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Doppelganger Dilemma

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Doppelganger Dilemma

I. Introduction

A shadowy figure slowly approaches the plate. In his dust covered hands he grips a bat made of wood. As his skin rubs against the wood it slightly splinters with each tightening grasp. He kicks up dirt from his heels as he walks towards the place where he is king; each step thundering as if there is more to him than any other mere man. His opponent trembles before him with a slight, but noticeable quiver in his lip as he ponders what pitch will give him the best chance for surviving this encounter; although deep inside he knows that none will suffice.

When he reaches the plate, he knocks the sand off his cleats with the tip of his bat almost as if to show that he is shrugging off this encounter as another insignificant moment in his conquest of the masses that try to rise up against him. If that was not enough, he proceeds to tap the bat head on each corner of the plate, establishing his dominance over that territory in the face of his enemy.

He digs his feet into the sand, rooting himself to the ground as an immovable mountain; a force to be reckoned with. The fading sunlight glistens against the sweat collected above his brow. His fiery breath crystalizes as it hits the cold air in front of his mouth. In that moment, silence descends around him. Time seems to stand still as he stares down the pitcher, glaring into the very soul of the man before him, knowing that he has already won. He extends his arm toward center field, marking the territory where he will strike and solidify himself as a legend forever. No one can do anything to stop what has already begun to happen. His opponent knows at this point he is only a pawn, about to be used to write one of the greatest stories in sports. The

wind up follows and the bat swings, and with a crack that sounds like thunder striking the hearts of everyone in the stadium, history was written.

For most people who know anything about the game of baseball, the scenario described above should be recognizable. The time of day may be off, and the imagery romanticized, but there are certain elements that stick out that make it clear who is being referred to. The baseball bat, the plate, the pitcher, the show of dominance over the game, and finally the gesture towards center field; these all come together to show the image of Babe Ruth. This is one of the most recognizable moments in the history of baseball but more so, the history of sports. People don't always know that the Babe played for both the Red Sox and the Yankees, or that he was a pitcher, as well as one of the greatest sluggers the game has ever seen. However, most everyone knows this moment that lives on forever; when he called his shot and made it.

Without any reference to his name, team, or even era when he played, it is easy to see that this scenario references the Bambino. This moment is part of his legacy and lives on with other things like the name Sultan of Swat, which is one of only few nicknames he accumulated during his career. It is part of his image and regardless of who may try to recreate this moment; it will always be identifiable with the Home Run King. It lives on with him forever.

While this re-creation evokes the image of Ruth, does it also have some deeper meaning? Is there something so special about this image as it relates to the Babe that it should get some special treatment? Intellectual property lawyers would probably say yes, that this portrayal is part of Babe Ruth's image, and therefore should be held under his control to be marketed and used as he pleases because of the Right of Publicity.

Wait just a second: This is the great Babe; one of the greatest Yankees ever; the bane of every Red Sox fans' existence up until the turn of the century; a man whose name is synonymous

with the game of baseball; and he can potentially prevent others from using his image? This cannot be the case can it? Bud Selig in all his greatness could never let this happen! However, the fact of the matter is that it very much can happen and does happen with athletes and superstars everywhere.

This is possible because of the Right of Publicity which is “[t]he right to control the use of one's own name, picture, or likeness and to prevent another from using it for commercial benefit without one's consent.”¹ So in other words, our friend Babe may have a right over the very image mentioned above. That right may not only be used for his commercial benefit but can also exclude people from commercially profiting from it unless he gives his permission. Good thing this paper is not being written for monetary gain or Babe (or Babe’s representatives since he has passed on to the field of dreams in the sky) might come knocking with his Louisville Slugger.

This may seem unfair that such an important image from the history of baseball and Americana could potentially be restricted by the very man who made it famous. However, there are two sides to every coin. Babe, although gifted with a natural talent for the game, worked hard to become the ball player he was. Would it not be unfair to him if he could not reap the benefits for the hard work he has sown? As will be discussed below, most of the time a person can reap those benefits like Babe, but as fair warning, they also come with certain caveats.

As a general observation, Right of Publicity issues normally arise with people who are famous to moderately famous. The logical reason is that when a Right of Publicity is exploited, there is usually some kind of commercial appeal that people will want to exploit. Despite the fact that the title of best rock-paper-scissors dueler on your block may earn you local fame, Nike probably won’t feature the image of your triumph over the town Girl Scout troop as the backdrop

to their latest sneaker release. Therefore, the Right of Publicity normally will surface with athletes and other celebrities. In terms of athletes this may mean a number of things. As seen above it can be anything dealing with the athlete's name, picture, or likeness. This means if an athlete has a distinct persona, then it could be protectable. It also means that the athlete's name is off limits unless he gives permission. In addition to the athlete's likeness being off limits, he can also protect against exploitation of portrayals that merely resemble him.

Although it seems like this would be an air tight right, for some it is not. The best example of this is with college athletes like Sam Keller, who is currently battling in court for his Right of Publicity against the very institution that is supposed to protect him; and the exploitative company with which the institution conducts business.² Even though college sports (especially football which Keller plays) can be seen on a national stage, people like Keller can have their Right of Publicity exploited every year.

On any given weekend in the fall, it is possible to watch college and professional football on television. Of the two groups, professional athletes are currently the only ones enjoying the Right of Publicity out of the two mentioned above. This is not fair to college athletes everywhere. College athletes deserve the same protection of their Right of Publicity that professional athletes receive. Evidence for this will be given below, specifically as it relates to Sam Keller's case. However, this is something that can apply to all student athletes who currently are denied their Rights of Publicity.

II. Right of Publicity: History and Development

Before discussing Keller and how the Right of Publicity specifically relates to his case, it is important to discuss in more depth what the Right of Publicity is, how it came to be, and where it is now. As defined by Illinois Statute (where the NCAA is located), the Right of

Publicity is “(t)he right to control and to choose whether and how to use an individual's identity for commercial purposes....”³ As a secondary source Black’s Law Dictionary also says it is “[t]he right to control the use of one's own name, picture, or likeness and to prevent another from using it for commercial benefit without one's consent.”⁴ While this is very straight forward and to the point, it is only a few lines of definitions that attempt to compact mountains of law into a catch all phrase. Therefore, to get a big picture idea of the Right of Publicity this paper will examine the law⁵ in numerous forms so that the discussion of Keller’s case will have a stronger footing to stand upon.

