DELLE DONNE: No, no.

8 JUDGE FAHEY: You seem to have a somewhat of a
9 statute of limitations problem, clearly, with advertising,
10 and I'm not - - - I'm not exactly sure on trade but perhaps
11 with trade also. Do you want to address that?

12 MR. DELLE DONNE: Yes, well, for trade purposes,
13 the game was released on September 17, 2013. The complaint
14 was filed and served in July of 2014. So when - - - when
15 the - - - when the game was released, it started a - - -
16 another element of this statute is trade usage. It started
17 a limitations period for trade usage when - - - when the
18 game was released. So that - - - to argue - - - the
19 argument on that statute of limitations - - - statute of
20 limitations does not expire on the trade usage element of
21 Section 51 is obvious. It was filed within a year.

22 Regarding the advertising images that - - - I
23 don't think they have initially met their burden as to when
24 all the advertisements went through the Internet and were -
25 - - the dates that they were released on. They say it was



1 more than a year before - - - before we filed our - - - I
2 don't think they've met their burden initially establishing
3 that.

4 However, once the games are modified and put on
5 the - - - on the - - - on the game itself, taken from
6 posters down and switched around and recropped and things
7 are cut out of the scenes, these important items that
8 they're saying are free-speech protected are now cut out of
9 the scene and put on, you know, the disk portions of her -
10 - - of the features are cut out, so the images are modified
11 when they're put on the game and on the packaging. So that
12 modification is - - - is a republication, which refreshes
13 the statute of limitations, as cited in - - - in the Bondar
14 case, which is the very case that they cite.

15 If - - - if the - - - if the image is - - - if
16 the image is modified or is intended to reach a new
17 audience, it's considered a republication. The
18 advertisements are intentionally directed at potential
19 purchasers. And the - - - the - - - the people who
20 purchase the game, they're - - - they're - - - and - - -
21 and see the images in - - - in the game itself, they're
22 actual game players. There are two different audiences.
23 So we - - - we - - - the - - - the republication exception
24 applies to the advertising images, but there is - - -
25 there's no question that the - - - the release of the game



1 starts a trade usage period.

2 But I think the most important point here is the
3 - - - the advertising and trade purposes. What they're
4 doing here, if we accept that it's - - - the complaint says
5 it says it's her portrait and voice, if you accept those
6 allegations as true under 3211, so it's her portrait that's
7 being flashed for a fleeting moment on two still transition
8 screens in the game.

9 Then my adversary says that that - - - that those
10 - - - that that portrait is illustrating the article of
11 using these game play instructions that are next to it.
12 When they advertise and put the - - - these images on the
13 packaging, they remove the instructions. So they're just
14 showing - - -

15 JUDGE STEIN: Yeah, but haven't we said that if
16 it's being used in connection with something that it's a
17 part of, that - - - that - - - that doesn't - - -

18 MR. DELLE DONNE: But when you're - - - when you
19 - - -

20 JUDGE STEIN: - - - constitute advertising?

21 MR. DELLE DONNE: When they're using the image in
22 advertising, it's not - - - it's not shown - - - it's not
23 shown - - -

24 JUDGE STEIN: Well, I un - - - I un - - -

25 MR. DELLE DONNE: It's not shown illustrating - - -



1 -

2 JUDGE STEIN: I understand that, but - - - but
3 there's a connection. There's a - - - there's a
4 connection.

5 MR. DELLE DONNE: Somewhere else. But in - - -
6 in - - - in Arrington v. New York Times - - -

7 JUDGE STEIN: No, it's not just - in other words,
8 it's not just taking her image and putting on a bag of
9 flour. It's taking her image and putting it on the cover
10 to a game in which that image is - - - is a part of that
11 game.

12 MR. DELLE DONNE: Well, I mean, the - - - the two
13 transition screens don't move. They're not avatars in the
14 game.

15 JUDGE FAHEY: But - - - but they are images of an
16 avatar in the game?

17 MR. DELLE DONNE: No, no, they're not images of
18 an avatar in the game. They're images - - - the avatar has
19 another face on it. The avatar only contains her voice.
20 That's the - - - the avatar only contains her voice.

21 JUDGE FAHEY: I see.

22 MR. DELLE DONNE: The images - - -

23 JUDGE RIVERA: But don't - - - don't the still
24 images serve a purpose in the game? They're not - - -

25 MR. DELLE DONNE: They - - - they illustrate - -



1 -

2 JUDGE RIVERA: They're not the gamer playing. I
3 get that.

4 MR. DELLE DONNE: According to my adversary, Mr.
5 Feigelson, they illustrate the game play instructions.
6 That's the purpose he has in the game. It's part and
7 parcel - - - so when I - - - when I say there's no real
8 connection to the game, he put in his brief and put - - -
9 sought leave to put the - - - the instructions in the - - -
10 in the - - - in his opposition brief that the portrait is
11 illustrating these instructions.

12 Then in the advertisements, on the cover of the
13 game, and on the billboards, the instructions aren't there.
14 So the instructions were deliberately removed, so the
15 advertisement appears in a different - - - in a different
16 light than it's actually used within the work itself, which
17 is the game.

18 JUDGE STEIN: So you're saying her image, in
19 order to - - - to fall within this connection requirement,
20 has to be the exact same image that's actually in the
21 video?

22 MR. DELLE DONNE: Well, I - - - yes, that's - - -
23 that's what I answer him - - -

24 JUDGE STEIN: That's your - - - that's your
25 position.



1 MR. DELLE DONNE: - - - yes, because - - - or
2 yes, because if not, then you could take any movie and - -
3 -

4 JUDGE FAHEY: But you see that the logical
5 problem, which is that, you've got an avatar. You're
6 saying it's not the avatar that in the storyline, right?
7 That's a different one. It's basically a different
8 picture. So we've got now three - - - three templates for
9 - - - for Ms. Lohan - - - Ms. Lohan, herself - - - let me
10 finish - - - the screen - - - screen shots and then the
11 avatar in the game. You say the two within the game are
12 not exactly the same. Only her voice is being used is your
13 allegation in the game and that the other one is - - - is
14 closer to a representation of her.

