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Closing the “Free Speech” Loophole: The Case for Protecting College Athletes’ Publicity Rights in Commercial Video Games

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CLOSING THE “FREE SPEECH” LOOPHOLE: THE CASE FOR
PROTECTING COLLEGE ATHLETES’ PUBLICITY RIGHTS IN
COMMERCIAL VIDEO GAMES

*Marc Edelman**

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INTRODUCTION

When Electronic Arts Inc. (Electronic Arts) launched its video game series *NCAA Football* in June 1993, the available technology limited developers to crafting avatars that looked like faceless figurines.¹ Today, however, advancements in digital technology have enabled developers to create “virtual players” that strongly resemble their real-life counterparts.² For example, in *NCAA Football 12*, the avatar that represents University of Florida running back Chris Rainey possesses Chris Rainey’s actual height, weight, skin complexion, and hair style.³

1. See Joe Fortenbaugh, *Inside NCAA Football 12*, NAT’L FOOTBALL POST (July 11, 2011, 9:00 AM), <http://www.nationalfootballpost.com/Inside-NCAA-Football-12.html> (explaining that Electronic Arts’s *NCAA Football* video games have “come a long way since the days... when an open-field tackle looked like one bowling pin knocking down another bowling pin”).

2. See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 761, 764 (D.N.J. 2011) (discussing the realistic appearances of Electronic Arts’s virtual players); see also Katie Thomas, *College Stars See Themselves in Video Games, and Pause to Sue*, N.Y. TIMES, July 4, 2009, at A1, available at <http://www.nytimes.com/2009/07/04/sports/04ncaa.html> (same); Sean Hanlon & Ray Yasser, “*J.J. Morrison*” and His Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L. J. 241, 247, 271 (2008) (describing the high quality graphics in Electronic Arts’s video games).

3. Compare Antonya English, *UF Streak? What UF Streak?*, TAMPA BAY TIMES, Sept. 20, 2011, at 2C, available at <http://www.tampabay.com/sports/colleges/article1192460.ece> (showing Florida running back Chris Rainey wearing a clear visor, sweatbands on his elbows, a towel on his waist, and gloves), with *The Photographic Side of NCAA Football 12*, OPERATION SPORTS (Sept. 26, 2011, 8:53 PM), <http://www.operationsports.com/forums/ncaa-football/492578-photographic-side-ncaa-football-12-a-190.html> (providing a photograph of the Electronic Arts video game version of Chris Rainey, containing each of these same attributes).

In addition, both Chris Rainey and his virtual counterpart wear the same jersey number, visor, gloves, and sweatbands.⁴

Recently, Pulitzer Prize-winning journalist Taylor Branch criticized video game publishers for failing to pay for the use of college athletes' likenesses.⁵ According to Branch, failing to pay for college athletes' likenesses not only leads to windfall profits for video game publishers, but also transforms college athletes into a “profit center” for their business partner, the National Collegiate Athletic Association (NCAA).⁶

At the core of intellectual property law, there lies a well-established principle that “if you create something, then that something is . . . yours to exploit.”⁷ Based upon this principle, courts have generally disallowed the unlicensed, commercial use of celebrity likenesses.⁸ Nevertheless,

4. See *supra* note 3 and accompanying text.

5. See, e.g., Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, at 4, available at <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/1/> (describing the “shame of college sports” and pointing out that while millions of dollars are “ultimately derive[d] from the college athletes whose likenesses are shown in the films or video games. . . . none of the profits go to them”) (emphasis added).

6. *Id.*; see also *CLC Grants EA Exclusive College Football Video Game License*, BUSINESS WIRE (Apr. 11, 2005, 8:30 AM) <http://www.businesswire.com/news/home/20050411005378/en/CLC-Grants-EA-Exclusive-College-Football-Videogame> (announcing that the Collegiate Licensing Company, which is the marketing arm for the NCAA, had signed a six-year, exclusive deal to license NCAA intellectual property from video games to Electronic Arts). See generally *Hart*, 808 F. Supp. 2d at 784 (noting that Electronic Arts pays a licensing fee for the “use of team trademarks, uniforms, and logos[] that are included in the *NCAA Football* video game”); 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 J. LEGAL ASPECTS SPORTS 35, 37 (2010) (“[F]or the 2005–06 season, the University of Florida and Ohio State University each earned \$130,500 in licensed royalties from EA. The games have proven to be an added revenue source, in addition to being a strong promotional tool, for the NCAA and its member institutions.”) (internal citations and quotations omitted).

7. *JESSE DUKEMINIER ET. AL.*, PROPERTY 51 (6th ed. 2006); accord *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (“Perhaps the basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference.”); *Munden v. Harris*, 134 S.W. 1076, 1078 (Mo. Ct. App. 1911) (noting that “[i]f there is value in [one’s likeness] sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?”); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) (recognizing that from this principle of acquisition of creation comes “the right of each person to control and profit from the publicity values which he has created or purchased”). But see generally Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 173–96 (1993) (arguing that this principle is misguided on a number of grounds in the context of protecting one’s likeness).

8. See, e.g., *Hilton v. Hallmark Cards*, 599 F.3d 894, 909 (9th Cir. 2010) (noting that in California, the common law elements of a right of publicity claim include “(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”); *White v. Samsung Elecs. of Am.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (same); *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007) (defining in

courts have failed to protect the publicity rights of Division I college athletes.⁹ Instead, they have created a First Amendment loophole to circumvent college athletes' rights.¹⁰

This Article argues that despite First Amendment concerns, courts should protect college athletes' publicity rights in commercial video games. Part I of this Article discusses the status of the American college athlete and the practice of licensing intellectual property rights from colleges to video game publishers. Part II introduces the state-law right of publicity—an intellectual property right that protects commercial interests in one's own likeness. Part III explains why Electronic Arts's video games violate the publicity rights of college football players. Part IV explains why courts should not allow video game publishers to hide behind a First Amendment defense when publishers are using exact depictions of college football players' likenesses. Finally, Part V concludes that even if a video game publisher were to create an avatar that partially transforms a college athlete's likeness, the courts should still recognize some liability in the video game publisher for the use of the nontransformed aspects of the college athlete's identity.

I. THE STATUS OF THE AMERICAN COLLEGE ATHLETE AND THE PRACTICE OF LICENSING INTELLECTUAL PROPERTY RIGHTS FROM COLLEGES TO VIDEO GAME PUBLISHERS

A. *The Status of the American College Athlete*

College athletes represent a unique class of celebrity within American society.¹¹ On the one hand, college athletes are revered for

Missouri the elements of a right of publicity action as including “(1) [t]hat defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage”) (internal citations and quotations omitted); *Uhlaender*, 316 F.Supp. at 1279 (D. Minn. 1970) (treating a breach of the right of publicity as constituting “appropriation for commercial benefit of the plaintiff's name or likeness”).

9. See, e.g., *Hart*, 808 F. Supp. 2d at 760 (rejecting a college athlete's right of publicity claim in the context of a commercial video game); cf. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 169–70 (5th Cir. 1941) (holding that a college football player could not make a claim for breach of his right of privacy for the use of his picture in a beer advertisement where the beer manufacturer had purchased rights to the picture directly from the athlete's college).

10. See *Hart*, 808 F. Supp. 2d at 783–84 (noting that even though video game publishers “walk a fine line . . . [of] exploiting the hard-earned reputations of college players for [their] own profit,” protecting a limited number of “creative elements” in Electronic Arts's video game is more important than protecting collegiate athletes' rights to control the use of their own identities); see also *id.* at 784 (noting that “there are sufficient elements of [one's] own expression found in [Electronic Arts's college-sports video games] that justify . . . First Amendment protection”).

11. See Dave Fairbank, *Giving Back to 757*, DAILY PRESS (Newport News, VA), July 12, 2009, at C1 (“In an area without major-league sports, high school and college athletes are celebrities. If they make it to the pros, they provide living, breathing, neighborhood examples of success.”); Stephanie Pedersen, *Stephanie Pedersen Commentary: Twitter Trash Talk Causing*

their strength, agility, and skill.¹² But on the other hand, college athletes are generally prohibited from earning money based on their athletic talents.¹³ This general prohibition arises from the NCAA's Principle of Amateurism, which states that “student-athletes shall be amateurs in intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental[,] and social benefits to be derived.”¹⁴

Based upon this Principle of Amateurism, the NCAA requires its athletes to decline salaries for playing their sport, and to reject remuneration, in any form, offered in connection with their status as athletes.¹⁵ In addition, the NCAA deems college athletes ineligible to compete in sporting events if they “permit[] the use of [their] name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind.”¹⁶

Trouble for College Athletes, LEDGER-ENQUIRER (Columbus, GA), Aug. 13, 2011, available at <http://www.ledger-enquirer.com/2011/08/13/1692325/stephanie-pedersen-commentary.html> (“Whether you like it or not, high school recruits and college athletes are celebrities.”).

12. See Erik Brady, *Athletes' Service Organization Gets \$140,000 Grant*, USA TODAY, Nov. 3, 1994, at C6 (quoting AmeriCorp CEO Eli Segal stating that “student-athletes are admired for their sport skills”); see also Andrew Bagnato, *NCAA, Schools, Athletes Seek Money Answers—College Athletes Can Be Famous but Without the Money to Wash Clothes*, THE SEATTLE TIMES, Mar. 16, 1997, available at <http://community.seattletimes.nwsources.com/archive/?date=19970316&slug=2529008> (providing examples of admiration and idolization of a college athlete within the local community).

13. See generally NAT'L COLLEGIATE ATHLETIC ASS'N, 2011–12 NCAA DIVISION I MANUAL, § 2.9 (effective Aug. 1, 2011) (The Principle of Amateurism) [hereinafter NCAA MANUAL], available at <http://www.ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual.aspx> (noting the amateur status of college athletes). This Principle of Amateurism originally emerged from nineteenth-century England, during which time young men of privileged economic status regularly engaged in unpaid athletic events at colleges such as Oxford and Cambridge. See Robert A. McCormick & Amy Christian McCormick, *Major College Sports: A Modern Apartheid*, 12 TEX. REV. ENT. & SPORTS L. 13, 22 (2010); see also Daniel Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 331 n.7 (2007) (tracing America's version of amateur college athletics back to the British model at universities such as Cambridge and Oxford); Kay Howes, *Debate on Amateurism Has Evolved over Time*, NCAA NEWS ARCHIVE, Jan. 3, 2000, available at <http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate%2Bon%2Bamate%2Bhas%2Bevol%2Bover%2Btime%2B-%2B1-3-00.html> (same, from the perspective of the NCAA). It was then adopted by the NCAA upon its inception in 1906 as a way to protect its members from competing for the services of premier athletic labor, even though few American athletes were from privileged families. See *id.* (noting that when the NCAA first adopted its Principle of Amateurism in 1906, the association of member colleges was “known as the Intercollegiate Athletic Association of the United States”).

14. NCAA MANUAL, *supra* note 13, at § 2.9.

15. *Id.* at § 12.1.2 (Amateur Status).

