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## Selling Your Soul at the Crossroads: The Need for a Harmonized Standard Limiting the Publicity Rights of Professional Athletes

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**SELLING YOUR SOUL AT THE CROSSROADS:  
THE NEED FOR A HARMONIZED STANDARD  
LIMITING THE PUBLICITY RIGHTS OF  
PROFESSIONAL ATHLETES**

“I went to the cross road; fell down on my knees.”<sup>1</sup>

“Every professional athlete owes a debt of gratitude to the fans  
. . . . He should never miss a payment.”<sup>2</sup>

INTRODUCTION

“Celebrity” does not come cheap. Fame, notoriety, and the monetary benefits stemming therefrom require time, talent, dedication, and a will to succeed that can survive any setback or obstacle thrown in its way. There are shortcuts to fame and success, but taker beware: though you may gain what you seek, payment will come due and you may find you have written an “IOU” that you are not prepared to fulfill. If legend is to be believed, no one knows this to be truer than influential blues guitarist Robert Johnson, the man who sold his soul to the devil in exchange for the title of King of the Delta Blues.<sup>3</sup>

As the story goes, a young Johnson, desperate to realize his dreams of musical greatness, paid a midnight visit to a deserted rural crossroads in order to barter his soul to Satan for the ability to play the blues guitar.<sup>4</sup> Allegedly, upon Johnson’s arrival at the fated crossroads, a large dark figure appeared and tuned Johnson’s guitar, an act that transformed him from a struggling, mediocre musician to a Delta Blues legend.<sup>5</sup> Johnson flourished during the few short years he was alive after his midnight deal with the devil, but the devil eventually

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1. Robert Johnson, *Cross Road Blues* (Vocalion Records 1934).

2. Quotation of Bobby Hull, in *GREAT QUOTES FROM GREAT SPORTS HEROES* 80 (Peggy Anderson ed., 1997).

3. BARRY LEE PEARSON & BILL McCULLOCH, *ROBERT JOHNSON: LOST AND FOUND* 89 (2003). There is some debate over whether this legend actually originated with Robert Johnson. A number of accounts actually credit blues musician Tommy Johnson with being the first to pawn away his eternal soul to a sinister figure at the crossroads in exchange for a mastery of the blues. See DAVID EVANS, *TOMMY JOHNSON* 22–24 (1971). However, because the tale is most commonly associated with Robert Johnson, this author assumes for the purposes of this Comment that the credit correctly lies with him.

4. R. GARY PATTERSON, *TAKE A WALK ON THE DARK SIDE: ROCK AND ROLL MYTHS, LEGENDS, AND CURSES* 3 (2004).

5. See *id.* at 8.

came looking for what Johnson owed.<sup>6</sup> The victim of an alleged poisoning, Johnson died under suspicious circumstances in 1938.<sup>7</sup>

Midnight bargains with Satan for talent, fame, and fortune seem to have faded from popularity in recent years, perhaps in response to the unpleasant manner in which the devil has been known to collect from his debtors.<sup>8</sup> However, people continue to make deals with metaphorical devils every day. Professional athletes in particular must negotiate for their notoriety and celebrity statuses, but recently Satan has taken a backseat to a more figuratively devilish party: the fans. And that “devil” is just as eager to collect as the one who met with Robert Johnson at the crossroads on that fateful night.

At least one scholar has noted how important the adoring public is in the creation of celebrity.<sup>9</sup> The public participates directly and actively in the process of creating and shaping a celebrity image,<sup>10</sup> and in no realm of celebrity is this clearer than in that of the professional athlete.<sup>11</sup> The public—the metaphorical devil to the deal—is owed something from professional athletes in exchange for this generous grant. Specifically, the public is owed the right to exploit the images and likenesses of the athletes that it has actively helped to cultivate for expressive purposes.<sup>12</sup>

Athletes have been able to avoid satisfying their end of the bargain, however, through the development and exploitation of the so-called right of publicity. Established in the 1950s, the right of publicity is “the inherent right of every human being to control the commercial use of his or her identity.”<sup>13</sup> Athletes are increasingly invoking the right of publicity in an attempt to control both commercial and ex-

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6. *See id.* at 9.

7. *Id.* at 10.

8. Robert Johnson allegedly suffered a slow, tortured death after enduring “three days of intense, excruciating pain.” *Id.* Johannes Faust, whose fabled pact with Satan is credited with originating the “deal with the devil” legend, was left charred and mutilated upon the expiration of his deal. MIRIAM VAN SCOTT, *THE ENCYCLOPEDIA OF HELL* 118–20 (1998).

9. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 190–96 (1993).

10. *Id.* at 193–94.

11. *See* Geoff Crawly, *The Most Important Position in Professional Sports: Fan*, BLEACHER REPORT (Nov. 3, 2009), <http://bleacherreport.com/articles/283740-the-most-important-position-in-professional-sports-fan>.

12. *See* Madow, *supra* note 9, at 195–96 (arguing that because a celebrity cannot say that her public image is solely the product of her own effort, she cannot claim exclusive ownership or control of the economic values that attach to it).

13. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2004). It is worth noting that, though the focus of this Comment is on celebrities and athletes, the right of publicity is not strictly a “right of celebrity.” *Id.*

pressive appropriations of their likenesses.<sup>14</sup> This trend is most evident in publicity rights litigation concerning the depiction of athletes' likenesses in video games.<sup>15</sup> Such depictions are currently at issue in *Davis v. Electronic Arts, Inc.*, a case in which a class of retired NFL players is suing Electronic Arts (EA), the makers of the *Madden* video games,<sup>16</sup> for using their likenesses within the game without their consent.<sup>17</sup> While athletes' success in these actions has been mixed,<sup>18</sup> the progression of *Davis* thus far reflects courts' willingness to favor athletes in right of publicity cases.<sup>19</sup> *Davis* also exemplifies the lack of uniformity in right of publicity jurisprudence, and the outcomes that can result.<sup>20</sup>

*Davis* and other similar cases illustrate the multifaceted problems with the right of publicity, and the difficulty courts have rectifying those issues. Affirmation of the district court's decision in *Davis*—as well as the outcome of *Keller v. Electronic Arts, Inc.*<sup>21</sup>—has not only failed to harmonize the multiplicity of conflicting tests for right of

14. See *C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007); see also *Cardtoons, L.C. v. MLB Players Ass'n*, 95 F.3d 959 (10th Cir. 1996); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

15. See *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010), *aff'd sub nom.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013); see also *Brown v. Elec. Arts, Inc.*, No. 09-CV-1598, 2009 U.S. Dist. LEXIS 131387 (C.D. Cal. Sept. 23, 2009), *aff'd*, 724 F.3d 1235 (9th Cir. 2013).

16. The *Madden NFL* series is a long-running video game series that seeks to create a digital version of the National Football League by substantially replicating each player's real-life abilities. The games contain both active players and "historic" retired players. Active players are depicted with the correct names and jersey numbers, while historic players are given no names and different jersey numbers from their real-life counterparts.

17. Plaintiff's Class Action Complaint, *Davis v. Elec. Arts, Inc.*, No. CV 10-3328, at 4–6 (N.D. Cal. July 29, 2010), available at <http://xbox360movies.ign.com/xbox360/document/article/110/1109826/maddensuit.pdf>.

18. Compare *Keller*, 2010 WL 530108, at \*3 (holding plaintiff's use of the athlete's likeness in a video game violated the athlete's right of publicity), with *Brown*, 2009 U.S. Dist. LEXIS 131387 (holding plaintiff's use of the athlete's likeness in a video game was protected by the First Amendment).

19. The district court denied Electronic Arts' motion to dismiss the case pursuant to First Amendment protection. Ben Strauss, *NFL Retiree Lawsuit Against EA to Proceed to Court*, GAMES INDUSTRY (March 30, 2012 5:57 PM), <http://www.gamesindustry.biz/articles/2012-03-30-nfl-retiree-lawsuit-to-proceed-to-court-against-ea>.

20. The court's denial of EA's motion was at the time seemingly at odds with the New Jersey district court's decision to dismiss a similar case in 2011 on the same First Amendment grounds claimed by EA in *Davis*. See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757 (D.N.J. 2011). The district court decisions in *Hart* and *Keller* were recently overturned by the Court of Appeals for the Third Circuit in *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), and the Court of Appeals for the Ninth Circuit in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013), respectively. The implications of these decisions are discussed *infra* Part II.B.3.

21. See *Keller*, 2010 WL 530108; see also *infra* notes 87–97 and the accompanying text.

publicity cases,<sup>22</sup> but also indicates the continued expansion of already over-inflated and under-standardized publicity rights for professional athletes. The trend will likely significantly disrupt the balance between professional athletes and the public that grants that publicity. No matter what the ongoing impact of these cases proves to be, they make one thing clear: courts cannot craft a meaningful solution to the right of publicity problem. Judges make poor advocates for the devil.

This Comment addresses the multitude of problems relating to the publicity rights of athletes. It responds to these problems by proposing a harmonized right of publicity standard that curtails current publicity rights while securing adequate economic and moral rights to athletes' personas for a limited time. This "Crossroads Standard" will examine two factors to determine whether an athlete has an actionable right of publicity claim: (1) whether the use of the athlete's likeness is expressive or "purely commercial"<sup>23</sup> and (2) if the use is expressive, whether the use is "wholly unrelated" to the work or utilized to intentionally mislead consumers as to the athlete's endorsement of the use or work.<sup>24</sup> The Crossroads Standard provides the athlete with protection for ten years, allowing for one ten-year extension upon a sufficient showing of cause, after which point the publicity rights inquiry will be limited solely to the first factor of the standard.

Part II of this Comment provides a historical background on the right of publicity and the varying approaches to that right developed by courts.<sup>25</sup> Part III examines the strengths and weaknesses of the varying state approaches to publicity rights, and sets forth a proposal for a harmonized right of publicity standard to replace the disjointed state approaches.<sup>26</sup> Part IV analyzes how the Crossroads Standard will impact right of publicity litigation. Specifically, it examines how cases resembling the *Madden* class action suit would be resolved under that standard.<sup>27</sup> Finally, this Comment concludes with a justification for immediate implementation of the Crossroads Standard.<sup>28</sup>

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22. See *infra* notes 29–141 and the accompanying text.

23. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185 (9th Cir. 2001).

24. *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

25. See *infra* notes 29–141 and the accompanying text.

26. See *infra* notes 142–217 and the accompanying text.

27. See *infra* notes 218–249 and the accompanying text.

28. See *infra* notes 250–253 and the accompanying text.

## II. BACKGROUND

A. *Down to the Crossroads: The Emergence of the Right of Publicity*

The right of publicity is rooted in one of the most basic of human interests: an individual's right to privacy.<sup>29</sup> Its visionaries succinctly described it as one's right to simply "be let alone."<sup>30</sup> The right of privacy was developed with commercial uses of individuals' likenesses in mind, and the early cases involved private persons' interests in not being displayed in public for advertising purposes.<sup>31</sup>

The first recognition of a right of publicity separate and distinct from privacy rights came in 1954 with the Second Circuit's decision in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>32</sup> *Haelan Laboratories* involved the use of photographs depicting professional baseball players in connection with the promotion and sale of chewing gum.<sup>33</sup> The court rejected the defendant's argument that "a man has no legal interest in the publication of his picture other than his right of privacy."<sup>34</sup> Instead, the court reasoned that individuals, "especially actors and ball-players," have a definite right to the "publicity value" of their photograph.<sup>35</sup> In this influential opinion, Judge Jerome Frank first labeled the "right of publicity," independent of the right to privacy.<sup>36</sup> Judge Frank emphasized the commercial importance of the right, stating that it must be "the subject of an exclusive grant which bar[s] any other advertiser from using [the plaintiff's] pictures."<sup>37</sup>

Soon after *Haelan Laboratories* laid the foundation for the right of publicity, Melville Nimmer published his influential work, *The Right of Publicity*.<sup>38</sup> One scholar has commented that "if Judge Frank was the architect of a 'right of publicity,' then Nimmer was the first builder."<sup>39</sup> Nimmer detailed the deficiencies of privacy law in protect-

29. Madow, *supra* note 9, at 167.

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

31. See Roberta R. Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1351 (2009) ("These privacy decisions thus supported the proposition that those wishing to capitalize upon another's name or likeness for advertising purposes should not be free to do so without compensating the principal."); see also Madow, *supra* note 9, at 167 ("The right of privacy . . . received its initial legal recognition instead in connection with the unauthorized advertising use of names and likenesses.").

32. Kwall, *supra* note 31, at 1351; see also Madow, *supra* note 9, at 172.

33. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953).

34. *Id.* at 868.

35. *Id.*

36. *Id.*

37. *Id.*

38. Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

39. MCCARTHY, *supra* note 13, § 1:27.

ing the commercial value of an individual's identity, a value that he termed a person's publicity value.<sup>40</sup> *The Right of Publicity* definitively separated the individual rights of publicity and privacy, and became the first stone upon which the estate of publicity rights would be built.<sup>41</sup>

A number of commentators and courts also tout William Prosser's formulation of the four distinct privacy torts in his 1960 seminal work, *Privacy*, as the source of the eventual creation of the right of publicity separate from the right of privacy.<sup>42</sup> Prosser identified four privacy torts embodied within the overarching right of privacy.<sup>43</sup> It was the third of these privacy torts, misappropriation of name or likeness, which is credited by some as being the starting point for the right of publicity we know today.<sup>44</sup>

Whatever its origins, the right of publicity has become a widely accepted doctrine in the law today. As of 2013, over half of the fifty states have come to recognize a statutory or common law form of the right of publicity.<sup>45</sup>

### B. *Different Devils, Different Deals: The Many Approaches to Publicity Rights*

The Supreme Court has addressed the right of publicity only once since the inception of the doctrine.<sup>46</sup> In *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>47</sup> the plaintiff was an entertainer who regularly per-

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40. Nimmer, *supra* note 38, at 204 (defining "publicity value" as the pecuniary worth of a person's identity when it is used for advertising, communications, entertainment, or other commercial purposes).

41. See MCCARTHY, *supra* note 13, § 1:27.

42. See, e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003); Russell Hickey, *Refashioning Actual Malice: Protecting Free Speech in the Right of Publicity Era*, 41 TORT TRIAL & INS. PRAC. L.J. 1101, 1105 (2006).

43. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (identifying the torts of public disclosure of private facts; false light publication; misappropriation of name, likeness and picture; and intrusion).

44. In *Doe v. TCI Cablevision*, the Supreme Court of Missouri credited Prosser's "misappropriation of name" tort with giving rise to the similar right of publicity tort. *TCI Cablevision*, 110 S.W.3d at 368 (Mo. 2003). The court also opined that, although the two are separate torts, the elements of misappropriation of name and of right of publicity are "essentially the same." *Id.*

45. Susannah M. Rooney, Note, *Just Another Brown-Eyed Girl: Toward a Limited Federal Right of Publicity Under the Lanham Act in a Digital Age of Celebrity Dominance*, 86 S. CAL. L. REV. 921, 933 (2013). Of the states that recognize publicity rights, some have statutory protections for publicity rights in place, others implement common law approaches to publicity rights, and still others use some combination of the two. See *id.*; see also Jeremy Wale, Comment, *Adequate Protection of Professional Athletes' Publicity Rights: A Federal Statute Is the Only Answer*, 11 T.M. COOLEY J. PRAC. & CLINICAL L. 248, 249-50 (2009).

46. Kwall, *supra* note 31, at 1355.

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

formed a “human cannonball” routine in a local county fair.<sup>48</sup> One evening, a reporter for the defendant broadcasting company attended the fair and recorded the plaintiff’s fifteen-second performance, the entirety of which the defendant then aired on that evening’s nightly newscast.<sup>49</sup> The entertainer sued for damages under Ohio’s right of publicity doctrine, alleging that the broadcasting company aired and commercialized his act without consent, which constituted an unlawful appropriation of his personal property.<sup>50</sup>

The U.S. Supreme Court took the case after the Ohio Supreme Court held that the First Amendment protected the broadcasting company from liability for infringement of the Ohio right of publicity law.<sup>51</sup> The Court held that the broadcasting company was not protected from liability by virtue of the First and Fourteenth Amendments.<sup>52</sup> The Court suggested that the tension between the First Amendment’s guarantee of freedom of expression and the right of publicity’s guarantee of control over the use of one’s own identity may in some instances be resolved in favor of preserving First Amendment freedoms.<sup>53</sup> However, the Court rejected such First Amendment deference in this case, based largely on the fact that the broadcasting company aired the entertainer’s *entire* act, rather than merely his likeness or reputation.<sup>54</sup> However, the First Amendment does not necessarily serve to protect usurpation of the economic value of one’s persona.<sup>55</sup>

While scholars have recognized the lasting impact of *Zacchini* as requiring courts to balance First Amendment concerns and the right of publicity,<sup>56</sup> the Court’s opinion provides little guidance as to the standard under which the balancing test should be conducted.<sup>57</sup> Com-

48. *Id.* at 563.

49. *Id.* at 563–64.

50. *Id.* at 564.

51. *Id.* at 565.

52. *Id.* at 565–66.

53. *See Zacchini*, 433 U.S. at 574–78.

54. *See id.* at 575 (“Much of its economic value lies in the ‘right of exclusive control over the publicity given to his performance’; if the public can see the act free on television, it will be less willing to pay to see it at the fair.”); *see also id.* at 576 (“In this case, Ohio has recognized what may be the strongest case for a ‘right of publicity’—involving, not the appropriation of an entertainer’s reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.”).

55. *See id.* at 578.

56. *See Kwall, supra* note 31, at 1356.

57. *See* MCCARTHY, *supra* note 13, § 8:27 (“[W]hile the *Zacchini* . . . opinions have been picked apart word by word by the commentators, no clear message emerges and no general rule is discernable by which to predict the result of conflicts between the right of publicity and the First Amendment.”).



pounding this issue is that the right of publicity in its current form is entirely a creature of state law and is therefore lacking any uniform application.<sup>58</sup> The result has been a multitude of varying tests applied across different jurisdictions that achieve inconsistent, and often directly conflicting, results.<sup>59</sup>

At least four balancing tests concerning the right of publicity have been applied by various courts: the “predominant purpose” test,<sup>60</sup> the “transformative use” test,<sup>61</sup> the “relatedness” test,<sup>62</sup> and the “actual malice” test.<sup>63</sup> In addition to these formal tests, some courts elect to balance the right of publicity against the First Amendment through a more general ad hoc approach.<sup>64</sup>

### 1. *The Predominant Purpose Test*

The predominant purpose test was characterized by one commentator as the “fairest way to approach [right of publicity] issues” because it focuses the analysis on one simple question: “What is being exploited?”<sup>65</sup> This test was most notably applied by the Supreme Court of Missouri in *Doe v. TCI Cablevision*.<sup>66</sup>

The plaintiff in *TCI Cablevision*, Tony Twist, was a professional hockey player who had acquired a widespread reputation as a ruthless and violent “enforcer.”<sup>67</sup> Twist brought a claim for misappropriation of his identity against the defendant, Todd McFarlane, creator of the comic book series *Spawn*.<sup>68</sup> The dispute stemmed from McFarlane’s creation of a villainous mob “enforcer” character allegedly modeled after Twist.<sup>69</sup> McFarlane’s character, “Anthony ‘Tony Twist’ Twis-

58. See Roberta R. Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 52–53 (1994); see also *Wale*, *supra* note 45, at 249–50.

59. Compare *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003) (holding that the defendant’s use of popular musicians as inspiration for comic book villains was protected by the First Amendment) with *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (holding that the defendant’s use of a professional hockey player as inspiration for a comic book villain was not protected by the First Amendment).