15 MR. DELLE DONNE: No, what we're saying - - - the
16 - - - the allegations of the amended complaint is that the
17 - - - the two still images are her portraits.

18 JUDGE FAHEY: I see.

19 MR. DELLE DONNE: That they deliberately drew
20 from her pictures. They had the pictures in this hand and
21 drew the portrait from those pictures and - - - but the - -
22 - the main thing is if - - - if we don't - - - if - - - if
23 - - - then you could take a still image of anybody and
24 flash it in a movie, okay, and - - - because it's part of
25 the movie, then you can make an advertisement of that scene

1 for the movie of any portrait, of anybody. If - - - that's
2 - - - that's what I'm saying.

3 Or if you're shooting a fictional movie in New
4 York City and there's a portrait of Madonna hanging on the
5 wall, okay, and there's actors there, and you take a still
6 of that scene, and there happens to be a portrait in the
7 background, you could probably use that picture in
8 advertising. But in the advertisement, if you cut out the
9 actors and just show the picture of Madonna, you're
10 deliberately changing the scene; you're deliberately
11 changing the work, and you're just showing the
12 advertisement. That's what they did.

13 JUDGE RIVERA: But - - - but aren't you tell - -
14 - aren't you telling the person who you're trying to entice
15 to see the film, play the game - - -

16 MR. DELLE DONNE: Right.

17 JUDGE RIVERA: - - - buy the book, whatever it is
18 that the image they're seeing in that advertising is
19 representative of who they're going to see in the work?

20 MR. DELLE DONNE: Well, you - - - you can't - - -

21 JUDGE RIVERA: Say Ms. Lohan's portrait is in - -
22 - in the game, right? And then they just draw a different
23 - - -

24 MR. DELLE DONNE: Well, then you could - - -

25 JUDGE RIVERA: - - - version of her on the box as



1 an ad, but the point is the same from your perspective,
2 because you're saying it's my client's image and they
3 didn't pay her for it.

4 MR. DELLE DONNE: Well, no, no, what - - - what
5 I'm saying is you can't use somebody's portrait in - - - in
6 advertising or trade without - - - without their consent.
7 If - - - if - - - if you can use anybody's portrait within
8 a work of art, if you're going to call it a fleeting - - -
9 a fleeting reference or a use of a real person in a
10 fictional circumstance to give the fictional scene context,
11 however you want to use that real person's picture or a
12 reference a real person's name in a novel to give it
13 context - - - a lot of fictional writers do that - - - you
14 can do that as long as when you ad - - - if - - - if it's a
15 fleeting reference - - -

16 JUDGE STEIN: They put it on the cover of the
17 novel. That's what you're saying.

18 MR. DELLE DONNE: If you - - - if you use - - -
19 that - - - whatever the artist is trying to say there in
20 that novel with that name there, fine - - - okay, that's -
21 - - that's permissible. But when you advertise with that -
22 - - with that don't - - - don't change the context, instead
23 if you mention Madonna on page 53 of the Notre Dame novel,
24 okay, don't put a portrait of her on the cover of the novel
25 and say it's a - - - it's a - - - it's a different use

1 then. It's not - - - it's not - - - it's - - - it might be
2 a permitted use to use her name on page 57 as a fleeting
3 reference, but when you put her portrait on the cover of
4 the novel, it becomes a different use.

5 It's not an incidental use to a permissible use.
6 It's a different use to a permissible - - - it's a - - -
7 it's a - - - it's a different use irrelevant to a
8 permissible use. It's a different use. They used the
9 images different in the advertisements than they appear in
10 the game, deliberately done. Therefore, our position is
11 that violated Section 51 advertising and trade purposes as
12 a matter of law, because they deliberately changed the work
13 in the advertisements.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.
15 Counsel?

16 MR. FEIGELSON: May it please the court, Jeremy
17 Feigelson, representing Take-Two. Your Honors, there are
18 two cases in front of you and one thread that will pull you
19 through to affirmance in both, and that is that Grand Theft
20 Auto V is a creative work of fiction. Creative works of
21 fiction do not qualify - - -

22 JUDGE FEINMAN: So to that end, would it help our
23 analysis for future cases to basically turn this whole
24 thing upside down and start with that as the threshold and
25 - - - and not get into all these factual disputes about



1 what is a likeness, what is a portrait, what is a voice?

2 MR. FEIGELSON: I think that's exactly the right
3 approach, Judge. I think when you start with the well-
4 settled rule in this state, that creative works do not
5 qualify as trader advertising, Section 51, as this court
6 has said over and over, is to be narrowly construed and
7 limited to the circumstances that prompted it, which are
8 the flour sack case that Your Honor mentioned, Roberson.

9 And this is so clearly 180 degrees different from
10 that. I think that's an excellent clean-kill analytic
11 path. It's one of the two reasons why the Appellate
12 Division dismissed here. But it's really the only reason
13 you need when a creative work is challenged in one of these
14 cases. What - - -

15 JUDGE FAHEY: Well, would that - - - would that
16 rule - - - if we - - - if we went in your direction, would
17 that totally destroy the right of publicity or what - - -
18 the right of privacy under Sections 50 and 51?

19 MR. FEIGELSON: No, it would not totally destroy
20 it, Judge.

21 JUDGE FAHEY: So there - - - there would - - -
22 there would still be - - - you would say that the issue of
23 commercial exploitation would still survive.