One of the earliest common law births of the Right of Publicity came from a case in 1953 where the court distinguished it from the right of privacy.⁶ Specifically the court said that,

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), 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, and that such a grant may validly be made ‘in gross,’ i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth. This right might be called a ‘right of publicity.’ For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.⁷

This was a landmark case because it introduced the Right of Publicity as something separate from the right of privacy. Before this, the right of privacy was recognized as the overarching right. This is evidenced further in the case above because the defendant specifically tried to argue that the plaintiff’s right of privacy did not protect against the violation that the defendant had committed.⁸ Much to the defendant’s surprise, the court introduced the Right of Publicity as an

independent idea which protected the plaintiff from the defendant's actions. Needless to say, the defendant lost.⁹

This case was not only important in establishing the Right of Publicity as a viable right that someone or something (a company) could assert, but also this case conceived what the right actually was. As seen in the above quotations, this case discussed pictures, or in other words, images. Not only did it mention that the Right of Publicity concerns the protection of an image but it also introduced the idea that a person could profit from that image. More specifically, it showed that a person could profit from said image, by giving permission to someone to use that image, and in turn collecting monetary compensation for that right. In essence, we find through this case that a person can not only protect their image from being used for profit without their permission, but can also profit from their image by giving permission for its use. While not from the same jurisdiction and occurring later in time, the California Civil Code gives a larger idea of how a Right of Publicity protects against monetary or commercial exploitation. The code reads,

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

(e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).¹⁰

This is an important note for the overall understanding of the Right of Publicity. The use of someone's image must be substantially connected with the present commercial entity that consent would be required from the right holder. Like we see in Haelan quoted above, unless

there is some exclusion, there can be no profit; and in essence the Right of Publicity then would not be acting out its purpose.

As the case law developed, another important case was decided that would also have great impact on the Right of Publicity. It is only logical that this case would have a great impact because it dealt with a man who referred to and still refers to himself as “The Greatest”.¹¹ This case involved a nude drawing of a man in a boxing ring that bore a very stark resemblance to Muhammad Ali.¹² The court said that “[t]he cheekbones, broad nose and wideset brown eyes, together with the distinctive smile and close cropped black hair are recognizable as the features of the plaintiff, one of the most widely known athletes of our time.”¹³ The drawing is also “depicted ... on a stool in the corner of a boxing ring with both hands taped and outstretched resting on the ropes on either side.”¹⁴ Furthermore, “the identification of the individual as Ali is further implied by an accompanying verse which refers to the figure as “the Greatest””.¹⁵

Without acquiring Ali’s consent, Playgirl this drawing in its magazine and depicted the man to look and seem as much like Muhammad Ali while still not saying it was Muhammad Ali. This may seem like a clever idea, but because of the Right of Publicity it would prove to be not too crafty after all.

Part of what made this use so problematic was that it was used for a commercial profit, which, as we observed in Haelan, was not allowed unless permission was given. The court specifically addressed this by referencing Section 51 of the New York Civil Rights Law which read,

Any person whose name, portrait or picture is used within this state for . . . the purposes of trade without the written consent (of that person) may maintain an equitable action . . . against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injury sustained by reason of such use . . .¹⁶

After listing the statute, the court states that, “[i]t is ... clear that the picture has been used for the “purpose of trade” within the meaning of s 51.”¹⁷ Furthermore, the court clarified that, “[i]n this regard it is the established law of New York that the unauthorized use of an individual's picture is not for a “trade purpose”, and thus not violative of s 51, if it is “in connection with an item of news or one that is newsworthy.”¹⁸

In making these two points, the judges do a couple important things. First they establish that Playgirl was using the depiction for the “purpose of trade” or commercial benefit. Second they discuss the fact that “trade purpose” does not violate the law if it is newsworthy, which introduces a First Amendment element. This is of course very important when talking about someone like Muhammad Ali because he is the greatest boxer of all time and also a polarizing political figure, which means that there will undoubtedly be news reports about him. If he was able to restrict or profit off of every news report that dealt with his image, then he would not only be very rich, but there would also be a great disservice committed against the public who deserve to have news as part of their constitutional rights.

After discussing these two points, the judges decide that, “[i]n the instant case there is no such informational or newsworthy dimension to defendants' unauthorized use of Ali's likeness. Instead, the picture is a dramatization, an illustration falling somewhere between representational art and cartoon, and is accompanied by a plainly fictional and allegedly libellous bit of doggerel.”¹⁹ They further say that “[t]he nude portrait was clearly included in the magazine solely “for purposes of trade e. g., merely to attract attention.”²⁰ The court obviated the newsworthy element and found that Playgirl was in the wrong by merely trying to use Ali's likeness for the “purposes of trade”.²¹

In discussing the law that it used to reach this conclusion, the court stated that,

The distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or “persona.” As held by this Circuit, New York State recognizes that, independent of his s 51 rights, “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.” This common law publicity right is analogous to a commercial entity's right to profit from the “goodwill” it has built up in its name, and the interest which underlies protecting the right of publicity “is the straightforward one of preventing unjust enrichment by the theft of good will.”²²

By using the standard from Haelan, the judges expand upon their original statement of the Right of Publicity by including the idea of “goodwill built up in its name.”²³ The goodwill referred to was mentioned in a case that took place five years before Ali’s case where the court stated that “[t]he ‘right of publicity’ is somewhat akin to the exclusive right of a commercial enterprise to the benefits to be derived from the goodwill and secondary meaning that it has managed to build up in its name.”²⁴ This goodwill idea basically referred to the reputation and good name that someone can build up as part of his image both because he is well known and has other attractive qualities. Therefore, not only was the Ali case a problem because Playgirl used his likeness, but also because it used that likeness in an immoral way by displaying him nude. The reason this is an issue is because the right gives him control over how his image is used and portrayed, so this nude depiction may hurt the reputation and marketability that Ali has fostered.

As many people know, Muhammad Ali is Muslim, and therefore this type of sexual and revealing photo is a violation of his faith and the image that he has cultivated. It would be questionable for the man who would not go to war because of his moral and religious principles to subsequently endorse an immoral depiction of himself nude for a pornographic magazine. Therefore, his reputation was at risk and as part of the protection via his Right of Publicity, he was able to defend against misappropriations of the goodwill that he had built.

This right is also shown in another case where the court stated a person “is free to protect himself from the exploitation of his name and likeness against all the world.”²⁵ As a result, Ali was victorious in this case and was granted an injunction against Playgirl from “distributing and disseminating any copies” of this particular magazine.²⁶ The Ali case gave the Right of Publicity another strong building block to add to its foundation in defending against the exploitation of a person’s image and likeness.

