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Intercepting Licensing Rights: Why College Athletes Need a Federal Right of Publicity

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ABSTRACT

The right of publicity is the right of an individual to control the commercial use of her name, image, likeness, or other identifiable aspects of her persona. In the United States, the right of publicity is a state-law right, not federal, and recognition of the right varies significantly from state to state. The lack of uniformity among states poses significant problems for individuals who are recognizable throughout the United States. Specifically, student athletes, who would lose the ability to play college athletics if they were reimbursed for the use of their images, are among the individuals most at risk of inequitable treatment resulting from varied state laws. This inequality recently manifested itself when two former college quarterbacks alleged that Electronic Arts, Inc.'s depiction of football players in its NCAA Football game used their likenesses without compensation. One quarterback brought his case in California, the other in New Jersey. Despite the similarity of the facts, however, the district courts reached opposite conclusions. This Note examines those two cases and recommends that Congress create a federal right of publicity to better protect student athletes.

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College athletics has become a billion dollar business,[1] and so too has the business of celebrity.[2] Therefore, one would think college athletes are among the richest celebrities in the United States, but that is not the case. The National Collegiate Athletic Association (NCAA) forbids college athletes from receiving payment for their participation in college sports[3] and also prohibits college athletes from endorsing any products.[4] Thus, the NCAA bans college athletes from receiving compensation for their performance either on or off the field.

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1. *See* Joe Drape, *Big Ten Network Alters Picture of College Sports*, N.Y. TIMES, Oct. 1, 2010, http://www.nytimes.com/2010/10/02/sports/02bigten.html (estimating the twenty-five year agreement between the Big Ten and Fox Cable Networks at $2.8 billion); Stewart Mandel, *De Facto TV Network Will Push SEC Even Further Ahead of Competitors*, SPORTS ILLUSTRATED (July 24, 2009), http://sportsillustrated.cnn.com/2009/writers/stewart_mandel/07/24/sec-espn/index.html (discussing the SEC's $2.25 billion contract with ESPN over fifteen years and its overlap with an $825 million CBS contract); *NCAA Revenue Breakdown*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://ncaa.org/wps/wcm/connect/public/NCAA/Finances/Revenue (last updated Jan. 17, 2012) (stating the NCAA made $845.9 million in fiscal year 2010-2011); Ralph D. Russo, *College Football Playoff: Questions and Answers on Game Location, Selection Committee*, HUFFINGTON POST (June 27, 2012, 4:26 AM), http://www.huffingtonpost.com/2012/06/27/college-football-playoff-faq-team-selection-bcs_n_1629880.html (estimating the television rights to the future college football playoff system being worth, conservatively, at least $300–$500 million); Richard Sandomir, *Pac-10 Secures Rich Deals with Fox and ESPN*, N.Y. TIMES (May 3, 2011), http://www.nytimes.com/2011/05/04/sports/04sandomir.html?_r=1&ref=sports (confirming a $3 billion television deal between the Pacific-12 conference and both Fox and ESPN over a twelve year period).

2. *See* Dorothy Pomerantz, *Lady Gaga Tops Celebrity 100 List*, FORBES (May 18, 2011), http://www.forbes.com/2011/05/16/lady-gaga-tops-celebrity-100-11.html ("The men and women on our annual Celebrity 100 list—the most powerful people in the entertainment business this year—earned $4.5 billion over the last 12 months . . . .").

3. *See* NCAA, 2011–12 NCAA DIVISION I MANUAL § 12.1.2(a) (2011), *available at* http://www.ncaapublications.com/productdownloads/D112.pdf (stating that student athletes become ineligible to play if they use their athletic skills for pay in any form in that sport).

4. *See id.* § 12.5.2.1(a) (stating that student athletes become ineligible to play if they receive remuneration for or permit the use of their name or picture to "recommend or promote directly the sale of or use of a commercial product or service of any kind").

Seventeen athletes are named among the "*Forbes* 100 Most Powerful Celebrities,"[5] and they all have one thing in common—endorsement deals.[6] Tiger Woods, the third highest paid athlete in the world,[7] is an example of just how important it is to leverage one's persona. Despite earning only $4.4 million on the golf course from June 2011 through June 2012, Tiger Woods earned an additional $55 million during that period through endorsements and appearance fees.[8]

The ability to leverage one's identity has increased in recent years with the advent of social media networks. In fact, *Forbes Magazine* considers presence on Facebook and Twitter in calculating a celebrity's "fame."[9] According to *Forbes*, the world's most powerful celebrities rose to the top by garnering influence, and "[t]hese days that means mastering social media."[10] Except at a handful of colleges and universities,[11] college coaches permit athletes to use social media.[12] The right to profit from the use of one's identity is the basis

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5. *The World's Most Powerful Celebrities*, FORBES (May 16, 2012), http://www.forbes.com/wealth/celebrities/list.

6. *See, e.g.*, Kurt Badenhausen, *Mayweather Tops List of the World's 100 Highest Paid Athletes*, FORBES (June 16, 2012, 12:41 PM), http://www.forbes.com/sites/kurtbadenhausen/2012/06/18/mayweather-tops-list-of-the-worlds-100-highest-paid-athletes (noting that LeBron James, like all NBA players, had his salary cut by 20 percent due to the NBA lockout, but continued to make a significant amount of money from sponsors like Nike, Coca-Cola, State Farm, and McDonalds).

7. *See* Kurt Badenhausen, *The World's Highest Paid Athletes*, FORBES (June 16, 2012), http://www.forbes.com/athletes/list. The first- and second-highest-paid athletes in 2012 were Floyd Mayweather and Manny Pacquiao, respectively. *Id.* This year was the first time in eleven years that Tiger Woods was not number one on the list. *See* Badenhausen, *supra* note 6. These two athletes were not used as examples because the pay structure for boxing differs significantly from most other sports in that boxers do not receive a salary, rather they receive a "purse" (percentage of the fight money) paid by the promoters. *See* Leonard Dozier, *The Salary of a Boxer*, EHOW, http://www.ehow.com/info_8519304_salary-boxer.html (last visited Oct. 10, 2012).

8. *See* Badenhausen, *supra* note 6.

9. Dorothy Pomerantz, *J.Lo's Stunning Career Reincarnation Puts Her No. 1 On The Celebrity 100*, FORBES (May 16, 2012, 9:56AM), http://www.forbes.com/sites/dorothypomerantz/2012/05/16/jennifer-lopez-tops-celebrity-100-list (listing other factors to consider like media visibility in print, television, radio, and online).

10. Pomerantz, *supra* note 2.

11. *See* Bradley Shear, *NCAA Student-Athlete Social Media Bans May Be Unconstitutional*, SHEAR ON SOC. MEDIA L. BLOG (Aug. 11, 2011), http://www.shearsocialmedia.com/2011/08/ncaa-student-athlete-social-media-bans.html (highlighting Villanova men's basketball, Mississippi State men's basketball, New Mexico men's basketball, Miami men's football, South Carolina men's football, Iowa men's football, Boise State men's football, and Kansas men's football as programs that have Twitter bans).

12. *See* Tom Satkowiak, *50 Twitter Tips for Division I Student-Athletes*, CONSPICUOUS IDEAS BLOG (July 29, 2011, 2:27 PM), http://conspicuousideas.blogspot.com/2011/07/50-twitter-tips-for-division-i-student.html (detailing Twitter advice from Tom Satkowiak, the associate director of media relations for the University of Tennessee men's basketball team); *Twitter Tips for Student Athletes!*, UNIV. S. CAL. ATHLETICS (Nov. 1, 2011), http://www.usctrojans.com/sports/academics/spec-rel/110111aaa.html; *see also* Shear, *supra* note 11 ("[C]reating an outright ban on

for the modern right of publicity,[13] and an identity is the only money-making leverage student athletes have. Thus, the lack of regulation in this field by the NCAA creates a safe harbor in which student athletes can develop their personas or identities as brands.[14]

The right of publicity is "a state-law created intellectual property right whose infringement is a commercial tort of unfair competition."[15] Some states do not recognize the right of publicity.[16] In the states that do, courts enforce the right of publicity under state common law,[17] state statutes, or both.[18] But the law setting out the

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using Twitter and/or other social media platforms for a select group of students at a public institution is a clear violation of the First Amendment . . . .").

13. *See, e.g.*, Experience Hendrix, L.L.C. v. Elec. Hendrix, L.L.C., No. C07-0338 (TSZ), 2008 WL 3243896, at *4 (W.D. Wash. Aug. 7, 2008) ("The inquiry under a right of publicity action is whether there was a commercial appropriation of one's identity without consent.").

14. *See generally* NCAA, *supra* note 3 (no mention of social networking).

15. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY 1-2 (1999).

16. Alaska, Arkansas, Colorado, Delaware, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, South Dakota, Vermont, West Virginia, Wyoming. *Cf.* sources cited *infra* notes 17-18 (listing states *with* "Right of Publicity").