16. See *id.* at § 12.5.2.1 (Advertisements and Promotions After Becoming a Student-Athlete).

Nevertheless, the NCAA operates as a commercial entity.¹⁷ For example, the NCAA licenses its broadcast rights for sporting events to both public and cable television stations.¹⁸ Similarly, the NCAA licenses its trademark rights for use by corporate business partners.¹⁹ Thus, the NCAA's unique treatment of college athletes as amateurs within a broader commercial enterprise creates both confusion and uncertainty for the outside world.²⁰

B. *The Practice of Licensing Intellectual Property Rights from Colleges to Video Game Publishers*

Although the NCAA shamelessly licenses its intellectual property rights to video game publishers, the NCAA's stringent enforcement of its Principle of Amateurism prevents publishers from negotiating directly with college athletes to acquire rights to use their likenesses.²¹

17. See Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 497 (2008) (noting that "[t]he idea that major college sports are amateur is demonstrably false, and that fallacy has improperly sheltered college sports from the application of a variety of laws"); see also Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J. L. REFORM 861, 862 (2002) (noting that college athletic directors and coaches seek to limit college athletes' economic opportunities because they, in turn, are able to maintain a greater share of their athletic departments' proceeds, as well as to reap some of the endorsement deals that otherwise would go to college athletes); Darren A. Heitner & Jeffrey L. Levine, *Corking the Cam Newton Loophole, a Sweeping Suggestion*, 2 HARV. J. SPORTS & ENT. L. 341, 342 (2011) ("[W]hile the NCAA trumpets its philosophy of amateur competition, an increasing refrain points to the hypocritical nature of the Association, as its financial success is built on the sweat of amateur athletes."); Lazaroff, *supra* note 13, at 354–55 ("[T]he assumption that so-called student-athletes in high profile Division I football and basketball programs are students first and athletes second may reflect more of an idealistic fantasy than modern reality. . . . [T]hey are inextricably intertwined with university activities that are irrefutably commercial."); Branch, *supra* note 5, at 2 ("The NCAA makes money, and enables universities and corporations to make money, from the unpaid labor of young athletes.")

18. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Ok.*, 468 U.S. 85, 89–94 (1984) (discussing the history of the NCAA's broadcasting plan of college football games on television); Marc Edelman & David Rosenthal, *A Sobering Conflict: The Call for Consistency in the Message Colleges Send About Alcohol*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1389, 1404–05 (2010) (noting that the NCAA garners billions of dollars in revenues from selling sports broadcasting rights to television stations).

19. See generally NCAA.ORG, *NCAA Licensing Program Frequently Asked Questions*, https://www.ncaa.org/wps/wcm/connect/corp_relations/corprel/corporate+relationships/licensing/faqs.html (last visited Sept. 26, 2012).

20. Cf. McCormick & McCormick, *supra* note 17, at 497 (noting that "[t]he idea that major college sports are amateur is demonstrably false").

21. See NCAA MANUAL, *supra* note 13 (noting that the NCAA Principle of Amateurism 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"). Because the NCAA Principle of Amateurism prohibits college athletes from "accept[ing] any remuneration" based on their status as athletes and from "promot[ing] directly

In the absence of a practical means to license the use of college athletes' likenesses, publishers are left to consider how to make their games as realistic as possible without infringing upon rights they do not own.

Without any perfect course of action, the company that currently enjoys an exclusive license to use NCAA logos in college football games, Electronic Arts, has adopted the strategy of producing video games that use college athletes' virtual images and biographical data but not their actual names.²² This strategy, however, is somewhat troubling because Electronic Arts's virtual players are still easily identifiable as their real-life counterparts based on their jersey numbers, positions, physical characteristics (height and weight), physical abilities, and biographical details.²³ Furthermore, *NCAA Football* users are able to easily identify virtual players as their real-life counterparts based on a game feature that allows users to add surnames to the back of virtual players' jerseys.²⁴ Once a user adds surnames, the game announcer will then refer to each avatar by the designated surname.²⁵

Thus, even though Electronic Arts does not explicitly market a game that includes avatars that bear the names of college athletes, the ultimate result is, in essence, no different. It is on this basis that some college football players contend that Electronic Arts violates their publicity rights.²⁶

II. THE RIGHT OF PUBLICITY: A STATE-LAW INTELLECTUAL PROPERTY RIGHT

A. Introduction to the Right of Publicity

The “right of publicity” is a state-law intellectual property right that serves “to protect the commercial interest of celebrities and their identities.”²⁷ In some states, the right of publicity arises entirely from

the sale or use of a commercial product,” video game publishers cannot easily enter into licensing agreements with college athletes. *Id.* at § 12.5.2.1.

22. See Appellee's Brief at 5, *Keller v. Elec. Arts, Inc.*, No. 10-15387 (9th Cir. Oct. 29, 2010).

23. See *id.*; *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 761, 783 (D.N.J. 2011).

24. *Hart*, 808 F. Supp. 2d at 761; see also *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, at *1 (N.D. Cal. Feb. 8, 2010) (noting that users of *NCAA Football* can add surnames to the avatars by use of third-party software that allows users to update avatar names for entire college football teams by downloading instantaneously the custom rosters of these teams).

25. See *Cianfrone & Baker*, *supra* note 6, at 43 (stating that if you manually insert a name for the avatars, the announcers will say that player's name aloud during game play).

26. See *Hart*, 808 F. Supp. 2d at 760–61 (explaining the grounds for the *Hart* lawsuit).

27. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983); see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (describing the right of publicity as “protecting the proprietary interest of the individual in his act in part to encourage such entertainment”); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003) (“The

statute.²⁸ In others, it arises from common law principles set forth in an 1890 law review article written by U.S. Supreme Court Justice Louis Brandeis and attorney Samuel Warren.²⁹ Meanwhile, in yet a third set of states, courts recognize both a statutory and common law right of publicity.³⁰

In almost all states, a prima facie claim for violating one's right of publicity requires the showing of four elements: (1) the use of one's identity; (2) for purposes of a commercial advantage; (3) without consent; and (4) in a manner that causes monetary harm.³¹ If the plaintiff is able to make a prima facie showing of the breach of his publicity rights, the court will then balance the plaintiff's right of publicity claim against potential affirmative defenses, including First Amendment defenses.³²

right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her [own] identity."); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967 (10th Cir. 1996) ("The right of publicity is the right of a person to control the commercial use of his or her identity. . . . While the right was originally intertwined with the right of privacy, courts soon came to recognize a distinction between the personal right to be left alone and the business right to control use of one's identity in commerce.") (citation omitted); *Gionfriddo v. MLB*, 114 Cal. Rptr. 2d 307, 318 (Cal. Ct. App. 2001) ("The right to exploit commercially one's celebrity is primarily an economic right.") (citations omitted). *But cf. Haelan Labs. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d. Cir. 1953) ("[A] man has a right in the publicity value of his photograph. . . . Whether it be labeled 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.").

28. *See, e.g., CAL. CIV. CODE* § 3344(a) (1984) ("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."); *OKLA. STAT. tit. 12 § 1449(A)* (1986) ("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 . . . shall be liable for any damages sustained by the person or persons injured as a result thereof, and any profits from the unauthorized use that are attributable to the use shall be taken into account in computing the actual damages.").

29. *See Hart*, 808 F. Supp. 2d at 772 (crediting Brandeis and Warren's article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), with laying the foundation for New Jersey's recognition of the individual's right to prevent the unauthorized commercial appropriation of his or her likeness).

30. *See No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 405 (Cal. Ct. App. 2011) (noting a right of publicity claim filed under both California's statutory and common law right of publicity).

31. *See cases cited supra* note 8.

32. *See Gionfriddo*, 114 Cal. Rptr. 2d at 313 ("[T]he common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity [and] be balanced against the public

B. Elements of a Claim for Breach of the Right of Publicity

1. Use of One's Identity

The exact scope of circumstances that will satisfy the first element of any right of publicity claim, “use of one's identity,” is unclear, but may at the least be satisfied by the use of someone else's actual name or likeness.³³ In addition, most courts deem the “use of one's identity” to include any drawing, sculpture, or design that is intended to represent a particular individual—irrespective of whether that person is mentioned by name.³⁴ For instance, in *Ali v. Playgirl, Inc.*, the U.S. District Court for the Southern District of New York held that a composite drawing of a naked African-American man in a boxing ring that contained many of the facial features of boxer Muhammad Ali had used the former heavyweight champion's identity.³⁵ Similarly, in *Young v. Greneker Studios, Inc.*, the New York Supreme Court held that a mannequin that was modeled after the plaintiff had used her identity.³⁶

In this same vein, most courts have found the “use of one's identity” to extend to the impersonation of one's likeness either electronically or through other forms of new media.³⁷ For example, in *White v. Samsung Electronics America*, the U.S. Court of Appeals for the Ninth Circuit held that Samsung Electronics America misappropriated the identity of Wheel of Fortune hostess Vanna White by airing a television commercial that depicted a female-shaped robot wearing a long gown, blonde wig, and large jewelry while turning block letters on a game

interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.”) (internal quotation marks and citations omitted). *But cf.* Transcript of Proceedings to Consolidate Various Litigations Against the NCAA at 34, *Keller v. Elec. Arts*, No. C-09-1967 CW, (N.D. Cal. Mar. 1, 2010) (referencing discussion of the First Amendment as an “affirmative defense” to a claim of breach of one's right of publicity) (quoting Robert B. Carey, lawyer for Samuel Keller).

33. *See White v. Samsung Elecs. of Am.*, 971 F.2d 1395, 1397–98 (9th Cir. 1992) (finding the use of one's name or likenesses to suffice the most narrowly construed contours of using the plaintiff's identity); *see also C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007) (finding the use of one's name, even without their likeness, is generally sufficient); *cf. Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 613 (Cal. Ct. App. 2006) (defining “likeness” as “a person's visual image”).

34. *Cf. Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 454 (S.D.N.Y. 2008) (holding that Mars Incorporated did not violate The Naked Cowboy's right of publicity by producing an animated cartoon featuring a blue M&M dressed up exactly like The Naked Cowboy in white underwear, a white cowboy hat, white cowboy boots and a white guitar).

35. 447 F. Supp. 723, 729 (S.D.N.Y. 1978).

36. 26 N.Y.S.2d 357, 358 (1941) (analyzing the use of a look-alike mannequin of an otherwise non-famous individual under the right of privacy, rather than the right of publicity).

37. *See generally White*, 971 F.2d at 1397 (citing William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 401–07 (1960)).

board.³⁸ Meanwhile, in *Wendt v. Host International, Inc.*, the same court determined that the use of animatronic robots resembling actors from the television show *Cheers* was subject to factual analysis under the right of publicity.³⁹

Most recently, some courts have even extended the definition of “identity” to include electronic images and video game avatars. Notably, in *Kirby v. Sega of America, Inc.*, the Court of Appeals of California held that performer Kieran Kirby had presented a triable issue of fact about the misuse of her likeness where Sega of America, Inc. sold a video game that featured a character who shared Kirby’s thin figure, facial features, and form-fitting clothing.⁴⁰ Likewise, in *No Doubt v. Activision Publishing, Inc.*, the Court of Appeals of California found that a video game publisher that allowed users to manipulate avatars resembling members of the band No Doubt had impermissibly used the band members’ likenesses.⁴¹

2. Commercial Advantage

The second element of a breach of publicity rights claim, “commercial advantage,” includes the use of goodwill of another’s name or identity for purposes of making a profit.⁴² “Profit alone,” however, does not necessarily “render expression ‘commercial.’”⁴³ For instance, though the use of one’s name or identity for purposes of writing a biography does not violate this prong of the analysis, “the use of that same data . . . in connection with a [moneymaking] project” poses a likely violation.⁴⁴

The most traditional category of “commercial advantage” involves the use of an individual’s name or likeness for advertising and

38. *White*, 971 F.2d at 1399.