24 MR. FEIGELSON: Well, I would say - - -

25 JUDGE FAHEY: Because the way - - - the way



1 you're reading it to me, it sounds - - - it sounds to me
2 like that, once we put them in a work of fiction, we can do
3 whatever we want with anything in there.

4 MR. FEIGELSON: Your Honor, the test that we
5 would suggest is already in this court's cases, and you
6 find it in Howell and Messenger and others. Newsworthiness
7 and protection of creative works have always been treated
8 as two sides of the same coin. In the newsworthiness
9 cases, this court has said as long as there is any real
10 relationship between the subject matter - - -

11 JUDGE FAHEY: Right.

12 MR. FEIGELSON: - - - of the work and the
13 challenged use - - -

14 JUDGE FAHEY: So let's - - - so let's talk about
15 the details just a little, then.

16 MR. FEIGELSON: Yeah.

17 JUDGE FAHEY: It - - - it seems in the Lohan
18 case, we're really focusing down on the beach weather and
19 the stop-and-frisk images. And is it your contention that
20 those images are part of the storyline of the video game?

21 MR. FEIGELSON: Those - - - Grand Theft Auto V,
22 Your Honor, is like an interactive movie. And the
23 transition screen artworks are like what you see in the
24 credits of a movie. They are among the very first things
25 you'll see. There's ten of them, not just these two. And

1 they sort of roll across the screen while the game is
2 loading. Okay? So what they are there to do is to
3 introduce the player to the world of Los Santos, this
4 incredibly rich visual and fictional world that they're
5 about to experience.

6 JUDGE FEINMAN: Some might call it mind-numbing,
7 but okay. And - - -

8 JUDGE RIVERA: But do you ever come across them
9 again? If the work of fiction is the gaming experience,
10 where do you come across these things again?

11 MR. FEIGELSON: The work of - - - no, you do not
12 see the beach weather and the stop-and-frisk images again
13 in the game. What you do see in the game repeatedly are
14 the settings that those images introduce - - -

15 JUDGE FAHEY: But the bot - - - the bottom line
16 is here, the images are not used in the game, right?
17 They're not - - - those - - - those images, that person,
18 whatever that avatar, it's not used in the game.

19 MR. FEIGELSON: Those two persons are not
20 characters in the game, but the settings that they
21 introduce in the transition screen artworks are very much
22 part and parcel of the game.

23 JUDGE RIVERA: Yeah, but what's the part of the
24 work of fiction? If the work of fiction is the game
25 itself, is that - - - what you call - - - that interactive

1 gaming part of it, and - - - and these two images are never
2 part of that experience, how are they also part of this
3 work of fiction?

4 MR. FEIGELSON: They are the table setters,
5 Judge. They are the introduction to the world of Los
6 Santos, which is this incredibly comprehensive - - -

7 JUDGE RIVERA: But you could certainly do that
8 only with those who are in the game, so what - - - what's
9 the purpose of these others that goes towards the work of
10 fiction itself?

11 MR. FEIGELSON: The work of fiction, Your Honor,
12 is a satire of modern life in Southern California - - -

13 JUDGE RIVERA: Yes, I've seen it.

14 MR. FEIGELSON: And - - -

15 JUDGE RIVERA: Thank you for the demo.

16 MR. FEIGELSON: You're welcome, Your Honor. And
17 what these images do is, you know, they are examples of,
18 you know, the type of, you know - - - Southern California
19 imagery is just going to saturate the game. Here is the
20 party girl - - - you gotten into a little trouble - - -

21 JUDGE RIVERA: Right, but they never show up
22 again.

23 MR. FEIGELSON: No, they don't - - -

24 JUDGE RIVERA: They - - - those images never show
25 up again.



1 MR. FEIGELSON: They do not.

2 JUDGE RIVERA: You agree with me, yes?

3 MR. FEIGELSON: I would agree, Your Honor, but
4 the experience of the transition screen artworks is part
5 and parcel of the game. You can't play the game without
6 viewing it - - -

7 JUDGE FAHEY: Okay, so let - - - let's say - - -

8 MR. FEIGELSON: - - - and experiencing them.

9 JUDGE FAHEY: - - - so what's - - - what's the
10 test we apply to distinguish between these images, between
11 an image of Ms. Lohan, Ms. Gravano, and then the transition
12 images and the avatars in the game? We have three sets of
13 images that we're dealing with. How do we distinguish
14 them? What - - - what legal test can we apply to do that?

15 MR. FEIGELSON: Okay. It's the no-real-
16 relationship test, Judge, from Howell, Messenger, and other
17 Section 51 cases from this court. And what this court has
18 said very explicitly and going back to Notre Dame is - - -

19 JUDGE FAHEY: So - - - so - - -

20 MR. FEIGELSON: - - - we're not - - - the court -
21 - -

22 JUDGE FAHEY: Let me just stop you for a second.

23 MR. FEIGELSON: I'm sorry.

24 JUDGE FAHEY: And then you can continue to go
25 ahead. I agree with you. Messenger may apply. But what -



1 - - what I'm wondering is, is how does this not become a
2 question of fact?

3 MR. FEIGELSON: Your Honor, we're dealing with
4 the protection of creativity, which this court has said is
5 a fundamental concern of the statute - - -

6 JUDGE FAHEY: So, in - - - in - - - so - - -

7 MR. FEIGELSON: - - - the First Amendment
8 concerns were duplicated here.

9 JUDGE FAHEY: So that would narrow us - - - let
10 me just finish, then. So that would narrow - - - that
11 would take the Escape from Papparazzi. That's the - - - the
12 protection of creativity, the work of fiction, that's
13 within the storyline. Let's forget about anything inside
14 the storyline, even Ms. Gravano. Let's forget about them.
15 What about the two images, which are used, I guess, on the
16 front of the packages that sell the - - - the DVDs, is it -
17 - - well, they're like DVDs, I guess, that go in the - - -
18 is that correct? Yeah.