17. *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977); Allison v. Vintage Sports Plaques, 136 F.3d 1443 (11th Cir. 1998) ("We read Alabama's commercial appropriation privacy right, however, to represent the same interests and address the same harms as does the right of publicity as customarily defined."); Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985) (applying Illinois common law); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (applying Michigan common law); Apple Corps. Ltd. v. Button Master, No. 96-CV-5470-A, 1998 WL 126935 (E.D. Pa. 1998) (recognizing Pennsylvania common-law right of publicity); Hillerich & Bradsby Co. v. Christian Bros., 943 F. Supp. 1136, 1141 (D. Minn. 1996) (granting preliminary injunction against infringement of Minnesota right of publicity); Cheatham v. Paisano Publ'ns, Inc., 891 F. Supp. 381 (W.D. Ky. 1995) (recognizing both the "invasion of privacy" tort and the right of publicity); Estate of Presley v. Russen, 513 F. Supp. 1339, 1355 (D.N.J. 1981) (finding that New Jersey supports a common-law right of publicity); Eastwood v. Superior Court, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983) (applying California common law), *superseded by statute*, CAL. CIV. CODE § 3344 (West 2012), *as recognized in* KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 717 n.5 (Cal. Ct. App. 2000); Genesis Publ'ns, Inc. v. Goss, 437 So. 2d 169 (Fla. Dist. Ct. App. 1983) (finding that publishing pictures without permission is actionable as an invasion of privacy); Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982) (holding that Georgia recognizes the right of publicity); Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141, 144 (Haw. 1968) (holding that a right of privacy exists for appropriation of photographs or names for commercial use); Munden v. Harris, 134 S.W. 1076, 1079 (Mo. Ct. App. 1911) ("[O]ne has an exclusive right to his picture . . . [as] a property right of material profit."); Kimbrough v. Coca-Cola/USA, 521 S.W.2d 719 (Tex. Civ. App. 1975) (recognizing the right of privacy); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (Wis. 1979) (applying Wisconsin common law).

18. *See, e.g.*, CAL. CIV. CODE § 3344 (West 2012); FLA. STAT. ANN. § 540.08 (West 2012); 765 ILL. COMP. STAT. 1075/1 (West 2012); IND. CODE ANN. § 32-36-1-1 (West 2012); KY. REV. STAT. ANN. § 391.170 (West 2012); MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2012); NEB. REV. STAT. ANN. § 20-202 (West 2012); NEV. REV. STAT. ANN. § 597.790 (West 2012); N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2011); OHIO REV. CODE ANN. § 2741.01 (West 2012); OKLA. STAT. ANN. tit. 12, § 1448 (West 2012); 42 PA. CONS. STAT. ANN. § 8316 (West 2012); R.I. GEN. LAWS ANN. § 9-1-28.1 (West 2012); TENN. CODE ANN. § 47-25-1104 (West 2012); TEX. PROP. CODE ANN. § 26.002 (West

elements of publicity rights varies greatly from state to state.[19] The lack of uniformity among states is particularly problematic for athletes because, unlike other celebrities who tend to reside in New York City, Los Angeles, and other major metropolitan hubs, athletes reside in all fifty states because each state has at least one public university and each university has an athletic program.[20] Moreover, in the case of student athletes, a violation of student athletes' right of publicity will often implicate numerous athletes who may reside in different states.[21] The inconsistency across state laws inhibits class certification because questions of law among different states vary.[22] As a result, the state-law status quo fails to address publicity-rights issues that face many of today's student athletes.

Recently, the right of publicity has become the subject of an increasing amount of litigation in the world of athletics.[23] With fantasy sports becoming almost a $4 billion industry,[24] athletes are starting to become protective of others who are profiting through the use of their names.[25] In a case addressing this exact issue, the US

2012); UTAH CODE ANN. § 45-3-2 (West 2012); VA. CODE ANN. § 8.01-40 (West 2012); WASH. REV. CODE ANN. § 63.60.040 (West 2012); WIS. STAT. ANN. § 995.50 (West 2012).

19. *Compare* IND. CODE ANN. § 32-36-1-7 to -8 (West 2012) (offering protection for a person's "name; voice; signature; photograph; image; likeness; distinctive appearance; gesture; or mannerisms" during a person's "lifetime or for one hundred (100) years after the person[]'s death"), *with* VA. CODE ANN. § 8.01-40 (West 2012) (providing protection only for "name, portrait, or picture" for up to "twenty years after the death" of the individual), *and* NEW YORK CIVIL RIGHTS LAW §§ 50-51 (McKinney 2011) (offering no protection after the death of the individual).

20. *E.g.*, *NCAA Sports Sponsorship: Football Bowl Subdivision*, NCAA.ORG, http://web1.ncaa.org/onlineDir/exec2/sponsorship?sortOrder=4&division=1A&sport=MFB (last visited Sept. 8, 2012) (listing forty-one states that have football programs in the Football Bowl Subdivision). Even the University of Alaska Anchorage has a Division I men's hockey team. *See* OFFICIAL HOME OF SEAWOLF ATHLETICS, http://www.goseawolves.com/SportSelect.dbml (last visited Sept. 8, 2012).

21. *See, e.g.*, *In re* NCAA Student-Athlete Name & Likeness Litig., No. C 09-1967 CW, 2010 WL 5644656 (N.D. Cal. Dec. 17, 2010) (consolidating two class actions brought by student athletes and former student athletes because of the similarity of the claims and legal theories).

22. *See* FED. R. CIV. P. 23.

23. *See, e.g.*, ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003) (finding that a picture of Tiger Woods had been substantially transformed entitling it to First Amendment protection overriding the athlete's right of publicity); Dryer v. NFL, 689 F. Supp. 2d 1113 (D. Minn. 2010) (alleging the NFL's use of game footage for promotional videos violated the players' right of publicity); Lemon v. Harlem Globetrotters Int'l, Inc., 437 F. Supp. 2d 1089 (D. Ariz. 2006) (asserting that former Harlem Globetrotters' right of publicity was violated when their names, likenesses, and numbers were used on a clothing line).

24. Tom Van Riper, *The Biggest Sports Site You've Never Heard Of*, FORBES.COM (Apr. 16, 2009, 5:25 PM), http://www.forbes.com/2009/04/16/fantasy-sports-ventures-business-sports-fantasy-sports.html.

25. *E.g.*, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 824 (8th Cir. 2007) (holding that the use of professional baseball players' names and statistics for fantasy sports did not violate their right of publicity because it is protected by the First Amendment).

Court of Appeals for the Eighth Circuit found that the use of athletes' names and statistics is protected by the First Amendment.[26] The former president of the NCAA, Myles Brand, criticized this ruling, stating that the decision opened the door for not only the use of professional athletes' names in fantasy sports, but also the use of student athletes' names in fantasy sports.[27] As a result of this ruling, the gap between college athletics and professional sports continues to decrease. The general public begins to see college athletes merely as entertainers in a virtual fantasy world, much like they do now with professional athletes.[28] Professional athletes are well compensated for this dehumanization, but student athletes remain students first and entertainers second. Brand argues that using the names of student athletes in fantasy sports runs "counter to some of the most important characteristics that distinguish college sports from professional sports."[29] Namely, intercollegiate athletics have educational value, whereas professional sports have primarily entertainment value.[30] Thus, he argues, student athletes should be exempt from this ruling.[31]

Fantasy sports are not the only market that has caught the attention of athletes. Video games have also become a hotbed of litigation for athletes.[32] Naturally, the right of publicity was not an issue in the initial video-game litigation surrounding games such as "Pong,"[33] but as the technology and graphics improved, the individuals displayed in the video games began to more accurately depict their real-world counterparts, and video games and the right of publicity became intertwined.[34] The cases of *Keller v. Electronic Arts, Inc.* and

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26. *Id.*

27. Myles Brand, *Fantasy Leagues May Be Less Than They Seem*, HUFFINGTON POST (Sept. 8, 2008, 10:06 AM), http://www.huffingtonpost.com/myles-brand/fantasy-leagues-may-be-le_b_124758.html.

28. Paul Kuharsky, *Arian Foster and a Unicorn*, ESPN.com (July 25, 2012, 12:05 PM), http://espn.go.com/blog/afcsouth/post/_/id/38674/arian-foster-and-a-unicorn.

29. *Id.*

30. *Id.*

31. *See id.*

32. *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010) (alleging the NCAA rules constitute an antitrust violation because the rules allow the NCAA to enter licensing agreements with video-game companies fixing the price of his image at zero).

33. Pong is a two-dimensional game that simulates table tennis. STEVEN L. KENT, ULTIMATE HISTORY OF VIDEO GAMES: FROM PONG TO POKEMON–THE STORY BEHIND THE CRAZE THAT TOUCHED OUR LIVES AND CHANGED THE WORLD, 34-35 (2001). There are no characters, it is merely a dot and two lines. *Id.* It was one of the first arcade video games, and the first to reach mainstream popularity. *Id.*

34. *See, e.g.*, No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011) (alleging a violation of their right of publicity, members of the band "No Doubt" sued the creators of the game *Band Hero* when they created avatars designed to look like the members of the band). Claiming a violation of her right of publicity, a singer with the catch phrase "ooh la la"

Hart v. Electronic Arts, Inc. are two recent examples of the intersection of video games, the right of publicity, and student athletes.[35] In these cases, college football players in two states brought class actions against the same video-game company, Electronic Arts, Inc. (EA), based on the same facts.[36] They illustrate the large role video games play in the right of publicity for any contemporary athlete.

Part I of this Note chronicles the development of the right of publicity and analyzes *Keller* and *Hart*. Part II analyzes how the inconsistent state laws addressing the right of publicity negatively impact athletes and complicate litigation, as exemplified by *Keller* and *Hart*. Finally, Part III proposes that Congress create a federal right-of-publicity statute to resolve the current problems caused by the lack of uniformity among state laws.