39. *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 809 (9th Cir. 1997) (holding that “it cannot be said as a matter of law that [Universal’s animatronic robot] figures are so dissimilar from [*Cheers* actors George Wendt and John Ratzenberger] that no reasonable trier of fact could find them to be ‘likenesses’”).

40. *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 613–14 (Cal. Ct. App. 2006).

41. 122 Cal. Rptr. 3d 397, 411–12 (Cal. Ct. App. 2011).

42. *See Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *see also Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970) (“A name is commercially valuable as an endorsement of a product or for financial gain . . .”).

43. *Gionfriddo v. MLB*, 114 Cal. Rptr. 2d 307, 315 (Cal. Ct. App. 2001).

44. *See Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 461–62 (N.J. Super. Ct. Ch. Div. 1967); *see also Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003) (en banc) (“[P]laintiff must prove that defendant intended to obtain a commercial advantage, and it is not enough to show that defendant incidentally obtained a commercial advantage by using plaintiff’s name or that defendant had some other purpose in using plaintiff’s name other than to obtain a commercial advantage.”) (citing *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997)).

merchandising purposes, or as a means of indicating an endorsement.⁴⁵ Meanwhile, the Restatement (Third) of Unfair Competition additionally recognizes the use of a name or likeness as being for a commercial advantage “in connection with services rendered by the user,” even absent an advertisement or endorsement.⁴⁶ Under this view, the U.S. Court of Appeals for the Eighth Circuit recently held in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.* that the use of “baseball players’ identities in . . . fantasy baseball products” is sufficient to meet the “commercial advantage” requirement of the right of publicity.⁴⁷ Likewise, the Superior Court of New Jersey, Chancery Division, held in *Arnold Palmer v. Schonhorn Enterprises, Inc.* that the use of professional golfers’ identities in conjunction with a paperboard box game represented an impermissible “commercial project.”⁴⁸

3. Without Consent

The third element of analysis, “without consent,” is met whenever a party uses another’s identity without the rights-holder’s permission.⁴⁹ A plaintiff seeking to state a claim rarely has much difficulty satisfying this element.⁵⁰ However, a plaintiff may fail to meet the “without consent” element if he previously licensed the right to use his likeness to the defendant, or if he had previously licensed the right to use his likeness to a third party that later sublicenses the right to the defendant.⁵¹

45. See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007).

46. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995); see also *C.B.C. Distrib. & Mktg.*, 505 F.3d at 822.

47. *C.B.C. Distrib. & Mktg.*, 505 F.3d at 823. For a more general discussion of the right of publicity in fantasy sports games, see also Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 42–44 (2012).

48. *Palmer*, 232 A.2d at 462.

49. See generally *C.B.C. Distribution & Mktg, Inc.*, 505 F.3d at 822 (discussing element of consent); *Jones v. Corbis Corp.*, 815 F. Supp. 2d 1108, 1113–16 (C.D. Cal. 2011).

50. See *C.B.C. Distrib. & Mktg.*, 505 F.3d at 822 (noting that all parties in the case agree that the use of baseball players’ names and playing information occurred, at some point, without the players’ consent); see also *Palmer*, 232 A.2d at 459 (noting the same with respect to the use of the names of golfers and members of the Professional Golfers’ Association of America in a golf table game).

51. See *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397, 406 (Cal. Ct. App. 2011) (explaining that a valid license to use one’s likeness negates the argument of lack of consent).

4. Monetary Harm

Finally, a claim for breach of one's publicity rights requires a plaintiff to show monetary harm.⁵² Thus, in stark contrast with the right of privacy's requirement of showing damages to one's feelings, the right of publicity requires the showing of an actual financial impact.⁵³ The traditional measure of damages for the breach of one's right of publicity "focuses on [either] the pecuniary loss to the plaintiff or the unjust pecuniary gain to the defendant."⁵⁴ Typically, either calculation would lead a court to the same result—awarding a payment in the amount of the fair market value of the use of one's likeness for the particular purpose.⁵⁵

C. *The First Amendment Defense*

If a plaintiff is able to meet its prima facie burden, the court will next consider potential affirmative defenses.⁵⁶ Among these affirmative defenses, the ones most frequently invoked involve the First Amendment.⁵⁷ As a general matter, "[t]he First Amendment only protects speech from regulation by the government."⁵⁸ However,

52. See *supra* note 8 and accompanying text; see also *Hilton v. Hallmark Cards*, 599 F.3d 894, 909 (9th Cir. 2009) (referring to the "monetary harm" prong as "resulting injury"; *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003) (discussing monetary nature of the right of publicity); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. b (1995) (explaining calculation of damages under a breach of publicity rights claim).

53. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (discussing the notion of a right of privacy and comparing it with the right of publicity); see also *TCI Cablevision*, 110 S.W.3d at 368 (noting that the right of publicity focuses on monetary harm).

54. RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 49 cmt. b (1995).

55. See *TCI Cablevision*, 110 S.W.3d at 368 (referring to the plaintiff's attempt to calculate damages for alleged misappropriation of his right of publicity based on "the amount of the fair market value that respondents should have paid to use his name . . . and for damage done to the commercial value—in effect the endorsement value—of his name").

56. See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 767–68 (D.N.J. 2011). Many affirmative defenses are limited to individual states and largely conflate with First Amendment defenses; thus, they are beyond the scope of this Article. For example, California Civil Code § 3334(d) provides a "public affairs exemption" from liability for any "use of a name . . . or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign." CAL. CIV. CODE § 3344(d) (West 2010); see also *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, at *1 (N.D. Cal. Feb. 8, 2010), at *7 (discussing the California public affairs exception).

57. See *Hart*, 808 F. Supp. 2d at 768; see also Brief of Amici Curiae in Support of Appellee by Screen Actors Guild, Inc., et al. at 3, *Keller v. Elec. Arts*, No. 10-15387 (9th Cir. Nov. 8, 2010) ("For over a century, courts, including the United States Supreme Court, have carefully balanced [the right of publicity] with the protections accorded speakers under the First Amendment.").

58. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968 (10th Cir. 1996).

because the right of publicity is a state-generated right that restricts free speech, courts must “directly balance the magnitude of the speech restriction against the asserted governmental interest in protecting the intellectual property right.”⁵⁹

This direct balancing is not an easy task.⁶⁰ According to one leading treatise on the issue:

In some cases of media use of human identity, there is indeed a conflict with the First Amendment. It is real. It will not go away. . . . There is no neatly packaged general rule that can be waved like a magic wand to make the solution any easier. The balance must be laboriously hacked out case by case.⁶¹

Nevertheless, even despite a lack of clear “judicial consensus . . . on the contours of the First Amendment vis-à-vis the right of publicity,” three factors substantially shape the outcome of any court’s balancing analysis.⁶² First, courts generally grant broader First Amendment protection to speech that informs the public about matters of “public

59. *Id.* at 972; see also Order on Defendants’ Motions to Dismiss and Electronic Arts’s Anti-SLAPP Motion to Strike at 7, *Keller v. Elec. Arts*, C-09-1967 (N.D. Cal. Feb. 8, 2010) (“The defense poses what is essentially a balancing test between the First Amendment and the right of publicity.”) (internal citations omitted); *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 823 (8th Cir. 2007) (“The Supreme Court has directed that state law rights of publicity must be balanced against first amendment considerations.”); *Gionfriddo v. MLB*, 114 Cal. Rptr. 2d 307, 313 (Cal. App. Ct. 2001) (noting that “[t]he First Amendment requires that the right to be protected from unauthorized publicity be *balanced* against the public interest in the dissemination of news and information”) (internal quotations omitted) (emphasis added); cf. *Hart*, 808 F. Supp. 2d at 775 (noting that courts throughout the country have adopted “up to eight ‘balancing’ tests that attempt to weight the First Amendment rights . . . against the right of publicity”).

60. See generally *TCI Cablevision*, 110 S.W.3d at 372 (“Of course, not all speech is protected under the First Amendment . . . [C]ourts often will weigh the state’s interest in protecting a plaintiff’s property right to the commercial value of his or her name and identity against the defendant’s right to free speech.”).

61. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 8.39, at 173 (2012).

62. Marshall Leaffer, *The Right of Publicity: A Comparative Perspective*, 70 ALB. L. REV. 1357, 1364 (2007); see also *Cardtoons, L.C.*, 95 F.3d at 972 (referencing such a balancing test); cf. Brief of Amici Curiae in Support of Appellee by Screen Actors Guild, *supra* note 57, at 5 (“For over a century, courts have wrestled with the interplay between [the right of publicity] and the First Amendment. As media evolved, the courts resolved the consequential intrusions on individual rights by striking a careful balance between competing interests.”).

interest.”⁶³ This includes speech that is newsworthy, political, informative, or critical.⁶⁴

Next, courts award broader protection to speech that “contains significant transformative elements,” which extend beyond the mere literal depiction of a celebrity.⁶⁵ In other words, courts are more likely to protect speech that is the synthesis of a variety of sources than speech that “is the very sum and substance of the work in question.”⁶⁶

63. See *Hilton v. Hallmark Cards*, 599 F.3d 894, 902 (9th Cir. 2010) (discussing the public interest defense); see also *Cardtoons, L.C.*, 95 F.3d at 967; *Hart*, 808 F. Supp. 2d at 774 (taking a broad view of public interest in concluding that “New Jersey recognizes a robust . . . defense” against right of publicity claims where “speech is newsworthy and informative”).

64. See *Cardtoons, L.C.*, 95 F.3d at 969–70 (noting that a set of parody baseball cards that provided social commentary on Major League Baseball players were awarded full First Amendment protection because the cards were more than just commercial speech); see also *CBS Interactive, Inc. v. Nat’l Football League Players Ass’n*, 259 F.R.D. 398, 414 (D. Minn. 2009) (finding athletes’ statistical information to be in the public interest, at least where it was already in the “public domain”); *Gionfriddo*, 114 Cal. Rptr. 2d at 315 (noting that athletes’ statistical information fell within this category because such statistical information was informative). See generally *Hilton*, 599 F.3d at 912 (discussing California’s interpretation of its “public interest” defense extending to most matters of news reporting). By contrast, speech that does not inform includes speech that is intended primarily to attract money from third parties. See, e.g., *Gridiron.com, Inc. v. Nat’l Football League Players Ass’n*, 106 F. Supp. 2d 1309, 1315 (S.D. Fla. 2000) (noting that the use of college football players’ likenesses for purposes of attracting third party advertisements “go[es] way beyond merely conveying the news”).

65. *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 935 (6th Cir. 2003); *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 615 (Cal. 2006) (“The transformative test is straightforward: [t]he inquiry is whether the celebrity likeness is one of the raw materials from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.”) (internal quotations omitted); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (“[W]hen a work contains significant transformative elements . . . it is also less likely to interfere with the economic interest protected by the right of publicity.”).