19 MR. FEIGELSON: You will see them on certain
20 versions of the packaging.

21 JUDGE FAHEY: Okay.

22 MR. FEIGELSON: Your Honor, the transition screen
23 artworks - - - I'm calling them artworks for a reason.
24 They are rich visual works of art, in and of themselves.

25 JUDGE STEIN: Well, how - - - how does this



1 dovetail with - - - with the law about advertising in
2 disguise? So, you know, you say, okay, well, it's all part
3 of - - - of - - - of the setting the scene and everything,
4 but let's just say for the sake of argument that - - - that
5 you have intentionally created this to look like Lindsay
6 Lohan and - - - and Lindsay Lohan isn't a part of the - - -
7 you know, of the - - - of the game or this - - - what goes
8 on in this - - - in this world, but it's just at the very
9 beginning, and it could be any - - - you know, you - - -
10 you could put anybody. You could have a - - - anybody.
11 But it - - - so the question is, is how do - - - how do we
12 distinguish between that it's really a part of setting the
13 scene versus, yeah, you did this because Lindsay Lohan will
14 sell - - - will sell the game.

15 MR. FEIGELSON: Well, Your Honor, let's keep in
16 mind that in this case the plaintiff's entire theory is
17 that all three characters are Lindsay Lohan, so - - -

18 JUDGE STEIN: No, I understand that. We're - - -
19 we're just - - - I'm - - - I'm - - -

20 MR. FEIGELSON: - - - it may - - -

21 JUDGE STEIN: - - - I'm just assuming it for the
22 purposes of my discuss - - - for my question.

23 MR. FEIGELSON: Okay, oh, yeah, I think you'll
24 come - - - I think the no-real-relationship test, Judge,
25 will see you through. What this court has said is it's



1 going to be very deferential to creators, content creators,
2 and - - -

3 JUDGE STEIN: So but then, doesn't the no-real-
4 relationship test always be an issue of fact?

5 MR. FEIGELSON: Not - - -

6 JUDGE STEIN: How do we determine that?

7 MR. FEIGELSON: No, Judge, it will not always be
8 an issue of fact. In fact, it will rarely - - -

9 JUDGE FAHEY: So - - - so - - - so - - -

10 MR. FEIGELSON: - - - be an issue of fact.

11 JUDGE FAHEY: - - - you got three images, and why
12 isn't it here a question of fact?

13 MR. FEIGELSON: As to whether there's a real
14 relationship?

15 JUDGE FAHEY: Well, just to make the decision.
16 If - - - if whether or not it's - - - it's Lohan or it
17 isn't Lohan. How do - - - how do we decide that?

18 MR. FEIGELSON: What this court has said before
19 is it's not going to second-guess editorial and creative
20 judgments. And this court will not sit - - -

21 JUDGE FAHEY: No, that's not what I'm asking you.
22 What I'm asking you is, you've got three images. They say
23 it's Lohan. You say it's not. How do we decide that?

24 MR. FEIGELSON: Whether it's a portrait or
25 picture?



1 JUDGE FAHEY: Right.

2 MR. FEIGELSON: Okay, which is - - -

3 JUDGE FAHEY: As a matter of law, now.

4 MR. FEIGELSON: Okay.

5 JUDGE FAHEY: That this generic young woman is -
6 - - is Lindsay Lohan or isn't.

7 MR. FEIGELSON: Well, I'd suggest you could look
8 to the Onassis case, Judge, where the court used words like
9 "counterfeit" and "illusion." It really should be, you
10 know, that strong. The image has to be the plaintiff. And
11 that's an objective test. Your Honor brought up Cohen.

12 JUDGE FAHEY: Right.

13 MR. FEIGELSON: And Cohen specifically refers to
14 the role of the court as the gatekeeper. And the court is
15 going to, you know, do its own objective check as to the
16 quality - - -

17 JUDGE GARCIA: Counsel, may I - - -

18 MR. FEIGELSON: - - - and quantity of visual
19 references.

20 JUDGE GARCIA: May I ask a question?

21 MR. FEIGELSON: Yes, Judge Garcia. I'm going to
22 flip what Judge Feinman was - - - the way Judge Feinman was
23 approaching this, and ask, if we find this isn't a name,
24 portrait, picture, or voice, do we need to get to
25 advertising or trade at all? If we find it is not.



1 MR. FEIGELSON: If you find it is not portrait or
2 picture?

3 JUDGE GARCIA: Right.

4 MR. FEIGELSON: You could choose either issue,
5 Judge, and affirm on either basis, absolutely.

6 JUDGE GARCIA: Right, so then we would not get
7 into whether under this creative work theory, you could
8 take someone's actual photo, voice and put it into whatever
9 work, and we'd have to decide is that creative; is that not
10 creative? When can you do it? Is it a First Amendment
11 violation?

12 So if you go with the first test - - - name,
13 portrait, picture, or voice - - - and assume - - - I know
14 there's some dispute over voice - - - but assume this is
15 over portrait, right? So to get back, I think, to what
16 Judge Fahey was asking, what case, what test would this
17 apply at this stage, 3211, to say that this was not a
18 portrait?

19 MR. FEIGELSON: I think you'd look at Onassis and
20 say that - - - just see the objective differences, which
21 are in the record, stark objective differences between the
22 plaintiff and the characters in the game, and say that's
23 not a counterfeit. That's not an illusion. That's a work
24 of art.