I. THE EVOLUTION OF THE RIGHT OF PUBLICITY

Much of the inconsistency surrounding the right of publicity arises from the confusion between whether the right is a personal right to privacy or a property right.[37] In the United States, the right of publicity originally developed from privacy law.[38]

A. From Privacy to Property

Scholars often attribute the origin of privacy law to a law-review article by Samuel Warren and Louis Brandeis.[39] Warren and Brandeis argued that people have the right to privacy, which they defined as the right to prevent the disclosure of private facts that, if

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sued a Japanese video-game company for making a game with a character named "Ulala" that shared similarities with the singer. Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607 (Cal. Ct. App. 2006).

35. Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010), *appeal pending* (No. 10-15387); Hart v. Elec. Arts, Inc., 808 F. Supp. 2d 757 (D.N.J. 2011).

36. *Keller*, 2010 WL 530108, at *1; *Hart*, 808 F. Supp. 2d at 760.

37. *See* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 836 n.14 (1979) (Bird, C.J., dissenting) (noting that confusion is not surprising "when the right of publicity is discussed as a variety of the right of privacy, a personal right, and then promptly described as a property right"); *see also* COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION—INTELLECTUAL PROPERTY—PRIVACY 173 (Paul L.C. Torremans ed., 2004) [hereinafter COPYRIGHT AND HUMAN RIGHTS] ("[T]here is an important distinction that is often disregarded in connection with the concept of appropriation of personality . . . . [The distinction is] between a right against harm to the claimant, and a right of ownership.").

38. *See* 1 MCCARTHY, *supra* note 15, at ch. 1.

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

exposed, would "embitter" one's life.[40] Privacy law is different from property law because the "possibility of future profits is not a right of property which the law ordinarily recognizes."[41] Professor William Prosser later expanded on this notion by describing privacy law as providing four distinct torts: (1) intrusion, (2) disclosure, (3) false light, and (4) appropriation.[42] *The Restatement (Second) of Torts* later adopted this four-part division, and almost every court in the United States has followed suit.[43] Courts often define the fourth tort as "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness,"[44] which in effect describes the right of publicity.

It quickly became clear to both scholars and practitioners that the right to protect against misappropriation of a well-known celebrity's name or likeness could not be fully protected under a law focused on injury to the celebrity's feelings.[45] The tendency to view the right of privacy as a purely personal right posed several hurdles to the creation of the right of publicity.[46] The two most evident problems were the unwillingness of the courts to protect celebrities from unpermitted commercial use of their identities (on the grounds they were public figures who had made a career of being in the public) and that the personal right of privacy was created as a remedy for mental injury, not commercial injury.[47]

In a shift from personal rights to property rights, Judge Jerome Frank first coined the term "right of publicity" in his opinion, *Haelan Laboratories v. Topps Chewing Gum, Inc.*[48] The plaintiff in that case, Haelan Laboratories, obtained from professional baseball players the exclusive right to use their names and pictures on baseball cards.[49] The defendant and competitor, Topps Chewing Gum, Inc., also used the names and pictures of professional baseball players, but without

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40. *See id.* at 204.

41. *Id.* at 204-05.

42. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 388-89 (1960) [hereinafter *Privacy*]; *see also* WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER & KEETON ON TORTS, ch. 20 (5th ed. 1984).

43. *See* 1 MCCARTHY, *supra* note 15, at 1-18 to 1-19.

44. *See Privacy*, *supra* note 42, at 389.

45. *See* O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941) (reasoning that a football player was not a private person and even though he did not wish to be associated with Pabst's beer advertisement, he would not be disgraced by association with a "legitimate and eminently respectable business").

46. JULIUS C.S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA 24 (Egbert J. Dommering & P. Bernt Hugenholtz eds., Info. Law Series, Ser. No. 5, 1996).

47. *Id.* at 25-26.

48. 202 F.2d 866, 868 (2d Cir. 1953).

49. *Id.* at 867.

the players' authorization.[50] Topps argued that only the baseball players could bring an action against it because the invasion of the right to privacy is a personal right, and therefore is not assignable.[51] In holding that "[i]t is no defense that . . . defendant is the assignee of a subsequent contract," Judge Frank reasoned, "a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture."[52] This marked the creation of a new property right in the commercial value of a person's identity.

After *Haelan*, the notion that the right of publicity is a property right began to take hold in several jurisdictions[53] and was validated by the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court's first and only case involving the right of publicity.[54] In *Zacchini*, Hugo Zacchini sued a television station for filming and showing his "human cannonball" routine in its entirety during a nightly news broadcast.[55] The Court ruled that, under the state-law right-of-publicity claim, the First Amendment does not immunize the television station for airing the entire performance without Zacchini's consent.[56] The Court's recognition of the right of publicity confirmed the validity of the right and was the impetus that caused several states to recognize the right.

The transformation in right-of-publicity law from a privacy right to a property right is best exemplified in the two distinct claims for misappropriation. A privacy misappropriation claim recognizes a person has the right to protect against the use of her image for commercial purposes on the grounds that association with the product or activity harms an interest that should be protected, such as an interest in reputation or dignity.[57] Such a claim would not protect against an unauthorized use, such as using a player's likeness on a baseball card as in *Haelan,* that does not do any direct reputational harm to the person. On the other hand, a property misappropriation of personality or persona claim identifies that a person owns her

50. *Id.* at 868.

51. *Id.* at 867.

52. *Id.* at 868-69.

53. *See, e.g.*, Cepeda v. Swift & Co., 415 F.2d 1205, 1206 (8th Cir. 1969) ("Plaintiff has a valuable property right in his name, photograph and image and that he may sell these property rights."); Canessa v. J.I. Kislak, Inc., 235 A.2d 62, 76 (N.J. Super. Ct. Law Div. 1967) ("[I]nsofar as plaintiffs' claim is based on the appropriation of their likeness and name for defendant's commercial benefit, it is an action for invasion of their 'property' rights and not one for 'injury to the person.'").

54. 433 U.S. 562 (1977).

55. *Id.* at 564.

56. *Id.* at 575.

57. *See* COPYRIGHT AND HUMAN RIGHTS, *supra* note 37, at 173.

image and is therefore entitled to its commercial value.[58] Under such a claim, *all* unauthorized commercial uses would be actionable, not merely those that cause reputational harm. Courts in the United States have long recognized property as a judicially enforceable right between people about things both tangible and intangible, and those rights are seen as granting the possessor of the thing a bundle of rights including the ability to transfer, use, possess, and exclude others from that thing.[59] Under this conception, the right of publicity can be viewed as a property right protecting a persona and authorizing transfer, use, possession, and exclusion of others from the persona through the grant of exclusive licenses.[60] It is through this perception of the right of publicity that the right was able to survive the transformation from a privacy right to a form of property right.

B. From Property to Intellectual Property

Courts often analogize the right of publicity to intellectual property rights.[61] One explanation of why courts make this connection is that both the right of publicity and intellectual property rights are intangible.[62] They are both distinguishable from tangible property because they are neither excludable (able to be stored away from others) nor capable of rivalrous consumption (able to be consumed or used by someone such that others cannot then use the item).[63] A closer look at the policy rationales behind both the right of publicity and other intellectual property rights further explains and justifies this association.

The policy underlying the right of publicity that most closely resembles an intellectual property right is "incentive justification."[64] The incentive justification theory asserts that certain persons "should be given an economic incentive to undertake socially useful or

58. *Id.*

59. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543 (8 Wheat.) (1823) (finding that the King of England had superior title over the Native Americans because the Native Americans did not have the right to transfer or exclude others from the land).

60. *See* PINCKAERS, *supra* note 466, at 277.

61. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co,* 433 U.S.562 at 573 (analogizing the "right of publicity" to copyright and patent law); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 834-35 (1979) (explaining that considerable time, money, and energy are spent developing one's prominence in a particular field and the result of this hard work is recognition and good will from consumers similar to a trademark).

62. *See* PINCKAERS, *supra* note 46, at 278.

63. LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS 1-2 (2012).

64. *See* 1 MCCARTHY, *supra* note 15, at 2-10.

enriching activities and thereby enter the public eye."[65] Indeed, the Supreme Court recognized this rationale when it noted that protecting the right of publicity "rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for [the performer] to make the investment required to produce a performance of interest to the public."[66] This policy consideration resembles the policy behind patent and copyright law that "[c]reators need a certain amount of remuneration in order to invest their time and labor into creative pursuits instead of other activities that might result in higher rewards."[67] Accordingly, the right of publicity shares a fundamental policy rationale with both copyrights and patents.

In addition to reflecting the policies behind copyright and patent laws, the rationales for the right of publicity closely mirror those supporting trademarks. First, the incentive justification from a trademark perspective is not to incentivize invention or creative pursuits, but rather to incentivize companies to invest in the goodwill associated with a mark.[68] Similarly, one's persona can be viewed as a form of goodwill, especially when it is used commercially for endorsements. In the same way that a company would be unwilling to invest in creating a quality product if its competitors could simply use its trademark, individuals would be less likely to invest time and energy in "creative pursuits" if others could unilaterally profit from their public persona by using it to endorse their products. Second, one of the primary goals of trademark law is to prevent consumer confusion.[69] In a similar fashion, the right of publicity protects against consumer confusion by guarding against misappropriation of one's persona to endorse a product, or in the case of EA, to help sell a product through association.[70] Thus, the rationale for recognizing the right of publicity also closely resembles the rationale for granting trademark protection.

Despite these similarities, intellectual property rights, such as the ones conferred by patents, copyrights, and trademarks, differ from the right of publicity because they are all protected by federal

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65. *Id.*

66. *Zacchini*, 433 U.S. at 576-77.