60. See *infra* notes 65–75 and the accompanying text.

61. See *infra* notes 77–97 and the accompanying text.

62. See *infra* notes 98–118 and the accompanying text.

63. See *infra* notes 119–129 and the accompanying text.

64. See *infra* notes 131–140 and the accompanying text.

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

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

67. *Id.* at 366. Enforcers are players “whose chief responsibility [is] to protect goal scorers from physical assaults,” a job that the plaintiff accomplished with an arsenal of “notorious . . . violent tactics.” *Id.*

68. *Id.* at 365–66.

69. *Id.* at 366.

telli,” shared the same name as the plaintiff Twist, and McFarlane admitted that Twist was the inspiration behind the creation of the character.<sup>70</sup> The character bore no physical resemblance to Twist and they shared no similarities except the name and the outward “enforcer” persona.<sup>71</sup>

The court adopted the predominant purpose test to determine whether the First Amendment protected McFarlane’s use of Twist as inspiration for his villain. According to the court:

If a product is being sold that predominantly exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some “expressive” content in it that might qualify as “speech” in other circumstances.<sup>72</sup>

The court favored this test as a more balanced approach in cases where speech is “both expressive and commercial.”<sup>73</sup>

Applying the test, the court held that McFarlane’s use of Twist’s likeness was not entitled to First Amendment protection.<sup>74</sup> Despite McFarlane’s use of some expressive elements, the work was ultimately motivated by a desire to profit from Twist’s likeness.<sup>75</sup> The predominant purpose test continues to be invoked by right of publicity plaintiffs.<sup>76</sup>

## 2. *The Transformative Use Test*

The Supreme Court of California developed and applied what it termed the transformative use test in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*<sup>77</sup> That test has subsequently found favor with a number of courts, including federal district courts in the Third and Ninth Circuits.<sup>78</sup>

70. *Id.*

71. *Id.*

72. *TCI Cablevision*, 110 S.W.3d at 374 (quoting Lee, *supra* note 65, at 500).

73. *Id.* (rejecting the “relatedness” and “transformative” tests for failing to adequately consider the dual nature of many uses of a person’s identity).

74. *Id.*

75. *Id.* at 371–74. The court noted the fact that the defendant marketed his products directly to hockey fans, as well as the defendant’s statements that readers “will continue to see current and past hockey players’ names in [his] books,” as evidence supporting its ruling. *Id.* at 371.

76. See, e.g., *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 153 (3d Cir. 2013); *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 616 (Cal. Ct. App. 2006).

77. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

78. See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757 (D.N.J. 2011), *rev’d*, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); see also *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010), *aff’d sub nom.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013). For an analysis of the respective courts’ application of the test in these cases, see *infra* notes 87–97, 111 and the accompanying text.

The defendant in *Comedy III* was an artist who specialized in charcoal drawings of celebrities.<sup>79</sup> At issue in this case was the artist's sale of one of his drawings, a charcoal rendering of the Three Stooges, on lithographic prints and t-shirts.<sup>80</sup> The plaintiff, the registered owner of all rights to the Three Stooges, sued the artist for damages and injunctive relief pursuant to the California right of publicity statute.<sup>81</sup>

In attempting to distinguish between protected works of expression and nonprotected commercial uses of likeness, the court detailed its transformative use test.<sup>82</sup> The principle inquiry under this approach is "whether the new work merely supersedes the objects of the original creation, or instead adds something new . . . [that] alter[s] the first work with new expression, meaning, or message."<sup>83</sup> Essentially, the author must make something "recognizably his own" by adding some nontrivial aspect of expression.<sup>84</sup> Further, if the "marketability and economic value" of the defendant's use derive "principally from some source other than the fame of the celebrity" the use may be found to be sufficiently transformative.<sup>85</sup> Applying this standard, the court found that the artist's works were not sufficiently transformative to warrant First Amendment protection.<sup>86</sup>

More recently, the Third Circuit applied the *Comedy III* test to evaluate the use of athletes' likenesses in video games.<sup>87</sup> In *Hart v. Electronic Arts, Inc.*, the court applied a modified *Comedy III* approach to the transformative use test to reverse the district court's grant of summary judgment in favor of the video game developer.<sup>88</sup>

To determine whether the use was sufficiently transformative, the court focused on the actual depiction of the athlete in the work rather than the use in the context of the work as a whole.<sup>89</sup> The court held that the use of the plaintiff athlete's appearance and biographical in-

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79. *Comedy III Prods.*, 21 P.3d at 800.

80. *Id.*

81. *Id.*

82. *Id.* at 807–08.

83. *Id.* at 808 (internal quotation marks omitted).

84. *Id.* at 810 (internal quotation marks omitted).

85. *Comedy III Prods.*, 25 P.3d at 810.

86. *Id.* at 811 (reasoning that "[plaintiff's] undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions" and that "the marketability and economic value of [defendant's] work derives primarily from the fame of the celebrities depicted").

87. *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010), *aff'd sub nom.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013).

88. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 165–70 (3d Cir. 2013).

89. *See id.* at 163 (stating that the test "requires a more circumscribed inquiry, focusing on the specific aspects of a work that speak to whether it was merely created to exploit a celebrity's likeness").

formation constituted a misappropriation of his likeness that was unprotected by the First Amendment.<sup>90</sup> EA argued that the other creative elements of the game were so numerous that the work as a whole was transformative. The court was unpersuaded, finding instead that the game's other expressive features were wholly unrelated elements that were irrelevant to the inquiry of transformativeness.<sup>91</sup> The court was concerned only with the use of the individual's likeness alone, rather than focusing on the use in the context of the entire work.<sup>92</sup>

The *Hart* approach was adopted and expanded upon by the Ninth Circuit. In *In re NCAA Student-Athlete Name & Likeness License Litigation*,<sup>93</sup> a former college football athlete claimed that EA implemented unauthorized likenesses of collegiate athletes in its *NCAA Football* video game series.<sup>94</sup> The court held that EA's depiction of athletes in its video game was not a sufficiently transformative work warranting First Amendment protection.<sup>95</sup> The court reasoned that the athlete was depicted as what he was—the starting quarterback for Arizona State University—and in a setting identical to where he was found during his collegiate career—on a football field.<sup>96</sup> According to the court, the depiction of the athlete fell well short of being sufficiently “transmogrified,” as was contemplated by the *Comedy III* court in formulating the test.<sup>97</sup>

### 3. *The Relatedness Test*

The relatedness standard is rooted in the *Restatement (Third) of Unfair Competition*, which states that “if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising.”<sup>98</sup> The doctrine embodied in the *Restatement*

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90. *Id.* at 170–71.

91. *Id.* at 169.

92. *Id.* at 141 (Ambro, J., dissenting).

93. Formerly *Keller v. Electronic Arts, Inc.*

94. *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268, 1272 (9th Cir. 2013). While no athletes were specifically named within the games, the defendant took a number of steps designed to portray the real-life athletes as accurately as possible, including using the correct jersey numbers, background information, and similar physical characteristics of the digital athletes' real-life counterparts. *Id.*

95. *Id.* at 1271.

96. *Id.*

97. *See id.* at 1276 (quoting *Hilton v. Hallmark Cards*, 599 F.3d 894, 911 (9th Cir. 2009)).

98. Kwall, *supra* note 31, at 1360–61 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. C (1995)).

was expanded upon and articulated in the form of a two-pronged relatedness analysis by the Second Circuit in *Rogers v. Grimaldi*.<sup>99</sup>

In *Rogers*, the plaintiff, Ginger Rogers, brought suit against the producers of the film *Ginger and Fred*.<sup>100</sup> The film tells the story of two young Italian cabaret singers who, through imitation of Rogers and her frequent film partner Fred Astaire, come to be known by the names of Fred and Ginger.<sup>101</sup> Though Rogers's suit was primarily based on an alleged violation of the Lanham Act, she also claimed that the use of her name in the title and screenplay of the film violated her right of publicity.<sup>102</sup>

To address the right of publicity claim, the court implemented a broader version of its two-pronged analysis for determining violations under the Lanham Act.<sup>103</sup> After initially finding the work in question to be expressive, the court concluded that the right of publicity should not bar the use of a celebrity's name or likeness unless: (1) the use is wholly unrelated to the underlying work; or (2) the use was "simply a disguised commercial advertisement for the sale of goods or services."<sup>104</sup> In other words, the use will be barred if it explicitly misleads consumers as to the individual's endorsement of the use or underlying work.<sup>105</sup> Applying this two-pronged approach, the court held that the use of Rogers's name in the movie title was not barred by the right of publicity.<sup>106</sup> The court found that merely because the characters of the film were nicknamed "Ginger" and "Fred," the use of Rogers's name was not "arbitrarily chosen just to exploit the publicity value of [Rogers]" and could not be said to be wholly unrelated to the work.<sup>107</sup> In considering the second prong, the court determined that the title contained no explicit indication that Rogers had any involvement in the film.<sup>108</sup> The risk that at most "some members of the public would draw the incorrect inference that Rogers had some involvement in the film" was "so outweighed by the artistic expression

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99. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

100. *Id.* at 997.

101. *Id.* at 996-97.

102. *Id.* at 997.

103. *Id.* at 1004. In determining whether a defendant's use of a person's likeness constitutes a misappropriation under the Lanham Act, the court considers (1) whether the challenged work has any relevance to the underlying work, and (2) if relevant, whether the challenged work misleads the consumer as to the source or content of the work. *See id.* at 999.

104. *Id.*

105. *See Rogers*, 875 F.2d at 1004.

106. *Id.* at 1004-05 (holding that "the title 'Ginger and Fred' is clearly related to the content of the movie and is not a disguised advertisement for the sale of goods or services").

107. *Id.* at 1001.