25 JUDGE GARCIA: And there would have to be some



1 gatekeeping function at this stage of the litigation,
2 otherwise anyone can bring this get by some - - - get by
3 motion to dismiss, and we'd have fifteen different people
4 claiming they were one avatar.

5 MR. FEIGELSON: Exactly, and, Judge DiFiore, to
6 your point, I'd encourage anyone who's interested to go
7 Google, you know, blonde woman, red bikini. You will get
8 seven million hits, okay? It is a - - - these images are
9 generic cultural types. They are not the plaintiff, okay.
10 And this court - - -

11 JUDGE RIVERA: Well, I thought they were arguing
12 there are other aspects of the image that went beyond just
13 the blonde female in a red bikini. It's the way she's
14 holding - - - her pose, the - - - the hand, whatever else
15 she has on besides the bikini, perhaps a particular smirk
16 on her face.

17 MR. FEIGELSON: Well, there is a suggestion that
18 that - - -

19 JUDGE RIVERA: And doesn't that, then, become a
20 question for the jury?

21 MR. FEIGELSON: No, in fact, that takes us even
22 further away from anything that a jury should ever hear,
23 Judge, because now what the plaintiff is really arguing is,
24 it's not my portrait or picture; it's my persona; it's my
25 style; it's the clothing I like to wear. And no one has



1 property rights on those. Lindsay Lohan is essentially
2 arguing that she owns the peace sign in this case. And I
3 think that Winston Churchill would be surprised to hear
4 that. And Richard Nixon would be surprised to hear that.

5 So, no, we're - - -

6 JUDGE RIVERA: Doesn't your argument really boil
7 down to that, if you look at - - - if you look at this
8 image, it doesn't look enough like her to be her? In other
9 words, if the face really looked like her, no doubt in
10 anyone's mind, you would be arguing something else.

11 MR. FEIGELSON: On the portrait or picture
12 element, Judge, yes, we would be - - -

13 JUDGE RIVERA: Well, picture - - - I'm thinking
14 of a photo.

15 MR. FEIGELSON: Right, okay.

16 JUDGE RIVERA: A portrait is - - - is a creation
17 of an image through some other medium - - -

18 MR. FEIGELSON: Sure, thank you, yes.

19 JUDGE RIVERA: - - - again, what's around us,
20 versus the digital.

21 MR. FEIGELSON: We are surrounded by portraits.
22 I would agree, Your Honor.

23 JUDGE RIVERA: But here we're talking about
24 digital.

25 MR. FEIGELSON: And now we're talking about



1 pictures which is a broader - - -

2 JUDGE RIVERA: Or whatever this form is.

3 MR. FEIGELSON: - - - a broader term. But no,
4 there is an objective gatekeeping function for the court to
5 play, to ensure that - - - that the counterfeit or illusion
6 standard is met or else - - -

7 JUDGE FAHEY: But isn't your argument - - - also,
8 it's larger than - - - what you're saying is, is our
9 gatekeeping function becomes all the more important because
10 of the First Amendment concerns in any work of art.

11 MR. FEIGELSON: Absolutely, Judge, and - - - and
12 I would really underscore the U.S. Supreme Court's decision
13 in Brown in that regard, where video games were squarely
14 before the court, and the question was what level of First
15 Amendment protection do they get. And the resounding
16 answer from that court was the highest level of First
17 Amendment protection.

18 JUDGE RIVERA: But I think in part we're back - -
19 - back to an earlier round of questions, which is when - -
20 - when the image has nothing to do with the work of fiction
21 and the gaming experience, is it really - - - is it really
22 a work of art in the way you are describing it? Does it
23 really fit within this other video game example you're
24 using?

25 MR. FEIGELSON: Your Honor, the two transition



1 screen artworks that are challenged here are works of art
2 on two separate grounds. They are standalone, rich, visual
3 works of popular art, and they are, in fact, part and
4 parcel of the game experience. There is no way to view
5 them within the game. There is no way to avoid viewing
6 them, actually, when you are beginning to play the game.
7 And - - - and they are not just depicting the two women,
8 they are depicting the physical setting, the geographic
9 setting of the game - - -

10 JUDGE RIVERA: So - - -

11 MR. FEIGELSON: - - - and that's a creative
12 purpose.

13 JUDGE RIVERA: No, but I think you're missing - -
14 - I think you're missing our - - - perhaps I'm not being
15 clear with my point.

16 MR. FEIGELSON: I'm sure it's me, Your Honor.

17 JUDGE RIVERA: I'm not disagreeing with you that
18 there's an artistic quality to the imagery. I'm not
19 disagreeing with that at all. The question is, even that
20 artistic image, if it's not part of that gaming storyline,
21 that it's not really part of the work of fiction, which is
22 what's being recognized as the work of art, that - - - that
23 gets protection or isn't covered by the statute, and then
24 that image is used on the outside box, as Judge Fahey
25 described, to sell the product, don't you now fit within 50

1 and 51, because the image you've chosen is not part of that
2 work of art? It is an artwork. I'm not going to disagree
3 with you about the richness of the image.

4 MR. FEIGELSON: Well, Your Honor, it doesn't have
5 to be part of the narrative gameplay to be part of the
6 work, any more than something that you only see, like we -
7 - - if we saw an image in the credits of a movie, and that
8 image didn't recur, we'd still - - - if the image is sort
9 of playing out behind the opening credits of the movie,
10 we'd still say that's part of the experience that the
11 consumer of the artwork is enjoying. So I don't think you
12 can separate the transition screen artwork from the game.

13 JUDGE RIVERA: Well, since - - - since it only
14 comes up when it's loading, don't - - - a gamer could walk
15 away, right? I mean, they can enjoy this work without ever
16 looking at that image.