In keeping in line with the ideas stated above, the Sixth Circuit stated that, “[t]he right ... has developed to protect the commercial interest of celebrities ... identities. The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from ... commercial exploitation of that identity.”²⁷ This same court further stated, “[i]f the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his ‘name or likeness’ is used.”²⁸ By this statement, the court meant that a person’s name or likeness does not need to be the thing that is being exploited for an invasion to be present. This means that something that relates to that person, or is identifiable with that person, can be held to be an invasion of the Right of Publicity if it is commercially exploited. With this opinion, the Right of Publicity is once again expanded beyond only image, likeness, and name, but also to include a more general category of identity. While the first three are very specific to the person as a singular individual, identity expands the reach of the Right of Publicity to things that are attributable to the image, likeness and name of the person. This idea will be very important when discussing Sam Keller’s case and is expanded upon in the following Ninth Circuit opinion.

In Motschenbacher, “defendants, R. J. Reynolds Tobacco Company and William Esty Company, produced and caused to be televised a commercial which utilized a ‘stock’ color

photograph depicting several racing cars on a racetrack.”²⁹ The “[p]laintiff’s car appears in the foreground, and although plaintiff is the driver, his facial features are not visible.”³⁰ In discussing the general facts as they pertain to the Right of Publicity dispute, the court outlined that,

In producing the commercial, defendants altered the photograph: they changed the numbers on all racing cars depicted, transforming plaintiff’s number ‘11’ into ‘71’; they ‘attached’ a wing-like device known as a ‘spoiler’ to plaintiff’s car; they added the word ‘Winston,’ the name of their product, to that spoiler and removed advertisements for other products from the spoilers of other cars. However, they made no other changes, and the white pinstriping, the oval medallion, and the red color of plaintiff’s car were retained. They then made a motion picture from the altered photograph, adding a series of comic strip-type ‘balloons’ containing written messages of an advertising nature; one such balloon message, appearing to emanate from plaintiff, was: ‘Did you know that Winston tastes good, like a cigarette should?’ They also added a sound track consisting in part of voices coordinated with, and echoing, the written messages. The commercial was subsequently broadcast nationally on network television and in color. Several of plaintiff’s affiants who had seen the commercial on television had immediately recognized plaintiff’s car and had inferred that it was sponsored by Winston cigarettes.... [T]hese markings were not only peculiar to the plaintiff’s cars but they caused some persons to think the car in question was plaintiff’s and to infer that the person driving the car was the plaintiff.³¹

As seen in the facts from this case, the defendant’s did not use the plaintiff himself, but instead focused their attention to something that was closely related to the plaintiff that could put forth his image without actually using his image. However, the court viewed these things as identifiable with the plaintiff and therefore violative of his Right of Publicity. Due to the designs and sponsorships that race car drivers display on their cars, they are easily recognizable to fans only by the car itself. It is not necessary for the image of the person to be used because the cars are so attached and identifiable with the person that even without their physical presence, people know who is being referenced. The defendants attempted to use a case in which another identifiable car was used for commercial purposes. However, the court dismissed that argument because that vehicle was indistinguishable, “[b]ut in this case, the car under consideration clearly has a driver and displays several uniquely distinguishing features.”³²

This is a very important decision because, as mentioned above, it greatly expanded the Right of Publicity. Individuals could now also be protected from exploitation of portrayals that were identifiable with their image. These depictions could easily include jerseys, numbers, specific vehicles, and other things that complete the image of the person. This is a key point for the discussion of Keller's case which will be analyzed later on.

While Muhammad Ali's case mostly focused on likeness, there was also a mention of a name that could be attributed to him which helped bolster the fact that the drawing was a reference to the boxer. The term "the greatest" was used in connection with the picture. This was an issue because it was a common nickname used to describe Ali. While this reference to a nickname was accompanied by an image, use the name by itself is also sufficient to violate the Right of Publicity. We see this in the case of Elroy Hirsh.

In Hirsch v. S.C. Johnson & Son, Inc., . . ., the court held that use by defendant of the name "Crazylegs" on a shaving gel for women violated plaintiff's right of publicity. Plaintiff, Elroy Hirsch, a famous football player, had been known by this nickname. The court said: The fact that the name, "Crazylegs," used by Johnson, was a nickname rather than Hirsch's actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person. In the instant case, it is not disputed at this juncture of the case that the nickname identified the plaintiff Hirsch. It is argued that there were others who were known by the same name. This, however, does not vitiate the existence of a cause of action.³³

"Crazylegs" was so identifiable with Elroy Hirsch that its use without permission violated his Right of Publicity. Similar to the race car in Motschenbacher, the name was identifiable with the person to whom it belonged and therefore it could be seen that the person's image was being exploited for commercial gain; and as a result, their Right of Publicity was being violated. As another case similarly posits,

A name is commercially valuable as an endorsement of a product or for use for financial gain only because the public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality. To hold that such publicity

destroys a right to sue for appropriation of a name or likeness would negate any and all causes of action, for only by disclosure and public acceptance does the name of a celebrity have any value at all to make its unauthorized use enjoinable.³⁴

This is just another feather in the cap of the identity element of the Right of Publicity. This is important because this idea not only applies to tangible things, but also to intangible, yet identifiable references as well.

The last major element to consider when examining the law dealing with the Right of Publicity is its intermingling with the First Amendment. This can take two specific forms. The first deals with the press element of the First Amendment while the second deals with the freedom of speech element. Both will be discussed in detail below, but as a brief introduction, these matters predominately arise when dealing with newsworthy information or artistic expression respectively.