67. LOREN & MILLER, *supra* note 63, at 1.

68. *Id.* at 544-45.

69. *Id.*

70. *See, e.g.*, White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (holding that an advertisement depicting a robot dressed like Vanna White was a violation of White's right of publicity).

statutes.[71] The right of publicity, on the other hand, remains a piecemeal compilation of state statutes and common law or is wholly unrecognized.

C. NCAA Student-Athlete Likeness-Licensing Litigation

Two recent cases provide paradigmatic examples of how divergent state-law causes of action can negatively affect student athletes: *Keller v. Electronic Arts, Inc.* and *Hart v. Electronic Arts, Inc.* In both cases, former college football players sued the same video-game company alleging nearly identical facts.[72] These cases demonstrate how differences in the right-of-publicity laws as well as differences in the way courts apply the laws render the protection afforded student athletes inadequate.[73]

1. *Keller v. Electronic Arts, Inc.*

In 2010, Samuel Keller, a former college football player at both Arizona State University and the University of Nebraska, sued EA, the NCAA, and the Collegiate Licensing Company (CLC) in the US District Court for the Northern District of California.[74] When Keller graduated from high school, he was considered the ninth-best quarterback in the country.[75] After playing three years at Arizona State, Keller transferred to Nebraska where he set the school's single-season record for completion percentage (69.1 percent).[76] Keller briefly signed with the Oakland Raiders of the National Football League (NFL) as a free agent,[77] but the Raiders released him less than a month later.[78]

Keller alleged that the NCAA violated his right of publicity under Indiana law (the NCAA is headquartered in Indianapolis, Indiana) and that EA violated his right of publicity under California

71. 35 U.S.C. § 1 (2006) (providing patent protection); 17 U.S.C. § 101 (2006) (providing copyright protection); 15 U.S.C. § 22 (2006) (providing trademark protection).

72. *See* discussion *infra* Part I.C.

73. *See* discussion *infra* Part I.C.

74. Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108, at *1-2 (N.D. Cal. Feb. 8, 2010), *appeal pending* (No. 10-15387).

75. *Player Bio: Sam Keller*, ARIZ. STATE UNIV. SUN DEVIL ATHLETICS, http://www.thesundevils.com/sports/m-footbl/mtt/keller_sam00.html (last visited Sept. 7, 2012).

76. *Player Bio: Sam Keller*, UNIV. OF NEB. FOOTBALL, http://www.huskers.com/ViewArticle.dbml?SPSID=4&SPID=22&DB_OEM_ID=100&ATCLID=866801&Q_SEASON=2007 (last visited Sept. 7, 2012).

77. Matt Loede, *Raiders Sign QB Keller; Waive Meyer*, RAIDERS GAB BLOG (June 25, 2008), http://www.raidersgab.com/2008/06/25/raiders-sign-qb-keller-waive-meyer.

78. *Transactions: 2008–2009*, NFLHUSKERS.COM, http://nflhuskers.com/transactions0809.html (last visited Sept. 7, 2012).

law (EA is headquartered in Redwood City, California).[79] The allegation is based on EA's video-game series titled *NCAA Football*, where consumers simulate football games between more than 120 NCAA teams.[80] Keller claimed EA designed the virtual football players in the likeness of the real-life football players on their respective teams to make the game more realistic.[81] He asserted that the players created by EA share all of the following attributes as their real-life counterparts: the same jersey numbers, the same home states, the same physical characteristics (including height and weight), and they play the same positions.[82] Thus, he claimed the NCAA "used" his likeness when it "expressly reviewed and knowingly approved each version of each NCAA-brand videogame."[83] At the time of this Note's publication, Keller intended to certify his case as a class action.[84]

The NCAA argued Keller's right-of-publicity claim should fail as a matter of law because the NCAA did not "use" his image or likeness.[85] The district court agreed and dismissed Keller's right-of-publicity claim against the NCAA for failure to offer any authority showing that approval could be construed as "use" under Indiana's right-of-publicity statute.[86] But the court granted Keller leave to amend his complaint.[87]

EA did not deny it used the likeness of college football players in its game.[88] Instead, EA asserted its use of college football players qualifies as fair use, thus barring Keller's right-of-publicity claims.[89] The fair use doctrine set forth in the 1976 Copyright Act lists four factors used to determine whether a use qualifies as fair use:

> (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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79. *Keller*, 2010 WL 530108, at *1-2.

80. *Id.* at *1.

81. *Id.*

82. *Id.* Keller also alleged EA sent questionnaires to the team's equipment managers in order to create players with the same equipment, such as facemasks, gloves, or sweatbands. *Id.*

83. *Id.* at *2.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at *3.

88. *Id.*

89. *Id.*

(4) the effect of the use upon the potential market for or value of the copyrighted work.[90]

The first factor asks whether and to what extent the new work is "transformative."[91] To qualify as transformative, the work must add "something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[92] The more transformative the use, the less significance courts give to the other three factors.[93] EA asserted its use of college athletes' likenesses is sufficiently transformative to qualify for fair use protection.[94]

The court disagreed, stating that, as a matter of law at the motion-to-dismiss stage, EA's depiction of Keller was not sufficiently transformative.[95] The court contrasted the depiction of Keller with another California video-game case, *Kirby v. Sega of America, Inc.*, where the court held that a specific use was transformative.[96] The court found the cases were distinguishable because, among other things, "the game's setting is identical to where the public found [Keller] during his collegiate career: on the football field."[97] Therefore, the court denied EA's motion to dismiss.[98] As a result, the Ninth Circuit has heard Keller's case,[99] and the forthcoming opinion may change the landscape of the right of publicity.

2. *Hart v. Electronic Arts, Inc.*

Alleging similar facts to *Keller*, Ryan Hart, a former Rutgers University quarterback, brought a putative class action suit against EA in the US District Court for the District of New Jersey for violation of his right of publicity under New Jersey law.[100] In this case, EA again conceded that a sufficient *prima facie* right of publicity claim had been asserted under New Jersey law and again invoked the First Amendment as a defense.[101]

The court weighed EA's First Amendment rights against Hart's right of publicity using what it described as the "two key tests followed by courts today": (1) the transformative-use test (borrowed from the

90. 17 U.S.C. § 107 (2006).
91. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
92. *Id.*
93. *Id.*
94. *Keller*, 2010 WL 530108, at *5.
95. *Id.*
96. *Id.* at *4-5 (citing Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607 (2006)).
97. *Id.* at *5.
98. *Id.* at *11.
99. *Id., argued,* No. 10-15387 (9th Cir. Feb. 16, 2011).
100. Hart v. Elec. Arts, Inc., 808 F. Supp. 2d 757, 760, 762 (D.N.J. 2011).
101. *Id.* at 764, 766.

copyright fair use doctrine) and (2) the *Rogers* test (borrowed from trademark actions brought pursuant to the Lanham Act).[102]

Unlike the court in *Keller*, the New Jersey district court held that EA's use of Hart's likeness in its video game was transformative.[103] In reaching its conclusion, the court emphasized that EA created a mechanism that allowed users to alter the appearance of the virtual players.[104] Thus, EA's use of the players' likenesses constituted a transformative fair use.[105] Furthermore, the court, though unconvinced that either form of the *Rogers* test would be applicable to a misappropriation case,[106] found that EA's use of Hart's likeness did not violate either of the *Rogers* tests.[107]

Courts most often apply the *Rogers* test in trademark cases;[108] it is named for the famous film couple Fred Astaire and Ginger Rogers.[109] In 1989, Rogers brought a false-endorsement claim against the creators of the film *Ginger and Fred* about two fictional Italian cabaret performers who had traveled around Italy imitating Rogers and Astaire.[110] The *Rogers* test is in fact two different tests: the *Rogers* Lanham Act test and the *Rogers* right-of-publicity test.[111] The *Rogers* Lanham Act test asks: (1) whether the challenged work has relevance to the underlying work; and, if so, (2) whether the title misleads the public as to the source of the content of the work.[112] The *Rogers* right-of-publicity test asks: (1) whether the challenged work is wholly unrelated to the underlying work; or (2) whether the use of the plaintiff's name is a disguised commercial advertisement.[113] The court in *Hart* found EA's use of Hart's likeness passed both tests because even though the game may draw upon the public's familiarity with Hart, it does not "explicitly state that [Hart] endorses or contributes to the creation of the game," and it does not confuse potential consumers as to the source, or creator, of the game.[114] Ultimately, the court held

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102. *Id.* at 776-93.

103. *Id.* at 787.

104. *Id.* at 785.

105. *Id.* at 794.

106. *Id.* at 792-93 ("The transformative test better balances First Amendment and right of publicity interests . . . .").

107. *Id.* at 794.

108. *Id.* at 776.

109. *See* Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989) (applying the *Rogers* test for the first time to a claim by Ginger Rogers alleging violation of the Lanham Act and infringement of her rights to publicity and privacy).

110. *Id.* at 996-97.

111. *Hart*, 808 F. Supp. 2d at 792.

112. *Id.* at 793.

113. *Id.*

114. *Id.*

that, even though EA passed both tests, the court need not explicitly adopt either test because EA's First Amendment defense prevailed.[115] Therefore, the court granted EA's motion for summary judgment, and Hart lost his right-of-publicity case.[116]

II. ANALYZING THE PROBLEM FACING STUDENT ATHLETES

Under the current legal regime, many individuals, especially student athletes, have no legal recourse when their rights of publicity are violated. Currently, only twenty-nine states recognize the right of publicity.[117] Of those twenty-nine states, the law of each individual state differs in cause of action,[118] scope of protection,[119] duration of protection,[120] statute of limitations,[121] and remedy.[122] These variations affect whether a plaintiff wins, loses, or is able to bring a case at all. For instance, Samuel Keller could not have brought a claim for a violation of his right of publicity in the following states that *recognize* the right: Massachusetts,[123] Nebraska,[124] New York,[125] Ohio,[126]

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115. *Id.* at 794.

