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**Sports Video Games and Student Athletes:  
An Analysis of Publicity Rights and First Amendment Concerns**

Kirsten O'Donnell

I. Introduction

Over the past several years, multiple suits have been brought against Electronic Arts, Inc. (EA) by current and former National Collegiate Athletic Association (the NCAA) student athletes (student athletes). The student athletes allege, among other claims, that EA publishes video games which feature the images of student athletes, in violation of their publicity rights.<sup>1</sup> In response, EA has claimed its video games are protected under the First Amendment, and that their First Amendment interests trump the publicity rights of the student athletes.<sup>2</sup>

The use of student-athlete images in EA video games has been examined extensively in the academic world. Many of these publications are primarily focused on discussing the inherent unfairness of the NCAA bylaws, specifically the amateurism clauses.<sup>3</sup> These clauses prevent student athletes from receiving any compensation in connection with their athletic performance, but do not prevent the NCAA from receiving hundreds of millions of dollars per year through media and licensing agreements.<sup>4</sup> In addition, third parties, such as EA, receive a huge economic benefit from licensing intellectual property from the NCAA for use in its products.<sup>5</sup>

These publications raise possible solutions to address this inequity, such as repealing amateurism clauses in the NCAA bylaws;<sup>6</sup> compensating student athletes through university-provided salaries or trusts,<sup>7</sup> allowing student athletes to contract with and be paid by third parties or requiring student athletes to license their image to the NCAA, which, although an expansion of the NCAA's rights, would result in the NCAA lawfully acquiring the rights to student athletes' images.<sup>8</sup>

This paper will argue, as many of the articles mentioned above, that student athletes have publicity rights and that EA, specifically through its *NCAA Football* games (*NCAA Football*), violates those rights. In contrast to the above publications, however, this article will not propose solutions to address the inequity between student athletes and the NCAA. Rather, this paper will argue that EA's First Amendment rights should not outweigh the publicity rights of student athletes, and discuss how courts should analyze First Amendment defenses raised in right of publicity cases, specifically highlighting the First Amendment raised in right of publicity cases through an analysis of the First Amendment defense argued in *Hart v. Electronic Arts, Inc.*

To begin, this paper will provide a background of the NCAA's history, bylaws and licensing. Next, the paper will examine the right of publicity, demonstrating how student athletes possess publicity rights and how EA violated those rights. The paper will then analyze the First Amendment defense raised by EA in *Hart* and discuss how the *Hart* court misapplied the transformative use test in upholding EA's defense. Finally, this paper will address the potential subsequent impact of this decision, and discuss how courts should analyze First Amendment defenses in right of publicity cases.

## II. The NCAA, The Players and The Game

### A. The NCAA and Student Athletes

Following a rash of serious injuries and some deaths in the 1905 football season,<sup>9</sup> then-President Theodore Roosevelt lead the charge to reform football.<sup>10</sup> This push to reform resulted in 62 colleges and universities banding together in 1906 to form the Intercollegiate Athletic Association of the United States (IAAUS).<sup>11</sup> In 1910, the IIAUS was renamed the National Collegiate Athletic Association.<sup>12</sup>

The NCAA originally operated solely as a discussion group and rules-making body, until the first NCAA National Championship in 1921.<sup>13</sup> More national championships followed the initial National Collegiate Track and Field Championship, and the group eventually grew to resemble the complex structure of the present-day NCAA.<sup>14</sup>

Today, the NCAA's stated purpose is to protect student-athletes with increased emphasis on athletics and academic excellence.<sup>15</sup> To support these goals, the NCAA adopted an amateurism provision in its bylaws, purportedly to ensure athletes are: 1.) "motivated by education and by the physical, mental and social benefits" of participating in the sport, and 2.) "protected from exploitation by professional commercial enterprises."<sup>16</sup>

The NCAA bylaws prohibit student athletes from being compensated.<sup>17</sup> Specifically, section 12.1.2 of the NCAA bylaws prohibits a student athlete from any of the following: using their athletic skill for pay, accepting a promise of pay, signing a contract to commit to a professional athletic team, or receiving salary or other financial assistance based on athletic skill or participation.<sup>18</sup> If a student athlete violates any provision of section 12.1.2 of the NCAA bylaws, he or she loses amateur status, and becomes ineligible for competing in the sport related to the violation.<sup>19</sup> Because of the amateurism clause in the NCAA bylaws, student athletes are prohibited from receiving any money for playing a sport professionally, endorsing any products or services, signing memorabilia in the off-season, or licensing their names, images or likenesses.<sup>20</sup>

The NCAA bylaws also require student athletes to sign certain forms in order to be eligible to participate in a collegiate athletic program.<sup>21</sup> One of those forms, Form 11-3a, required by NCAA bylaw 12.5,<sup>22</sup> "authorize[s] the NCAA (or a third party acting on behalf of

the NCAA . . .) to use [the student athlete's] name or picture . . . to generally promote NCAA championships or other NCAA events, activities or programs."<sup>23</sup>

## B. NCAA Licensing

Under the NCAA bylaws, student athletes are not allowed to receive compensation for their athletic abilities; however, the NCAA does receive compensation, mainly through licensing.<sup>24</sup> The NCAA has a long-term agreement with IMG College to administer the domestic and international licensing programs for the NCAA.<sup>25</sup> The Collegiate Licensing Company (CLC), a subsidiary of IMG College, manages the daily administration of the NCAA licensing program.<sup>26</sup>

The NCAA licensing agreements are extremely lucrative. For example, media agreements are a significant source of revenue for the NCAA, constituting 86 percent of the NCAA's revenue in 2009-2010.<sup>27</sup> In 2010, the NCAA entered into a 14-year agreement with CBS and Turner Broadcasting System for \$10.8 billion, or about \$771 million annually.<sup>28</sup>

In 2005, EA entered into an exclusive 6-year license with CLC for the NCAA's intellectual property.<sup>29</sup> This license made EA the top non-apparel licensee of the NCAA,<sup>30</sup> and provided EA the exclusive right to use league logos, teams, stadiums and uniforms for use in its EA Games.<sup>31</sup> The license does not provide EA any right to use the names, images or likenesses of NCAA student-athletes; however, it is widely recognized that the virtual players in EA games are clearly intended to represent NCAA student athletes.<sup>32</sup>

## III. Right of Publicity

### A. History and Development

The right of publicity has its roots in the right to privacy,<sup>33</sup> and its evolution can be traced through several publications and key judicial decisions in the late nineteenth and early twentieth century.