17 MR. FEIGELSON: Oh, a gamer could walk away from
18 the game at any point. It's an open world game, that a
19 gamer can enjoy at - - - in any number of different ways.
20 But, these are, you know, independent visual artworks in
21 their own right and the connection of the transition screen
22 artworks to the game is very strong in the minds of players
23 of these games. And they are a regular feature of video
24 games. They're, you know, widely enjoyed, widely consumed.
25 There is a reason they were used in the advertising - - -



1 JUDGE STEIN: So - - -

2 MR. FEIGELSON: - - - you know, because - - -
3 exactly because of that.

4 JUDGE STEIN: But would - - - you would agree
5 that - - - that there - - - there may be some circumstances
6 - - - some exemptions for - - - for fiction. And - - - for
7 example, we have the newsworthiness exemption, right, in
8 this whole framework of - - - of the Civil Rights Law. Do
9 you see any way that that could fit within - - - within
10 this - - - within this area?

11 MR. FEIGELSON: The newsworthiness exemption,
12 Judge, and the exemption for creative works really are,
13 just as I said before, two sides of the same coin. It
14 really is the same protections - - - as the Appellate
15 Division said in Foster. Works of art are simply not trade
16 or advertising. And that applies broadly. Mo - - - movies
17 have been protected, books, television shows, all forms of
18 creative works. Video games just fall in the line with all
19 the creative works that have historically - - - all the
20 courts in this state, starting with this court in Notre
21 Dame - - -

22 JUDGE STEIN: But it's not - - - it's not
23 absolute. There - - - there are situations in which - - -
24 in - - - in which publicity claims can't survive First
25 Amendment challenges, right?



1 MR. FEIGELSON: A low bar is not no bar, Judge,
2 but it is a low bar. It's a deferential test - - -
3 deferential - - -

4 JUDGE STEIN: Okay.

5 MR. FEIGELSON: - - - to First Amendment
6 interests - - -

7 JUDGE STEIN: Okay.

8 MR. FEIGELSON: - - - deferential to the
9 creators.

10 JUDGE STEIN: Could we use that same analysis
11 within the newsworthy except - - - exception - - -

12 MR. FEIGELSON: No real relationship is the test
13 that's been applied in the newsworthiness cases, and I'm
14 suggesting it just ports right over, that it's deferential.
15 It's that the court applies its gatekeeping function right
16 up front, determines if this is a creative work, and
17 therefore, it's not trade, it's not advertising, and
18 therefore, you can use excerpts from it to advertise it.
19 And there are multiple cases in our briefs - - -

20 JUDGE STEIN: So if we - - - if we decide - - -

21 MR. FEIGELSON: - - - that stand for that
22 proposition.

23 JUDGE STEIN: - - - if we were - - - as a matter
24 of law that there is no real relationship between these
25 still screens and the experience, you lose?



1 MR. FEIGELSON: If you decide as a matter of law
2 that there's no real relationship?

3 JUDGE STEIN: Um-hum.

4 MR. FEIGELSON: That would be the implication,
5 Judge, but that's, you know, objectively, simply not a
6 supportable conclusion. I want to emphasize - - -

7 JUDGE RIVERA: But isn't - - - isn't that - - -
8 if - - - if we just come out one moment from the imagery
9 that we're talking about here. If you had took a picture
10 of Lindsay Lohan, put her on the cover of Grand Theft Auto,
11 had one slide pass by the gamer's image for two seconds,
12 does that violate the statute?

13 MR. FEIGELSON: If - - -

14 JUDGE RIVERA: It never shows up again.

15 MR. FEIGELSON: It never shows up again.

16 JUDGE RIVERA: Two seconds while the thing is
17 loading. Never - - - it's not part of the storyline. The
18 gamer will never come across, not only that image, anyone
19 like her.

20 MR. FEIGELSON: I think you'd have to look at the
21 exact context, Judge, and see what's the totality of the
22 image and what contexts are being presented and for what
23 purpose and potentially - - -

24 JUDGE RIVERA: Well, here's the purpose. You
25 have it on the cover. I like Lindsay Lohan; I'll buy



1 anything that has her picture on it. I'm buying it. And
2 you put the one picture inside so that she can't sue you.

3 MR. FEIGELSON: Well, Your Honor, let's start
4 with the premise that you can use actual photographs in
5 creative works, and there are multiple cases that say that.
6 That was also part of Foster, Hoepker - - -

7 JUDGE RIVERA: Absolutely, but I thought your
8 argument was that creative work is the gaming experience of
9 Grand Theft Auto.

10 MR. FEIGELSON: No, the creative work is - - -
11 and the gaming experience includes the entry into the game,
12 just like - - -

13 JUDGE RIVERA: So if - - - if - - - if that shot
14 - - - that - - - we'll just use a picture, because it makes
15 it easier - - - of her, so there's no debate that it's her
16 - - - for two seconds, as the game is loading, the gamer
17 may not even - - - may blink and not see this, you say it's
18 still part of that work of art, that gaming experience - -
19 -

20 MR. FEIGELSON: I'm saying, number one, according
21 to this plaintiff's theory, since she's actually in the
22 game, in the Escape Paparazzi sequence, clearly yes.

23 JUDGE RIVERA: So for that instance.

24 MR. FEIGELSON: In - - - in - - -

25 JUDGE RIVERA: I'm talking about the ones that



1 are never shown.

2 MR. FEIGELSON: In your hypothetical, Judge, but
3 - - - but the - - - we're going with the plaintiff's theory
4 here, which is that she's actually in the game; she is not
5 just in the transition screen artworks. So - - -

6 JUDGE RIVERA: But my hypothetical - - -

7 MR. FEIGELSON: Your hypothetical is different.

8 JUDGE RIVERA: - - - is pushing that question.
9 Right.

10 MR. FEIGELSON: Your hypothetical is pushing it.
11 Now, if we stipulate, Judge, that it is a photograph of her
12 and it's completely detached from the visual context of the
13 game. We're not using it to introduce the broader scenery
14 of the game, the visual look and feel of the game. We're
15 not using it to convey information about how to play the
16 game.