66. *Comedy III Prods., Inc.*, 21 P.3d at 809; see also *Hilton*, 599 F.3d at 910 (“[I]t is clear that merely merchandising a celebrity’s image without that person’s consent . . . does not amount to a transformative use.”). With respect to this presumption, courts disagree about the proper role of a transformative element within the scope of the overall balancing test. See *infra* notes 128–38 and accompanying text; see also Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 32 COLUM. J.L. & ARTS 165, 166 (2010) (noting the great variations in “fundamental questions concerning the relationship of publicity rights to federal law”). On one end of the spectrum, the U.S. Court of Appeals for the Sixth Circuit has implied that even a single transformative element might entitle the work to First Amendment protection. See *ETW Corp.*, 332 F.3d at 936 (concluding that defendant’s lithographs depicting Tiger Woods golfing at the 1997 Masters Tournament were protected by the First Amendment primarily because the lithographs also included the images of past Masters Tournament champions in the backdrop). By contrast, the Supreme Court of Missouri has held that even the full “transformation or fictionalized characterization of a person’s celebrity status” is not enough to defeat a claim for breach of the right of publicity if the defendant’s “sole purpose is the commercial use of that person’s name and identity.” *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc) (concluding that a test based solely on the presence of a transformative element involves “no balancing at

Finally, courts are most inclined to protect speech that does not thwart innovation.⁶⁷ To illustrate this point, the U.S. Court of Appeals for the Sixth Circuit held in *ETW Corp. v. Jireh Publishing, Inc.* that a publisher’s First Amendment right to sell a painting that contained Tiger Woods’s likeness trumped the golfer’s right of publicity.⁶⁸ The court reasoned that even if it did not protect Tiger Woods’s publicity rights, he would likely still “reap substantial financial rewards from authorized appearances and endorsements.”⁶⁹ By contrast, the U.S. Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.* concluded that the First Amendment “do[es] not immunize the media when they [are] broadcast[ing] a performer’s entire act without his consent . . . because the broadcast of [an] entire performance . . . goes to the heart of petitioner’s ability to earn a living as an entertainer.”⁷⁰

III. WHY ELECTRONIC ARTS’S VIDEO GAMES LIKELY VIOLATE COLLEGE ATHLETES’ RIGHTS OF PUBLICITY

Applying this step-by-step analysis, it is nearly certain that Electronic Arts’s depiction of college athletes in its *NCAA Football* video games meet each of the four elements required to show a prima facie breach of college athletes’ publicity rights.⁷¹

all”).

67. See generally *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 824 (8th Cir. 2007) (“Other motives for creating a publicity right are the desire to provide incentives to encourage a person’s productive activities”); see also MCCARTHY, *supra* note 61, at § 2.6 (claiming that publicity rights are intended to protect the financial incentive for celebrities to engage in beneficial activities that are within the public’s eye); *infra* notes 68–70 and accompanying text.

68. *ETW Corp.*, 332 F.3d at 938.

69. *Id.* Similarly, in *C.B.C. Distribution & Marketing v. Major League Baseball Advanced Media*, the U.S. Court of Appeals for the Eighth Circuit found that the First Amendment rights of a fantasy sports host site trumped Major League Baseball players’ publicity rights in their names and statistics, partially because “major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements.” 505 F.3d at 824; see also Edelman, *supra* note 47, at 42–44 (discussing more generally the balance of the right of publicity against the First Amendment in fantasy sports games).

70. 433 U.S. 562, 575–76 (1977); Meanwhile, in *Palmer v. Schonhorn Enterprises, Inc.*, the Superior Court of New Jersey, in upholding the rights of publicity of numerous golfers, noted that “plaintiffs derive [a] substantial portion of their respective earnings from professional golf and the marketability of their names as professional golfers.” 232 A.2d 458, 459 (1967).

71. See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 794 (D.N.J. 2011) (acknowledging that college athletes had a right of publicity in their likenesses, but holding against their right of publicity claims based on First Amendment considerations).

A. *Electronic Arts's Video Games Use College Athletes' Identities*

With respect to the first element, use of one's likeness, the images that Electronic Arts uses in its video games are widely understood to represent specific college athletes.⁷² For example, avatars not only resemble real-life players, but they also share the real-life players' jersey numbers, heights, weights, handednesses, and hometowns.⁷³ In addition, Electronic Arts's avatars include armbands, gloves, sleeves, and other "accessories" that match the items their real-life counterparts wear on game days.⁷⁴

Moreover, Electronic Arts does not stop at simply copying the visual likeness of college athletes.⁷⁵ *NCAA Football* avatars also have specific ratings based on the athleticism and tendencies of the actual players they represent.⁷⁶ For example, the avatar that serves in *NCAA Football 12* as the starting quarterback for the University of Michigan possesses one of the game's highest possible speed ratings and a high rating for the likelihood of injury.⁷⁷ These attributes are similar to those of University of Michigan's real-life starting quarterback, Denard Robinson, who rushed for a school-record 2,570 yards in the 2010 season and left ten of twelve games with an injury.⁷⁸

B. *Electronic Arts's Video Games Use College Athletes' Identities for a Commercial Advantage*

As for the second element, commercial advantage, the main purpose behind Electronic Arts's use of college athletes' likenesses is undoubtedly commercial.⁷⁹ As a public company, Electronic Arts has a

72. See *C.B.C. Distrib. & Mktg.*, 505 F.3d at 822 (drawing similar conclusion with respect to use of players' names in fantasy sports games).

73. *Hart*, 808 F. Supp. 2d at 786–87.

74. *Id.* at 761.

75. See *infra* note 76 and accompanying text.

76. See *Hart*, 808 F. Supp. 2d at 761 ("Each virtual player [has] unique attributes, including personal characteristics (height, weight, athletic ability), accessories (helmet visor, wristband), physical abilities (speed and agility, throwing arm, passing accuracy) . . .").

77. See Sean Yuille, *NCAA 12 Player Ratings for Big 10 Leak Out*, SB NATION: DETROIT (June 30, 2011, 3:03 PM), <http://detroit.sbnation.com/michigan-wolverines/2011/6/30/2252757/ncaa-12-player-ratings-michigan-football-michigan-state> (revealing that the game features Michigan quarterback Denard Robinson's speed rating as 95 out of a possible 99); see also Reader Comment, *Denard Robinson Injured Every Game*, OPERATION SPORTS, <http://www.operationssports.com/forums/ncaa-football/496928-denard-robinson-injured-every-game.html> (showing that his injury rating, out of a possible 99, is listed at 72).

78. See Nick Baumgardner, *Denard Robinson Has Paid More Attention to His Health this Season, Feels Good at Midway Point of Season*, ANN ARBOR.COM, (Oct. 12, 2011, 4:19 PM), <http://annarbor.com/sports/um-football/denard-robinson-says-hes-paid-more-attention-to-his-health-this-season-feels-much-better>.

79. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (discussing the importance of attempting to earn a profit in making a claim for breach of one's

fiduciary duty to consider shareholder value.⁸⁰ Even according to its annual report, the practice of using college athletes' likenesses in sports video games relates to the goal of obtaining a positive impact on “revenues, profitability, and cash flow.”⁸¹ In other words, even though Electronic Arts could produce a functionally equivalent sports video game that does not use college athletes' likenesses, Electronic Arts still prefers to use college athletes' likenesses because consumers prefer video games with avatars that resemble actual college athletes.⁸² Furthermore, unlike the depiction of celebrity likenesses in educational or politically themed video games, Electronic Arts's use of college athletes in its *NCAA Football* video games does not serve any secondary, noncommercial purpose.⁸³ For example, unlike the use of the likenesses of U.S. presidents in children's video games, Electronic Arts's use of celebrity likenesses is not designed to teach about important historic events.⁸⁴ Moreover, unlike the depiction of the likenesses of conservative politicians and media personalities as villains in the politically themed video game *Tea Party Zombies Must Die*,⁸⁵

publicity rights); *see also* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818, 822–23 (8th Cir. 2007) (“Because we think that it is clear that CBC uses baseball players' identities . . . for purposes of profit, we believe that their identities are being used for commercial advantage . . .”) (emphasis added); Uhlaender v. Henricksen, 316 F. Supp. 1277, 1283 (D. Minn. 1970) (same).

80. *See, e.g.*, Lemon Bay Partners LLP v. Hammonds, 2007 WL 1830899, at *3, n.7 (D. Del. June 26, 2007) (noting that a public board of directors has “a duty to maximize shareholder value”). *But see generally* Shepard v. Meridian Ins. Grp., 137 F. Supp. 2d 1096, 1113 (S.D. Ind. 2001) (noting that the “business judgment rule was written to make clear, for example, that even in the sale of the business, the directors do not have an unqualified duty to maximize shareholder value at the expense of all other considerations and constituencies”).

81. Electronic Arts Inc., *Annual Report, Form 10-K for the Period Ending Mar. 31, 2011*, at 19.

82. *See* Brett Walton, *Wii Sports is the Most Successful Videogame of All Time*, VG CHARTZ (Jan. 3, 2009), <http://www.vgchartz.com/article/2724/wii-sports-is-the-most-successful-videogame-of-all-time> (noting that *Wii Sports* “is the most purchased [video] game of all time” but does not use any athlete's likeness in the game).

83. *See infra* notes 84–85 and accompanying text.

84. *See President Games, Concentration 2*, APPLES4THETEACHER.COM, available at <http://www.apples4theteacher.com/holidays/presidents-day/games/concentration2>. For an example of other video games that use famous likenesses in an educational manner, *see History Detectives, Guess the Year*, PBSKIDS.ORG, http://pbskids.org/historydetectives/games/capsule_index.html (using the likenesses of historical figures like Martin Luther King, Jr., Twiggy, and the Beatles in order to teach kids about the 1960s and 1970s).

85. In *Tea Party Zombies Must Die*, which used to be available at teapartyzombiesmustdie.com, video game manufacturer Jason Oda used the likenesses of conservative politicians and media personalities to portray a political message about Medicare, taxes, and a host of other issues. *See* Paige Lavender, *‘Tea Party Zombies Must Die’ Video Game Lets Players Kill Off Conservatives*, THE HUFFINGTON POST, Sept. 7, 2011, available at http://www.huffingtonpost.com/2011/09/07/tea-party-zombies-must-die-video-game_n_951896.html (noting that the video game *Tea Party Zombies Must Die* provides users with the opportunity “to

Electronic Arts's use of college athletes' likenesses in its college football video games does not convey a political message.

C. *College Athletes Do Not Consent to the Use of Their Identities in These Video Games*

Similarly, with respect to the third element, lack of consent, there is little doubt that most college athletes do not consent to Electronic Arts's use of their likenesses in video games.⁸⁶ This is especially true in light of the NCAA Principle of Amateurism, which, if enforced, would take away college sports eligibility from any athlete that granted such consent.⁸⁷

A remote argument, appearing in the lawsuit *O'Bannon v. NCAA*, suggests that college athletes might implicitly consent to the use of their likenesses by signing the Student-Athlete Statement, which states that college athletes agree to abide by the NCAA Bylaws and to allow the NCAA's subsequent licensing of their intellectual property rights in certain contexts.⁸⁸ However, this argument is doubtful for at least four reasons.⁸⁹

First, the rights purportedly assigned by college athletes to the NCAA in the Student-Athlete Statement are limited to those rights implicated when "promot[ing] NCAA championships or other NCAA events, activities[,] or programs."⁹⁰ However, college sports video games serve primarily as an additional revenue source for the NCAA,

explore a post-apocalyptic Fox News studio and kill off zombies that resemble famous conservatives including Michele Bachmann, Sarah Palin, Newt Gingrich, Rick Santorum, Bill O'Reilly and Glenn Beck"); Joshua Rhett Miller, *Video Game Targets 'Tea Party Zombies,' Fox News Personalities*, FOX NEWS, Sept. 9, 2011, available at <http://www.foxnews.com/politics/2011/09/07/video-game-targets-tea-party-zombies-fox-news-personalities> (generally same); Glenn Garvin, *New Video "Game" Goes Too Far*, MIAMI HERALD, Sept. 12, 2011, available at 2011 WLNR 18070001 (casting this video game in far harsher light); see also, e.g., *Anti-Bush Game*, SCUZZSTUFF.ORG, <http://www.scuzzstuff.org/bushgame> (last visited Nov. 5, 2012); Joshua Rhett Miller, *Videogame Targets 'Tea Party Zombies,' Fox News Personalities*, FOX NEWS, Sept. 9, 2011, at <http://www.foxnews.com/politics/2011/09/07/video-game-targets-tea-party-zombies-fox-news-personalities> (noting that the anti-Bush video game was similarly the creation of Jason Oda).