116. *Id.*

117. *See supra* note 16.

118. *Compare* OHIO REV. CODE ANN. § 2741.03 (West 2012) (creating a cause of action only for individuals domiciled in the state), *with* IND. CODE § 32-36-1-1 (West 2012) (creating a cause of action for acts or events that take place in the state), *and* R.I. GEN. LAWS ANN. § 9-1-28.1 (West 2012) (creating a cause of action for any person within the jurisdiction of the state).

119. *Compare* IND. CODE ANN. § 32-36-1-1 (West 2012) (offering protection for "name, voice, signature, photograph, image, likeness, distinctive appearance, gesture, or mannerisms"), *with* VA. CODE ANN. § 8.01-40 (West 2012) (providing protection only for "name, portrait, or picture"), *and* NEB. REV. STAT. § 20-208 (West 2012) (providing protection after death for only "name" and "likeness").

120. *Compare* OKLA. STAT. ANN. tit. 12, § 1448 (West 2012) (providing protection for up to one hundred years after the death of the individual), *with* TENN. CODE ANN. § 47-25-1104 (West 2012) (protecting an individual's name, photograph, or likeness for ten years after the individual's death), *and* UTAH CODE ANN. § 45-3-2 (West 2012) (providing no protection after the death of the individual).

121. *Compare* NEB. REV. STAT. § 20-211 (West 2012) (providing one year to bring an action), *with* NEV. REV. STAT. ANN. § 597.800 (West 2012) (providing that a successor in interest has six months after becoming aware of a violation to file a claim).

122. *Compare* MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2012) (authorizing treble damages in the court's discretion), *with* CAL. CIV. CODE § 3344 (West 2012) (authorizing attorney's fees and costs to the prevailing party).

123. *See* MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2012) (applying only to "name, portrait or picture").

124. *See* NEB. REV. STAT. § 20-211 (West 2012). Keller did not bring his action within the one-year statute of limitations.

125. *See* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2011) (recognizing only uses of "name, portrait or picture").

126. *See* OHIO REV. CODE ANN. § 2741.03 (West 2012). Keller was not domiciled in Ohio.

Pennsylvania,[127] Texas,[128] Utah,[129] Virginia,[130] or Wisconsin.[131] These inconsistencies illustrate the need for a federal right of publicity.

A. Specific Problems Posed By the Restatement *for Student Athletes*

Even if a student athlete resides in a state that recognizes the right of publicity, some student athletes may not be able to establish a prima facie case for violation of the right of publicity if the state has adopted the *Restatement (Third) of Unfair Competition*.[132] Under the *Restatement*, to establish a claim for a publicity violation, a student athlete must satisfy the following elements: (1) the defendant used the plaintiff's identity; (2) the identity has commercial value; (3) the commercial value is appropriated for the purpose of trade; (4) the plaintiff did not consent; and (5) the appropriation resulted in a commercial injury.[133] While the first, third, and fourth elements are relatively easy to satisfy, student athletes will likely struggle to establish the second and fifth elements, which will prevent them from succeeding on the claim.

The second element of the claim requires that the plaintiff's identity be commercially valuable.[134] Some cases interpret this to mean that the plaintiff must be famous.[135] For example, in *Pesina v. Midway Manufacturing Co.*,[136] a martial artist who was a model for characters in the arcade version of the video game *Mortal Kombat* sued the video-game company for violating his right of publicity when the company adapted the game to a home version.[137] The US District Court for the Northern District of Illinois held the martial artist failed to show his likeness was recognizable and therefore failed to show a

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127. *See* 42 PA. CONS. STAT. ANN. § 8316 (West 2012). Keller was not domiciled in Pennsylvania.

128. *See* TEX. PROP. CODE ANN. § 26.002 (West 2012) (recognizing the right of publicity only in the deceased).

129. *See* UTAH CODE ANN. §§ 45-3-2 to -3 (West 2012) (applying only to "name, title, picture, or portrait" and only if used in an advertisement that implies endorsement).

130. *See* VA. CODE ANN. § 8.01-40 (West 2012) (applying only to "name, portrait, or picture").

131. *See* WIS. STAT. ANN. § 995.50 (West 2012) (recognizing only "name, portrait, or picture").

132. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 8316 (West 2012) (providing relief only for people whose identity has commercial value and have suffered a commercial injury).

133. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

134. *Id.*

135. *See id.* cmt. D ("[A] few cases appear to require some minimum degree of fame or notoriety as a prerequisite for relief. However, the identity of even an unknown person may possess commercial value.").

136. 948 F. Supp. 40 (N.D. Ill. 1996).

137. *Id.* at 41.

violation of his right of publicity.[138] Like the martial artist in *Pesina*, many student athletes are not recognizable to members of the public, which devalues their likeness. Consequently, many student athletes will find it difficult to satisfy this element of the claim, making it almost impossible to ever successfully assert a right-of-publicity claim.

Student athletes may also have trouble proving the fifth element—the appropriation of their likeness resulted in commercial injury.[139] The *Restatement* defines commercial injury as "loss to the plaintiff" or "unjust gain to the defendant."[140] This is problematic for student athletes because, unlike professional athletes, student athletes are not allowed to profit while in school. Therefore they suffer no loss; their monetary damages are zero.[141] And although there may be a way to quantify the defendant's unjust gain, doing so can be difficult. For instance, in a video game that features over 120 NCAA teams, each with eighty-five athletes on a team, it would be difficult—absent a class action—to prove the defendant's unjust gain from one specific student athlete. Therefore, even if the athlete resides in a state that recognizes publicity rights, a student athlete will have difficulty establishing all elements of the claim. But even in states that decline to adopt the *Restatement* the statutory protection afforded student athletes for violation of their publicity rights is inadequate, as demonstrated by *Keller* and *Hart*.

B. Keller & Hart

Keller and *Hart* involve similar facts, the same legal theories, and the same defendants, but, at the motion-to-dismiss phase in *Keller* and at the summary judgment phase in *Hart*, the court in each case reached different results.[142] Admittedly, a number of factors may have affected the outcome of either trial;[143] however, an obvious difference between the two cases is venue. As it turns out, the choice of venue has a material effect on the court's determination.

In contrast to Hart's case, which he brought under New Jersey's right-of-publicity law that developed from common law,[144]

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138. *Id.* at 42.

139. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

140. *See id.* cmt. A.

141. *See* NCAA, *supra* note 3, at 12.5.

142. *See* Hart v. Elec. Arts, Inc., 808 F. Supp. 2d 757 (D.N.J. 2011); Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108, at *1 (N.D. Cal. Feb. 8, 2010), *appeal pending* (No. 10-15387).

143. For instance: the relative skill of counsel or the judges who heard the cases.

144. Estate of Elvis Presley v. Russen, 513 F. Supp. 1339, 1355 (D.N.J. 1981).

Keller brought his case under California law, which is statutory.[145] California is also home to the majority of the United States' celebrities and is the state where the majority of the country's right-of-publicity lawsuits originate. As a result, a series of decisions by the US Court of Appeals for the Ninth Circuit has expanded the scope of California's right-of-publicity law. For example, in 1974, the Ninth Circuit found that the unauthorized use of a race-car driver's automobile in an advertisement was a violation of the driver's right of publicity.[146] The court reasoned that the driver's own likeness could be identified by his car's "uniquely distinguishing features."[147] Similarly, in 1992, the court held that the creators of a television advertisement violated Vanna White's right of publicity where the advertisement depicted a robot with a blonde wig turning letters on a set resembling White's television show *Wheel of Fortune*.[148] Therefore, had Hart filed his claim in California, he likely would have achieved a dramatically different result.

Looking at what would have occurred had Hart filed his claim in Missouri demonstrates another example of the inconsistency in state law. Missouri rejects the "transformative use" test as a defense to a right-of-publicity claim and instead uses a "predominant use" test.[149] Under the predominant use test:

> If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some "expressive" content in it that might qualify as "speech" in other circumstances.[150]

The predominant use test provides less protection for EA's *NCAA Football*, making a First Amendment defense unlikely to succeed. The variance of First Amendment protection among state laws creates inconsistent and unjust treatment of athletes with the same claims.

Although oral argument was originally heard in the *Keller* case in February 2011, and a rehearing was held on July 13, 2012, at the time this Note was published the Ninth Circuit had yet to issue its

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145. CAL. CIV. CODE § 3344 (West 2012).

146. *See* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825-27 (9th Cir. 1974).

147. *Id.* at 827.

148. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992).

149. Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).

150. Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003).

opinion.[151] Two cases will likely influence the opinion. The first is the recent Supreme Court case *Brown v. Entertainment Merchants Ass'n*.[152] In *Brown*, the Supreme Court held that a California law prohibiting the sale or rental of violent video games to minors is unconstitutional.[153] While not directly addressing the right of publicity in video games, the Supreme Court's decision affirmed the extensive First Amendment protections video games enjoy and may add weight to EA's First Amendment defense.