17 JUDGE RIVERA: Right.

18 MR. FEIGELSON: It's just a picture of a
19 celebrity dropped in. Then I think the no-real-
20 relationship test will see you through. And you can
21 conclude that that's an issue of fact. It's just not this
22 case.

23 I know my red light is on. If I could ask the
24 court's indulgence for thirty more seconds.

25 CHIEF JUDGE DIFIORE: You may.



1 MR. FEIGELSON: This is - - - the legal rule here
2 that we are asking this court to continue enforcing, the
3 rule that creative works simply are not trade or
4 advertising, is a rule that has been bedrock in this state
5 and recognized, really, by creators all around this
6 country, many of whom are before the court as amici.

7 It's the rule that brings us Forrest Gump. It's
8 the rule that brings us the George Steinbrenner and Soup
9 Nazi characters on Seinfeld. It's the rule that brings us
10 the novel Primary Colors. It's the rule that allows Andy
11 Warhol to paint celebrities and museums to advertise those
12 paintings, to advertise exhibitions of those paintings with
13 those paintings.

14 This is bedrock. It's very important to the
15 creative community in this country that the rule be
16 continued and preserved. The amici and we simply asking
17 this court to stay the course.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 MR. FEIGELSON: Thank you.

20 CHIEF JUDGE DIFIORE: Mr. Farinella?

21 MR. FARINELLA: Thank you. With regard to the -
22 - - the First Amendment issue in this particular case, the
23 Appellate Division relied on the Brown case, which is a
24 content ban restriction case, so, you know, in a - - - in a
25 context of these - - - these facts here, it's an - - - it's



1 an opposite, because when you're dealing with a content ban
2 restriction under strict scrutiny, it - - - it's a
3 different analysis.

4 Commercial speech in and of itself is not
5 protected. I mean, there's been a Second - - - a Third
6 Circuit case dealing with video games, and in the Ninth
7 Circuit, they have determined that, where a likeness is
8 used, there is - - - there's an actual claim.

9 I would respectfully ask the court to point to
10 the Second Circuit in *Ali v. Playgirl*, and then - - - and
11 then also - - - which basically stands for the proposition
12 - - - it's a Civil Rights Law, not restricted to actual
13 photos, but comprises any representation which are
14 recognizable as likeness of the complaining individual.
15 And *Titan Sports* as well, which - - - which - - - which
16 does go on to explain that trade and advertising is a
17 question of fact. And - - - and - - - and that the First
18 Amendment protection is a genuine issue of material fact as
19 to whether or not it is protected by the First Amendment.

20 But to point out with the *Onassis* case, in - - -
21 in my particular case, the *Onassis* case stand - - - stood
22 for the proposition that limitations - - - I'm sorry - - -
23 imitations of a person's face, intended to portray the
24 impression that the picture is that of such person, may
25 constitute a use of picture or portrait. In my particular



1 case, I went through an analysis of the similarities in - -
2 - in the facial structure, in the - - - in the individual
3 uniqueness of - - - or the sim - - - the similarities in
4 hair color, and other sim - - - other similarities in the
5 character itself.

6 But more importantly, I was also able to
7 demonstrate through independent people in the world, who
8 have reached out to my client, believing that character to
9 be her.

10 So, thank you.

11 CHIEF JUDGE DIFIORE: Mr. Delle Donne?

12 MR. DELLE DONNE: Thank - - - thank you, Your
13 Honor. First of all, we didn't concede that these aren't
14 Ms. Lohan's pictures as my adversary keeps saying. We are
15 alleging that they are her portraits, her digital
16 portraits, intentionally and deliberately made to be her.
17 That's the first thing. And I - - - I think I was - - - I
18 may have misspoke before. In the Cohen case, I think Cohen
19 required an affidavit from a person or - - - there was an
20 affidavit from a person recognizing the photograph. And
21 the court used that - - -

22 JUDGE FEINMAN: It was the husband's, wasn't it?

23 MR. DELLE DONNE: Pardon, Your Honor?

24 JUDGE FEINMAN: It was the husband's affidavit, I
25 thought.



1 MR. DELLE DONNE: Yes, yes. So there - - - there
2 - - - not only would it have to be - - - could a reasonable
3 person recog - - - find that the photograph was her
4 portrait, but it's in that case - - -

5 JUDGE FAHEY: You understand, though, that - - -
6 that factually this is kind of a long way from Cohen, I
7 think.

8 MR. DELLE DONNE: Pardon me?

9 JUDGE FAHEY: Factually, this seems like a long
10 way from Cohen. The factual circumstances here seem much
11 different.

12 MR. DELLE DONNE: But there - - - there has to be
13 - - - based on the current state of where it seems now,
14 there has to be some evidence in that direction that it is
15 - - - it could be recognized as her portrait. I think her
16 brother in this case - - - there's an affidavit from her
17 brother that he recognized the - - - the - - - the - - -

18 JUDGE FAHEY: Right.

19 MR. DELLE DONNE: - - - the beach weather
20 portrait as her. And it's - - -

21 JUDGE FAHEY: Well, that's - - - okay.

22 MR. DELLE DONNE: I'm sorry.

23 JUDGE FAHEY: I - - - I get your point.

24 MR. DELLE DONNE: So there's additional - - -
25 there has to be some - - - some evidence in that direction.



1 The - - - the - - - what the - - - I think the
2 main thing is, if - - - if - - - if the work - - - if how
3 these still portraits appear in the work, okay, if it's
4 important with these instructions and in the credits of the
5 scene, if you're going to change that in the advertising,
6 it's just a different use on the cover or on the box. The
7 - - - the - - - the advertising team is changing the work.
8 They're cutting away the instructions and the rest - - -
9 and not only the instructions, but the rest of the scene
10 that this portrait is supposed to be illustrating and
11 illuminating and just stick - - - put the portrait on the
12 screen. So the - - - the - - -

13 JUDGE STEIN: To me that's a lot of fine line
14 drawing. I think, you know, I - - - I think the - - - the
15 - - - the tougher question really is, is what, if any,
16 purpose does it serve in the - - - inside, once you open it
17 up to play the game?