In Thomas Cooley's 1888 publication *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract (Cooley on Torts)*, Cooley inferred the right to be let alone from a series of court decisions regarding contracts, personal property and defamation.<sup>34</sup>

Public perceptions that the press had overstepped the bounds of decency and the advent of new technology motivated Samuel D. Warren and Louis D. Brandeis to write about the right to privacy.<sup>35</sup> In their 1890 publication *The Right of Privacy*, Warren and Brandeis supported Cooley's right to be let alone, and classified this right as a subset of the right to life.<sup>36</sup>

In 1953, the United States Court of Appeals for the Second Circuit coined the term "right of publicity"<sup>37</sup> in *Haelan Laboratories v. Topps Chewing Gum, Inc.*<sup>38</sup>

In *Haelan*, major league baseball players assigned exclusive rights to their photographs to the plaintiff for use in promoting the plaintiff's product.<sup>39</sup> The complaint asserted that the defendant induced the players to assign the same rights while the players were still under contract with the plaintiff.<sup>40</sup> The *Haelan* court rejected the defendant's claims that: 1.) the contract was a release of the players' right of privacy and 2.) such right was not an assignable property right, stating:

[I]n addition to and independent of that right of privacy, . . . 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 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.<sup>41</sup>

This decision clarified and distinguished publicity from the right of privacy, and articulated the right as a property right, one that could be assigned, and used to recover damages from a defendant who used a plaintiff's name or likeness without authorization.<sup>42</sup>

Shortly after *Haelan*, Professor Melville Nimmer's 1954 article *The Right of Publicity* sought to clarify and define the parameters of the right.<sup>43</sup> In agreement with the holding in *Haelan*, Nimmer stated that celebrity status did not constitute a waiver of publicity rights and that such rights could be licensed or assigned.<sup>44</sup> Nimmer also stated that everyone, not just celebrities, has a right of publicity,<sup>45</sup> and provided policy rationales to support that assertion.<sup>46</sup> In particular, he argued that "the right of publicity . . . is the right of each person to control and profit from the publicity values which he has created or purchased . . .," and that "every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations . . ."<sup>47</sup>

In 1967, William Prosser furthered the discussion on the right of Publicity in his publication *Privacy*. In this article, Prosser explained that the right of privacy as described in *The Right of Privacy* should be viewed as being comprised of four distinct torts:

- (i) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs,
- (ii) Public disclosure of embarrassing private facts about the plaintiff,
- (iii) Publicity which places the plaintiff in a false light in the public eye, and
- (iv) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.<sup>48</sup>

The first three torts proffered by Prosser clearly protect privacy interests of individuals. This approach reflects the privacy concerns summarized in the *The Right of Privacy*.<sup>49</sup> However, the final tort, appropriation, provided individuals a right Nimmer described as the other side of the

privacy coin.<sup>50</sup> Instead of protecting one's right to privacy in personal affairs, appropriation protected one's ability to publicly exploit his or her name or likeness for commercial gain, and prevented others from doing so without permission.<sup>51</sup> Prosser cited *Haelan* in support of creating the tort of appropriation, and, echoing Nimmer, recognized it as a proprietary right that could be transferred by selling licenses.<sup>52</sup>

In 1977, the right of publicity was formally recognized by the United States Supreme Court in *Zacchini v. Scripps Howard Broadcasting*, the only right to publicity case it has decided to date.<sup>53</sup> *Zacchini*, a "human cannonball," sued a news program for televising his entire fifteen-second performance without his permission.<sup>54</sup> In holding in favor of *Zacchini*, the Court noted that the right of publicity not only ensures that entertainers are compensated for their work, but also provides entertainers with an "economic incentive . . . to make the investment required to produce a performance of interest to the public."<sup>55</sup> This statement echoes the policy justifications for federal copyright and patent laws.<sup>56</sup>

#### B. Modern Right of Publicity

Today, the right of publicity is a matter of state law,<sup>57</sup> and is recognized by statute, common law or a combination of both.<sup>58</sup> Though the elements vary from state to state, the right of publicity generally protects an individual's property interest in his or her image.<sup>59</sup> While there is no federal right of publicity,<sup>60</sup> federal law, specifically the Lanham Act, provides similar protection by preventing unfair competition and misappropriation.<sup>61</sup> The Lanham Act provides protection against any false or misleading descriptions or representations of fact likely to cause confusion regarding a plaintiff's endorsement of, or an affiliation, connection or association with

the defendant's product or service.<sup>62</sup> As a result of providing for similar protection, suits which raise right of publicity claims usually also raise claims under the Lanham Act.<sup>63</sup>

### C. Violation of Right of Publicity

As noted above, the specific elements of the right of publicity vary by state. In states that recognize publicity rights, however, courts generally consider the following elements to determine if a person's right of publicity has been violated:

- (i) Use of the plaintiff's identity
  
- (ii) For the commercial advantage of the defendant
  
- (iii) Without consent of the plaintiff
  
- (iv) Resulting in injury to the plaintiff.<sup>64</sup>

#### 1. Use of Plaintiff's Identity

Courts rely on statutory definitions, case law, or both to determine "identity" in right of publicity claims.

As statutes and controlling law vary from state to state, definitions of the basic elements of a right to publicity claim also vary.<sup>65</sup> For example, in California, one of the first states to enact a right of publicity statute and a state in which many right of publicity cases have been tried, "identity" includes the name, voice, signature, photograph or likeness of an individual,<sup>66</sup> and the definition applies equally to deceased personalities.<sup>67</sup> In contrast, the Indiana right of publicity statute is much more expansive.<sup>68</sup> Indiana defines identity, known as personality in the statute, as the "name, voice, signature, photograph, image, likeness, distinctive appearance,

gestures or mannerisms”<sup>69</sup> of a living or deceased natural person, and provides that such right is descendible.<sup>70</sup> Indiana’s expansive rights are in sharp contrast with the statutory right of publicity in New York, which narrowly defines “identity” as a living person’s name, portrait, picture or voice.<sup>71</sup>

Courts have also relied on case law to shape the definition of “identity” under the right of publicity. Courts have recognized “identity” to include a person’s name or likeness,<sup>72</sup> distinctive voice,<sup>73</sup> and any drawing or other artistic rendering intended to represent a particular person, whether or not the person’s name is actually used in connection with the depiction.<sup>74</sup> Particularly applicable to the suits brought against EA, courts have also determined that “identity” includes electronic imitations of a person,<sup>75</sup> animatronic reproductions of a person<sup>76</sup> and virtual images of persons in video games.<sup>77</sup> *No Doubt v. Activision Publishing, Inc*<sup>78</sup>. is an example of the latter. In *No Doubt*, the Court of Appeals of California recognized avatars of No Doubt band members in the Activision game *Band Hero* as likenesses of the band members which could be licensed for a commercial purpose.<sup>79</sup> Similarly, in *Kirby v. Sega of America, Inc.*, the Court of Appeals of California determined that Kirby’s allegation that Sega used her identity to create a virtual character in a Sega videogame presented a triable issue of fact.<sup>80</sup>

## 2. Use of Identity for a Commercial Advantage

Using the name or likeness of another for commercial gain constitutes use of identity for a commercial advantage.<sup>81</sup> Traditional misappropriation is usually obvious,<sup>82</sup> and generally refers to an individual’s name or likeness in advertising or marketing to state or imply endorsement by the individual.<sup>83</sup> Demonstrating use of identity for a commercial advantage is not limited to a showing of false endorsement, however.<sup>84</sup> In *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media*,<sup>85</sup> the United States Court of Appeals for the

Eighth Circuit held that CBC's use of baseball players' identities in its fantasy baseball products satisfied the commercial advantage requirement, despite the identities not being used as an advertisement or endorsement.<sup>86</sup>

### 3. Lack of Consent

As first noted in *Haelan*, the right of publicity includes the right for a person to license his or her identity.<sup>87</sup> Use of one's identity without valid consent through such a license constitutes a violation of the right of publicity.<sup>88</sup> Valid consent can be demonstrated through an express or implied license or assignment.<sup>89</sup> Conversely, a lack of consent can be inferred if a defendant cannot demonstrate an express or implied license or assignment existed, or if the defendant's use is inconsistent with the terms of a license or assignment.<sup>90</sup>

### 4. Resulting injury

The final prong of a right of publicity claim requires the plaintiff to demonstrate an actual economic harm.<sup>91</sup> This can be measured by calculating the value lost by the person whose identity was misappropriated, or by calculating the economic value derived from the use of the identity.<sup>92</sup> Accordingly, if a plaintiff cannot demonstrate that his or her identity has commercial value, no right of publicity violation exists because the plaintiff did not suffer any injury.<sup>93</sup>

## IV. Application of the Right of Publicity to Student Athletes

Applying the four-pronged analysis to student athletes, it is clear that EA's use of student athlete images in *NCAA Football* violated the student athletes' right of publicity.