108. *Id.*

as to preclude” a finding of liability for a violation of the plaintiff’s right of publicity.<sup>109</sup>

The *Rogers* relatedness test is most often utilized in conjunction with misappropriation claims brought under the Lanham Act.<sup>110</sup> However, a number of courts have applied this two-pronged analysis in right of publicity actions, particularly in cases involving the use of athletes’ likenesses in video games, such as in *Brown v. Electronic Arts, Inc.*<sup>111</sup>

In *Brown* a former player in the National Football League brought a right of publicity claim against the defendant video game producer for implementing his likeness into its *Madden* video game without his consent.<sup>112</sup> Similar to the use of the collegiate athletes’ likenesses in *Keller*, the player’s name was not attached to his digital counterpart, but the game did include accurate physical characteristics and “nearly identical” statistical information as the real-life plaintiff.<sup>113</sup>

Upon its initial determination that *Madden* was an expressive work,<sup>114</sup> the court applied a *Rogers* analysis to EA’s use of the player’s likeness in the game.<sup>115</sup> The court determined that, under the first prong, the use of the player’s likeness was “not completely irrelevant” to the content of the underlying football video game.<sup>116</sup> The court found the second prong unsatisfied because the alleged use of the player’s likeness as an anonymous and misnumbered avatar could

109. *Id.*

110. See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 791–93 (D.N.J. 2011), *rev’d*, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

111. *Brown v. Elec. Arts, Inc.*, No. 09-CV-1598, 2009 U.S. Dist. LEXIS 131387 (C.D. Cal. Sept. 23, 2009), *aff’d*, 724 F.3d 1235 (9th Cir. 2013); see also *Dillinger, LLC v. Elec. Arts, Inc.*, No. 1:09 CV 1236, 2011 WL 2457678, at \*4 (S.D. Ind. June 16, 2011) (noting that the court “would have analyzed [plaintiff’s right of publicity] claim under *Rogers*” had it not already been dismissed on other grounds); *Hart*, 808 F. Supp. 2d at 793, *rev’d*, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (applying the two-pronged *Rogers* analysis and holding that the defendant video game producer’s use of collegiate athletes’ likenesses in the game was protected by the First Amendment).

112. *Brown*, 2009 U.S. Dist. LEXIS 131387, at \*2.

113. *Id.* at \*4.

114. *Id.* at \*8–12.

115. *Id.* at \*8–15 (explaining that the creative elements and processes that the game’s creators put into it make *Madden NFL* an expressive work “akin to any expressive painting that depicts celebrity athletes of past and present in a realistic sporting environment”). To be sure, *Brown* involved a challenge to the use of the athlete’s likeness under the Lanham Act, rather than a right of publicity claim. *Id.* at \*4. However, because the facts of *Brown* are practically indistinguishable from those that would arise under a right of publicity challenge to use of athletes’ images in video games, and because the *Rogers* test would be applied in the same manner to such a case, it is still illustrative to analyze this case in the right of publicity context. See Plaintiff’s Class Action Complaint, *supra* note 17; cf. *Rogers v. Grimaldi*, 875 F.2d 994, 1004–05 (2d Cir. 1989).

116. *Brown*, 2009 U.S. Dist. LEXIS 131387, at \*12.

not be understood by any rational consumer as an explicit attempt to mislead consumers.<sup>117</sup> Thus, under the *Rogers* analysis, EA's use of the player's likeness in its video game was protected by the First Amendment.<sup>118</sup>

#### 4. *The Actual Malice Test*

The actual malice standard was developed as one court's attempt to transform the law governing celebrities' publicity rights to more closely resemble the law regarding defamation of public figures.<sup>119</sup> The Ninth Circuit was the first court to apply the actual malice standard from *New York Times v. Sullivan* to a right of publicity case.<sup>120</sup> That standard predicates liability on a defendant's knowledge of falsity or a reckless disregard for the truth.

In *Hoffman v. Capital Cities/ABC, Inc.*, the defendant magazine published a fashion-focused article containing a number of celebrity photographs.<sup>121</sup> The photos were famous film stills altered to make it appear that the actors were clothed in the season's fashions.<sup>122</sup> The last photo in the article was a still of Dustin Hoffman from the movie "Tootsie" clothed in a red sequined dress, but altered so that his head was superimposed on a different body wearing a different dress.<sup>123</sup> Hoffman sued the magazine, alleging a misappropriation of his name and likeness in violation of California's right of publicity doctrine.<sup>124</sup>

The court prefaced its analysis by noting that the question of actual malice would not arise in many right of publicity cases because challenged uses would most frequently occur in "purely commercial" contexts.<sup>125</sup> In the case of expressive works, or works in which "any commercial aspects are inextricably entwined with expressive elements," the actual malice rule applies.<sup>126</sup>

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117. *Id.* at \*14. The court initially expressed reservations as to whether the plaintiff's likeness was used at all.

118. *Id.*

119. Kwall, *supra* note 31, at 1360.

120. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001); *see also* *New York Times v. Sullivan*, 376 U.S. 254, 279–280 (1964).

121. *Hoffman*, 255 F.3d at 1183.

122. *Id.*

123. *Id.* In the film, Hoffman plays a male actor who, in order to get a part on a television program, dresses as a woman. *Id.* at 1182.

124. *Id.* at 1183.

125. *Id.* at 1184–85 ("The core notion of commercial speech is that it does no more than propose a commercial transaction." (internal quotation marks omitted) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983))).

126. *Id.* at 1185 (internal quotation marks omitted).

Next, the court found the challenged photo of Hoffman to be expressive for purposes of a right of publicity analysis.<sup>127</sup> Applying the actual malice standard, the court held that Hoffman failed to demonstrate that the magazine knew, or purposely avoided knowing, that the photo would mislead readers into thinking they were seeing the plaintiff's body in the photo.<sup>128</sup> At most, the magazine *unknowingly* misled readers into such belief, which was insufficient to prove actual malice.<sup>129</sup> Though this standard has not been widely adopted, it has been advocated by some scholars as the best approach to the right of publicity.<sup>130</sup>

### 5. *The Ad Hoc Approach*

Some courts have shunned the four traditional tests in favor of a case-by-case approach.<sup>131</sup> This ad hoc approach to the right of publicity requires a court to consider the individual facts of a particular case to balance the competing interests of the plaintiff's rights in her publicity value and the public's right to unfettered free expression under the First Amendment.<sup>132</sup>

The Eighth Circuit recently undertook an ad hoc right of publicity analysis in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*<sup>133</sup> In *C.B.C. Distribution*, the defendant, Major League Baseball Advanced Media, L.P., claimed that the plaintiff's unlicensed use of the names and statistics of professional baseball players for its fantasy baseball products violated the publicity rights of those athletes.<sup>134</sup> The court determined first that the defen-

127. *Hoffman*, 255 F.3d at 1185–86 (“[The defendant] did not use Hoffman’s image in a traditional advertisement printed merely for the purpose of selling a particular product.”).

128. *Id.* at 1187–89.

129. *Id.* (“There is not actual malice where journalists unknowingly mislead the public.” (internal quotation marks omitted)); *see also id.* at 1188 (“While [defendant] never explicitly told its readers that the [plaintiff] did not pose for the . . . photographs . . . there is certainly no clear and convincing evidence in the magazine itself that [defendant] intended to suggest the opposite . . .”).

130. *See generally* Hickey, *supra* note 42.

131. *See* *Cardtoons, L.C. v. MLB Players Ass’n*, 95 F.3d 959 (10th Cir. 1996) (balancing the interests, policies, and justifications for First Amendment protection against those for enforcing the right of publicity of professional baseball players); *see also* *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 936 (6th Cir. 2003) (balancing elements of the “actual malice,” “transformative use,” and “relatedness” tests in a case involving a work of art incorporating the image of a professional golfer).

132. *Cardtoons*, 95 F.3d at 972.

133. *C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).

134. *Id.* at 820. C.B.C. initially brought the action, seeking a declaratory judgment to establish its right to use the names and statistics of baseball players without paying for licenses. *Id.* The major league baseball players had previously licensed their publicity rights to Advanced Media



dant adequately alleged evidence to establish a right of publicity violation,<sup>135</sup> but still found that the specific facts and circumstances of the case tipped the balance in favor of the plaintiff's First Amendment right of expression.<sup>136</sup> The court concluded that the economic justifications for protecting the publicity rights of athletes simply did not measure up to the significant goal of encouraging and protecting public access and expression under the First Amendment.<sup>137</sup>

The ad hoc approach has been criticized as being "unhelpful,"<sup>138</sup> "unpredictable,"<sup>139</sup> and as "amount[ing] to no more than an 'I know it when I see it' approach."<sup>140</sup> At least one scholar has argued that the uncertainties inherent in the ad hoc approach would cause a chilling effect as users would forgo potentially harmless uses for fear of the unpredictable result of an ad hoc analysis.<sup>141</sup> Because such an approach embodies all of the negatives that the Crossroads Standard seeks to rectify, this Comment will not consider the ad hoc approach in formulating that standard.

### III. ANALYSIS

#### A. *Standin' at the Crossroads, Tryin' to Flag a Ride: The Dangers of a Non-Uniform Right of Publicity Standard*

The devil has made numerous deals over the course of history, and he has been unwaveringly consistent. In all his rumored dealings, the devil has been prompt,<sup>142</sup> unrelenting,<sup>143</sup> and, as the untimely demise

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through their association, the Major League Baseball Players Association, which allowed Advanced Media the standing to counterclaim for violation of the athletes' rights of publicity. *Id.*

135. The court purportedly adopted the *TCI Cablevision* approach to the right of publicity, finding that C.B.C.'s purpose in using the athlete's statistics was for profit, and thus C.B.C. had the "intent or purpose to obtain a commercial benefit from the use of [the players'] identity." *Id.* at 822–23 (quoting *Doe v. TCI Cablevision*, 110 S.W.3d 363, 370–71 (Mo. 2003)).

136. *Id.* at 824.

137. Professional baseball players are already lavishly compensated for their performances on the diamond, reducing the need to "promote . . . the right of the individual to reap the rewards of his or her endeavors and . . . to earn a living" through the enforcement of publicity rights. *Id.* at 824. Conversely, C.B.C.'s interest in the use of the statistics, which are of significant public interest in that they "allow[ ] fans to better appreciate" what is recognized by the court as "the national pastime," garners significant First Amendment justification as protected expression. *Id.* at 823.