When dealing with the press element, there is generally some type of information involved. For example, “[i]n C.B.C. Distribution and Marketing, Inc., the court relied heavily upon the Supreme Court’s decision in Zacchini in balancing the public’s interest in sports information against the players’ Right of Publicity interests.”³⁵ Furthermore, “[i]n Zacchini the Supreme Court found that ‘no social purpose is served by having the defendant get some free aspect of the plaintiff that would have market value and for which he would normally pay.’”³⁶ As such,

The Eighth Circuit in C.B.C. Distribution and Marketing, Inc., viewed player records and statistics as information that was already available to those who wanted it because it was published throughout various media outlets, free of charge. Thus, public’s interest in the information used on the defendant’s website outweighed the plaintiffs’ economic interest in that information.³⁷

In C.B.C., a company affiliated with Major League Baseball excluded C.B.C. from using statistical information in its fantasy games without compensating the Major League players

first.³⁸ As seen above, the court stated that because this information was already available in the public domain, the public's interest outweighed the plaintiff's Right of Publicity, and therefore the MLB players' economic interests. The court explained this in detail when it declared,

For the reasons more fully set forth above, the court finds that the undisputed facts establish that the players do not have a right of publicity in their names and playing records as used in CBC's fantasy games and that CBC has not violated the players' claimed right of publicity. The court further finds, alternatively, that even if the players have a claimed right of publicity, the First Amendment takes precedence over such a right. The court further finds that the undisputed facts establish that the names and playing records of Major League baseball players as used in CBC's fantasy games are not copyrightable and, therefore, federal copyright law does not preempt the players' claimed right of publicity. Additionally, the court finds that the no-challenge provision of the 2002 Agreement between CBC and the Players' Association and the provision of this Agreement which prohibits CBC from using players' names and playing records after the expiration of the Agreement are unenforceable based on public policy considerations. The court finds, therefore, that declaratory judgment should issue in CBC's favor. As such, the court will order the Players' Association and Advanced Media to refrain from interfering with CBC's fantasy games in the manner proscribed by this court's decision.³⁹

Here, the court gave First Amendment protection to the information because it was already public and therefore could fit into the press element of the First Amendment. The court essentially reasoned it would go against public policy to charge for something already in the public domain and also considered that because the players were already so handsomely compensated, the denial of their Right of Publicity here would not be as detrimental to them as it would if they denied the public free access to the information.⁴⁰ This is a different outcome than Zacchini, where “the Supreme Court found that ‘no social purpose is served by having the defendant get some free aspect of the plaintiff that would have market value and for which he would normally pay.’”⁴¹ In this case a man performed an act where he shot himself out of a cannon, and a local news station filmed the act while claiming it as newsworthy and therefore protected by the First Amendment.⁴² However, this was how Zacchini made money, so to air his

whole act on the news would be detrimental to his livelihood. Therefore, the court ruled in favor of his Right of Publicity over the First Amendment.⁴³

When examining the press element of the First Amendment, a balancing test that can be found in both C.B.C and Zacchini. When using this test, courts will measure whether the greater benefit lies with the Right of Publicity or the First Amendment; and then base its decision on the outcome of that test.

The freedom of speech element of the First Amendment deals predominately with some form of artistic expression when related to the right of publicity. The idea of artistic expression and the Right of Publicity was very evident in Comedy III Productions, Inc. v. Gary Saderup, Inc. where the court stated, "... when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection... but it is also less likely to interfere with the economic interest protected by the right of publicity.." ⁴⁴ In order for a work to be protected by the First Amendment, and therefore to obviate the Right of Publicity, the work must be sufficiently transformative. It must be done in such a way that it becomes something different because if it is merely a reproduction of a person's image or likeness, then there is nothing artistic or transformative about it. It will then fall under the scrutiny of the Right of Publicity.

An example of a transformative work can be found in a case dealing with Tiger Woods. In that case, Tiger tried to argue that the artist's work was not transformative and, therefore, was not "worthy of First Amendment protection". ⁴⁵ In discussing its decision the court opined that,

Finally, applying the transformative effects test adopted by the Supreme Court of California in *Comedy III*, we find that Rush's work does contain significant transformative elements which make it especially worthy of First Amendment protection and also less likely to interfere with the economic interest protected by Woods' right of publicity. Unlike the unadorned, nearly photographic reproduction of the faces of The Three Stooges in *Comedy III*, Rush's work does not capitalize solely on a literal depiction of Woods. Rather, Rush's work consists of a collage of images in addition to Woods's image which are combined to describe, in artistic form, a historic

event in sports history and to convey a message about the significance of Woods's achievement in that event. Because Rush's work has substantial transformative elements, it is entitled to the full protection of the First Amendment. In this case, we find that Woods's right of publicity must yield to the First Amendment.⁴⁶

Due to all the extra elements that the artist added to the portrayal of Tiger, the court decided that the depiction was sufficiently transformative to be protected by the First Amendment because it was not just a mere reproduction of Woods, but instead a new and artistic image.

Lastly, the case of the Winter brothers presents further insight into the parameters of First Amendment protection over the Right of Publicity. The court wrote,

We made two important cautionary observations. First, “the right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals. Once the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope. The necessary implication of this observation is that the right of publicity is essentially an economic right. What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of the ‘name, voice, signature, photograph, or likeness’ of the celebrity....⁴⁷

The above is very important because it essentially shows that when a person places themselves into the public spotlight, there is no restricting what someone can do with your image. Due to this fact the the court points out that the Right of Publicity is only used to prevent people from gaining some economic benefit, not for protecting your image or censoring it like the right of privacy may be used to do.

In addition, the court, like the court in ETW, presented an example of a transformative work. They wrote,

Although the fictional characters Johnny and Edgar Autumn are less-than-subtle evocations of Johnny and Edgar Winter, the books do not depict plaintiffs literally. Instead, plaintiffs are merely part of the raw materials from which the comic books were synthesized. To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature. And the Autumn brothers are but cartoon characters—half-human and half-worm—in a larger story, which

is itself quite expressive. The characters and their portrayals do not greatly threaten plaintiffs' right of publicity.⁴⁸

Whereas Tiger was still Tiger, but with an artistic portrayal around him, the Winter brothers were literally transformed into something not even totally human. Despite the fact that the brothers were recognizable, this was certainly transformative enough to pass First Amendment muster.

Unlike the press element of the First Amendment, the freedom of speech element is examined through less of a balancing test and more of a side-by-side comparison between the actual person and the artistic creation. If the image is sufficiently transformative to go beyond just being a mere recreation of the person into something totally new, then courts will find that it can be held under First Amendment protection instead of the scrutiny of the Right of Publicity.

Before entering the next section of the paper, there are two additional thoughts about the Right of Publicity that should be mentioned. The two following points are derived from a Ninth Circuit opinion which is in the same venue where Keller v. Electronics Arts, Inc., is being heard. The first is that "...a common law cause of action for appropriation of name or likeness may be pleaded by alleging "(1) the defendant's use of plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."⁴⁹ Each of these elements must be met in order to plead a Right of Publicity violation. Depending on the situation these elements can be difficult to accomplish. For example, if the injury is difficult to quantify, it may not be feasible to satisfy the fourth prong. Due to the vast application of the Right of Publicity, different situations will present different challenges as they arise.