### A. EA Used Student Athletes' Identities in Its *NCAA Football* Game Series

As discussed above, "identity" in publicity rights cases has been held to include use by another of virtual avatars that resemble a real person, as well as use by another of a person's name.<sup>94</sup> EA used both in their *NCAA Football* game series.<sup>95</sup>

Regarding the virtual avatar, it is important to note that since many college football games are televised, the physical characteristics of players and their uniforms have become associated with the student athletes on a national level.<sup>96</sup> The virtual players in *NCAA Football* are nearly identical to their real-life student athlete counterparts, mirroring their jersey number, height, weight, skin color, hair color, playing style, handedness, performance statistics and hometown.<sup>97</sup> In addition, the virtual players in the *NCAA Football* are depicted wearing the same accessories, such as visors, gloves and armbands that the student athletes favored while playing.<sup>98</sup> These facts alone sufficiently demonstrate that EA used student athletes' identities.

In addition to mirroring the real-life players' physical characteristics, EA also permits, and arguably encourages, its customers to add the student athlete names to *NCAA Football*<sup>99</sup>. Although the student athletes' names do not appear in *NCAA Football* initially, EA programmed its games to allow consumers to add or edit the names of the virtual players, and save the modifications within the game.<sup>100</sup> Furthermore, EA helped to facilitate the name-changing process in later editions. Starting with *NCAA Football 09*, *NCAA Football* included a feature called "Locker Room," which allows consumers to easily upload current NCAA player rosters into the game.<sup>101</sup> Upon uploading the rosters, the names of the actual student athletes appear on the jerseys of their virtual counterparts.<sup>102</sup>

In the event that a consumer remained unable to identify the virtual athlete with his real-life counterpart after the roster upload, EA programmed its virtual game announcers to identify the virtual players by their names in game commentary.<sup>103</sup> Prior to uploading player rosters or manually entering player names, commentators refer to the virtual players by jersey number only.<sup>104</sup> After uploading a roster or manually entering a student athlete's name, the game commentators will refer to the virtual player by their name; however, the game commentators

only recognize and announce the names which are programmed by EA into the game.<sup>105</sup> For example, when the name Ryan Perriloux was entered into the game, the virtual commentators pronounced it correctly (as Perrillew); however, when “Perrillew” was entered into the game manually, the commentator did not recognize or say the name.<sup>106</sup> In addition, Brad Nessler, an NCAA Football game commentator, admitted that these names are pre-recorded into the games.<sup>107</sup>

The game features described above demonstrate that EA used student athletes’ images in the NCAA Football games, and meet the first prong of the right of publicity analysis.

#### B. EA Used Student Athletes’ Identities for a Commercial Advantage

EA used the identities of student athletes for commercial gain. Inserting the student athletes’ identities into its commercial product gave EA’s games a degree of realism, which is the primary reason for the popularity and success of the EA Games.<sup>108</sup> Additionally, one student athlete claimed other “commerical use violations,” alleging that EA used his identity to advertise, market and endorse *NCAA Football*.<sup>109</sup> These additional claims are not required to find that EA used the identities for a commercial gain.<sup>110</sup> Perhaps most importantly, EA admits that the revenue generated from its games is greatly enhanced by the use of intellectual property licensed from third parties, such as the NCAA.<sup>111</sup>

#### C. EA Used Student Athletes’ Identities Without Consent

Use of another’s identity without permission of the person or entity that holds the rights to the image constitutes lack of consent.<sup>112</sup> The student athletes did not license images to EA; in fact, they are prohibited from doing so under the NCAA bylaws.<sup>113</sup> The Form 11-3a, which student athletes are required to sign, provides the NCAA the right to use student athletes’ likenesses to promote NCAA championships, events, activities or programs.<sup>114</sup> Though this

includes a provision which allows NCAA to sublicense student athletes' identities to third parties,<sup>115</sup> it cannot be said that EA's NCAA Football games are NCAA championships, events, activities or programs.

#### D. EA's Unauthorized Use of Student Athletes' Identities Injures Them

Courts look to the pecuniary loss of the plaintiff or the pecuniary gain of the defendant resulting from the use to determine damages under right of publicity claims.<sup>116</sup> In either case, for a plaintiff to prove damages, the plaintiff needs to show that his or her identity has economic value.<sup>117</sup>

The pecuniary loss to student athletes is difficult to ascertain because the amateurism provision of the NCAA bylaws prevents student athletes from licensing their image in exchange for compensation.<sup>118</sup> This does not mean that the identities of student athletes do not have commercial value, however. The NCAA bylaws regarding amateurism are nothing more than guiding principles of an organization and do not trump state's right of publicity laws.<sup>119</sup> Ultimately, because student athletes are not compensated and the NCAA license to EA (even if its terms were disclosed) does not include the transfer of student athlete identities, it is not possible to determine definitively the pecuniary loss to the student athletes.

Conversely, it is not possible to determine, in absolute terms, the pecuniary gain to EA resulting from the use of student athlete identities, but EA uses similar licensing structures in other games. Those licensing agreements, therefore, may estimate the value of the student athletes' identities. For example, EA pays \$35 million per year to license NFL players' identities for its *Madden NFL* games.<sup>120</sup> Although this is not a perfect comparison, it provides a court a relevant factor to consider in formulating damages. Moreover, a court could compare the

profitability of EA's NCAA football games before and after the virtual players became easily identifiable with their real-life counterparts.

Because EA receives a pecuniary benefit from unauthorized use of student athletes' identities, the student athletes can prove they have been injured by this use.

## V. Crossroads—the First Amendment, *Hart* and the Right of Publicity

### A. The First Amendment

In 2011, the Supreme Court of the United States found that a California statute that prohibited the sale of violent video games to children was unconstitutional, and, in doing so, held that video games are entitled to First Amendment protection.<sup>121</sup> The court found that video games communicate ideas and social messages, like books, plays and movies that all receive protection under the First Amendment, and, much like those traditionally protected media, use literary devices to communicate those messages.<sup>122</sup> When video games feature likenesses of real people, First Amendment interests are placed at odds with publicity rights of the individual.