138. Kwall, *supra* note 31, at 1363 ("The court in *C.B.C. Distribution* . . . performed a similarly unhelpful analysis . . .").

139. McCARTHY, *supra* note 13, § 8:23 ("[T]here is no rule to be applied, there is only the unrestrained and unpredictable judicial balancing of competing values.").

140. *Id.*

141. Lee, *supra* note 65, at 500–01.

142. CHRISTOPHER MARLOWE, *DOCTOR FAUSTUS* 81 (Sylvan Barnet ed., Signet Classic 2001) (1588) (the devil collected Faust's soul at midnight on the day their deal expired).

of Robert Johnson proves, he nearly always collects on a debt.<sup>144</sup> In stark contrast, the right of publicity and the fulfillment of the metaphorical deals athletes make with the public devil have been wholly inconsistent.

The main problem with the right of publicity is that it is largely a creature of state law, with each jurisdiction creating its own standards and rules for enforcing the right.<sup>145</sup> As discussed in Part II.B, at least four liability tests have arisen out of the jurisdictions that recognize a right of publicity, and a number of other jurisdictions have opted for an ad hoc form of analysis.<sup>146</sup> Courts and state legislatures are divided not only over what test to apply to resolve right of publicity claims, but also over whether to codify the right,<sup>147</sup> whether the right is descendible,<sup>148</sup> and whether to recognize a right of publicity at all.<sup>149</sup>

As one scholar noted, the lack of judicial consistency in the realm of right of publicity does not threaten the existence or viability of the right itself amongst the rapidly growing number of jurisdictions that recognize it.<sup>150</sup> However, the problems created by inconsistent doctrines governing publicity rights have the potential to harm litigants and the judicial system as a whole, just as would an outright abolition of the right.<sup>151</sup> By failing to address the jurisdictional discrepancies and conflicting outcomes, litigants will be exposed to problems of forum shopping,<sup>152</sup> continuing judicial confusion,<sup>153</sup> and inconsistent and unpredictable litigation.<sup>154</sup>

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143. After attempting to renege on his deal with Satan, Tom Walker tried to avoid the ultimate debt collector by carrying two bibles on his person at all times. CHARLES MONTGOMERY SKINNER, *The Devil and Tom Walker*, in 1 MYTHS AND LEGENDS OF OUR OWN LAND 275, 278 (Phil., J.B. Lippincott Co. 1896).

144. This author is aware of one instance in which it is told that the devil was bested and sent away from an attempted collection empty handed. The irony of the fact that Daniel Webster, the man who defeated Satan, was acting as a lawyer does not go unnoticed. See STEPHEN VINCENT BENÉT, *THE DEVIL AND DANIEL WEBSTER* (1937).

145. Lee, *supra* note 65, at 488.

146. See *supra* Part II.B.1–5.

147. Lee, *supra* note 65, at 478–79.

148. Kwall, *supra* note 58, at 81–82.

149. *Id.* at 52–53.

150. *Id.*

151. Professor Kwall asserts that the jurisdictional inconsistencies are inconsequential because the courts have “a relatively uniform way of analyzing these questions, even if the outcomes of particular cases are somewhat inconsistent.” *Id.* at 53. However, a number of instances reveal not just “somewhat inconsistent” case resolutions, but outcomes that are diametrically opposed based on very similar facts. Compare, e.g., *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003), with *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

152. Wale, *supra* note 45 at 255–59.

153. Lee, *supra* note 65.

154. Compare *Winter*, 69 P.3d 473, with *TCI Cablevision*, 110 S.W.3d 363.

*B. Falling Down on Your Knees: A Proper Standard*

While each of the existing tests developed by courts in right of publicity contexts has some merit, none of them solves all of the problems that persist with the right in its modern form. The Crossroads Standard provides a workable alternative that can be applied universally to curtail the rapid expansion of the right of publicity, while simultaneously providing professional athletes with consistent protection from commercial exploitation of their likenesses. This is accomplished through a two-factor test to determine whether an athlete has an actionable right of publicity claim against the use of her persona. The two factors are: (1) whether the use is expressive or purely commercial; and (2) if the use is expressive, whether the use is wholly unrelated to the work or utilized to intentionally mislead consumers as to the athlete's endorsement of the use or work. The Crossroads Standard provides the athlete with this level of protection for a period of ten years, with the possibility for one ten-year extension upon a sufficient showing of cause, after which point the publicity rights inquiry will be limited solely to the first factor.

*1. The First Factor: The Hoffman Approach to the Commercial vs. Expressive Determination*

The initial inquiry under the Crossroads Standard, as with any right of publicity action, asks whether the challenged appropriation of the likeness is commercial or expressive in nature.<sup>155</sup> Every court that addressed publicity rights has recognized that “expressive” works are generally entitled to broader protection under the First Amendment, while works utilizing a person's identity for “purely commercial purposes” are generally unprotected and render the author liable for the unauthorized use of a person's identity.<sup>156</sup> Rather than ending the analysis here, each approach—except the *Hoffman* standard—adds extraneous elements to the expressive–commercial determination that only serve to confound the findings, excessively enlarge the scope of publicity rights protection, and create confusing and diametrically opposed case rulings.

In light of these problems, the Crossroads Standard adopts the approach to the expressive–commercial distinction articulated by the *Hoffman* court: whether the challenged use of the athlete's persona

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155. *TCI Cablevision*, 110 S.W.3d at 373.

156. *See id.*; *see also Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184–85 (9th Cir. 2001); *Rogers v. Grimaldi*, 875 F. 2d 994, 1003–05 (2d Cir. 1989); *Winter*, 69 P.3d at 477.

“do[es] *no more* than propose a commercial transaction.”<sup>157</sup> Under this approach, the use of an athlete’s persona “entirely and directly for the purpose of selling a product” would constitute an actionable right of publicity claim.<sup>158</sup> If, however, the use serves some other expressive purpose, the work will be entitled to broader First Amendment protection and, contingent upon satisfaction of the second half of the Crossroads Standard, will not be subject to liability for appropriating the athlete’s likeness.<sup>159</sup> In short, the use of the athlete’s likeness is not immediately actionable unless it serves no other discernable purpose than to sell a product or service.<sup>160</sup> This approach eliminates the uncertainty that plagues “weighing and balancing” tests utilized by other courts, providing a proper threshold consideration in the right of publicity context.<sup>161</sup>

The expressive–commercial analysis adopted by the *Hoffman* court illustrates the desired balance between the athlete’s interest in the commerciality of her persona and the public’s interest in unfettered expressive access to its heroes. The right of publicity was specifically created to serve the athlete’s interest in the use of her identity and likeness for commercial purposes.<sup>162</sup> Judge Frank justified the existence of this newly created right by reasoning:

For it is common knowledge that many prominent persons (especially . . . ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements . . . displayed in newspapers, magazines, buses, trains and subways.<sup>163</sup>

The advertising use of an athlete’s identity, noted by Judge Frank as the reason behind the right of publicity, is exactly the type of use that would constitute an actionable claim under the *Hoffman* standard.<sup>164</sup>

157. *Hoffman*, 225 F.3d at 1185–86 (emphasis added).

158. *Id.* at 1185.

159. *See id.* at 1184–85.

160. This admittedly low standard also serves to emphasize the Crossroads Standard’s focus on protecting the non-commercial use of a public figure’s likeness by providing a sort of escape valve for expressive users to avoid costly and burdensome litigation. In this way, the first prong of the Crossroads Standards serves a similar purpose as the various state anti-SLAPP (Strategic Lawsuits Against Public Participation) statutes. *See Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (“[T]he anti-SLAPP motion is designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression . . .”).

161. *See supra* Part II.B.1–3, 5.

162. McCARTHY, *supra* note 13, § 1:26.

163. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 858 (2d Cir. 1953).

164. The *Hoffman* court cited a number of examples of uses that would qualify as “purely commercial” uses that would be entitled to the thinnest level of protection, including the use of a baseball player’s image in a print advertisement in *Newcombe v. Adolf Coors Co.*, 157 F.3d 686,

The *Hoffman* “pure commercial use” approach allows for these uses—the quintessential violations of one’s right of publicity—to be quickly filtered out from protection without sacrificing the First Amendment’s right of expression. Fulfilling this balancing task, the standard recognizes that the expressive character of a use properly outweighs commerciality that may exist in the work as well.<sup>165</sup> Such an approach allows the athlete to effectively control the commercial exploitation of her image, while simultaneously limiting her right to prevent any use, commercial or otherwise, that evokes her image.<sup>166</sup> The *Hoffman* court properly understood and incorporated the laws favoring the First Amendment over the individual interests of those in the public eye.<sup>167</sup> In short, the *Hoffman* court was in tune with the notion that professional athletes bargain with the public for notoriety and fortune, and they must repay that debt with unfettered public access to their image for expressive purposes. Without the adoration, attention, and monetary support of the public that makes them famous, the professional athlete is nothing more than a lonely soul at the crossroads, sitting in the dirt and waiting for a deal that will never come.<sup>168</sup>

As at least one commentator has aptly noted, the main issue with the extraneous expressive–commercial considerations made by the predominant use, transformative use, and the relatedness tests is that they each require courts to undertake a subjective analysis of the artis-

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691 (9th Cir. 1998), and the use of a basketball star’s birth name in a television commercial in *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996). *Hoffman*, 255 F.3d at 1185.

165. *Hoffman*, 255 F.3d at 1185–86. A use will still be considered expressive in character if any commercial aspects of the work are “inextricably entwined with expressive elements, and so they cannot be separated out from the fully protected whole.” *Id.* at 1185 (internal quotation marks omitted).