86. See generally NCAA MANUAL 2011–12 NCAA Division I Manual, *supra* note 13, at § 2.9, at 4 (Principle of Amateurism) (disallowing student-athletes from affirmatively selling use of their likenesses).

87. See NCAA MANUAL, *supra* note 13, at § 2.9 (Principle of Amateurism); see also *id.* at § 12.1.2 (Amateur Status).

88. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 2010 WL 445190 at *2 (N.D. Cal. Feb. 8, 2010); see also NCAA Form 08-3a, Academic Year 2008–09, at 4 (Part IV, Promotion of NCAA Championship Events, Activities or Programs).

89. See *infra* notes 90–97 and accompanying text.

90. See NCAA Form 08-3a, *supra* note 88, at 4.

and not as a way to “promote NCAA championships or other NCAA events, activities[,] or programs.”⁹¹

Second, even to the extent that a court were to find the meaning of “promotion of NCAA championship events” to be ambiguous, an important maxim of contract law is that a court must interpret any ambiguities in contracts against the interests of the drafter.⁹² Therefore, recognizing that the Student-Athlete Statement was drafted by the NCAA, any uncertainty as to whether college sports video games fall within the set of categories that “promote NCAA championships” must, again, be interpreted in the negative.⁹³

Third, even presuming for the sake of argument that college athletes license their publicity rights to the NCAA via the Student-Athlete Statement, there is still no readily available evidence that the NCAA ever attempted to sublicense those rights to Electronic Arts.

Finally, even presuming that the Student-Athlete Statement and some theoretical subsequent contract were deemed to grant Electronic Arts the right to use college athletes’ likenesses, a court still might find this arrangement void based on two grounds.⁹⁴ First, a court might find the Student-Athlete Statement void due to lack of consideration with respect to non-scholarship college athletes, because the NCAA does not incur any legal detriment in exchange for the acquisition of college athletes’ publicity rights.⁹⁵ Second, a court might deem such an arrangement void due to illegality under Section 1 of the Sherman Act.⁹⁶ The reason for this holding would be that any agreement among all of the NCAA member schools to require college athletes to sign such a statement is tantamount to an agreement to “fix the price

91. *See id.* (quoting language assigning aspects of student-athletes’ rights of publicity to the NCAA and its member schools).

92. *See, e.g., Sternberger v. United States*, 401 F. 2d 1012, 1021 (U.S. Ct. Cl. 1968); *Sun Shipbuilding & Drydock Co. v. United States*, 393 F.2d 807, 816 (U.S. Ct. Cl. 1968); *Jones v. United States*, 304 F. Supp. 94, 103 (S.D.N.Y. 1969).

93. *See* NCAA Form 08-3a, *supra* note 88, at 4 (stating that by signing below, the student athlete “authorize[s] the NCAA [or a third party acting on behalf of the NCAA (e.g. host institution, conference, local organizing committee)] to use [his or her] name or picture to generally promote NCAA championships or other NCAA events, activities or programs”).

94. *See infra* notes 95–97 and accompanying text.

95. *See* CORBIN ON CONTRACTS § 110 n.1 (1963) (defining consideration); RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (“To constitute consideration, a performance or a return promise must be bargained for. . . . The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation.”). *See generally* THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS at 132 (Aspen Publishers 4th ed. 2004) (same); Edelman, *supra* note 47, at 27, n. 178 (same).

96. *See* Sherman Act, 26 Stat. 209 (1890) (codified as amended in 15 U.S.C. §§ 1–7 (2006)) (“Every . . . combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”).

of . . . student athletes' images at zero and to boycott former student athletes in the collegiate licensing market."⁹⁷

D. *Electronic Arts's Use of College Athletes' Identities Causes Monetary Harm*

Lastly, the fourth element of any right of publicity claim, monetary harm, is also likely met.⁹⁸ A court could easily calculate the monetary harm to college athletes by calculating the pecuniary gain derived from the use of their identities.⁹⁹ For example, recognizing that Electronic Arts currently pays \$35 million per year for the rights to use the names and likenesses of National Football League players in a similar video game, this amount could serve as a reasonable approximation of the monetary harm caused by Electronic Arts's gain.¹⁰⁰

Of course, one potentially complicating factor in ascertaining the monetary harm for Electronic Arts's use of college athletes' likenesses is that by signing the National Letter of Intent and thereafter the Student-Athlete Statement, college athletes consent to forgo any pecuniary gains from the use of their likenesses during their college careers pursuant to the NCAA Principle of Amateurism.¹⁰¹ Thus, the actual pecuniary loss suffered by college athletes for the misappropriation of their likenesses may not perfectly align with the pecuniary gain enjoyed by Electronic Arts as the free-riding party.¹⁰²

Nevertheless, the NCAA Principle of Amateurism is a private association's mandate and not a rule of law.¹⁰³ Thus, college athletes are entitled to compensation based on the unauthorized use of their

97. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 2010 WL 445190 at *5 (N.D. Cal. 2010). *See generally* Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts?*, 58 CATH. U. L. REV. 631, 639 (2009) (noting that group boycotts are illegal under Section 1 of the Sherman Act both because they harm consumers and have the potential of preventing workers from "secur[ing] employment in [their] chosen avocation, trade and calling").

98. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 49, cmt. b (1995) (describing this monetary harm in term of either "pecuniary loss" or "pecuniary gain").

99. *See id.* (explaining calculation of damages under a breach of publicity rights claim).

100. *See* NFL PLAYERS ASS'N, FORM LABOR ORGANIZATION ANNUAL REPORT (2007); *see also* Daniel Kaplan, *NFL Gives EA a Break*, SPORTSBUSINESS (Feb. 14, 2011), available at <http://www.sportsbusinessdaily.com/Journal/Issues/2011/02/20110214/Leagues-and-Governing-Bodies/NFL-EA.aspx> (discussing the NFL and NFLPA licensing agreements with Electronic Arts).

101. Brief for Appellee at 7, *Keller v. Elec. Arts, Inc.*, No. 10-15387 (9th Cir. Oct. 29, 2010) (citing NCAA MANUAL, § 12.5.1.1(h)).

102. *See supra* notes 98–101 and accompanying text.

103. *See* NCAA MANUAL, *supra* note 13, at §§ 2.9, 5.01 (Principle of Amateurism, General Principles) (stating that "[a]ll legislation of the Association that governs the conduct of intercollegiate athletics programs . . . shall be adopted by the membership in Convention assembled").

likenesses, irrespective of the NCAA's position on allowing college athletes to affirmatively sell the rights to use their identities.¹⁰⁴ In addition, the use of college athletes' likenesses in current video games may have a negative impact on college athletes' ability to license their likenesses upon graduation for use in other video games.¹⁰⁵ Thus, even if a court were inclined to enforce the NCAA Principle of Amateurism for the time period during which college athletes compete in their sport, doing so still should not bar college athletes from collecting on the misuse of their likenesses once they are no longer eligible for intercollegiate competition.¹⁰⁶

With this distinction in mind, any court that seeks to honor both college athletes' publicity rights and the NCAA Principle of Amateurism could do so by simply ordering infringing video game publishers to pay damages into a trust fund.¹⁰⁷ From this trust fund, a trustee could disburse each college athlete's share as soon as the athlete is ineligible to participate in collegiate athletics.¹⁰⁸

IV. THE FIRST AMENDMENT DOES NOT PROTECT ELECTRONIC ARTS'S USE OF COLLEGE ATHLETES' IDENTITIES

Presuming that a reviewing court finds each of the four above elements met, a proper analysis of Electronic Arts's liability next turns to assessing potential affirmative defenses, beginning with an analysis of the First Amendment defense.¹⁰⁹ In balancing college athletes' rights of publicity against Electronic Arts's freedom of speech, a court must consider each of the three relevant factors referenced in Section II.C:

104. *See id.* at §§ 12.1.2(a), 12.02.2 (defining “pay” as it applies to the disqualification of student-athletes).

105. *See, e.g., Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (recognizing that unlicensed use of one's likeness harms one's ability to “reap [future] reward[s] of his endeavor[.]”).

106. *See generally* NCAA MANUAL, *supra* note 13, at §§ 2.9, 12.01.2 (noting this principle ceases to apply to individuals at the time they no longer serve as college athletes).

107. *See* Ben Cohen, *The Case for Paying College Athletes: If the Rules Were More Flexible, Fewer Players Would Want to Break Them*, THE WALL ST. J.: CLASSROOM EDITION, Nov. 2011, available at http://www.wsjclassroomedition.com/cre/articles/11nov_idea_college_athletes.htm (noting that sports business author Marc Isenberg believes that there is a way without violating NCAA bylaws to “create a trust fund for athletes, funded by revenue from TV rights payments”).

108. *See id.* (stating that the trust could “be held in their name until they graduate”).

109. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (stating that the First Amendment is an appropriate topic of inquiry because “video games communicate ideas . . . through [a] familiar literary device”); *see also* *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996) (“The protections afforded by the First Amendment, however, have never been limited to newspapers and books. The Supreme Court has relied on the First Amendment to strike down ordinances that ban the distribution of pamphlets . . .”).

(1) whether Electronic Arts's speech is in the public interest; (2) whether the speech contains significant transformative elements; and (3) whether the speech provides a disincentive for college athletes to innovate in light of their current compensation structure.¹¹⁰

A. The "Public Interest" Defense

As discussed in Section II.C, the "public interest" defense emanates from the notion that certain speech is so newsworthy, political, informative, or critical that it requires additional protection based on the intrinsic rights of the public interest.¹¹¹ Thus, the heightened protection of public interest speech rests not only on the rights of the speaker, but also on "the right of the public to know and the freedom of the press to tell it."¹¹²

Although the precise definition of "public interest speech" varies by court, it would be a far cry to treat the use of players' likenesses in today's sports video games as within the public interest.¹¹³ Reason being, even though the public enjoys Electronic Arts's video games, these video games do not convey details about past events of importance, nor do they serve as an artistic vehicle to communicate a message, either supporting or criticizing collegiate sports.¹¹⁴

To the contrary, Electronic Arts's *NCAA Football* video games benefit only the "economic interests of the speaker and its audience."¹¹⁵ In this vein, college athletes' likenesses appear in video

110. See *supra* Section II.C.

111. See *Cardtoons*, 95 F.3d at 968–70 (noting that a set of parody baseball cards that provide social commentary on Major League Baseball players are awarded full First Amendment protection because the cards are more than just commercial speech); see also *Gionfriddo v. MLB*, 114 Cal. Rptr. 2d 307, 313–15 (Cal. Ct. App. 2001) (noting that athletes' statistical information falls within this category because such statistical information is informative).