In cases where First Amendment rights clash with the right of publicity, courts must weigh the effects of enforcing one right over the other.<sup>123</sup> To do so, courts must balance the importance of the right to free expression and the consequences of limiting that right against the consequences associated with infringing on the right of publicity.<sup>124</sup> Courts have invoked a variety of methods to assist in the balancing of First Amendment and publicity rights. The methods used by the court in *Hart* included discussing commercial speech (which receives less First Amendment protection), public interest, and transformative use. Each will be addressed in turn in the following section.

### B. *Hart v. Electronic Arts*: The Background

Ryan Hart filed a putative class action suit against Electronic Arts on June 15, 2009, in the Superior Court of New Jersey, Law Division, Somerset County,<sup>125</sup> which was later removed to the United States District Court, District of New Jersey on November 24, 2009.<sup>126</sup> On September 22, 2010, Hart's first amended complaint was dismissed with prejudice on all counts, save the right of publicity claim, which was dismissed without prejudice.<sup>127</sup> Hart filed a new complaint on October 12, 2010, asserting a more detailed claim for breach of his right of publicity.<sup>128</sup> In this complaint, Hart asserted that the EA violated his right of publicity based on its use of his likeness in *NCAA Football*.<sup>129</sup> The complaint alleged that a virtual player in *NCAA Football* shared identical attributes to Hart<sup>130</sup>, as listed in the Rutgers University Football Media Guide.<sup>131</sup> The Media Guide stated that Hart came from Florida, was six feet, two inches tall, weighed one hundred ninety-seven pounds, wore jersey number 13, wore a left wrist band, and wore a helmet visor.<sup>132</sup> Hart was the only quarterback at Rutgers University who hailed from Florida.<sup>133</sup> A virtual Rutgers quarterback was identical to Hart. The game stated that the virtual quarterback came from Florida, was six feet, two inches tall, weighed one hundred ninety-seven pounds, and wore jersey number 13, a left wrist band and a helmet visor.<sup>134</sup> Hart further alleged that the 2006 edition of *NCAA Football* mirrored his actual playing statistics during the football season.<sup>135</sup>

The court granted summary judgment in favor of Electronic Arts, holding that the defendant's First Amendment right to freedom of expression outweighed the plaintiff's right of publicity.<sup>136</sup> Subsequently, on February 10, 2012, Hart appealed the ruling to the United States Court of Appeals for the Third Circuit.<sup>137</sup>

### C. *Hart v. Electronic Arts*: Analysis of Claims under the First Amendment

#### 1. Commercial Speech Analysis

Before discussing EA's First Amendment defense, the court held that *NCAA Football* was not commercial speech subject to less First Amendment protection.<sup>138</sup> To reach this holding, the court relied on *Facenda v. N.F.L. Films, Inc.*,<sup>139</sup> which provides three factors to consider in determining whether speech is commercial or noncommercial: 1.) whether the speech is an advertisement; 2.) whether the speech refers to a specific product or service; and 3.) whether the speaker has an economic motivation for the speech.<sup>140</sup> *Facenda* instructs that "an affirmative answer to all three questions provides 'strong support' for the conclusion that speech is commercial."<sup>141</sup> The court applied the *Facenda* factors in analyzing Hart's claim, and determined that use of student athletes' identities in the game could not be considered an advertisement, because the student athlete identities were part of the game and could not be seen until after the commercial transaction took place.<sup>142</sup>

## 2. Transformative Use Analysis

After determining that EA video games should not be considered commercial speech, the court next considered whether the First Amendment granted EA the right to encroach on Hart's right of publicity.<sup>143</sup>

The Court evaluated Hart's claims under two tests: the transformative use and the Rogers test.<sup>144</sup> The Court's analysis resulted in favoring EA under both tests.<sup>145</sup> As the Court also concluded that the "transformative test best encapsulates the type of nuanced analysis required to properly balance the competing right of publicity and First Amendment interests,"<sup>146</sup> this paper will focus on the court's application of the transformative use test.

### a. Transformative Use Test

The transformative use test has its roots in copyright law.<sup>147</sup> Copyright law grants a limited monopoly to creators of a work fixed in a tangible medium of expression.<sup>148</sup> However,

this monopoly is tempered by the fair use doctrine, which allows others to use copyrighted work for “criticism, comment, news reporting, teaching . . . , scholarship, or research.”<sup>149</sup> The statute provides factors to determine whether the use of a copyrighted work constitutes fair use, including how much of the copyrighted work is used, whether the new work was created for a commercial purpose, and whether the new work impacts the market for the copyrighted work.<sup>150</sup>

Proving a work is a fair use of a copyrighted work is a complete defense to copyright infringement.<sup>151</sup> Courts have embraced the transformative use test to determine if use of a copyrighted work is a fair use.<sup>152</sup> In cases involving copyright infringement claims, the transformative use test inquires whether a new work has relied on the original work, or if the new work transforms the original work by adding new expression, meaning or message.<sup>153</sup>

#### b. Transformative Use Test Applied to Video Game Cases

Recently, courts have been using the transformative use test to “reconcile tensions between publicity rights and constitutionally protected free expression,”<sup>154</sup> including in the *Hart* case. In determining that EA’s use of student athlete images in *NCAA Football* was transformative, the court relied primarily on interpretation of, and comparisons to, two other cases: *Kirby v. Sega of America, Inc.*,<sup>155</sup> and *No Doubt v. Activision, Inc.*<sup>156</sup> These cases are particularly applicable to *Hart*, as they are also right of publicity cases involving video game avatars in which the transformative use test was applied.

In *Kirby*, singer Kierin Kirby sued Sega, alleging a character in Sega’s video game *Space Channel 5* was based on Kirby’s identity. Kirby claimed Ulala’s name was based on Kirby’s catch phrase, ooh-la-la, and that Ulala’s clothing, facial features and hair color were all based on Kirby.<sup>157</sup> Sega claimed Ulala was not based on Kirby, and that their game was therefore protected under the First Amendment.<sup>158</sup> The California court of appeals applied the

transformative use test and determined that, although Ulala shared some similarities with Kirby, Sega introduced enough of its own creative elements to satisfy the transformative use test and receive protection under the First Amendment<sup>159</sup>. Those creative elements included Ulala's clothing, which was merely similar to one of Kirby's many costumes; Ulala's hairstyle and dance moves, both of which were dissimilar to Kirby's; and the game itself, set in outer space centuries into the future, which shared no similarity with Kirby's style, video or photographs.<sup>160</sup>

In *No Doubt*, the band No Doubt sued Activision based on their right of publicity.<sup>161</sup> No Doubt entered into a license agreement with Activision, in which No Doubt provided Activision permission to use their likenesses to create avatars in the video game *Band Hero*.<sup>162</sup> No Doubt then sued, claiming that, though Activision had permission to use their images under the license agreement, Activision's use of the No Doubt avatars was outside the scope of the licensing agreement and therefore violated their right of publicity.<sup>163</sup> Activision claimed its game was protected expressive work under the First Amendment.<sup>164</sup>

Ruling in favor of No Doubt, the court determined that the video game was not transformative.<sup>165</sup> The court explained that the video game was not transformative because the avatars were "painstakingly designed to mimic" the likenesses of the band members so that they could "be" the rock stars,<sup>166</sup> the avatars perform rock songs on stage, the activity by which No Doubt is famous for,<sup>167</sup> and the game doesn't allow the player to change the appearance of the avatars.<sup>168</sup>

### c. Transformative Use Test Applied to *Hart*

The *Hart* court determined that EA included sufficient elements of its own expression in *NCAA Football* to satisfy the requirements of the transformative use test.<sup>169</sup> The court in *Hart*, however, misapplied the transformative use test, and therefore reached a faulty conclusion.