166. This aspect of the approach would serve to quell Judge Kozinski’s primary issue with the right of publicity as it has evolved over time. In his prominent dissent from the majority decision in *White v. Samsung Electronics America, Inc.*, Judge Kozinski chastised a view of the right that imposes liability on advertisers and authors of expressive works who merely “remind the public of a celebrity.” *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting). The Crossroads Standard, through application of the *Hoffman* expressive–commercial distinction, attempts to reign in this “Orwellian” overprotection of publicity rights. *Id.*

167. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (noting that First Amendment protection is greater for expression concerning “those who, by reason of their achievements or the vigor and success by which they seek the public’s attention, are properly classified as public figures”); see also *Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 665, 669–70 (Cal. Ct. App. 1984) (listing “the extent to which the individual voluntarily acceded to a position of public notoriety” as a factor in determining the newsworthiness element in an invasion of privacy action).

168. See *Crawly*, *supra* note 11 (“If we don’t watch, Alex Rodriguez is selling ladies shoes at Neiman Marcus. If we don’t watch, Chase Utley is selling cars. If we don’t watch, Cole Hamels is a barista at Starbucks.”).

tic merit, worth, and effort of the work to determine its character.<sup>169</sup> These “merit-based” analyses are generally disfavored in many areas of law<sup>170</sup> and should particularly be avoided in cases involving the determination of the aesthetic or creative merit of expression.<sup>171</sup>

An additional problem with the expressive–commercial determinations set forth by these tests is their potential to have a serious chilling effect on expression and creation. This is best evidenced by the predominant use test in *Doe v. TCI Cablevision*. The use of Tony Twist’s persona as the basis for a comic book character was arguably more than expressive enough to warrant First Amendment protection for the author,<sup>172</sup> yet the court found that the author’s “intent to gain a commercial advantage” outweighed the high level of expressiveness within the work.<sup>173</sup> The court based its determination on findings that the author admittedly based the character off of Twist and promised that readers would “continue to see current and past players’ names in his books.”<sup>174</sup>

It is entirely plausible that if the Missouri Supreme Court’s reasoning in *TCI Cablevision* were to become the norm, it would stifle creativity and the creation of memorable characters meant to invoke the image of certain celebrities. Countless memorable characters in cartoon history were modeled in voice, if not in total look and feel, after famous comedians and television stars.<sup>175</sup> Had the creators of these

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169. Hickey, *supra* note 42, at 1117; *see also* *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (analyzing the “literary value” of the comic book character based on Tony Twist in determining that the work was primarily commercial in nature); *Winter v. DC Comics*, 69 P.3d 473, 477 (Cal. 2003) (evaluating the “artistic expression” and “form” of the work to determine its commercial or expressive nature).

170. *See* *Snyder v. Phelps*, 131 S. Ct. 1207, 1219–20 (2011) (declining to incorporate an evaluation of the value or emotional impact of speech in determining the breadth of First Amendment protection); *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994) (refusing to take the further step of subjectively evaluating the quality of a parody in determining whether a fair use defense was applicable).

171. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

172. “Tony Twist” the comic book character bore no physical resemblance to the real life Twist, nor was the character “about” him. *TCI Cablevision*, 110 S.W.3d at 370; *see also* *Winter*, 69 P.3d at 477–80 (upholding the use of two rock musicians as the bases for comic book villains as sufficiently expressive under virtually identical circumstances as those giving rise to the action in *TCI Cablevision*).

173. *TCI Cablevision*, 110 S.W.3d at 371–74.

174. *Id.* at 371.

175. For example, Jabberjaw, a talking cartoon shark and star of the show of the same name, was clearly meant to evoke the image and persona of the Three Stooges’ Curly Howard, *see* *Cartoon Network: Dept. of Cartoons*, <http://web.archive.org/web/19990210172244/http://www.cartoonnetwork.com/doc/jabberjaw/index.html> (last visited Nov. 13, 2012); Johnny Bravo, the muscle-bound dimwitted star of a late-nineties Cartoon Network show, borrows his mannerisms

animated icons faced the risk of liability merely because they may have “create[d] the impression that [the person] was somehow associated with” the character,<sup>176</sup> the creators may have opted instead to take the safer route and forgo creation altogether. The law has long shown a preference for avoiding the chilling of First Amendment expression concerning figures of public prominence such as celebrities and professional athletes.<sup>177</sup>

## 2. *The Second Factor: The Two-Pronged Rogers Test*

Say what you will about the devil, but he has proven through centuries of bargaining that he will honor the consideration that he owes to his debtors. He does not “stiff” them or try to collect early based on a contractual loophole.<sup>178</sup> Similarly, the public devil must be fair in its dealings with the athlete before it may reap the benefits of the deal. It is for this reason that the Crossroads Standard inquiry does not end with a determination of the commercial or expressive nature of the challenged use of an athlete’s persona. Were an expressive use absolutely protected by virtue of it bearing some non-commercial element, the right of publicity would be so thin as to be virtually nonexistent. In the interest of fundamental fairness to the professional athlete, a finding that a use is expressive does not automatically entitle the user to protection from liability. Rather, such a finding triggers a second step in the Crossroads Standard analysis: the two-pronged *Rogers* relatedness approach.<sup>179</sup>

Under the second factor in the Crossroads Standard, a court would have to determine whether a use of an athlete’s persona found to be expressive under the first factor (1) is wholly unrelated to the underlying use, or (2) explicitly misleads consumers as to the endorsement of the athlete.<sup>180</sup> A finding in the affirmative as to either prong will result in the broad enforcement of the athlete’s publicity rights as if the work were purely commercial.<sup>181</sup> Conditioning First Amendment pro-

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unabashedly from Elvis Presley, see Boomerang, *The Woods* (clip), CARTOONNETWORK.COM, [http://www.cartoonnetwork.com/tv\\_shows/boomerang/video/the-woods-clip.html](http://www.cartoonnetwork.com/tv_shows/boomerang/video/the-woods-clip.html) (last visited July 22, 2013); and *The Simpsons* character Professor Frink was intentionally voiced to mimic Jerry Lewis, see CHRIS TURNER, PLANET SIMPSON: HOW A CARTOON MASTERPIECE DEFINED A GENERATION 414 (2004).

176. *TCI Cablevision*, 110 S.W.3d at 371.

177. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (noting that state action that deters speech because of the fear of liability creates a chilling effect that is “antithetical to the First Amendment’s protection”).

178. See *supra* notes 1–8, 142–144 and the sources cited therein.

179. *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

180. See *id.*

181. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184–85 (9th Cir. 2001).

tection for the non-“purely commercial” use of an athlete’s likeness upon satisfaction of the *Rogers* test ensures that the economic and dignitary rights of the athlete are protected, while still ensuring broad protection for expressive works in appropriate circumstances.

The relatedness prong serves the primary purpose of ensuring that a professional athlete may guard her sizeable publicity value<sup>182</sup> against appropriation for commercial gain by a work artistically and expressively unrelated to the athlete.<sup>183</sup> In these instances, where the challenged use is wholly unrelated to the athlete, the right of publicity outweighs the First Amendment freedom of expression.<sup>184</sup> This limitation is perhaps best understood as more of a gloss or qualification upon the expressive–commercial distinction that comprises the first factor of the Crossroads Standard. Even where the challenged use of the athlete’s image is “expressive” in that it is not “purely commercial,” the expressive value of the use is significantly lower where the use is unnecessary to the underlying work.<sup>185</sup> A challenged use that is so unnecessary or wholly unrelated to the underlying work lacks the expressive merit to justify usurpation of the athlete’s interest in the commercial control of her image.<sup>186</sup>

This first prong arguably guards the athlete’s interest in her commercial publicity value in another way—one that was not contemplated by the *Rogers* court. By preventing uses of the athlete’s image that are wholly unrelated to the underlying work, this prong preserves the athlete’s right to explore and commercially exploit unforeseen markets. Both copyright<sup>187</sup> and trademark law,<sup>188</sup> two areas with which the right of publicity is often paralleled, safeguard the ability of

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182. Nimmer, *supra* note 38, at 204.

183. *Rogers*, 875 F.2d at 1000. The court discussed the application of the “relatedness” prong in terms of a Lanham Act claim.

184. *Id.* at 1004.

185. *See id.* at 1000.

186. It is recognized that this form of “expressive value” analysis is strikingly similar to the forms of analysis rejected as inappropriate for courts to engage in in Part III.B.1 of this Comment. *See supra* notes 169–171 and the accompanying text. However, this author is not suggesting that such a merit-based analysis is never appropriate. Indeed, such an analysis is unavoidable, if not indispensable, if the level of protection afforded to a challenged use of an athlete’s likeness is to be fairly determined. Such a merit or expressive value determination is merely inappropriate *as a threshold matter*, as in the first factor of the Crossroads Standard. As such, this approach is similar to the objective “extrinsic” and subjective “intrinsic” tests applied in cases of alleged copyright infringement. *See Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990).

187. *Lee*, *supra* note 65, at 481–88.

188. *See Jordache Enters., Inc. v. Levi Strauss & Co.*, 841 F. Supp. 506, 517 (S.D.N.Y. 1993) (considering the potential that the trademark holder may enter into the market of the alleged infringer as a factor in the “likelihood of confusion” analysis).



the owner of the respective interest to consider and develop untapped markets.

The second prong of the *Rogers* analysis serves to protect athletes in instances where the challenged use of their personas is related to the underlying expressive work, but used by the author to deliberately deceive the public into believing that the athlete endorsed or was otherwise involved in the use or the work.<sup>189</sup> Where the challenged use is “simply a disguised commercial advertisement for the sale of goods or services,” the expressive value of the use is diminished and gives way to the athlete’s commercial interest in her own persona.<sup>190</sup>

While the two prongs of the Crossroads Standard’s second factor adequately protect the athlete from unauthorized usurpation of her significant publicity value, they serve as a protection for the “devil’s” interest in the deal as well. The *Rogers* analysis prevents an athlete from hiding behind her publicity rights as a means of effectively controlling or silencing public expression that she finds to be unfavorable.<sup>191</sup> Discussing the relatedness standard, the *Lane v. Random House, Inc.* court stated that the “[plaintiff] has devoted much time and effort establishing himself as paladin of the conspiracists. It is too late for him to retreat to the sidelines as a means of shielding himself from criticism.”<sup>192</sup> Thus, the *Lane* court seemed to recognize that the right of publicity is the product of a deal the person strikes with the public and is necessarily limited by the public’s interest in reaping the benefit owed to it.<sup>193</sup> In other words, the *Lane* court recognized that the devil always gets his due.