112. See Order on Defendants' Motions to Dismiss and Electronic Arts's Anti-SLAPP Motion to Strike, *supra* note 59, at 10.

113. See, e.g., *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 774 (D.N.J. 2011) (taking a broad view of "public interest" in concluding that New Jersey recognizes a "robust" defense against right of publicity claims where "speech is newsworthy and informative").

114. See *supra* notes 21–26 and accompanying text; see also *Keller v. Elec. Arts, Inc.*, No. C-09-1967 CW, 2010 WL 530108 at *6 (N.D. Cal. Feb. 8, 2010) (noting that Electronic Arts's video games do not "merely report or publish" information); see also Order on Defendants' Motions to Dismiss and Electronic Arts's Anti-SLAPP Motion to Strike, *supra* note 59, at 12 (noting that Electronic Arts's video game series *NCAA Football* "is unlike the works in *Gionfriddo* [because *NCAA Football*] does not merely report or publish Plaintiff's statistics and abilities. On the contrary, [Electronic Arts] enables the consumer to assume the identity of various student athletes and compete in simulated college football matches."); *id.* at 12–13 (contrasting the use of college athletes' identities from video games from those involving fantasy sports games because a sports video game does not depend on updated reports of the real-life players' progress and include depictions of athletes' likenesses in avatar form).

115. *Cardtoons*, 95 F.3d at 970 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv.*

games for the sole purpose of allowing the purchasers of these games “to replicate the experience of playing collegiate sports.”¹¹⁶ In other words, “[p]lacing present and former college athletes [into video games] strongly suggest[s] that the goal of the game is to capitalize upon the fame of those players.”¹¹⁷ Even Electronic Arts’s own Annual Report seems to indicate as much, noting that if Electronic Arts is unable to “acquire licenses to [college sports teams and players’] intellectual property . . . profitability and cash flows will decline.”¹¹⁸

Indeed, the U.S. District Court for the District of New Jersey recently reached the opposite conclusion in *Hart v. Electronic Arts*—holding that the use of college athletes’ likenesses in Electronic Arts’s video games extends beyond the purely commercial, because “the speech *is* the video game that is being sold . . . [and] not a separate instance of speech that promotes the purchase of another work.”¹¹⁹ Nevertheless, the court’s holding in *Hart* is questionable, as it seems to misapply existing case law on this point.¹²⁰ Most notably, the court in *Hart* cited to a general rule that found “strong support” for finding speech to be commercial where: (1) the speech appears in an advertisement; (2) the speech refers to a specific product or service; and (3) the speaker has an economic motivation for his speech.¹²¹ However, the court incorrectly interpreted this general rule to mean that an absence of any one of these three elements always negates the possibility of finding particular speech to be commercial.¹²² Such a conclusion not only goes beyond the scope of the earlier case law, but it also misunderstands how to construct a contrapositive argument—one of the most basic rules of logical reasoning.¹²³

Comm’n of N.Y., 447 U.S. 557, 561 (1980)); cf. *Gionfriddo*, 114 Cal. Rptr. 2d at 316 (“The term ‘commercial speech’ has a special meaning in the context of the First Amendment. [T]he core notion of commercial speech is that it does no more than propose a commercial transaction.”) (internal citations and quotations omitted).

116. Brief of Amici Curiae in Support of Appellee by Screen Actors Guild, *supra* note 57, at 19.

117. *Hart*, 808 F. Supp. 2d at 783.

118. Electronic Arts Inc., *Annual Report, Form 10-K for the Period Ending Mar. 31, 2011*, at 17.

119. *Hart*, 808 F. Supp. 2d at 770–71.

120. See *infra* Subsection IV.B.2.

121. *Hart*, 808 F. Supp. 2d at 770 (citing *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008)).

122. *Id.* at 770–71.

123. See TOM BASSAREAR, MATHEMATICS FOR ELEMENTARY SCHOOL TEACHERS 30 (Marc Bove ed., 5th ed. 2012) (noting that “a statement and its contrapositive are *logically equivalent*”). A statement is said to be the contrapositive of another statement when its antecedent is negated by the consequent of the other and vice versa. See *id.* For example, the contrapositive of “[i]f it is a dog, then it has four legs and a tail” is “[i]f it doesn’t have four legs and a tail, then it is not a dog.” *Id.*

B. *There is No Transformative Element to Electronic Arts's Speech*

In addition to balancing the public purpose of speech against the right of publicity, a court must also inquire as to whether there exists a “transformative element” that protects the speech.¹²⁴ In the context of depicting digital images in video games, most courts have concluded that a transformative element is one that makes a celebrity’s likeness no longer the “sum and substance of the work in question,” but rather, “one of the raw materials from which an original work is synthesized.”¹²⁵ In other words, “[i]f the product containing the celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression of what he or she is trying to create or portray . . . it is protected.”¹²⁶ By contrast, “merely merchandising a celebrity’s image without that person’s consent . . . does not amount to a transformative use.”¹²⁷

1. Applying the Transformative Element Test in the Video Game Context

Recently, several courts have considered whether using celebrity likenesses in video games is transformative. In the earliest of these cases, *Kirby v. Sega of America, Inc.*, the Court of Appeals of California held that there were sufficient transformative elements to protect Sega’s incorporation of attributes from singer Kierin Kirby into the character Ulala—“a young, fictional, elongated, and extremely thin female reporter . . . who works for a news channel called Space Channel 5” in the twenty-fifth century.¹²⁸ In deciding that case, the court concluded that Ulala was a “fanciful, creative character” and not simply a symbol of Kierin Kirby’s likeness.¹²⁹ The court reached this conclusion for five separate reasons: (1) Ulala’s extremely tall, slender computer-generated physique was dissimilar from Kirby’s physique; (2) Ulala was based in part on the Japanese style of “anime”; (3) Ulala’s hairstyle and costumes differed from those worn by Kirby; (4) the dance moves performed by Ulala were different from those performed by Kirby; and (5) the Ulala character was not placed in modern time, but rather in a fanciful space-age setting from the twenty-fifth century.¹³⁰

Five years later, in *No Doubt v. Activision Publishing, Inc.*, the Court of Appeals for California then held that video game publisher

124. See *infra* notes 125–27 and accompanying text.

125. *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 615 (Cal. Ct. App. 2006) (internal citations and quotations omitted).

126. *Id.* (internal citations and quotations omitted).

127. *Hilton v. Hallmark*, 599 F.3d 894, 910 (9th Cir. 2010).

128. *Kirby*, 50 Cal. Rptr. 3d at 610, 615–16 (internal citations and quotations omitted).

129. *Id.* at 616, 618.

130. *Id.* at 616.

Activision used the band No Doubt's likenesses in the video game *Band Hero* in a way that lacked sufficient transformative elements to award the video game First Amendment protection.¹³¹ There, the court reasoned that, unlike in *Kirby*, the “computer-generated recreations of the real band members” in *No Doubt* were “painstakingly designed to mimic their likenesses.”¹³² In other words, “Activision intentionally used these literal reproductions so that players could choose to ‘be’ the No Doubt rock stars.”¹³³

Most recently, the courts in *Keller v. Electronic Arts* and *Hart v. Electronic Arts* have attempted to apply the transformative element test specifically to college-sports video games.¹³⁴ In *Keller*, the U.S. District Court for the Northern District of California held, upon motion to dismiss, that Electronic Arts's depiction of a college football player in its *NCAA Football* video game “is not sufficiently transformative to bar his California right of publicity claims as a matter of law.”¹³⁵ However, because the *Keller* opinion was addressing a motion to dismiss, the facts considered may have been skewed in favor of the plaintiff.¹³⁶

Meanwhile, in *Hart v. Electronic Arts*, the U.S. District Court for the District of New Jersey awarded summary judgment to Electronic Arts, finding that “there are sufficient elements of [Electronic Arts's] own expression found in [the college football video game] that justify the conclusion that its use of [the plaintiff's] image is transformative [and thus] entitled to First Amendment protection.”¹³⁷ Nevertheless, much like how the court in *Hart* failed to properly apply the “public purpose”

131. *Id.* at 615 (internal quotations omitted); *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 409–12 (Cal. Ct. App. 2011).

132. *See No Doubt*, 122 Cal. Rptr. at 409–10.

133. *See id.* at 410.

134. *See* Order on Defendants' Motions to Dismiss and Electronic Arts's Anti-SLAPP Motion to Strike, *supra* note 59, at 9; *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 771, 776 (D.N.J. 2011) (applying the transformative test to Hart's depiction in *NCAA Football 2009*).

135. *See* Order on Defendants' Motions to Dismiss and Electronic Arts's Anti-SLAPP Motion to Strike, *supra* note 59, at 9. According to the court in *Keller*, when interpreting the facts in the light most favorable to Keller, Electronic Arts “does not depict [Keller] in a different form; he is represented as what he was: the starting quarterback for Arizona State University” because the avatar of Sam Keller “wears the same jersey number [as him], is the same height and weight and hails from the same state.” *Id.* at 10.

136. *Hart v. Electronic Arts, Inc.*, No. 09-cv-5990 (FLW) (D.N.J. Sept. 9, 2011), at *54.

137. Order on Defendants' Motion to Dismiss and Electronic Arts's Anti-Slapp Motion to Strike, *Keller v. Electronic Arts*, C-09-1967, Feb. 8, 2010, at 48–49 (noting that as examples of “transformative elements,” the court pointed to “virtual stadiums, athletes, coaches, fans, sound effects, music and commentary, all of which are created and compiled by the games' designers,” as well as features in the video game that permit users to alter player avatars, change player ability levels, and “change the team of which the player is a part by downloading varying team names and rosters”) (quoting, in part, *Kirby*, 50 Cal. Rptr. 3d at 615).

test, that court also improperly applied the transformative element test.¹³⁸

2. How *Hart v. Electronic Arts* Failed to Properly Apply the Transformative Element Test

While *Hart v. Electronic Arts* provides the most extensive analysis of the transformative test as applied to college sports video games, the district court's reasoning in *Hart* was specious in many respects, and thus the court's decision should have come out in the opposite direction.¹³⁹ Most troubling, the court in *Hart* failed to properly analyze the holdings of the transformative element cases that it cited.¹⁴⁰ For instance, the court cited to the California case *Comedy III Productions, Inc. v. Gary Saderup, Inc. (Comedy III)* for its formulation of the transformative element test, but then disregarded the language in *Comedy III* that explains how distortions to a celebrity's figure are transformative only if they do not serve as "good substitutes for conventional depictions of the celebrity."¹⁴¹ If the district court in *Hart* had properly applied the law of *Comedy III*, it would have concluded that Electronic Arts's distortions to the avatars by allowing users to choose between different hairstyle options were not transformative.¹⁴² Indeed, even after these distortions, the avatars still resemble the actual athletes.¹⁴³

In addition, the court in *Hart* seemed to err in presuming that a video game's inclusion of "virtual stadiums, athletes, coaches, fans, sound effects, music, and commentary" makes the video game sufficiently transformative.¹⁴⁴ This presumption fails to account for the language of the U.S. Court of Appeals for the Ninth Circuit in *Hilton v. Hallmark*

138. See *Hilton v. Hallmark Cards*, 599 F.3d 894, 906-08 (9th Cir. 2010) (describing various public purpose tests utilized by California courts); see also *Hart*, 808 F. Supp. 2d at 778-80 (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001)); cf. *id.* at 775 (explaining that the *Hart* court, although based within the Third Circuit, relied on "decisional law throughout the country" because "neither New Jersey nor the Third Circuit has explicitly adopted a test that reconciles First Amendment interests with the state law right of publicity").