Contrary to the opinion in *Hart*, *NCAA Football*'s use of the student athletes' identities was not transformative, and therefore was not entitled to First Amendment protection.

As in *Kirby*, the court looked beyond the virtual player to other elements of the game, and found that there were "sufficient elements of EA's own expression found in the game [to] justify the conclusion that its use of Hart's image is transformative,"<sup>170</sup> including coaches, stadiums, athletes, fans, commentary and more.<sup>171</sup> In *Kirby*, the court analyzed the setting of *Space Channel 5* not only to determine if it contained expressive elements, but to determine if those expressive elements were a part of, or shared any similarity with, Kirby's identity.<sup>172</sup> In *NCAA Football*, the expressive elements the court listed as comprising the setting of the game—college stadiums, coaches, fans—<sup>173</sup> certainly are part of the identity of the student athletes. The student athletes are known as college football players who compete at college stadiums with their coaches and in front of fans. These elements are part of their identity. Accordingly, the *Hart* court incorrectly determined that *NCAA Football* contained expressive elements beyond the virtual players.<sup>174</sup>

The court's reasoning in *No Doubt* further undercuts this portion of the *Hart* holding. The court cited three points in determining that the use of the *No Doubt* avatars in *Band Hero* was not transformative—the avatars were the literal likenesses of the band members, the avatars performed the activity from which the band members achieved their fame, and the consumers were unable to change the avatars' appearance.<sup>175</sup> In *NCAA Football* (and unchallenged by EA in *Hart*),<sup>176</sup> the virtual players are the literal likenesses of the student athletes.<sup>177</sup> Beyond using the literal images of student athletes to create the virtual players, EA also includes biographical information, physical attributes and abilities of the student athletes.<sup>178</sup> The virtual players also

perform the activity from which the student athletes achieved their fame—playing college football in a college stadium with their coaches and in front of fans.<sup>179</sup>

The court also found that Hart’s virtual image independently met transformative use.<sup>180</sup> The court conceded that the virtual player looked like Hart and was designed with the same physical attributes, physical abilities and biographical information as Hart,<sup>181</sup> similar to the avatars in *No Doubt*.<sup>182</sup> The court then distinguished *Hart* from *No Doubt*, finding that, unlike *Band Hero*, *NCAA Football* provides the ability to alter the virtual players’ images, physical abilities and teammates.<sup>183</sup> Relying on *Brown v. Entertainment Merchants Association*, the court found that Hart’s claim “fail[ed] to fully take into account the distinctive interactive nature of video games.”<sup>184</sup> “[L]ike protected books, video games communicate ideas . . . through many familiar literary devices . . . and through features distinctive to the medium (such as the player’s interaction with the virtual world).’ That suffices to confer EA protection . . . to deny First Amendment protection because the game initially displays the virtual player in an unaltered form would not give due accord to this expressive aspect of video games.”<sup>185</sup> The court’s reliance on this quote to support its point is simply misplaced. Although First Amendment protection, as stated in *Brown*, does apply to video games, it does not do so blindly and at the expense of publicity rights. Rather, those First Amendment protections must still be balanced with copyright law and the right of publicity. Courts have determined that the transformative use test is appropriate to evaluate both copyright infringement and right of publicity violation suits.<sup>186</sup> The analysis provided in this paper has shown that *NCAA Football*, though generally protected under the First Amendment, fails this test and therefore loses its First Amendment protection.

If the *Hart* analysis were accepted and applied to future cases, it would essentially begin to erode of the right of publicity, at least within the world of video games. Using the court’s

analysis, a commercial entity may use someone's image without their permission and without compensating them, as long as the new work transforms the image by adding sufficient creative elements outside of the representation of the individual. The problem with this analysis is that it provides an overly broad view on what satisfies transformation. Under the *Hart* standard, video games such as EA's *Madden Football*, which utilize the identity of real NFL players, would not violate the identity of those players even if the game were set in a football stadium and depicted virtual players playing football, as the real players do, so long as the game contains creative elements such as the ability to modify a jersey color, or add a mustache to a player. Video games like *Band Hero* would receive the same protection if consumers were able to modify the image of the avatars.

This application of the transformative use test is dangerous, as it strips away a person's right of publicity in an entire form of media. Publicity rights, like copyright, patent, and trademark rights, are an important form of intellectual property. To cultivate a publicity right that has commercial value can take considerable money, time and energy.<sup>187</sup> By allowing video game manufacturers to use another's identity without compensation is to condone stealing property from that individual, and providing consumers the ability to modify the identity in a game does not change that- the stolen identity is still being used without compensation by the video game manufacturer.

## VI. Conclusion

EA violated the publicity rights of student athletes in *NCAA Football* when it used the student athlete's identities for their commercial advantage, without consent of, and resulting in injury to, the student athletes.

Video games are protected as creative works under the First Amendment, and this protection can outweigh an individual's right to publicity. First Amendment rights must be balanced against the individual's right to publicity to ensure neither right impermissibly encroaches on the other. The transformative use test has been utilized in cases implicating both right of publicity and First Amendment considerations. This test was applied in *Hart*, however, the court's interpretation of the test resulted in EA's First Amendment rights swallowing the publicity rights of the student athletes. The approach used in *Hart* was incorrect, and its application to other similar cases will effectively erode the right of publicity as we know it, and as Prosser elucidated it in *Privacy*. This problem was recognized by Hart's attorney, Timothy J. McIlwain, who remarked "this is arguably the most important case in America today because it involves a citizen's right to their persona and their image. There is nothing more sacred than your own identity. Whether you're an artist, an athlete or a celebrity, a corporation's right as an 'individual' should not trump the rights of the real individual...there is just no way the framers of the US constitution intended that."<sup>188</sup>

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<sup>1</sup> *Keller v. Electronic Arts, Inc.*, No. 09-1967 CW, 2010 WL 530108, at \*1 (N.D.Cal. Feb. 8, 2010) (alleging defendant used plaintiff's identity without consent in violation of Indiana publicity laws); *see also Hart v. Electronic Arts, Inc.*, 808 F. Supp. 2d 757, 760 (D.N.J. 2011) (misappropriation of the likeness and identity of Plaintiff a for a commercial purpose in connection with Defendant's NCAA Football video games); *see also In re: NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. 09-cv-01967, 2012 WL 174834, at \*1 (N.D.Cal. Jan. 20, 2012) (plaintiffs claim NCAA, Collegiate Licensing Company and EA engaged in restraint of trade, a group boycott conspiracy, and publicity rights violation).

<sup>2</sup> *Hart*, 808 F. Supp. 2d. at 764; *see also Keller*, 2010 WL 530108, at \*3.

<sup>3</sup> Matthew G. Matzkin, *Gettin' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for Their Likenesses*, 21 Loy. S.A. Ent. L. Rev. 227 (2001).