The second case is *Brown v. Electronic Arts, Inc.* in which Jim Brown, a former NFL player,[154] sued EA for violating his right of publicity in its game *Madden NFL*.[155] In a case factually similar to *Keller* and *Hart*, the US District Court for the Central District of California denied Brown's Lanham Act claim, stating that consumers would not be misled to believe that Brown was endorsing the product as a result of recognizing his likeness.[156] After denying Brown's Lanham Act claim, the court declined to exercise supplemental jurisdiction over the right-of-publicity claim, which, at the time of this Note, is currently on appeal to the Ninth Circuit.[157] Although the district court did not reach the merits of Brown's right-of-publicity claim, the court's discussion of the game's "numerous creative elements," "manipula[tion] of virtual athletes," and analogy to an "expressive painting" tend to lend support to EA's transformative-use defense.[158]

Although these two cases may favor a finding of transformative use, which would support EA's fair use defense, other California precedent may weigh in Keller's favor. For example, if a race-car driver could be identified by the unique features of his race car,[159] a strong case can be made that a football player could be identified by the colors, logos, and numbers on his jersey. Moreover, the college football players in *NCAA Football* also play the same position, are similar height and weight, and have the same skin tone as their real

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151. *Watch Recording for Case: Keller v. Electronic Arts, Inc., No. 10-15387*, UNITED STATES COURTS FOR THE NINTH CIRCUIT (July 13, 2012), http://www.ca9.uscourts.gov/media/view_video_subpage.php?pk_vid=0000006196.

152. 131 S. Ct. 2729 (2011).

153. *Id.* at 2742.

154. For further discussion of the interplay between retired NFL players and EA, see *infra* notes 213-17.

155. Brown v. Elec. Arts, Inc., No. 2:09CV01598(FMC-RZx), 2009 U.S. Dist. Lexis 131387 (C.D. Cal. 2009), *appeal pending sub nom.* Keller v. Elect. Arts, Inc., (No. 09-56675) (9th Cir.).

156. *See id.* at *13.

157. *Id.* at *15.

158. *See id.* at *11.

159. *See* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825-27 (9th Cir. 1974).

world counterparts.[160] Other damaging evidence weighing in favor of finding a violation of the right of publicity is that the announcers in the video game pre-record the names of all of the student athletes even though they "know [they are] not supposed to."[161] Moreover, the announcers record uncommon last names so that when a consumer modifies a unique player name, like "Hansbrough," or "Mbah a Moute," the announcers will accurately announce those names.[162] Therefore, even though the names of the players are not displayed, there is strong evidence that EA's use of student-athlete likenesses is *intentional.* Furthermore, unsealed emails and depositions revealed that university officials were aware that EA was using student-athlete likenesses.[163] In 2009, Nebraska Chancellor Harvey Perlman sent an email to the Big Ten Commissioner Dan Beebe in which he wrote, "I'm still trying to figure out by what authority the NCAA licenses these [name and likeness] rights to the game makers."[164] While intent is not an element in every state, some states acknowledge the "intent to obtain a commercial advantage" as an element of the right of publicity.[165]

C. Professional Athletes Compared to Student Athletes

Professional athletes are able to license their likenesses to video-game companies and profit from the use of their likenesses.[166] Student athletes, however, are not so fortunate. For example, if a high school athlete wants to play a sport in college, she must sign a contract granting the rights to use her name or picture to the NCAA, to the university she attends, and to the conference to which the university belongs.[167] She technically retains her right of publicity,[168] but she cannot profit from that right while in school without forfeiting her "amateur" status and being banned from participating in NCAA

160. Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108, at *1 (N.D. Cal. Feb. 8, 2010), *appeal pending* (No. 10-15387).

161. Anastasios Kaburakis et al., *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry*, 27 ENT. & SPORTS L. 1 (2009).

162. *Id.*

163. Jon Solomon, *EA Sports and Collegiate Licensing Co. Used Real NCAA Players in Video Games, E-Mails Suggest*, AL.COM (Sept. 18, 2012, 8:40 PM), http://www.al.com/sports/index.ssf/2012/09/ea_sports_and_collegiate_licen.html#incart_river.

164. *Id.*

165. Doe v. TCI Cablevision, 110 S.W.3d 363, 369 (Mo. 2003) (listing intent to gain a commercial advantage as an element of the Missouri right-of-publicity statute).

166. *See* Hart v. Elec. Arts, Inc., 808 F. Supp. 2d 757 (D.N.J. 2011).

167. *See* NCAA, *supra* note 3, at 12.5; *see also Form 10-3a: Student-Athlete Statement–NCAA Division I*, PBS.ORG, http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/etc/student-athlete-statement.html (last visited Sept. 6, 2012).

168. Brand, *supra* note 27.

athletics.[169] Furthermore, the NCAA and CLC have capitalized on the student athlete's plight. They have created licensing agreements with video-game companies like EA.[170] These agreements have generated over a half-billion dollars for the NCAA and EA through games like *NCAA Football* and *NCAA Basketball*, but the players (who supposedly retain their rights of publicity) have not received any compensation.[171] Consequently, among athletes, student athletes are uniquely disadvantaged by the use of their names and likenesses because they are unable to receive compensation for such uses.

The distinction between professional athletes and student athletes does not exist among other celebrities for whom the right of publicity is an important remedy. Student athletes must maintain "amateur" status according to the NCAA in order to be eligible to compete.[172] As the right of publicity has evolved from a protection of privacy to a protection of commercial interests, it has always evolved with celebrities in mind.[173] The demands on the lives of professional athletes are different than the demands on the lives of traditional celebrities. For example, athletes not only live in every state,[174] but athletes must travel throughout the United States on a weekly basis during their respective seasons. As a result, the inconsistency in state law affects athletes to a greater degree than traditional celebrities and the implications of a federal right of publicity are favorable for an athlete's lifestyle. Of all contemporary "celebrities," student athletes stand to gain the most from a federal right of publicity because they have the same concerns as professional athletes, but they are not afforded the same rights. The ability to demand high-paying future salaries by leveraging their personas is student athletes' only hope to capitalize on the celebrity they develop as student athletes. Moreover, not all college athletes become professional athletes, and many athletes' careers are cut short by injury, so the inability to monetize their personas while students may prevent them from capitalizing on their one opportunity to do so.

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169. *See* NCAA MANUAL I, *supra* note 3, at 12.1.2.

170. Mark Fainaru-Wada, *NCAA Basketball Game in Jeopardy*, ESPN.COM (Feb. 10, 2010, 11:15 PM), http://sports.espn.go.com/ncb/news/story?id=4904393.

171. *Id.*

172. *See* NCAA MANUAL, *supra* note 3 at 12.5.

173. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (making an identity with commercial value an element of the right of publicity).

174. *See supra* note 20.

III. SOLUTION: A FEDERAL RIGHT OF PUBLICITY

The proposed solution consists of two parts. First, to provide more predictability and consistency in the field of publicity rights, especially for student athletes, Congress should pass a federal right-of-publicity statute. Second, to further protect the interests of student athletes, this Note proposes the NCAA create an escrow fund for licensing fees that the NCAA collects through licensing student athletes' names, likenesses, or personas. The NCAA would make the fund available to student athletes upon completion of their eligibility or upon graduation.[175]

A. A Federal Right of Publicity

While federal trademark law is similar to the right of publicity, the two are not equivalent; federal trademark law does not fill the void of the right of publicity in states that do not recognize the right. The right of publicity can be viewed as a form of intellectual property, and infringement of one's right of publicity can be viewed as a form of unfair competition.[176] As Professor McCarthy explains, "Lanham Act § 43(a) cannot provide a federal vehicle for the assertion of infringement of the state law right of publicity for the simple reason that § 43(a) is limited to some form of falsity, while infringement of the right of publicity involves no element of falsity."[177] Because student athletes reside throughout the United States, and even the states recognizing the right of publicity interpret the right inconsistently,[178] Congress needs to pass a right-of-publicity statute providing a comprehensive cause of action for all US citizens. Such a statute would avoid the patent unfairness that arises when courts treat plaintiffs differently despite similar facts.[179]

The issues that differ the most among state laws, and that Congress therefore needs to specifically address when drafting a federal right-of-publicity statute, are: (1) Who should have a federal right of publicity? (2) What should a federal right-of-publicity protect? (3) Should there be a postmortem federal right of publicity? And (4) how long should a federal right-of-publicity protection last?

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175. Perhaps the fund could only be accessed by student athletes who graduate in order to incentivize obtaining a degree, but the implications of such a proposal are beyond the scope of this Note.

176. *See supra* text accompanying note 15.

177. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY 1202 (2d ed. 2009-2011).

178. *See supra* Part I.

179. *See supra* Part I.C.

1. Who Should Have a Federal Right of Publicity?

A minority of states have taken the position that the right of publicity requires the plaintiff to have acquired a certain degree of "celebrity" in order to state a claim for infringement of his or her right of publicity.[180] Congress should reject this position in the federal right-of-publicity statute. The status of celebrity is relative; it depends on factors such as time, territory, and genre. For example, millions of teenage girls around the world may consider Justin Bieber a "celebrity," while certain age groups would likely fail to recognize him. Because the nature of celebrity is relative, fame should not be part of the legal analysis or a basis for a cause of action in publicity rights.

Instead, as a majority of states recognize,[181] everyone should have a right of publicity, without any condition precedent to acquisition of the right. The Ninth Circuit recognized this logic when it explained that the right of publicity protects not only a celebrity's identity, but also her nonfamous birth name.[182] If the defendant thought the plaintiff's identity had commercial value and used the plaintiff's identity for commercial purposes, then a per se recognition of the value in the plaintiff's identity has been established. Therefore, fame should not be a prerequisite of the claim; all persons should be able to recover for a right-of-publicity violation.