139. See *infra* notes 140-61 and accompanying text.

140. See *infra* notes 141-61 and accompanying text.

141. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001); see also *Hilton*, 599 F.3d at 910 ("[M]erely merchandising a celebrity's image without that person's consent, the prevention of which is the core of the right of publicity, does not amount to a transformative use.").

142. See *Hart*, 808 F. Supp. 2d at 785.

143. *Comedy III Prods., Inc.*, 21 P.3d at 810-11 (noting further that for the transformative test to apply in California "an artist depicting a celebrity must contribute something more than a 'merely trivial' variation, [but must create] something recognizably 'his own', in order to qualify for legal protection").

144. *Hart*, 808 F. Supp. 2d at 784.

Cards, which explained that First Amendment protection applies only where “a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.”¹⁴⁵ Indeed, if simply adding a decorative background insulated video game publishers from any liability, then all video game publishers would opt to create new backgrounds rather than purchasing publicity rights from celebrities.¹⁴⁶

A third likely error in *Hart* was that the case relied on *Kirby v. Sega of America, Inc.* as support for the position that a decorative background makes the use of a celebrity’s likeness transformative.¹⁴⁷ However, a careful reading of *Kirby* explains that the case was about far more than just a decorative background.¹⁴⁸ In *Kirby*, the video game character Ulala was placed in an entirely fanciful time and place: outer space, several centuries into the future.¹⁴⁹ By contrast, the college-athlete avatars in Electronic Arts’s *NCAA Football* video game appear as digital replicas of themselves, performing in actual college football stadiums.¹⁵⁰ Clearly, the two are not the same.¹⁵¹

Meanwhile, yet a fourth likely error in *Hart* involves the way that the court pointed to “[t]he malleability of the player’s image [to suggest] that the image serves as an art-imitating-life starting point for the game playing experience” and that “the technology that permits users to alter a player’s image is itself a noteworthy, expressive attribute of the game.”¹⁵² This interpretation is misguided because the malleability feature in *NCAA Football* gives users the ability to alter the attributes of avatars to more closely resemble those of actual players.¹⁵³ In addition, this feature gives users the ability to add college athletes’ actual names to the back of avatar jerseys.¹⁵⁴ These are both clearly infringing uses.¹⁵⁵ Typically, courts have held that when a technology either induces or encourages infringement, the publishers of the technology are liable for the resulting wrongdoing.¹⁵⁶ Here, the

145. *Hilton*, 599 F.3d at 909.

146. Brief of Amici Curiae in Support of Appellee by Screen Actors Guild, *supra* note 57, at 16; *see also* Transcript of Proceedings to Consolidate Various Litigations Against the NCAA at 12, *Keller v. Elec. Arts*, C-09-1967 (N.D. Cal. Dec. 17, 2009) (Wilken, J.).

147. *See Hart*, 808 F. Supp. 2d at 782, 787 (citing *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 616 (Cal. Ct. App. 2006)).

148. *See Kirby*, 50 Cal. Rptr. 3d at 610, 616.

149. *See id.*

150. *See Hart*, 808 F. Supp. 2d at 784.

151. *Compare* note 148 and accompanying text *with* note 150 and accompanying text.

152. *See Hart*, 808 F. Supp. 2d at 787.

153. *See id.* at 784–85 (noting that *NCAA Football* users are “able to change the image’s features, statistics, and teammates”).

154. *See id.* at 784.

155. *See supra* notes 153–54 and accompanying text.

156. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 927–41

conclusion should be no different. Thus, the malleability function actually seems to support a finding that Electronic Arts breached college athletes' rights of publicity.¹⁵⁷

Finally, a fifth potential error in *Hart* pertains to its reliance on the recent U.S. Supreme Court case *Brown v. Entertainment Merchants Ass'n*.¹⁵⁸ Although the Supreme Court in *Brown* acknowledged that the content in video games represented a form of speech, *Brown* was not about balancing intellectual property rights against free speech in the context of a transformational analysis.¹⁵⁹ Rather, *Brown* was simply about whether the State of California may impose a law implementing a content-based restriction on violent speech in video games.¹⁶⁰ Thus, the Supreme Court's holding in *Brown* was entirely inapposite.¹⁶¹

C. *Electronic Arts's Speech Creates a Disincentive for College Athletes to Innovate*

Moving beyond the public interest and transformative element inquiries, the third factor in balancing college athletes' publicity rights

(2005) (finding that whoever distributes a device for the purpose of allowing for copyright infringement may be held liable for third parties' subsequent copyright infringement, even if the device also serves non-infringing uses); see also *Fantasy Sports Props. Inc. v. SportsLine.com, Inc.*, 287 F.3d 1108, 1117 (Fed. Cir. 2002) (leaving open the possibility that SportsLine.com was liable for patent infringement where its fantasy football game allowed users to select a scoring system that would violate Fantasy Sports Properties' patents).

157. See, e.g., *Metro-Goldwyn-Mayer*, 545 U.S. at 930 (explaining that a manufacturer of technology is liable for contributory infringement by "intentionally inducing or encouraging direct infringement" and liable for vicarious infringement "by profiting from direct infringement while declining to exercise a right to stop or limit it").

158. See *Hart*, 808 F. Supp. 2d at 768–69, 771, 785 (citing *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011)).

159. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2732–33, 2735 (2011).

160. See *id.* at 2738 ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest . . . California cannot meet that standard."); see also Terri R. Day & Ryan C.W. Hall, *Déjà Vu: From Comic Books to Video Games: Legislative Reliance on "Soft Science" to Protect Against Uncertain Societal Harm Linked to Violence v. the First Amendment*, 89 OR. L. REV. 415, 419 (2010) (referring to *Schwarzenegger v. Entertainment Merchants Association* as "a case involving statutory restrictions and labeling requirements on the sale or rental of violent video games to minors"); Deana Pollard Sacks, Brad J. Bushman & Craig A. Anderson, *Do Violent Video Games Harm Children? Comparing the Scientific Amicus Curiae "Experts" in Brown v. Entertainment Merchants Association*, 106 NW. U. L. REV. 1, 1 (2011) (stating that the primary issue presented to the Supreme Court in *Brown* was "whether California's interest in protecting children from serious psychological or neurological harm is sufficiently compelling to overcome First Amendment scrutiny"); Christopher S. Yoo, *Technologies of Control and the Future of the First Amendment*, 53 WM. & MARY L. REV. 747, 754 (2011) (referring to *Brown* as an example in which "the Court struck down a California statute requiring the labeling of violent video games and preventing their sale to minors").

161. See *supra* notes 158–60 and accompanying text.

against the First Amendment involves considering whether the use of college athletes' likenesses in video games creates a disincentive to innovate.¹⁶² In applying this factor, recent courts have shown an increasing reluctance to protect professional athletes' publicity rights when faced with a First Amendment defense because professional athletes “are rewarded, and handsomely, too, for their participation in games.”¹⁶³

At first glance, one may presume this same line of case law is relevant to collegiate athletes, who also enjoy great fame for playing their sport.¹⁶⁴ However, a close inspection of the plight of the modern college athlete indicates that college athletes, especially in the sport of football, are more akin to apprentices or interns than to highly compensated professional athletes.¹⁶⁵ Indeed, according to a recent report entitled *The Price of Poverty in Big Time College Sports*, more than 85% of college athletes live below the federal poverty line.¹⁶⁶ Because protecting the publicity rights of college athletes redistributes wealth in a downward direction, this final factor strongly points in favor of protecting college athletes' publicity rights as a means to encourage their continued performance and innovation as athletes.¹⁶⁷

V. REDEFINING THE BALANCING TEST BETWEEN THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT

Any careful review of case law involving the right of publicity, *Hart* notwithstanding, should lead to the conclusion that college athletes are

162. See *supra* notes 67–70 and accompanying text; see also *C.B.C. Distrib. & Mktg. Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 824 (8th Cir. 2007) (“Other motives for creating a publicity right are the desire to provide incentives to encourage a person’s productive activities.”); see also 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY & PRIVACY* § 2.2 (1987) (explaining that publicity rights are intended to protect the financial incentive for celebrities to engage in beneficial activities that are within the public’s eye).

163. *C.B.C. Distrib. & Mktg.*, 505 F.3d at 824; see also Edelman, *supra* note 47, at 43–44 (discussing more generally the balance of the right of publicity against the First Amendment in fantasy sports games).

164. See Bagnato, *supra* note 12 (discussing how college athletes are well-recognized and admired as celebrities throughout their community).

165. See *infra* notes 166–67 and accompanying text; cf. Rohith A. Parasuraman, Note, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 *DUKE L.J.* 727, 743, n.85 (2007) (“With respect to time commitment, college athletes fall somewhere between medical interns and graduate assistants.”).

166. See Troy Hirsch, *Report: 85 Percent of College Scholarship Athletes Live in Poverty*, FOX 5 SPORTS, Sept. 21, 2011, available at <http://www.fox5sandiego.com/sports/kswb-report-85-of-college-scholarship-athletes-live-in-poverty-20110921,0,2116195.story>.

167. See *supra* notes 162–66 and accompanying text; see also Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *CALIF. L. REV.* 125, 136–37 (1993) (the author, a general opponent of the right of publicity, notes that his typical complaint against protecting such rights is that it often redistributes wealth *upwards*).

entitled to compensation for the use of their names and likenesses in commercial video games such as *NCAA Football*.¹⁶⁸ Nevertheless, even if the U.S. Court of Appeals for the Third Circuit ultimately reverses *Hart*, doing so would still not likely provide adequate protection for today's college athletes against future infringement of their publicity rights.¹⁶⁹ This is because even under a proper interpretation of the "balancing test," video game publishers could continue to avoid liability by simply making a partial, albeit incomplete, modification to their avatars.¹⁷⁰

Perhaps recognizing that a partial, albeit incomplete, modification to an avatar is likely sufficient to avoid liability in most courts, Electronic Arts recently decided to preemptively modify the avatars of a few premier college football players that appear in its 2012 edition of *NCAA Football*.¹⁷¹ Most notably, Electronic Arts recently removed the dreadlock hairdo from the avatar that represents the University of Michigan's starting quarterback, even though dreadlocks have become a signature of the University of Michigan's real-life starting quarterback, Denard Robinson.¹⁷² In addition, Electronic Arts has added a blocking feature to its 2012 edition of *NCAA Football* that prevents users from modifying the hairdo of the University of Michigan quarterback avatar to dreadlocks.¹⁷³

The reason for Electronic Arts's limited modifications to certain avatars in *NCAA Football 12* seems less about protecting college athletes' rights and more about making the absolute minimum number of modifications required to avoid potential liability, even if *Hart* were to be reversed.¹⁷⁴ For instance, even though the avatar in the 2012 edition of *NCAA Football* no longer bears Denard Robinson's signature dreadlocks, the avatar still maintains numerous other characteristics of Denard Robinson, including his skill set, number, skin tone, height, and weight.¹⁷⁵ Thus, most users would continue to easily recognize it as an avatar based on Denard Robinson.¹⁷⁶

168. See *supra* Parts II, III, IV.

169. See *infra* notes 170–85 and accompanying text.

170. See, e.g., *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 613, 617–18 (Cal. 2006) (noting a California court's view that, when creating an avatar out of a human identity, modifying one's likeness in "significant respects" is enough to avoid liability under the common law right of publicity).