<sup>4</sup> NCAA, *Where Does the Money Go*, at

[http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Nine+points+to+consider\\_one](http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Nine+points+to+consider_one) (last visited Apr. 2, 2012 (85 percent of NCAA revenue is comprised of rights fees. In 2009-2010, media agreements made up 86 percent of NCAA revenue); *see also Sarah Morgan, 10 Things NCAA Basketball Won't Tell You*, available at <http://www.smartmoney.com/borrow/student-loans/10-things-ncaa-basketball-wont-tell-you-1300486798956/#articleTabs> (last visited Apr. 18, 2012) (NCAA entered into 14-year deal with CBS and Turner Broadcasting System for \$10.8 billion).

<sup>5</sup> Electronic Arts Online, *Electronic Arts Reports Q1 FY12 Financial Results*, available at <http://investor.ea.com/releasedetail.cfm?ReleaseID=594196> (last visited Apr. 2, 2012) (EA reporting NCAA 12 up

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17% versus prior year's version, and raised non-GAAP digital revenue guidance to \$1.1 to \$1.15 billion in fiscal year 2012).

<sup>6</sup> Matzkin, *supra* note 3, at 250.

<sup>7</sup> Leslie E. Wong, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes On the NCAA for Infringing on the Former Student-Athlete's Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1104-05 (2010).

<sup>8</sup> Tara Bhupathi, *If I Were General Counsel for the NCAA: A Report on How to Properly Exploit Student Athlete's [sic] Right of Publicity*, 2010. SSRN.com/abstract=1799462.

<sup>9</sup> Three college players died, and eighteen players at all levels of the sport. Tim Layden, *Embarassing Moments- College football risks humiliation with every season*, Sports Illustrated (Aug. 14, 2006, 3:23 PM), [http://sportsillustrated.cnn.com/2006/writers/tim\\_layden/07/14/moments/index.html](http://sportsillustrated.cnn.com/2006/writers/tim_layden/07/14/moments/index.html)

<sup>10</sup> Layden, *supra* note 9.

<sup>11</sup> NCAA HISTORY,

<http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history> (last visited Mar. 11, 2012).

<sup>12</sup> NCAA HISTORY, *supra* note 11.

<sup>13</sup> NCAA HISTORY, *supra* note 11.

<sup>14</sup> NCAA HISTORY, *supra* note 11.

<sup>15</sup> NCAA HISTORY, *supra* note 11.

<sup>16</sup> NCAA, 2010-2011 NCAA Bylaws § 2.9 (2011).

<sup>17</sup> *Id.* § 12.1.2 (a)-(e).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* § 14.1.3.

<sup>22</sup> NCAA, 2010-2011 NCAA Bylaws § 12.5 (2011).

<sup>23</sup> NCAA, FORM 11-3A: STUDENT-ATHLETE STATEMENT- NCAA DIVISION I, ACADEMIC YEAR 2011-2012, [hereinafter Form 11-3a] available at [http://fs.ncaa.org/Docs/AMA/compliance\\_forms/DI/DI%20Form%2011-3a.pdf](http://fs.ncaa.org/Docs/AMA/compliance_forms/DI/DI%20Form%2011-3a.pdf).

<sup>24</sup> See *infra* notes 27 through 29 and accompanying text.

<sup>25</sup> NCAA RULES COMPLIANCE,

[http://www.ncaa.org/wps/wcm/connect/corp\\_relations/corprel/corporate+relationships/licensing/faqs.html#One](http://www.ncaa.org/wps/wcm/connect/corp_relations/corprel/corporate+relationships/licensing/faqs.html#One) (last visited Apr. 2, 2012).

<sup>26</sup> "Founded in 1981, CLC is the oldest and largest collegiate licensing agency in the nation and currently represents nearly 200 colleges, universities, bowl games, athletic conferences, The Heisman Trophy, and the NCAA (including the Men's and Women's Final Four, the College World Series, and all NCAA Championships)." CLC, <http://www.clc.com/clcweb/publishing.nsf/Content/aboutclc.html> (last visited Apr. 18, 2012).

<sup>27</sup> NCAA, *Where Does the Money Go*, at

[http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Nine+points+to+consider\\_one](http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Nine+points+to+consider_one) (last visited Apr. 2, 2012).

<sup>28</sup> Sarah Morgan, *10 Things NCAA Basketball Won't Tell You*, available at

<http://www.smartmoney.com/borrow/student-loans/10-things-ncaa-basketball-wont-tell-you-1300486798956/#articleTabs> (last visited Apr. 18, 2012).

<sup>29</sup> BusinessWire, *CLC Grants EA Exclusive College Football Videogame License*, available at

<http://www.businesswire.com/news/home/20050411005378/en/CLC-Grants-EA-Exclusive-Videogame-License> (last visited Apr. 18, 2012).

<sup>30</sup> See *supra* note 29.

<sup>31</sup> See *supra* note 29.

<sup>32</sup> Katie Thomas, *College Stars Sue Over Likeness in Video Games*, New York Times (Jul. 4, 2009).

<sup>33</sup> See THOMAS COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT, (2d ed. 1888); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

<sup>34</sup> COOLEY, *supra* note 33, at 29.

<sup>35</sup> "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops.'" Warren & Brandeis, *supra* note 33, at 196.

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<sup>36</sup> The right to life should be expanded to include “...the right to enjoy life, --the right to be let alone...” Warren & Brandeis, *supra* note 33, at 193.

<sup>37</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953).

<sup>38</sup> *Haelan*, 202 F. 2d at 867.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 868.

<sup>42</sup> *Id.*

<sup>43</sup> Thomas J. McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1707 (1986).

<sup>44</sup> McCarthy, *supra* note 43, at 1707.

<sup>45</sup> McCarthy, *supra* note 43, at 1710.

<sup>46</sup> McCarthy, *supra* note 43, at 1710-12.

<sup>47</sup> Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

<sup>48</sup> Prosser, *supra* note 33, at 389; RESTATEMENT (SECOND) OF TORTS § 652 (1977).

<sup>49</sup> Warren & Brandeis, *supra* note 33, at 196.

<sup>50</sup> Nimmer, *supra* note 47, at 204.

<sup>51</sup> Prosser explains that “there is little indication that Warren and Brandeis intended to direct their article at (Appropriation).” Prosser, *supra* note 33, at 401. Nonetheless, he defends appropriation of another’s identity for some advantage of his or her own as a tort that fits clearly as a subset of the right of privacy. *Id.* at 403-04.

<sup>52</sup> Prosser, *supra* note 33, at 406.

<sup>53</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>54</sup> *Zacchini*, 433 U.S. at 563-64.

<sup>55</sup> *Id.* at 576.

<sup>56</sup> United States Constitution Article I, Section 8, Clause 8 United States Congress is empowered “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

<sup>57</sup> See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); see also *CBC Distribution & Marketing v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007).

<sup>58</sup> Currently, at least 19 states recognize a right of publicity through statutes, at least 28 more recognize the right via common law. RIGHT OF PUBLICITY, *Statutes*, <http://rightofpublicity.com/statutes> (last visited Apr. 20, 2012).