The second thought is that, "It is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so...."⁵⁰ While the first

point considered how to plead a Right of Publicity, this second one deals with how to identify one. Essentially the analysis should not be whether the defendant drew a picture that was not transformative or whether the defendant did something that was identifiable with the plaintiff, but instead should be about whether the defendant, in whatever manner, deprived and/or exploited the plaintiff's Right of Publicity for monetary gain or some other purpose.

Both of these thoughts are essential to any plaintiff's Right of Publicity case. The plaintiff must plead the case properly or no claim will lie. The plaintiff must also identify the violation properly or he will misdirect his efforts and not properly address the issue.

III. College Athletes' Right of Publicity

Despite the exhaustive analysis of the law concerning the Right of Publicity, the focus of this material is still based on that right as it relates to college athletes. To understand why the Right of Publicity should be realized by college athletes and why it is not, it is important to examine the relationship that college athletes have with the NCAA. The NCAA lists as its Basic Purpose,

“The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”⁵¹

The NCAA stands by the principle of amateurism which states that, “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from

exploitation by professional and commercial enterprises.”⁵² The NCAA seeks to orchestrate college athletics and also protect its athletes from exploitation. It acts as an overseer, appearing to care for its flock of athletes and ensuring their protection as they play amateur sports as part of the educational program, while keeping college and professional athletics separate.

Each year, as per the bylaws, an active member shall administer annually, on a form prescribed by the Legislative Council, a signed statement for each student-athlete that provides information prescribed in Bylaws 14.1.3 and 30.12.⁵³ Section 12.01.1 states that only an amateur student athlete is eligible for intercollegiate athletics participation in a particular sport.⁵⁴ Section 12.1.2 on Amateur Status states that:

An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received; (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations; (e) Competes on any professional athletics team per Bylaw 12.02.4, even if no pay or remuneration for expenses was received; ... (f) After initial full-time collegiate enrollment, enters into a professional draft ...or ... (g) Enters into an agreement with an agent.⁵⁵

Furthermore, 14.1.3.1 provides that every year each student must sign,

... a statement in a form prescribed by the Legislative Council in which the student-athlete submits information related to eligibility, recruitment, financial aid, amateur status, previous positive drug tests administered by any other athletics organization and involvement in organized gambling activities related to intercollegiate or professional athletics competition under the Association’s governing legislation. Failure to complete and sign the statement shall result in the student-athlete’s ineligibility for participation in all intercollegiate competition.⁵⁶

Specifically the student athletes have to sign form 08-3a in which they:

1.confirm their eligibility,

2. disclose information relating to health and education status,
3. affirm they are amateurs,
4. authorize the NCAA or third party on behalf of NCAA to use their name and picture to promote NCAA championships, events, activities, or programs,
5. Discuss drug tests,
6. Discuss if they are a transfer student.
7. And if an incoming freshman, affirm they have a valid ACT or SAT score.⁵⁷

Lastly, in section 12.5 concerning promotional activities, specifically the 12.5.1.1 introductory paragraph and paragraph h, the NCAA provides that,

A member institution or recognized entity thereof (e.g., fraternity, sorority or student government organization), a member conference or a noninstitutional charitable, educational or nonprofit agency may use a student-athlete's name, picture or appearance to support its charitable or educational activities or to support activities considered incidental to the student-athlete's participation in intercollegiate athletics, provided the following conditions are met:...

(h) Any commercial items with names, likenesses or pictures of multiple student-athletes (other than highlight films or media guides per Bylaw 12.5.1.7) may be sold only at the member institution at which the student-athletes are enrolled, institutionally controlled (owned and operated) outlets or outlets controlled by the charitable or educational organization (e.g., location of the charitable or educational organization, site of charitable event during the event). Items that include an individual student-athlete's name, picture or likeness (e.g., name on jersey, name or likeness on a bobble-head doll), other than informational items (e.g., media guide, schedule cards, institutional publications), may not be sold; and⁵⁸

It is evident from the information concerning college athletes and the NCAA regulations that the relationship between athletes and the NCAA is governed by a great many rules. In fact, these are only some of the more pertinent ones, but the actual manual is over 400 pages long.⁵⁹ As shown above, the NCAA owes a duty to its student athletes to maintain college athletics and protect

their athletes from commercial exploitation, while instead promoting commercial gain via student athlete likenesses, names, and pictures only for charitable purposes and member institutions. In return, the student athlete is to perform at a high level of integrity by keeping their academic record up to par, staying away from all types drugs that are prohibited from use, and maintaining their amateur status by not receiving any unauthorized benefit for playing their sport. While this sounds great in theory, as will be examined below, it is far from accomplished in practice.

IV. Athletes' Right of Publicity

As noted earlier, for an athlete like Keller to plead a Right of Publicity claim against Electronic Arts (EA), the Collegiate Licensing Company (CLC), and the NCAA, he must establish that, ““(1) the defendant's use of plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.””⁶⁰ In addition to this he must recognize that, “[i]t is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so....”⁶¹ Before discussing whether Keller's Right of Publicity has been violated, it is important to see if he even has a Right of Publicity. Keller was a quarterback for Arizona State and then transferred to Nebraska to play the same position.⁶² He was playing Division 1 football on a national stage. He had an identifiable jersey and specific jersey number assigned to him. Furthermore, as evidenced by the very case itself, he is in a video game that is sold around the country. From this information alone, it is enough to say that he has big enough celebrity status to have a Right of Publicity.

Since he has a Right of Publicity, the next question is, can he plead it successfully? To

examine the four prong test listed above, the facts surrounding his claim must be stated. The facts are as follows,

Keller wore number 9 on his jersey at Arizona State. The virtual player who wears number 9 for Arizona State in NCAA Football 2005 has the same height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, and facial features as Sam Keller... Upon his arrival at Nebraska, Keller wore number 5, which he kept throughout 2006. He continued to use number 5 during the spring game in 2007, but later, shortly before playing in his first game at Nebraska in fall 2007, Keller switched to number 9.... Virtual player number 5 has the same height, weight, skin tone, home state, handedness, and facial features as Sam Keller. Virtual player number 5 is also the starting quarterback for the University of Nebraska. Remarkably, the virtual player also wears a dark visor, which Keller wore for the first time at Nebraska....⁶³