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189. See *Rogers*, 875 F.2d at 1004–05.

190. *Id.* at 1004 (quoting *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (N.Y. App. Div. 1980); see also *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184–85 (9th Cir. 2001) (“False or misleading commercial expression is not protected.”)).

191. See *Rogers*, 875 F.2d at 1004.

192. *Lane v. Random House, Inc.*, 985 F. Supp. 141, 147 (D.D.C. 1995). At issue in *Lane* was the use of the plaintiff’s likeness in an advertisement for a book that aimed to refute the claims of prominent authors, plaintiff included, who questioned the Warren Commission’s conclusions concerning the Kennedy assassination. *Id.* at 144–45. The court analyzed the “relatedness” of the use under what it termed a “newsworthiness privilege,” but the *Lane* court’s “no real relevancy” standard was sufficiently similar in application to the *Rogers* “wholly unrelated” test to warrant the comparison. Compare *id.* at 147, with *Rogers*, 875 F.2d at 1004–05.

193. In the *Lane* case, what was “owed” to the public was the ability to use a prominent author’s image in connection with a commentary and criticism regarding a matter of public importance to which plaintiff was a major contributor. See *Lane*, 985 F. Supp. at 146–47.

*C. Think I'm Sinking Down: Appropriate Limitations Upon the Duration of Publicity Right Protection*

One aspect of Robert Johnson's fateful deal with the devil is common throughout the lore of satanic bargaining: the deal is a ticking clock. Each party with whom the devil deals is given the power, fame, or fortune they seek, but only for a predetermined amount of time.<sup>194</sup> The benefits of such a system are clear: they provide the devil with prompt and consistent enforcement of the deal's terms, and encourage those who deal with him to make the absolute most of the gifts bestowed upon them in the limited time they are given. The same policies underlie and justify the limitation of the professional athlete's right of publicity protection to a predetermined period of time.

Under the Crossroads Standard, the professional athlete will be entitled to broader protection of her publicity rights for a period of ten years. Upon expiration of this initial ten-year protection term, one of two scenarios will come to pass: (1) the broad protection will lapse and further uses of the athlete's identity will be subject only to the limited purely commercial inquiry;<sup>195</sup> or (2) if the athlete can make a substantial "likelihood of harm" showing, she will receive one additional ten-year extension of full protection.

Under the first scenario, any further use of the athlete's likeness after her protection period has expired will be protected as long as it is not purely commercial in nature.<sup>196</sup> The justification for this significantly lower threshold for protection is paralleled in copyright law. Of course, copyright law protects a copyrighted work for a limited period of time.<sup>197</sup> Further, the fair use doctrine provides for lesser

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194. Robert Johnson and Jabez Stone were given ten years of blues prowess and prosperous farming, respectively. Faust appears to have received the devil's best offer, gaining twenty-four years to enjoy the indulgences of the world. See *Cracked Topics: Deals with the Devil*, CRACKED.COM, <http://www.cracked.com/funny-7193-deals-with-devil/> (last visited Nov. 13, 2012).

195. One exception will continue to subject the user of an athlete's likeness for non-"purely commercial" uses to liability: those uses intended to harm or defame the athlete. As the *Hoffman* court noted: "the First Amendment does not protect knowingly false speech." *Hoffman*, 255 F.3d at 1186 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). In keeping with the limited scope of protection however, the athlete will have to prove by clear and convincing evidence that the use of her identity was done with "actual malice"—that is, with knowledge that the use created a false impression of endorsement that would mislead the public into believing that the athlete supported the use or work. *Id.* at 1186–87.

196. *Id.* at 1183.

197. Admittedly, the Copyright Act of 1976 provides for the much longer protection term of the life of the author plus an additional seventy years after the author's death. 17 U.S.C. § 302(a) (2006). This longer term is justified in the realm of copyrights however, because the copyrighted work is often a primary source of monetary value or income for the author. The same justification is not nearly as strong in the realm of professional athletes' publicity rights, as

protection of works that have been previously published and commercially exploited.<sup>198</sup> In such circumstances, the allegedly infringing use of the author's work does not usurp the author's valuable right of first publication and is thus more indicative of fair use.<sup>199</sup>

Similarly, where an athlete has had a sufficient amount of time to substantially exploit the commercial value of her identity, subsequent expressive uses of her persona by third parties constitute a lesser usurpation of the athlete's publicity value. Ten years is an appropriate amount of time for a professional athlete to fully exploit her commercial value. The endorsement values of top athletes decrease over extended periods of time.<sup>200</sup> Research suggests that the way to combat this inevitable decline in endorsement value and related sales is for sponsors to invest heavily in "winning records," or athletes that cultivate a career of continuing success.<sup>201</sup> However, that study still warns against lifetime or even long-term endorsement deals.<sup>202</sup> Indeed, the right of publicity was initially created to foster a celebrity's control of the commercial exploitation of her own persona—including these endorsement deals.<sup>203</sup> The initial ten-year period provides broader protection during the peak years of an athlete's career, when she is the most valuable as an endorsement asset, while also allowing protection to continue through the end of the athlete's career and into retirement, when her publicity value begins to dwindle. Ten years represents a more than adequate term of protection, as the average professional athlete will be active for no more than approximately five years.<sup>204</sup>

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the income generated through the commercial exploitation of their personas is more often merely supplementary to the athlete's substantial performance salary. *See* C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media, L.P., 505 F.3d 818, 824 (8th Cir. 2007).

198. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 551–52 (1985).

199. *See id.*

200. *See* Anita Elberse & Jeroen Verleun, *The Economic Value of Celebrity Endorsements*, 52 J. ADVERTISING RESEARCH 149, 163–64 (2012).

201. *Id.*

202. *Id.*

203. Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 869 (2d Cir. 1953).

204. The average career span for athletes in the "big four" professional sports leagues (NFL, MLB, NBA, and NHL) hovers between three and five years. NFL players are active for the shortest amount of time, averaging a career of 3.5 years. *The Average NFL Player*, BUSINESSWEEK (Jan. 27, 2011), [http://www.businessweek.com/magazine/content/11\\_06/b4214058615722.htm](http://www.businessweek.com/magazine/content/11_06/b4214058615722.htm). On average, MLB players are active the longest, generally playing for about 5.6 years. Sam Roberts, *Just How Long Does the Average Baseball Career Last?*, NYTIMES.COM (July 15, 2007), <http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html>.

Of course, there are instances where an athlete's true endorsement potential does not manifest until *after* the athlete has retired.<sup>205</sup> It is for these athletes that the potential for a second ten-year protection term may be provided. Where the athlete has cultivated a continuously gainful endorsement value, the justifications for reducing publicity right protection are lacking.<sup>206</sup> Accordingly, athletes may, upon a sufficient showing of good reason, receive one additional ten-year extension of full publicity protection under the Crossroads Standard. The factors that may be considered in determining whether to extend the protection term include: at what level or point the athlete is in her career;<sup>207</sup> what position or sport the athlete plays;<sup>208</sup> and the level of success the athlete has had in her career.<sup>209</sup> These factors are to be considered in the likelihood of harm analysis and are designed to protect the athlete from unjustified usurpation of her commercial value, *provided* that her value remains strong enough to outweigh the third-party user's interest in expression.<sup>210</sup>

The ten-year limitation of protection for athletes' publicity rights addresses another prominent issue in right of publicity law: descendibility and posthumous application. Many prominent scholars have argued that the right of publicity should be descendible.<sup>211</sup> However, due to the intimate and personal nature of the right,<sup>212</sup> the idea that it could be passed down and subsequently enforced by someone other than the athlete herself seems entirely counterintuitive. The Cross-

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205. For example, Olympic swimmer Michael Phelps, NBA legend Michael Jordan, and former PGA champion Arnold Palmer each stand to make millions of dollars annually during their lifetimes from post-career endorsements and sponsorship deals. Kurt Badenhausen, *Michael Phelps Locks Up Olympic Immortality and Post-Career Millions*, FORBES (Aug. 1, 2012), <http://www.forbes.com/sites/kurtbadenhausen/2012/08/01/michael-phelps-locks-up-olympic-immortality-and-post-career-millions/>.

206. As discussed above, the main justification for lowering the level of protection for athlete's publicity rights over time is the diminishing of their "publicity value" along with the ending of their careers. *See supra* notes 200–203 and the accompanying text. Where the athlete continues to cultivate substantial endorsement-value income however, the subsequent use of her image by another remains as much of a usurpation of that commercial value as it would be during the athlete's career.

207. *See* Elberse & Verleun, *supra* note 200.

208. Sports and athletes with higher visibility are more likely to garner a higher endorsement value. Kathleen Farrell et al., *Celebrity Performance and Endorsement Value: The Case of Tiger Woods*, 26 *MANAGERIAL FINANCE* 1, 12 (2000).

209. *Id.* (concluding that an athlete's subsequent athletic performances and successes can have a positive effect on the continuing commercial value of her endorsement potential).

210. *See supra* notes 155–56 and the accompanying text.

211. *See* Lee, *supra* note 65, at 479; *see also* Kwall, *supra* note 58, at 53.

212. *See* McCARTHY, *supra* note 13, § 1:3 (“[T]he right of publicity is simply this: it is the inherent right of every human being to control the commercial use of *his or her identity*.” (emphasis added)).

roads Standard would not allow for descendibility, and the term for broader protection would automatically terminate upon the death of the athlete.

Scholars who advocate for the descendibility and posthumous enforcement of publicity rights invoke a “moral rights” perspective.<sup>213</sup> That is, publicity rights should protect the posthumous use of an athlete’s persona to prevent emotional and dignitary damage to the deceased, her heirs, and her descendants.<sup>214</sup> However, the right of publicity was created in part to counter the emphasis that the right of privacy places on “humiliation” and dignitary harms.<sup>215</sup> Thus, it would be counterintuitive to adopt a scheme of descendibility culled directly from the values and goals of privacy law that the right of publicity was created to distance itself from.