2. What Should a Federal Right of Publicity Protect?

State laws vary with respect to the scope of protection the right of publicity provides.[183] In some states, the right of publicity protects only the plaintiff's "name, portrait, or picture."[184] Others provide greater protection. For example, Indiana provides protection for the use of "name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms."[185] A federal right-of-publicity

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180. *See supra* text accompanying notes 132-35; *see also* Ali v. Playgirl, Inc., 447 F. Supp. 723, 729 (S.D.N.Y. 1978) ("[T]his right of publicity is usually asserted only if the plaintiff has 'achieved in some degree a celebrated status.'"); Cox v. Hatch, 761 P.2d 556, 564 (Utah 1988) ("[T]he complaint fails because it must allege that the plaintiffs' names or likenesses have some 'intrinsic value' . . . . The plaintiffs do not allege . . . that they enjoy any particular fame or notoriety.").

181. *See supra* notes 16-17.

182. Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 415 (9th Cir. 1996) (holding that the fact the plaintiff did not use his birth name for over ten years did not constitute "abandonment" of the right of publicity in the identity of that name).

183. *See supra* text accompanying notes 117-21.

184. VA. CODE ANN. § 8.01-40 (West 2012).

185. IND. CODE ANN. § 32-36-1-1 (West 2012).

statute should provide protection for a person's "persona." Several courts have adopted the term persona to encompass the elements that identify a person, finding it clear that "the traditional phrase 'name and likeness' was inadequate to describe the many aspects of a person which can identify him or her."[186] The Ninth Circuit acknowledged the importance of protecting the plaintiff's persona rather than a list of identifiers when it observed:

> It is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so. [Prior cases] teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity. 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.[187]

In order to create a workable federal statute, Congress should define the use of a plaintiff's "persona" as "a use from which the plaintiff is identifiable in the total context of the defendant's use."[188] This begs the question: How should courts define "identifiable"? In Professor McCarthy's treatise on the right of publicity, he proposes a test for liability based on whether "a 'significant' or more than de minimis number of persons can reasonably identify the plaintiff from the total context of defendant's use."[189] McCarthy explains that, unlike trademark law, there need not be a particular number or percentage of people who actually identify the plaintiff from the defendant's use.[190] Rather, the number or percentage of people who can reasonably identify the plaintiff "goes to the extent of the remedy."

McCarthy suggests two types of "identification" the law could adopt for cases of right-of-publicity infringement.[191] He refers to the two types as "aided identification," when persons are able to identify the plaintiff from the defendant's work while simultaneously viewing the plaintiff, and "unaided identification," when "a reasonably typical

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186. *See* 1 MCCARTHY, *supra* note 177 at 289-90; *see also* Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 289 (2d Cir. 1981) (Mansfield, J., dissenting) ("The right of publicity . . . protects against the unauthorized appropriation of an individual's very *persona* which would result in unearned commercial gain to another." (emphasis added)); Norred v. Labren Enters. & Mgmt., No. 04-2690, 2005 U.S. Dist. LEXIS 36566, at *6 (E.D. La. Nov. 14, 2005) (explaining that the right of publicity "protect[s] . . . *persona*, which does not fall within the subject matter of copyright"); Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 260 (Sup. Ct. 1984) ("[The New York statute] is intended to protect the essence of the person, his or her identity or *persona* from being unwillingly or unknowingly misappropriated for the profit of another.").

187. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992).

188. *See* 1 MCCARTHY, *supra* note 177, at 291 (describing the identification issue in the right of publicity).

189. *Id.* at 146-47.

190. *Id.* at 141.

191. *Id.* at 143.

person [can] identify the plaintiff merely from seeing defendant's use alone."[192] But Congress should not adopt McCarthy's test wholesale.

McCarthy proposes that "[w]hen plaintiff is a 'noncelebrity' . . . the test of identifiability be that of 'aided identification.'"[193] This suggestion is problematic due to its circular logic. This proposal would require courts to determine the threshold question of whether the plaintiff is a "noncelebrity." The first test for identifiability should be unaided identification, and if the reasonable person cannot identify the plaintiff, then the plaintiff can offer an aided identification. Whether the plaintiff is identifiable based on either of the tests should determine liability, but the need for aided identification versus unaided identification should go to the scope of the remedy.

In adopting McCarthy's identification tests, it is important to note "who" must be able to identify the plaintiff in the defendant's work. This Note suggests the person who must be able to identify the plaintiff is the reasonable person familiar with the market in which the defendant allegedly uses the plaintiff's persona.[194] Adding the qualifier that the reasonable person must be "familiar with the market in which the defendant allegedly uses the plaintiff's persona" will help to control for the wide array of celebrity. The most famous professional wrestler may not be identifiable to a generic "reasonable person," but in the professional wrestling market a reasonable person would readily identify that individual.

There are a myriad of methods for proving a significant level of identifiability from a specific use. Some of McCarthy's suggestions include: (1) a simple comparison made in the courtroom between the defendant's use and the plaintiff's identifying features; (2) evidence of unsolicited comments to the plaintiff about the similarity; (3) survey evidence that consumers of defendant's product are able to identify the plaintiff from the defendant's use; and (4) "direct or circumstantial evidence of defendant's intent to trade upon the identity of plaintiff, from which identifiability can be presumed."[195] Survey evidence, for instance, is already in use in right-of-publicity cases to determine whether a plaintiff was identifiable in a defendant's video game.[196] The *Pesina* court, discussed in Part II.A, relied on a survey as proof of a lack of identification where the survey revealed only 6 percent of 306 users of the *Mortal Kombat* video game were able to identify the

192. *Id.*

193. *Id.* at 150.

194. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 23:91-23:103 (4th ed. 2012).

195. 1 MCCARTHY, *supra* note 177, at 147-49.

196. *See* Pesina v. Midway Mfg. Co., 948 F. Supp. 40, 42 (N.D. Ill. 1996).

plaintiff as the model for the character in the game.[197] Courts commonly rely upon surveys of this type in trademark cases,[198] and should provide a practical standard for evaluating identification.

In sum, a federal right-of-publicity statute should effectively protect an individual's persona. An individual's persona encompasses any aspect of the individual from which the individual can be identified in the entire context of the defendant's use. To determine if a plaintiff is identifiable from a specific use, the reasonable person familiar with the plaintiff's market must be able to identify the plaintiff either aided or unaided. Whether the identification was aided or unaided will go to the scope of the remedy, but the defendant will be liable if the reasonable person can identify the plaintiff even when aided.

3. Should There Be a Postmortem Federal Right of Publicity?

States do not agree on whether there is a postmortem right of publicity.[199] The heart of the disagreement lies in whether the state recognizes the right of publicity as a property right, which is generally considered to be descendible (able to be inherited by a descendant), or a personal right, which is not descendible.[200] Rather than getting tangled in the semantics of whether the right of publicity is a property right or a personal right, this Note suggests that a federal right of publicity should be descendible based on the rationale for recognizing the right of publicity.

A comparison with copyright law is informative of the rationale for declaring publicity rights descendible. The 1976 Copyright Act provides protection for the life of the author plus seventy years after the author's death.[201] The basic rationale for providing copyright protection is that authors need a certain amount of remuneration in order to invest their time and efforts in creative pursuits rather than

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197. *Id.*

198. *See generally* Zatarains, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786, 795 (5th Cir. 1983) ("The authorities are in agreement that survey evidence is the most direct and persuasive way of establishing secondary meaning.").

199. *Compare* OKLA. STAT. ANN. tit. 12, § 1448 (West 2012) (providing protection for up to one hundred years after the death of the individual), *with* UTAH CODE ANN. § 45-3-2 (West 2012) (providing no protection after the death of the individual).

200. *Compare* TENN. CODE ANN. §§ 47-25-1103, 1104 (West 2012) (describing the right of publicity as a property right in use of name, photograph or likeness assignable to one's heirs for a period of ten years after death), *with* NEW YORK CIVIL RIGHTS LAW §§ 50-51 (McKinney 2011) (describing the right of publicity as a personal right of privacy that does not survive the death of an individual).

201. 17 U.S.C. § 302 (2006).

other activities that may be more financially rewarding.[202] The rationale for providing the right of publicity is similar to that of copyright law, in that it rewards performance and thereby encourages effort and creativity. This rationale would be obfuscated if it did not extend postmortem to heirs of a celebrity. Justice Hill of the Georgia Supreme Court states:

> If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right of continued commercial use. Conversely, those who would profit from the fame of a celebrity after his or her death for their own benefit and without authorization have failed to establish their claim that they should be the beneficiaries of the celebrity's death. Finally, the trend since the early common law has been to recognize survivability, notwithstanding the legal problems which may thereby arise.[203]

If a postmortem right of publicity does not exist, celebrities may be deprived of income during their lifetime because they will not receive the benefit of some projects if advertisers choose to simply wait for the death of the celebrity and use their likeness without remuneration.

Moreover, a failure to recognize a postmortem right of publicity would lead to a windfall for advertisers and others who wish to profit from an individual's persona "in the form of freedom to use with impunity the [persona] of the deceased celebrity who may have worked his or her entire life to attain celebrity status."[204] Therefore, Congress should recognize a postmortem federal right of publicity.