18 MR. DELLE DONNE: And - - -

19 JUDGE STEIN: And are the, you know - - - and how
20 are the two connected?

21 MR. DELLE DONNE: And it's supposed to be
22 illustrating these instructions, and once you detach that,
23 it's a different use in - - - in my judgment. You're
24 changing the artists' - - - the advertising team is
25 changing the artists' perspective, whatever it was. I



1 don't want - - - I don't want to step on the artist's toes,
2 but when - - - if you're going to advertise it, advertise
3 what the artist was trying to say. Don't change it to say
4 to into something else and then call it a - - - trying to
5 pull rank with free speech.

6 JUDGE RIVERA: Well, how would they have done
7 that? I mean, if - - - if - - - I'm trying to remember
8 back to the imagery. How would they have done that for
9 that still image with whatever that - - - I think you're
10 talking about that circle next to it, that shows, right,
11 the character you can play? Is that what you're talking
12 about? What's - - - what's the difference, you say,
13 between the image - - - let me do it this way - - - the
14 image in the game versus on the box?

15 MR. DELLE DONNE: Well, the - - - the image - - -
16 the image - - -

17 UNIDENTIFIED SPEAKER: Oh, boy.

18 MR. DELLE DONNE: The image in the game itself
19 are the transition screens on page 11 and 12 of - - -

20 JUDGE RIVERA: Yes.

21 MR. DELLE DONNE: - - - of the brief.

22 JUDGE RIVERA: Yes.

23 MR. DELLE DONNE: And you can see that the
24 portrait - - -

25 JUDGE RIVERA: Yes.



1 MR. DELLE DONNE: - - - with the scene in the
2 background and illuminating, as Mr. Feigelson says, the in
3 - - - in - - - the vital game play instructions.

4 JUDGE RIVERA: Okay.

5 MR. DELLE DONNE: I'll take - - - I'll take the
6 artist's word for it, Mr. Feigelson's word for it that - -
7 -

8 JUDGE RIVERA: So you mean, that that - - - that
9 imagery that's in the brief, if he had just put that - - -
10 if they had just put that on the cover of whatever they're
11 selling in the ad. You're saying that's - - - if they had
12 done the exact same thing?

13 MR. DELLE DONNE: That - - - that - - - they
14 would have a better argument to come in with - - - within -
15 - - within the exception that way, because you're not
16 changing what the artist was trying to say. You're using
17 the artist's whole scene. Whatever the artist was trying
18 to say - - - whatever it was is used in the advertising.
19 It might be incidental use to a permitted use.

20 But in this case, they change it. You cut out
21 half of the scene, you cut out the rides in the background,
22 you cut off half of the car, you cut off half of the - - -
23 and you cut out the vital game plan instructions as they
24 say, it's a different use now. The image is changed,
25 deliberately changed by the advertising team and the



1 packaging team when they made it. They took the artist's
2 concept, whatever he was trying to say, and changed it.

3 JUDGE RIVERA: All right. So - - - so maybe I -
4 - - maybe I just don't understand the statute, but the
5 point is the portrait itself, everything that you're
6 talking about is the portrait itself - - -

7 MR. DELLE DONNE: Right.

8 JUDGE RIVERA: - - - right?

9 MR. DELLE DONNE: Well, if - - - if - - - if - -
10 - well, if - - - if you just use the portrait in the game,
11 okay, and there's no relationship to anything in the game,
12 then it's - - - there's no real relationship, and it's an
13 advertisement in disguise. So you just can't - - -

14 JUDGE RIVERA: My example about the picture
15 that's on the cover and that's in the game for two seconds,
16 that's not - - -

17 MR. DELLE DONNE: Yeah.

18 JUDGE RIVERA: - - - unconnected to anything?

19 MR. DELLE DONNE: Unconnected to anything, right,
20 and that that - - - that - - - that's - - - that's an
21 advertisement in disguise, because there's no connection to
22 playing the video game.

23 Here, the - - - the connection to playing the
24 video game is - - - I - - - I mean I - - - it's just not
25 there. The experience of playing of video game is wow,



1 this is real; this is live. You know, you can stick a
2 transition screen of anybody in there and say, oh, it's a
3 fleeting - - - it's a fleeting reference, it's a
4 permissible use, it's a fleeting reference in a work of
5 fiction, and then put it on a cover and say, we're - - -
6 we're protected, okay.

7 I say, no. I think that's - - - I think it's
8 just there's real - - - there's no real relationship there.
9 But even if you want to go that far and say that, if you're
10 going to - - - if the artist is going to say something on a
11 screen, whatever it is, and we're going to let him to that
12 as a use of a real person in a fictional setting to give a
13 context when you advertise it, the advertising team
14 shouldn't change that image and say it's protected. They
15 should use the same image and not step on the artist's toes
16 and change what he artist was trying to say.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 MR. DELLE DONNE: Thank you, Your Honor.

19 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Gravano v. Take-Two Interactive Software, Inc., No. 23, and Lohan v. Take-Two Interactive Software, Inc., No. 24, were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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