In addition to this,

The NCAA has a duty to NCAA athletes to honor its own rules prohibiting and contractual obligations relating to the use of student likenesses and pictures. CLC is likewise contractually obligated to honor NCAA prohibitions on the use of student likenesses. Specifically, the licensing agreements between the NCAA and CLC and between EA and CLC explicitly prohibit the use of NCAA athlete names and/or likenesses in NCAA branded videogames. Under the NCAA's licensing program, the NCAA and its member institutions, through CLC, are required to approve every EA videogame produced pursuant to the license before its release. Ostensibly NCAA athletes are the intended beneficiaries of the NCAA likeness prohibitions and the contractual provisions that incorporate them in contracts between and among CLC, NCAA and EA. Keller...never consented to the use of his name or likeness in any Electronic Arts product.⁶⁴

When viewing this information in light of the four prong test, it is evident that the defendant used the plaintiff's identity. The character in the game had the same likeness as Keller and followed the same changes from each school and each feature. If that was not enough proof, after purchasing the game, the actual roster can be downloaded by the consumer so that the players' names show up; but further, "Brad Nessler, one of the game commentators, admitted that NCAA players' names are pre-recorded into the games. Nessler confesses, "[w]e add player's names, although I know they aren't supposed to."⁶⁵ This shows that EA and the NCAA

premeditatedly put the players' identities in the game even though they were not supposed to. Keller can undoubtedly satisfy the first prong in the Right of Publicity claim.

The second prong deals with the defendant receiving some commercial benefit from the use of plaintiff's image. Since the game is a nationally sold video game and EA and the NCAA profit from sales of the game that improperly contain Keller's likeness, it can easily be said that through the appropriation of Keller's likeness, EA and NCAA commercially benefitted.

The third prong states that there has to be a lack of consent. As seen above, Keller never consented to have his likeness used by EA. Some might say, well didn't Keller sign form 08-3a that was mentioned above which said that he authorizes the NCAA or third party on behalf of NCAA to use your name and picture to promote NCAA championships, events, activities, or programs....?⁶⁶ This would be true, except,

EA is not a third party acting on behalf of the NCAA, as contemplated by section IV of the contract. Nor is Electronic Arts using Plaintiffs' or class members' names, pictures, or likenesses to generally promote an NCAA championship or other NCAA event, activity or program as contemplated by section IV of the contract. Instead, EA is using Right of Publicity Plaintiffs' and class members' names, pictures, and likenesses for commercial purpose and without consent.⁶⁷

In addition to this fact, the NCAA violated its duties to Keller because under section 12.5 dealing with promotional activities, specifically the 12.5.1.1 introductory paragraph and paragraph h, it states that,

A member institution or recognized entity thereof (e.g., fraternity, sorority or student government organization), a member conference or a noninstitutional charitable, educational or nonprofit agency may use a student-athlete's name, picture or appearance to support its charitable or educational activities or to support activities considered incidental to the student-athlete's participation in intercollegiate athletics, provided the following conditions are met:...

(h) Any commercial items with names, likenesses or pictures of multiple student-athletes (other than highlight films or media guides per Bylaw 12.5.1.7) may be sold

only at the member institution at which the student-athletes are enrolled, institutionally controlled (owned and operated) outlets or outlets controlled by the charitable or educational organization (e.g., location of the charitable or educational organization, site of charitable event during the event). Items that include an individual student-athlete's name, picture or likeness (e.g., name on jersey, name or likeness on a bobble-head doll), other than informational items (e.g., media guide, schedule cards, institutional publications), may not be sold; and⁶⁸

As such, not only was EA not permitted to use Keller's likeness under form 08-3a, but NCAA actually violated its duties to Keller by allowing EA to use his likeness in a commercial video game. EA is not a member institution where student athletes are enrolled, it is not an institutionally controlled outlet, or charitable organization, or educational organization.

Therefore when EA, a commercial business, sells its videogames with athletes' likenesses outside of the places listed above, the NCAA violates its duties to its student athletes because it grants EA the licenses and therefore violates the rule listed above. Due to these facts, Keller did not consent through form 08-3a, and furthermore, NCAA violated its duties to him. For these reasons Keller satisfies the third prong that he did not consent.

The last prong states that there must be a resulting injury. The first and most obvious injury is that Keller's likeness is being used in a game that makes money, but he does not receive any of it. People may argue that Keller received his education in exchange for the NCAA using his image this way so there can be no injury. However, this is false for two important reasons. First the game was still available and being distributed after he left college and therefore he was no longer receiving the benefit of an education while EA and the NCAA were reaping the benefits of using his likeness without compensation. Secondly, as shown when discussing the third prong, EA and the NCAA violated agreements that Keller made and therefore he is injured because he was held to a higher standard but the parties on the other side of the contract did not uphold their end of the deal. Due to these reasons, Keller can satisfy the fourth prong that he

suffered a resulting injury. By satisfying this last prong, Keller has satisfied all four prongs and therefore can plead a valid Right of Publicity claim. As stated above it does not matter how EA or the NCAA violated his right, but whether they did.⁶⁹ As shown through the satisfaction of the four prongs above, it is very evident that EA and the NCAA did in fact violate his Right of Publicity.

For a further examination, the cases stated above are instrumental in showing that Keller's Right of Publicity was violated. As shown in Haelan, there is a distinct Right of Publicity and it can be withheld from others or distributed out for monetary gain by giving permission for its use.⁷⁰ Since Keller's Right of Publicity was demonstrated, he could exclude others from using his image and likeness. He did not consent to that specific use of his likeness by EA or the NCAA and therefore he excluded them under Haelan.

In Ali, the likeness element of the Right of Publicity was developed when a court said that Muhammad Ali's Right of Publicity was violated by the nude depiction of a man who shared his likeness as well his nickname and the goodwill of his name.⁷¹ Keller's likeness was used by EA and the NCAA without his consent. Just like the Ali case, it did not specifically say his name, but because of things like the video game character wearing the same jersey number, having the same physical attributes, and being from the same hometown as Keller, the likeness was established. Furthermore, in Motschenbacher, the plaintiff's image used in violation of his Right of Publicity because the markings on the car in the commercial use were so identifiable with the plaintiff that people thought that it was actually him.⁷² As stated above, the game character had the same jersey number, even after Keller switched teams, and had the same physical and residential attributes as the real Sam Keller. It would be easy to mistake the game character for the real Keller, just like the fake advertised car was mistaken for the car of the

plaintiff in Motschenbacher. These two cases parallel each other well and therefore the video game Keller and all its attributes and markings are easily identifiable with the real Sam Keller.