<sup>59</sup> “One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in sections 48 and 49.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

<sup>60</sup> The concern regarding lack of uniformity among states in right of publicity laws and subsequent lack of uniformity in court decisions has led to a cry for a federal publicity statute. See, *Board Resolutions-U.S. Federal Right of Publicity*, INTERNATIONAL TRADEMARK ASSOCIATION (Mar. 3, 1998), <http://www.inta.org/advocacy/pages/usfederalrightofpublicity.aspx>; see also Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, DEPAUL J. ART & ENT. L. Vol. IX:227 (Spring 1999); see also Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, COMMUNICATIONS LAWYER, Aug. 2011, available at [http://www.bostwickjassy.com/pdf/why\\_federal\\_right\\_publicity\\_statute\\_is\\_necessary\\_comm\\_law\\_28\\_2.pdf](http://www.bostwickjassy.com/pdf/why_federal_right_publicity_statute_is_necessary_comm_law_28_2.pdf).

<sup>61</sup> 15 U.S.C. § 1051 (2006).

<sup>62</sup> 15 USC § 1125 A (1) (a).

<sup>63</sup> See *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 448 (S.D.N.Y. 2008) (Mars, Inc. did not violate Burck’s (also known as the “Naked Cowboy”) publicity by showing advertisements of cartoon M&M’s® dressed in Burck’s signature costume. The court dismissed his claims under New York state law, but found that his allegations of false endorsement under the Lanham Act were sufficient to state a claim). See also *Hirsh v. S.C. Johnson & Son, Inc.*, 90 Wis.2d 379, 741. (S.C. Wisc. 1979) (defendant’s use of plaintiff’s nickname “Crazylegs” to sell women’s shaving cream was a misappropriation of plaintiff’s identity).

<sup>64</sup> See *Hilton v. Hallmark Cards*, 599 F.3d 894, 909 (9th Cir. 2010) (“the elements of the claim under California law are (1) the defendant’s use of the 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”); see also *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9<sup>th</sup> Cir. 2001); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 (1995).

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<sup>65</sup> See VICK & JASSY, supra note 60, at 15.

<sup>66</sup> “Any person who knowingly uses another’s name, voice, signature, photograph or likeness in any manner, on or in products, merchandise, or goods or services, without such person’s prior consent...” CAL. CIV. CODE § 3344(a) (West 2012).

<sup>67</sup> CAL. CIV. CODE § 3344.1(a)(1) (West 2012).

<sup>68</sup> The Indiana Right of Publicity Statute has been described as the most plaintiff-friendly in the country. VICK & JASSY, supra note 60, at 1. The principal author of the statute, Mark Roesler, the Chairman and CEO of CMG Worldwide, explains for the reason for the expansive legislation. *Id.* at 3. CMG Worldwide, is “an Indiana-based company that represents the heirs and estates of large numbers of deceased celebrities . . .” *Id.*

<sup>69</sup> IND. CODE § 32-36-1-6 (2012).

<sup>70</sup> In addition to the broad application of “identity,” the Indiana right of publicity statute is also broad in its application. It is triggered whenever an act or event occurs within Indiana, regardless of a personality’s domicile, residence or citizenship. IND. CODE § 32-36-1-1(a) (2012). The law disallows the use, without permission, of a personality’s right of publicity for a commercial purpose personality during the personality’s lifetime plus 100 years following the personality’s death. IND. CODE § 32-36-1-8(a) (2012).

<sup>71</sup> See N.Y. CIV. RIGHTS § 51. This statute is also narrow in its application, as it prohibits only the unauthorized use of a person’s ‘identity’ for purposes of trade or advertising. *Id.*

<sup>72</sup> See *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1398–99 (9th Cir. 1993) (right of publicity is not limited to name and likeness, but extends to any appropriation of identity (anything that evokes one’s personality)); see also *Kirby v. Sega of America, Inc.*, 50 Cal.Rptr.3d 607, 613 (Cal. Ct. App. 2006) (misappropriation of one’s likeness refers to a person’s visual image).

<sup>73</sup> See *Midler v. Ford Motor Co.*, 849 F.2d 460, 465 (9th Cir. 1989) (“When a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.”) and *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1096 (9th Cir. 1992) (singer successfully brought false endorsement claim under the Lanham act when his unique singing voice was imitated in a commercial, recognizing voice misappropriation as a tort under California law).

<sup>74</sup> See *Burck v. Mars, Inc.*, 571 F. Supp. 2d. 446, 448 (S.D.N.Y. 2008); see also *Ali v. Playgirl, Inc.*, 447 F. Supp. 2d. 723, 728 (S.D.N.Y. 1978) (drawing appearing in Playgirl magazine of unnamed naked African-American man in a boxing ring in which also incorporated Ali’s catchphrase “the greatest” found to have used Ali’s identity).

<sup>75</sup> See *White*, 971 F.2d at 1399 (Samsung advertisement depicting female robot with characteristics similar to Vanna White (blonde hair, gown, and turning block letters) was a misappropriation of White’s identity).

<sup>76</sup> *Wendt v. Host International, Inc.*, 125 F.3d. 806, 809 (9th Cir. 1997)(whether animatronic figurines of Cheers actors John Ratzenburger and George Wendt should be considered likenesses of the actors is a question of fact to be determined by a jury).

<sup>77</sup> *No Doubt v. Activision Publishing, Inc.*, 192 Cal.App.4th 1018, 1024 (Cal. Ct. App. 2011).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Kirby v. Sega of America, Inc.*, 50 Cal.Rptr.3d 607, 613 (Cal. Ct. App. 2006).

<sup>81</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

<sup>82</sup> *Hoffman v. Capital Cities/ABC, Inc.*, 33 F.Supp. 2d 867, 873 (C.D. Cal. 1999) (magazine used Dustin Hoffman’s image for commercial gain by superimposing onto a picture of Hoffman’s body, without his consent, clothing manufactured by advertisers of the magazine).

<sup>83</sup> *CBC Distribution & Marketing v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION §47 (1995)); see also *Hoffman*, 33 F.Supp. 2d at 874.

<sup>84</sup> *CBC Distribution*, 505 F.3d at 822.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> “This right of publicity would usually yield [prominent persons] no money unless it could be made the subject of an exclusive grant . . .” *Haelan*, 202 F.2d at 868.

<sup>88</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, comment f (2010).

<sup>89</sup> Restatement (Third) of unfair comp. sec 46 comment f (2010).

<sup>90</sup> *No Doubt v. Activision Publishing, Inc.*, 192 Cal.App.4th 1018, 1023 (Cal. Ct. App. 2011).

<sup>91</sup> *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. Sup. Ct. 2003) (economic harm can be calculated for pecuniary loss and also for distress and suffering).

<sup>92</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49, comment b (1995).

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<sup>93</sup> *Pesina v. Midway Manufacturing Co.*, 948 F. Supp 40, 42 (N.D. Ill. 1996).

<sup>94</sup> *No Doubt*, 192 Cal. App. 4th 1018, 1023.

<sup>95</sup> See *Keller v. Electronic Arts, Inc.* No. 09-1967 CW, 2010 WL 530108, at \*1 (N.D.Cal. Feb. 8, 2010); *see also Hart v. Electronic Arts, Inc.*, 808 F. Supp. 2d 757, 760 (D.N.J. 2011).