171. See Operation Sports Forums, *Impossible to Give Denard Robinson Dreads?*, OPERATION SPORTS, July 13, 2011, <http://www.operationsports.com/forums/ncaa-football-rosters/493410-impossible-give-denard-robinson-dreads.html>.

172. See *id.*

173. *Id.*

174. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (calling into doubt whether minor modifications to a likeness should negate right of publicity violations).

175. See Yuille, *supra* note 77 and explanatory parenthetical; *Denard Robinson Injured*

In light of such self-serving attempts by video game publishers to use the First Amendment as a shield, courts should change their view of the existing balancing test to recognize that even a partial, albeit incomplete, transformation of a celebrity's likeness would not entirely absolve liability under a proper right of publicity balancing test.¹⁷⁷ Rather, in such contexts, courts should treat the partially transformative element as simply a mitigating factor to liability, and then assign damages based on the proportionate share of the celebrity's original likeness still in the final avatar.¹⁷⁸

This slightly revised version of a transformative element inquiry within the greater scope of a First Amendment balancing test could continue to place the initial burden on a plaintiff to show a prima facie case of breach of his publicity rights.¹⁷⁹ In addition, once this burden is met, the burden could still shift to the defendant to argue in favor of First Amendment preemption.¹⁸⁰ However, under a revised test, the inquiry's third stage would change, requiring the burden to shift back to the plaintiff to argue that the transformative element represents a partial, rather than full, transformation of the plaintiff's identity.¹⁸¹ If a court agrees that the transformation is merely partial, the plaintiff would still be entitled to damages, measurable based on the proportionate share of the defendant's likeness that remains in the virtual player.¹⁸²

Every Game, *supra* note 77 and explanatory parenthetical.

176. *See TCI Cablevision*, 110 S.W.3d at 374 (noting that a weakness with the traditional application of the transformative element tests is that “[t]hrough these tests purport to balance the prospective interests involved, there is no balancing at all—once the use is determined to be expressive, it is protected,” and “[i]f a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment”).

177. In other words, courts should treat the partial transformation of one's likeness as a factor toward mitigating damages; whereas courts treat the public interest defense as a bar on recovering any damages.

178. *See infra* notes 179–82 and accompanying text (discussing how a similar concept today is used in torts with respect to the doctrine of contributory negligence); *see also infra* notes 183–85 and accompanying text (explaining how this concept coincides with the property law doctrine of shared property rights).

179. *See, e.g., ETW Corp. v. Jireh Publ'g Inc.*, 332 F.3d 915, 935–36 (6th Cir. 2003) (placing prima facie burden on plaintiff to show breach of one's right of publicity before turning to the broader balancing test and consideration of image transformation); *see also C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 822–23 (8th Cir. 2007) (same).

180. *See, e.g., C.B.C. Distrib. & Mktg.*, 505 F.3d at 824 (ultimately holding, upon burden shifting, that “CBC's first amendment rights in offering its fantasy baseball products supersede the players' rights of publicity”).

181. *See supra* note 178 and accompanying text.

182. *See generally Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003) (“[I]n a right of publicity action, ‘the measure of damages focuses on the pecuniary loss to the plaintiff or the unjust pecuniary gain to the defendant.’”) (quoting RESTATEMENT (THIRD) OF UNFAIR

Treating the use of a partial transformative element as a means of mitigating damages rather than as a complete bar to recovery coincides with the U.S. legal system's broad movement toward apportioning liability rather than treating it as absolute.¹⁸³ In addition, this approach is consistent with modern property theory, which recognizes that "where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim."¹⁸⁴ Finally, it should be noted that this approach comports with the important principles of economic efficiency and fairness by exposing even a partial free rider to liability and disgorging the free rider's unjust enrichment.¹⁸⁵

CONCLUSION

Several right of publicity cases, including most recently the U.S. District Court for the District of New Jersey's decision in *Hart v. Electronic Arts*, reinforce the peculiar fate of college athletes as individuals who generate great economic value for society but are nevertheless prohibited from controlling the commercial use of their own names and likenesses.¹⁸⁶ Such a result—that a multi-billion dollar video game publisher, without a license, may insert the likenesses of college athletes into its video games—undermines the very foundation

COMPETITION, sec. 49, cmt. b).

183. See, e.g., William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 465–67 (1953); see also Stuart F. Schaffer, Comment, *Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions*, 1981 DUKE L.J. 824, 825 (1981) ("The doctrine of comparative negligence has gained increasing popularity . . . as a means of mitigating the harshness of the common law contributory negligence defense. A system of contributory negligence completely bars a plaintiff from recovery against a negligent defendant if the plaintiff's negligence is a proximate cause of his damages. A system of comparative negligence apportions the relative negligence of the parties and reduces the plaintiff's recovery according to his degree of fault. Although the defense of contributory negligence remains under the comparative negligence system, the plaintiff's negligence reduces, rather than bars, his award of damages. The comparative negligence system is fairer than the system based on the all-or-nothing contributory negligence defense because under the former a negligent plaintiff may recover for damages proximately caused by the defendant's negligence.").

184. See, e.g., *Popov v. Hayashi*, 2002 WL 31833731 at *8 (Cal. Sup. Ct. Dec. 18, 2002) (ultimately finding that both a baseball spectator who initially undertook significant steps to achieve possession of a home run baseball and a spectator who ultimately recovered baseball had property right interests in the baseball).

185. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 51 (3d. ed. 1986) (explaining that the law "may be viewed as an effort to attach costs to the violation of moral principles—principles that . . . operate to enhance the efficiency of a market economy").

186. See generally *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 793–94 (D.N.J. 2011) (declining college football players' control over the use of their likenesses in a college football video game); *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 168, 170 (5th Cir. 1941) (same, with respect to a photograph used in conjunction with a college football schedule and beer advertisement).

of the right of publicity as an intellectual property right meant to protect the commercial interests of celebrities to control their own likenesses.¹⁸⁷

While those who defend unbridled protection of the First Amendment may praise *Hart* as an important victory for video game publishers' freedom of speech, the *Hart* decision actually does far more to destroy college athletes' rights of publicity than to safeguard free speech.¹⁸⁸ Indeed, unlike most traditional First Amendment cases, the “speech” at issue in *Hart* was not traditional public interest speech, but rather speech targeted almost exclusively at obtaining a commercial advantage over other sports video game publishers.¹⁸⁹ In addition, the proceeds that Electronic Arts derived from using college athletes' likenesses without a license became windfall profits for Electronic Arts, as did the additional proceeds obtained by the NCAA when negotiating the license of its intellectual property rights to Electronic Arts.¹⁹⁰

Fully eliminating the NCAA rules that prohibit a free labor market for college athletes would require courts to engage in complicated debates about colleges' educational mission and requirements to comply with Title IX.¹⁹¹ These types of debates extend beyond the traditional scope of the court system. By contrast, allowing college athletes to sell their names and likenesses to video game publishers, much as professional athletes have now done for decades, is comparatively

187. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

188. *JESSE DUKEMINIER ET AL.*, PROPERTY 51 (6th ed. 2006); see also *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (“Perhaps the basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference.”); *Munden v. Harris*, 134 S.W. 1076, 1078 (Mo. 1911) (noting that “[i]f there is value in [one’s likeness], sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?”).

189. See *supra* notes 109–66 and accompanying text.

190. See Edelman, *supra* note 17, at 862 (“[B]y not paying student-athletes, the Principle of Amateurism leads to windfall profits for college coaches and administrators, who receive disproportionately high salaries and additional endorsement/promotion opportunities.”); see also Sarah M. Kinsky, Note, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1585 (2003) (“[T]he NCAA maximizes profits beyond a competitive rate and keeps the windfall in the hands of select few administrators, athletic directors, and coaches.”); cf. Lazaroff, *supra* note 13, at 357 (noting several commentators’ belief that the “economic impact of the NCAA’s amateurism rules creates a wealth transfer from the players to their schools”); Bagnato, *supra* note 12 (quoting Duke Sports Law Professor John Weistart as accusing the NCAA of “trying to hold back a real economic force” in college athletes).

191. See Lazaroff, *supra* note 13, at 367 (noting that unless Title IX is changed, there would be “exorbitant” costs involved with deregulating college athletic labor markets); McCormick & McCormick, *supra* note 13, at 79–80 n.34 (recognizing complicated issues related to recognizing student-athletes as employees that emerge from Title IX and extend beyond the scope of their article); cf. *Title IX*, 20 U.S.C. §§ 1682–88 (2006) (providing full statutory language of Title IX); Paul Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS SPORT 127, 128 (2008) (discussing the practical history of Title IX litigation against colleges and their athletic departments).

simple.¹⁹² College athletes could even sell their names and likenesses to publishers without violating the NCAA Principle of Amateurism if they require publishers to make payment into a trust fund on their behalf.¹⁹³

Most agree that college athletes provide “the most essential ingredient of any NCAA sports product.”¹⁹⁴ However, for far too long, courts have used technicalities to deny college athletes the fruits of their labor.¹⁹⁵ This result was especially evident in the case of *Hart v. Electronic Arts*, in which the First Amendment defense was used as just another legal fiction to allow both Electronic Arts and the NCAA to continue to exploit college athletes’ work product.¹⁹⁶

To protect the future interests of college athletes, courts must recognize that the scales of justice point in favor of protecting college athletes’ publicity rights in commercial video games.¹⁹⁷ Furthermore, courts must modify how they interpret right of publicity laws to ensure that video game publishers cannot use the mere partial transformation of college athletes’ avatars as a loophole to avoid providing college athletes with their fair share of video game profits.¹⁹⁸

192. See Edelman, *supra* note 17, at 887–88 (noting that, unlike full deregulation of NCAA labor markets, allowing college athletes to control their publicity rights “does not involve any payment from educational institutions to student-athletes, and therefore is free from the regulation’s scope”).

193. See Cohen, *supra* note 107 (noting that sports business author Marc Isenberg believes that there is a way without violating NCAA bylaws to “create a trust fund for athletes, funded by revenue from TV rights payments”).

194. See, e.g., Lazaroff, *supra* note 13, at 354.

195. See, e.g., *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081, 1091 (7th Cir. 1992) (denying a college football player the right to challenge an NCAA rule under antitrust law based on the court’s conclusion that the NCAA member schools are not “purchasers of labor” in the traditional sense); *O’Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941) (holding that a college football player could not make a claim for breach of his right of privacy for the use of his picture in a beer advertisement where the beer manufacturer had purchased rights to the picture directly from the athlete’s college).

196. See generally *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 794 (D.N.J. 2011) (holding that Electronic Arts “is entitled to assert the First Amendment defense and its motion for summary judgment must, therefore, be granted”).

197. See *supra* notes 71–167 and accompanying text.

198. See *Id.*