In addition to the California statute mentioned earlier, the Indiana code (where the NCAA is located) provides that “[a] personality is a living or deceased person whose image and likeness have commercial value. Under Indiana law, personalities have a property interest in, among other things, their images and likenesses.”⁷³ Also, “[a] person may not use an aspect of a personality's Right of Publicity for a commercial purpose during the personality's lifetime or for one hundred (100) years after the date of the personality's death without having obtained previous written consent from a person....”⁷⁴ Therefore, the NCAA not only violated its duties to Keller but also violated the Indiana Civil Code by using Keller’s likeness, which had commercial value, in a way that he did not consent to.

As far as any First Amendment issues, EA and the NCAA do not have footing to stand on. The main idea when dealing with the press element is the newsworthiness and public nature of the information. However, as the judge in the Keller proceedings has stated,

C.B.C. Distribution is inapplicable here. Success in “NCAA Football” does not depend on updated reports of the real-life players' progress during the college football season. Further, EA's game provides more than just the players' names and statistics; it offers a depiction of the student athletes' physical characteristics and, as noted, enables consumers to control the virtual players on a simulated football field. EA's use of Plaintiff's likeness goes far beyond what the court considered in *C.B.C. Distribution*. EA is not entitled to the public interest defense on this motion.⁷⁵

In C.B.C., the statistics were already public record. EA goes beyond that here and uses the actual likeness of the athlete. Therefore, this is much greater than mere newsworthy or public record information. The actions of EA and the NCAA cannot be protected here under this First Amendment right.

When dealing with the freedom of speech First Amendment defense, EA and the NCAA do not fare any better. The court from the Keller proceedings put forth in great detail why this defense is not available. The court stated,

Using *Comedy III* and *Winter* as guideposts, *Kirby* applied the transformative use analysis to a video game.... There, the court held that the main character in the defendant's video game was transformed. The plaintiff was a musician and dancer, known for saying the phrase "ooh la la."... Ulala, the main character in the defendant's game, worked as a news reporter in the twenty-fifth century, "dispatched to investigate an invasion of Earth." ... Although there were similarities between the two, the court held Ulala to be "more than a mere likeness or literal depiction of Kirby.".... In particular, Ulala was extremely tall and wore clothing that differed from the plaintiff's and the setting for the game was unlike any in which she had appeared....

Here, EA's depiction of Plaintiff in "NCAA Football" is not sufficiently transformative to bar his California right of publicity claims as a matter of law. In the game, the quarterback for Arizona State University shares many of Plaintiff's characteristics.... EA's depiction of Plaintiff is far from the transmogrification of the *Winter* brothers. EA does not depict Plaintiff in a different form; he is represented as he what he was: the starting quarterback for Arizona State University. Further, unlike in *Kirby*, the game's setting is identical to where the public found Plaintiff during his collegiate career: on the football field. EA asserts that the video game, taken as a whole, contains transformative elements. However, the broad view EA asks the Court to take is not supported by precedent.... These cases show that this Court's focus must be on the depiction of Plaintiff in "NCAA Football," not the game's other elements. Accordingly, at this stage, EA's transformative use defense fails.⁷⁶

There is no doubt from the judge's words that EA could assert this First Amendment right. They would not even have standing using ETW, the Tiger Woods case,. That case used the same transformative standard as Comedy III, and therefore EA and the NCAA would fail if they tried to assert this First Amendment right in any form.⁷⁷ By merely creating the likeness of Keller and placing his video game counterpart into the normal environment that we would find the real Keller, EA did not do enough to transform their work and therefore are violating Keller's Right of Publicity.

For the reasons stated above Keller would be able to successfully assert his Right of

Publicity and defend against the misappropriation of his name and likeness that EA and the NCAA have perpetrated against his right.

V. Conclusion

The Right of Publicity has changed and developed over the years and through the courts. Its application has grown as each new opinion is released. In its earliest days, it was distinguished from the right of privacy and viewed as an independent right that could be used to protect against commercial exploitation or reap commercial gain. It was shown to be an exclusive right that only its owner could control. Time saw the right expand to not only refer to the image of an individual, but also the person's likeness and the goodwill of their name. No longer could someone go so far as to imply the image of a person and merely exclude the name of the individual, while reaping commercial benefits. After the ruling in Ali, a person's likeness would also be safe from exploitation as well as their image. The courts went even further and included identity as another block in the Right of Publicity protection. This protected against signs, symbols, picture, markings, or any other representation that would be identifiable with a specific person. This prevented people from using identifiable elements to give the idea that the person who those elements identify with, actually was endorsing the commercial endeavor.

The First Amendment saw two defenses to the Right of Publicity arise. One dealt with the press while the other dealt with freedom of speech. Courts would balance the public interest of public record and newsworthy material against the individual's Right of Publicity. If the greater burden was on the public then the First Amendment won out. Similarly freedom of speech saw artistic expression rise up to compete with the Right of Publicity. As long as the work was transformative enough from the original, the First Amendment would trump. However, a mere reproduction of an image would not win out and instead would be violative of the Right of

Publicity.

The key is not how the defendant appropriates the plaintiff's identity, but whether it happened. To successfully plead a Right of Publicity claim, a person needs to show that the defendant used the plaintiff's identity, to their advantage; commercial or otherwise, that the plaintiff did not consent, and that there was a resulting injury. In Sam Keller's case, he could successfully plead a Right of Publicity claim against EA and the NCAA. Furthermore, because of the law stated above and EA's and the NCAA's violations of their agreements with Keller, he would be successful in a Right of Publicity action against these entities.

It is for the reasons just stated that all college athletes should have the same Right of Publicity as professional athletes. They are in the spotlight, and deserve to protect that right against entities like the NCAA and EA that would seek to break agreements and violate that right. The fact that they deserve a right does not mean that the right has to be aggressively pursued by marketing one's likeness for profit. In fact, the NCAA still has amateur rules in place that student athletes have to abide by (despite the NCAA not abiding by its own rules). Therefore, the athletes cannot be paid for their image. This does not mean they cannot exercise their right and in turn exclude the NCAA and EA from using that right in an exploitative manner for their own commercial benefit. Exclusion is just as much a part of the Right of Publicity as profiting.

Furthermore, EA should be enjoined from disseminating the video games that contain the players' likenesses. An injunction may seem like a drastic measure, but one was granted in the Ali case to stop the distribution of the Playgirl magazines with Muhammad Ali's likeness inside. The court stated that monetary damages would be too difficult to determine, so Playgirl was subsequently enjoined from further disseminating the issue in order to remedy Ali's injury.⁷⁸

Therefore, it would be very possible for the Keller court to grant an injunction against EA, preventing the further release of video games bearing the likenesses of student athletes. Also, the NCAA should be forced to equally distribute its profits from this improper venture to all its member institutions and be held accountable for abiding by its own rules in the future just as the athletes are expected to.