<sup>96</sup> *Matzkin*, *supra* note 3, at 246.

<sup>97</sup> See *Keller*, No. 09-1967 CW, 2010 WL 530108 at \*1; *see also Hart*, 808 F. Supp. 2d at 760.

<sup>98</sup> *Id.*

<sup>99</sup> Beth A. Cianfrone and 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, 41-2, *see also Keller*, No. 09-1967 CW, 2010 WL 530108, at \*2.

<sup>100</sup> *Cianfrone*, *supra* note 99, at 48.

<sup>101</sup> See *Keller*, No. 09-1967 CW, 2010 WL 530108, at \*2.

<sup>102</sup> *Id.*

<sup>103</sup> *Cianfrone*, *supra* note 99, at 43.

<sup>104</sup> *Matzkin*, *supra* note 3, at 240.

<sup>105</sup> *Cianfrone*, *supra* note 99, at 40.

<sup>106</sup> *Cianfrone*, *supra* note 99, at 43.

<sup>107</sup> *Cianfrone*, *supra* note 99, at 44.

<sup>108</sup> *BusinessWire- CLC Grants EA*, para 4.

<sup>109</sup> *Hart*, 808 F. Supp. 2d. at 760.

<sup>110</sup> *CBC Distribution & Marketing v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION §47 (1995)); *see also Hoffman*, 33 F.Supp. 2d at 874.

<sup>111</sup> *EA Inc.* (10-K filed May 24, 2011) (See Form 10-K for the fiscal year ended March 31, 2011 EA stated the importance of IP licensed from others to the revenue, profitability and cash flow of the company.

<sup>112</sup> *CBC Distribution & Marketing v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007).

<sup>113</sup> NCAA Bylaws § 12.1.2.

<sup>114</sup> Form 11-3a, *supra* note 23.

<sup>115</sup> *Id.*

<sup>116</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION §42.2 (1995).

<sup>117</sup> *Pesina v. Midway Manufacturing Company*, 948 F. Supp. 40, 43 (N.D. Ill. 1996).

<sup>118</sup> NCAA Bylaws § 12.

<sup>119</sup> *NCAA v. Tarkanian*, 488 U.S. 179, 185 (1988).

<sup>120</sup> *Keller v. Electronic Arts, Inc.* No. 09-1967 CW, 2010 WL 530108, at \*2 (N.D.Cal. Feb. 8, 2010).

<sup>121</sup> *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729, 2733 (2011).

<sup>122</sup> *Id.*

<sup>123</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>124</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 838 F. Supp. 1510, 1512 (N.D. Okla. 1993).

<sup>125</sup> *Hart v. Electronic Arts, Inc.*, 808 F. Supp. 2d 757, 761 (D.N.J. 2011).

<sup>126</sup> *Id.* at 762.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 761.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 763.

<sup>131</sup> *Hart v. Electronic Arts, Inc.*, 808 F. Supp. 2d 757, 760 (D.N.J. 2011).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 766.

<sup>136</sup> *Id.* at 760.

<sup>137</sup> *BusinessWire, McIlwain & Mullen Law Firm with the support of the Screen Actors Guild, NFL, NHL, NBA and MLBPA to Appeal Case Against EA Sports on behalf of Ryan Hart*, available at <http://www.businesswire.com/news/home/20120216006080/en/McIlwain-Mullen-Law-Firm-support-Screen-Actors> (last visited Apr. 18, 2012).

<sup>138</sup> *Hart*, 808 F. Supp. 2d. at 760.

<sup>139</sup> *Facenda v. N.F.L. Films Inc.*, 542 F.3d 1007 (3d Cir. 2008).

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<sup>140</sup> *Id.* at 1017.  
<sup>141</sup> *Id.*  
<sup>142</sup> *Hart*, 808 F. Supp. 2d. at 771.  
<sup>143</sup> *Id.*  
<sup>144</sup> *Id.* at 776 (noting that New Jersey has not specifically endorsed either test).  
<sup>145</sup> *Id.* at 794.  
<sup>146</sup> *Id.*  
<sup>147</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 570 (1994).  
<sup>148</sup> 17 U.S.C. § 102 (a) (2006).  
<sup>149</sup> § 107.  
<sup>150</sup> § 107.  
<sup>151</sup> *Campbell*, 510 U.S. at 582.  
<sup>152</sup> *Id.*  
<sup>153</sup> *Campbell*, 510 U.S. at 579.  
<sup>154</sup> James J.S. Holmes and Kanika D. Corley, *Defining Liability for Likeness of Athlete Avatars in Video Games*, Los Angeles Lawyer, May 2011, available at <http://www.lacba.org/Files/LAL/Vol34No3/2811.pdf>.  
<sup>155</sup> *Kirby v. Sega of America, Inc.*, 50 Cal.Rptr.3d. 607, 613 (Cal. Ct. App. 2006).  
<sup>156</sup> *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018, 1023 (Cal. Ct. App. 2011).  
<sup>157</sup> *Kirby*, 50 Cal. Rptr. 3d. at 609.  
<sup>158</sup> *Id.*  
<sup>159</sup> *Id.*  
<sup>160</sup> *Id.* at 613.  
<sup>161</sup> *No Doubt*, 192 Cal. App. 4th at 1022.  
<sup>162</sup> *Id.*  
<sup>163</sup> *Id.*  
<sup>164</sup> *Id.* at 1028.  
<sup>165</sup> *Id.* at 1033.  
<sup>166</sup> *Id.*  
<sup>167</sup> *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018, 1034 (Cal. Ct. App. 2011).  
<sup>168</sup> *Id.* at 1033.  
<sup>169</sup> *Hart*, 808 F. Supp. 2d. at 794.  
<sup>170</sup> *Id.* at 784.  
<sup>171</sup> *Id.*  
<sup>172</sup> See *supra* notes 130 through 135 and accompanying text.  
<sup>173</sup> See *supra* notes 170 through 171 and accompanying text.  
<sup>174</sup> *Id.*  
<sup>175</sup> See *supra* note 168.  
<sup>176</sup> *Hart*, 808 F. Supp. 2d. at 767.  
<sup>177</sup> See *supra* notes 130 through 135 and accompanying text.  
<sup>178</sup> *Id.*  
<sup>179</sup> See *supra* notes 170 through 171 and accompanying text.  
<sup>180</sup> *Hart*, 808 F. Supp. 2d. at 784.  
<sup>181</sup> *Id.*  
<sup>182</sup> *No Doubt*, 192 Cal. App. 4th at 1022.  
<sup>183</sup> *Hart*, 808 F. Supp. 2d. at 784.  
<sup>184</sup> *Id.* at 785.  
<sup>185</sup> *Id.* at 785-6.  
<sup>186</sup> See *supra* note 153.  
<sup>187</sup> *Comedy III Productions, inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 399 (Cal. 2001).  
<sup>188</sup> *BusinessWire, McIlwain & Mullen Law Firm with the support of the Screen Actors Guild, NFL, NHL, NBA and MLBPA to Appeal Case Against EA Sports on behalf of Ryan Hart*, available at <http://www.businesswire.com/news/home/20120216006080/en/McIlwain-Mullen-Law-Firm-support-Screen-Actors> (last visited Apr. 18, 2012).

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