4. How Long Should Federal Right-of-Publicity Protection Last?

Even among states that agree that the right of publicity is descendible, there is no agreement by states on how long the postmortem right-of-publicity protection should last.[205] This Note argues that right of publicity should mirror the protection offered by the Copyright Term Extension Act of 1998 (CTEA).[206]

When introducing the CTEA to Congress, Senator Orrin Hatch explained the main justifications for extending the term of copyright, including: (1) the insufficiency of the current term to provide a fair

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202. *See* LOREN & MILLER, *supra* note 63, at 342.

203. Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 705 (Ga. 1982).

204. Estate of Presley v. Russen, 513 F. Supp. 1339, 1355 (D.N.J. 1981) (quoting Lugosi v. Universal Pictures, 25 Cal. 3d 813, 846 (1979) (Bird, C.J., dissenting)).

205. *Compare* OKLA. STAT. ANN. tit. 12, § 1448 (West 2012) (providing protection for up to one hundred years after the death of the individual), *with* KY. REV. STAT. ANN. § 391.170 (West 2012) (protecting name and likeness of a person for fifty years after the person's death).

206. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

return for the authors and their heirs, and (2) the failure of the US copyright term to keep pace with rapid developments in communications media.[207] These justifications apply with equal force to the right of publicity.

First, consideration of demographic trends reveals increasing longevity and a trend toward rearing children later in life.[208] These trends motivated Congress to extend copyright protection from fifty years to seventy years after an author's death. The right of publicity should exist for the number of years commensurate with the average human lifespan. Thus, the right of publicity, like copyright protections, should last for at least seventy years. Second, unprecedented growth in technology, such as the explosion of social media, the increasingly realistic graphics of video games, and the ever-expanding pervasiveness of the Internet, have all led to drastic increases in the misappropriation of individuals' personas. Accordingly, the postmortem right of publicity should last for a term of seventy years in order to adequately incentivize individuals to create and invest in their personas.

B. A Student-Athlete Escrow Fund

Because student athletes cannot receive compensation and retain their amateur status,[209] the NCAA must consider other avenues to compensate these athletes for the use of their personas. For instance, one possible alternative would be for the NCAA to establish an escrow fund for student athletes from which they can collect royalties upon completion of their eligibility or graduation.[210] There is already precedent for such action among retired football players.[211]

In a 2007 class-action lawsuit brought by retired NFL players against the NFL Players Association (NFLPA), retired players alleged that the NFLPA's licensing agreements with companies like EA required exclusive dealing with the NFLPA, which unfairly interfered with the retired players' licensing opportunities.[212] The jury awarded

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207. *Senator Orrin Hatch's Introduction of the Copyright Term Extension Act of 1997*, 105th Cong. (1997) (statement of Sen. Orrin Hatch, Chairman, S. Judiciary Comm.), *available at* http://www.copyrightextension.com/page04.html.

208. *Id.*

209. *See* NCAA, *supra* note 3, at 12.1.2.

210. *See* Consolidated Amended Class Action Complaint ¶ 30, Keller v. Elec. Arts Inc., No. C 09-01967 CW, 2010 WL 908883 (N.D. Cal. Mar. 10, 2010).

211. *See* Adderley v. NFL Players Ass'n, No. C 07-00943 WHA, 2009 U.S. Dist. LEXIS 115741, at *4 (N.D. Cal. Nov. 23, 2009).

212. Parrish v. NFL Players Ass'n, 534 F. Supp. 2d 1081, 1087 (N.D. Cal. 2007), *motion granted sub nom. Adderley*, 2009 U.S. Dist. LEXIS 115741, at *8.

the class $28.1 million for breach of fiduciary duty.[213] The award consisted of $7.1 million in compensatory damages and $21 million in punitive damages.[214] The court certified the class as "[a]ll retired NFL players who executed a group licensing authorization form (GLA) with the NFLPA" between February of 2003 and February of 2007.[215] The GLA form stated that "the moneys generated by such licensing or retired player group rights will be divided between the player and an escrow account for all eligible NFLPA members."[216]

A general committee of the NCAA could administer the escrow fund.[217] The NCAA is involved in all of the licensing of universities and their student athletes. Accordingly, the NCAA would be in the best position to manage the escrow fund. It is unclear whether such a fund would violate Title IX, which makes it illegal for universities to discriminate based on sex.[218] The escrow fund would likely draw Title IX challenges if the money were collected solely from video-game companies because there are no video games featuring women's collegiate athletics. But the NCAA can avoid this challenge by collecting funds from other uses of female student-athlete likenesses, such as artwork.[219]

In addition to the discrepancies between male and female athletes, there would be concerns among the different divisions of college athletics. The NCAA divides athletics at different universities into divisions I, II, and III.[220] The divisional problems should pose a smaller hurdle than the potential Title IX challenges. For the purposes of athletics, the NCAA already treats the different divisions disparately.[221] For example, Division I schools can give eighty-five

213. *Adderley*, 2009 U.S. Dist. LEXIS 115741, at *4.

214. *Id.* at *4-5. "Defendants appealed and the case settled before decision for $26,250,000." *Id.* at *5.

215. *Id.* at *4.

216. *Id.*

217. *See Membership*, NAT'L COLLEGIATE ATHLETICS ASS'N, http://ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new (last visited Sept. 15, 2012).

218. Patsy Takemoto Mink Equal Opportunity in Education Act, 20 U.S.C. § 1681 (2006).

219. *See, e.g.*, Robert A. Tino, *Tennessee Lady Vols Print! Pat Summitt "In-TENN-Sity,"* ORANGE MOUNTAIN DESIGNS, http://www.shop.orangemountaindesign.com/product.sc?productId=205&categoryId=8 (last visited Sept. 12, 2012).

220. *See* NCAA, *supra* note 3; NCAA ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, 2011–12 NCAA DIVISION II MANUAL (2011) [hereinafter NCAA MANUAL II], *available at* http://www.ncaapublications.com/productdownloads/D212.pdf; NCAA ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, 2011–12 NCAA DIVISION III MANUAL (2011) [hereinafter NCAA MANUAL III], *available at* http://www.ncaapublications.com/productdownloads/D312.pdf.

221. *Compare* NCAA, *supra* note 3, at § 15.5.6.1 (permitting eighty-five athletics-based scholarships for football), *with* NCAA MANUAL II, *supra* note 221, at § 15.5.2.1.1 (permitting up to thirty-six athletics-based scholarships for football).

football scholarships,[222] Division II schools can only give thirty-six,[223] and Division III schools do not give any athletic scholarships.[224] Therefore, the discrepancies between the three divisions of college athletics would not likely pose a major obstacle to the creation of an escrow fund by the NCAA because disparate treatment already exists.

Had a fund like this existed when Samuel Keller or Ryan Hart were in college they would not have had to turn to the court system to address the misappropriation of their likenesses. Using the $7.1 million compensatory damages figure awarded to retired NFL players as a rough proxy, Keller and Hart would have received approximately $708–$2,832 each after four years in school from the use of their likenesses in the EA college football game alone.[225] While this fund would represent a drastic change in the landscape of college athletics, drastic changes have been made in other areas of college athletics in the last year,[226] and it is time that these changes account for the reality facing today's student athletes.

IV. CONCLUSION

Celebrity has become an integral part of our culture. In 2011, the total US box-office gross was over $10 billion, with over five studios making more than a billion dollars.[227] Likewise, college athletics has also become a billion-dollar industry.[228] Unfortunately, the law fails to protect college athletes the same way it protects other

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222. *See* NCAA MANUAL I, *supra* note 3, at § 15.5.6.1.

223. *See* NCAA MANUAL II, *supra* note 221, at § 15.5.2.1.1.

224. Lynn Oshaughnessy, *Why Athletes Have an Edge at Elite Colleges*, CBSNews.com (June 2, 2009, 3:00 AM), http://www.cbsnews.com/8301-505144_162-51307433/why-athletes-have-an-edge-at-elite-colleges.

225. There were 196 college football teams in the version of EA Sports *NCAA Football* while Keller and Hart were playing. Seventy-eight of those teams were Division II and 118 teams were Division I. This means that there were approximately 10,030 players in the game (assuming eighty-five players per team). And $7.1 million dollars divided evenly among all 10,030 players equals $708 for each player. The NFLPA case involved retired players who had signed the GLA form from 2003–2007. Accordingly, the compensatory damages will have spanned a four-year period, but this number would take into account the fact that some players only suffered damages for one, two, or three years. Therefore, the number in the solution represents a smaller number than college players would likely receive because the amount they would receive would be based on the number of years they appear in the game. If $708 is the baseline for one year, the potential amount a player could make might be as high as $2,832.

226. Dick Vitale, *Realignment Changes Landscape*, ESPN (Aug. 27, 2012, 2:29 PM), http://espn.go.com/espn/dickvitale/story/_/id/8306520/conference-realignment-shifts-balance-power-college-sports ("[Twenty-four] different schools are changing conference affiliation for the 2012–13 season.").

227. *Domestic Theatrical Market Summary for 2011*, THE NUMBERS, http://www.the-numbers.com/market/2011.php (last visited Feb. 6, 2012).

228. *See supra* note 1 and accompanying text.

celebrities. Since the right of publicity was first recognized in 1953, it has evolved differently across the states. States like California, where the majority of television and film celebrities live, have developed a more robust right-of-publicity law. But student athletes reside in every state. They face the same forms of infringement on their rights of publicity but are treated inequitably based on their states of residence. Indeed, the current state-law system is inadequate and fails to represent the interests of student athletes. Therefore, student athletes need a federal system and an escrow fund to provide consistent, equitable protection.

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