In close, the Right of Publicity should be realized by all college athletes. They are normally pushed into the national stage and develop notoriety even if it is only on a small scale. This still gives them enough celebrity to have an image worth protecting and it can only be done if they have access to the Right of Publicity to exclude others from exploiting them. They may not get paid, and they may not receive benefits, but for the time and effort student athletes put in, they should at least be able to say how and when and where their image and likeness is on display. The ball is in the judges court now (no pun intended) and it is high time to step back and take the jumper to win one for the student athletes for a change.

As the paper title would suggest, doppelgangers creates dilemmas related to the Right of Publicity. The term doppelganger is used to describe an alter ego or a look alike of a person. The reason this paper has that title is because when an image or likeness is improperly used; there is a doppelganger or a recreation of someone in the world that does not belong. The dilemma arises because the Right of Publicity is being violated by this doppelganger's existence. It is time to put an end to the college athlete doppelgangers that improperly exist for the benefit of those who would exploit them.

¹ Black's Law Dictionary, Right of Publicity (9th ed. 2009), available at Westlaw BLACKS.

² Keller v. Electronics Arts, Inc., C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

³ IL ST CH 765 § 1075/10.

⁴ Black's Law Dictionary, Right of Publicity (9th ed. 2009), available at Westlaw BLACKS.

⁵ Note: This paper is dealing with the Right of Publicity as a whole and how it can relate to college athletes. The cases and statutes are all from different jurisdictions. I realize that the law is not the same in every state, but I am not writing this paper to be jurisdiction specific. Instead it is a general view of the Right of Publicity and why college athletes deserve the same protection of that right as professional athletes.

⁶ Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

⁷ Id. at 868.

⁸ Id.

⁹ Id.

¹⁰ Cal. Civ. Code § 3344 a, e (West)

¹¹ Ali v. Playgirl, Inc., 447 F. Supp. 723, 727 (S.D.N.Y. 1978)

¹² Id. at 726.

¹³ Id.

¹⁴ Id.

¹⁵ Id. at 727.

¹⁶ Id. at 726.

¹⁷ Id. at 727.

¹⁸ Id.

¹⁹ Id.

²⁰ Id. (citation omitted).

²¹ Id.

²² Id. at 727. (*quoting* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953)). (citations omitted).

²³ Id.

²⁴ Grant v. Esquire, Inc., 367 F. Supp. 876, 879 (S.D.N.Y. 1973)

²⁵ Rosemont Enterprises, Inc. v. Urban Sys., Inc., 72 Misc. 2d 788, 791(1973).

²⁶ Ali, 447 F. Supp. at 732.

²⁷ Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983)

²⁸ Id. at 835.

²⁹ Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821, 822 (9th Cir. 1974)

³⁰ Id.

³¹ Id. at 822, 27.

³² Id. at 827.

³³ Carson, 698 F.2 at 835-36 (*quoting* Hirsch v. S.C. Johnson & Son, Inc., 90 Wis.2d 379 (1979)).

³⁴ Uhlaender v. Henricksen, 316 F. Supp. 1277, 1283 (D. Minn. 1970)

³⁵ Beth A. Cianfrone & Thomas A. Baker III, The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity, 20 Journal of Legal Aspects of Sport 35, 62 (2010). (citation omitted).

³⁶ Id. (citation omitted).

³⁷ Id. (citation omitted).

³⁸ C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077 (E.D. Mo. 2006) aff'd, 505 F.3d 818 (8th Cir. 2007)

³⁹ Id. at 1107.

⁴⁰ Id.

⁴¹ Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977).

⁴² Id.

⁴³ Id.

⁴⁴ Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 404 (2001).

⁴⁵ ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 938 (6th Cir. 2003).

⁴⁶ Id.

⁴⁷ Winter v. DC Comics, 30 Cal. 4th 881, 889 (2003).

⁴⁸ Id. at 890.

⁴⁹ Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 413-14 (9th Cir. 1996).

⁵⁰ Id. at 414.

⁵¹ NCAA 2009-2010 Division I Manual August 1, 2009 (Mar. 21,2012)
<http://www.ncaapublications.com/productdownloads/D110.pdf> 1.

⁵² Id. at 4.

⁵³ Id. at 9.

⁵⁴ Id. at 61.

⁵⁵ Id. at 62-3.

⁵⁶ Id. at 129.

⁵⁷ NCAA Form 08-3a Academic Year 2008-09 (Mar 21, 2012)
http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf 1-6.

⁵⁸ NCAA 2009-2010 Division I Manual August 1, 2009 (Mar. 21,2012)
<http://www.ncaapublications.com/productdownloads/D110.pdf> 71.

⁵⁹ Id.

⁶⁰ Abdul-Jabbar, 85 F. 3d at 413-14.

⁶¹ Id. at 414.

⁶² Keller, v. Electronic Arts INC. et al., 2010 WL 908883 (N.D.Cal.).

⁶³ Id.

⁶⁴ Id.

⁶⁵ Beth A. Cianfrone & Thomas A. Baker III, The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity, 20 Journal of Legal Aspects of Sport 35, 43-4 (2010). (citation omitted).

⁶⁶ NCAA Form 08-3a Academic Year 2008-09 (Mar 21, 2012)
http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf 4.

⁶⁷ Keller, 2010 WL 908883 (N.D.Cal.).

⁶⁸ NCAA 2009-2010 Division I Manual August 1, 2009 (Mar. 21,2012)
<http://www.ncaapublications.com/productdownloads/D110.pdf> 71.

⁶⁹ Abdul-Jabbar, 85 F. 3d at 414.

⁷⁰ Haelan, 202 F.2d at 868.

⁷¹ Ali, 447 F. Supp. at 726-27.

⁷² Motschenbacher, 498 F.2d at 822, 27.

⁷³ Ind.Code § 32-36-1-6, § 32-36-1-7, (*quoted in* Keller v. Electronics Arts, Inc., C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

⁷⁴ Ind. Code § 32-36-1-8, (*quoted in* Keller v. Electronics Arts, Inc., C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

⁷⁵ Keller v. Electronics Arts, Inc., C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

⁷⁶ Id. (*quoting* Kirby v. Sega of Am., Inc., 144 Cal. App. 4th 47(2006)).

⁷⁷ ETW, 332 F.3d at 938.

⁷⁸ Ali, 447 F. Supp. at 729, 30, 32.