Even if such reasoning were appropriately applied to the right of publicity, it does not necessarily support an extension of the right to a descendant of the original right holder. The motivation behind the descendibility argument is to protect the dignity and honor of the publicity rights of the *person whose identity is being appropriated*. One simply cannot embarrass or offend the dead. *De mortuis nil nisi bonum*<sup>216</sup> may be an admirable concept from a philosophical or moral standpoint, but it should not provide a legal basis for post-mortem expansion of publicity rights.

If history and legend have taught us anything, it is that the devil does not like to be kept waiting where the collection of debt is concerned.<sup>217</sup> Similarly, the greatest devil known to our earthly realm, the sport-adoring public, should not be indefinitely denied restitution for the gifts bestowed upon its athletes. The Crossroads Standard ensures that the public gets what it is rightfully owed.

#### IV. IMPACT

The Crossroads Standard would bring consistency and uniformity to right of publicity jurisprudence. The Crossroads Standard provides a workable means of producing consistent outcomes by eliminating the states’ various applications of the right of publicity and reducing the impact of judicial discretion prevalent in these approaches. The im-

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213. See Kwall, *supra* note 58, at 82–83.

214. *Id.*

215. McCarthy, *supra* note 13, § 1:27; see also Nimmer, *supra* note 38.

216. Translation: “Of the dead (say) nothing but good.” MERRIAM-WEBSTER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/de%20mortuis%20nil%20nisi%20bonum> (last visited Oct. 16, 2013).

217. See *supra* notes 142–144, 194 and the accompanying text.

pact that the Crossroads Standard would have on publicity rights litigation is best demonstrated by applying the standard to facts similar to those of *Davis v. Electronic Arts, Inc.*<sup>218</sup> It is useful to examine the workings of the standard in this context because it is highly unlikely that *Davis* will be the last of this type of litigation. Until a workable solution to the expansion of the right of publicity is reached, video games—and sports video games in particular—will always be scrutinized for their expressive and creative uses of once great athletes. The Crossroads Standard provides such a solution.

In *Davis*, a right of publicity suit was brought by a class of retired NFL players against EA, the makers of the popular *Madden* video game series, for allegedly including unauthorized re-creations of the players' identities and personas within its 2009 version of the game.<sup>219</sup> The plaintiff class claimed that EA unlawfully appropriated the players' likenesses by including them in "historic teams," digital re-creations of prolific teams from past NFL seasons.<sup>220</sup> The plaintiffs alleged that the use of the players' likenesses in the production and sale of the video games constituted a wrongful exploitation of their publicity rights for commercial gain.<sup>221</sup> While the historic players' avatars are statistically representative of the actual players they purportedly mimic, they do not bare the true names, numbers, or physical likenesses of their real-life counterparts.<sup>222</sup> Under the Crossroads Standard claims such as the one at issue in *Davis* must fail.<sup>223</sup>

The first determination that must be made under the Crossroads Standard is whether the alleged use of the players' likenesses is a commercial or expressive use.<sup>224</sup> The relevant inquiry in this instance is whether the use of the players' likenesses is "entirely and directly for the purpose of selling a product," or if the translation of statistical values into a playable digital avatar is expressive enough to warrant protection.<sup>225</sup> The use of the players' likenesses would only constitute a commercial use if the historical teams were included in the game

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218. Plaintiff's Class Action Complaint, *supra* note 17.

219. *Id.* at 2.

220. *Id.*

221. *Id.*

222. *Id.* at 5.

223. For the purposes of this example, the author will proceed upon the assumption that the plaintiffs would be entitled to the full protection of the Crossroads Standard, as a plaintiff who cannot satisfy the looser standards of full protection necessarily would fail to succeed under the narrower level of protection. In reality, there is some doubt as to whether these plaintiffs would qualify for full protection under the Crossroads Standard, as most have been retired for many years. See *supra* Part III.C.

224. See *supra* Part III.B.1.

225. *Hoffman v. Capital Cities/ABC Inc.*, 255 F.3d 1180, 1185 (9th Cir. 2001).

solely “for the purpose of selling” the *Madden* video game.<sup>226</sup> This was not the case with EA’s decision to include former players and historical teams in its game.

One would expect, pursuant to the most basic of marketing principles, that an effort “solely for the purpose of selling a product” would be at the forefront of the promotional efforts designed to sell that particular product. However, a detailed look at the rear cover of the *Madden* box, a common means of informing potential consumers of the selling points of the particular game, reveals no mention of the inclusion of historic teams or former players.<sup>227</sup> The official advertisement for the game similarly lacks any reference to the inclusion of the retired players at any point during its approximately two-minute runtime.<sup>228</sup> Surely, a feature that is not even mentioned in the promotional materials designed to spur consumer interest in the game cannot be considered “entirely and directly for the purpose of selling [the] product.”<sup>229</sup>

Conversely, there are expressive elements to the challenged use that would serve to outweigh whatever commercial character the use may have. At least one court has noted, the *Madden* video games use creative and expressive means in order to achieve their goal of realistically replicating NFL football games.<sup>230</sup> The plaintiff class’s argument that the games strive for realism and precise replication of NFL football<sup>231</sup> is insufficient to negate the creativity and expression required to successfully achieve those goals.<sup>232</sup> Thus, the use of the retired players’ likenesses in *Madden* constitutes a use within an expressive work, and the plaintiff class has failed to establish an actionable case under the first prong of the Crossroads Standard.

The plaintiff class may still be able to prove a violation of the right of publicity by EA by satisfying the second prong of the Crossroads Standard.<sup>233</sup> Under the second prong, the challenged appropriation of the players’ identities will be actionable if: (1) the use is wholly unre-

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226. *Id.*

227. Back Cover, *MADDEN NFL 09* (EA Sports 2008), available at <http://cache.kotaku.com/assets/images/kotaku/2008/08/Madden09PSP.jpg>.

228. VISO Games, *Madden 09 (NFL) – Official Trailer*, YOUTUBE (Feb. 5, 2009), [http://www.youtube.com/watch?v=5bzcVRk67\\_4](http://www.youtube.com/watch?v=5bzcVRk67_4).

229. *Hoffman*, 255 F.3d at 1185.

230. *Brown v. Elec. Arts, Inc.*, No. 09-CV-1598, 2009 U.S. Dist. LEXIS 131387, at \*11 (C.D. Cal. Sept. 23, 2009), *aff’d*, 724 F.3d 1235 (9th Cir. 2013).

231. Plaintiff’s Class Action Complaint, *supra* note 17, at 4.

232. *Brown*, 2009 U.S. Dist. LEXIS 131387, at \*11 (“That the designers used a realistic sports theme to express their creativity . . . does not change the fact that the *Madden NFL* games manifest their designers’ creative vision.”).

233. *See supra* Part III.B.2.

lated to the creation of the *Madden* video game; or (2) the use explicitly misleads purchasers of the game into believing that the athletes have endorsed the game.<sup>234</sup> Again, the plaintiff class in *Davis* cannot establish either of these factors.

Satisfaction of the first factor of this prong requires that the use of a person's likeness be entirely unnecessary or wholly unrelated to the underlying work.<sup>235</sup> The court in *Brown* found that the "[u]se of a legendary NFL player's likeness in a game about NFL football is clearly relevant," even considering the fact that Jim Brown, the plaintiff in that case, had long since retired from the sport.<sup>236</sup> By the *Davis* plaintiff class's own allegations, the *Madden* series purports to create a definitive NFL experience for the game's players.<sup>237</sup> It cannot be seriously argued that NFL history is wholly unrelated to crafting a thorough and enjoyable NFL video game experience. Because former NFL players are part of that history, they must be related to that goal as well.<sup>238</sup>

In order to satisfy the second factor of this prong, the *Davis* plaintiff class would have to show that the use was explicitly designed to mislead consumers into believing that the players endorsed the *Madden* video game.<sup>239</sup> The plaintiff class can succeed under this factor only if it can show that the use of the players' likenesses by *Madden* is merely a "disguised commercial advertisement" deliberately implying the players' endorsement of the game.<sup>240</sup>

As applied to the *Davis* class, the use of the players' likenesses for the video game is no such use. The lack of any personally identifying information, such as name or correct jersey number, should be more than sufficient to dissuade the average consumer from believing that the athletes explicitly approved the use.<sup>241</sup> This becomes especially clear when considered in conjunction with the fact that the virtual rep-

234. *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

235. *See id.* at 999–1000.

236. *Brown*, 2009 U.S. Dist. LEXIS 131387, at \*12.

237. Plaintiff's Class Action Complaint, *supra* note 17, at 4.

238. *See Brown*, 2009 U.S. Dist. LEXIS 131387, at \*12; *see also Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 793 (D.N.J. 2011) (finding the use of a former college player's image in the *NCAA Football* video game "has great relevance to the game itself, which is set on a college football field and revolves around the playing of virtual football"), *rev'd*, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

239. *See Rogers*, 875 F.2d at 1004.

240. *See Hart*, 808 F. Supp. 2d at 793, *rev'd*, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

241. *See Brown*, 2009 U.S. Dist. LEXIS 131387, at \*14 ("It would require a leap of logic to conclude that the anonymous, mis-numbered player's presence in the games equates to Brown's endorsement of the games.").



representations of *current* NFL players, who have explicitly endorsed the use of their likenesses in the game through a contract between the league and EA, are labeled with the correct name and jersey number. Thus, it cannot be contended that EA's use of the retired players' likenesses in *Madden* is an explicit attempt to mislead consumers as to the endorsement of the athletes. The hypothetical plaintiff class has failed to establish a cause of action under the second prong of the Crossroads Standard.

A judgment under the Crossroads Standard would present an outcome far more desirable and appropriate than those reached under the transformative use test in *Keller*. Under the transformative use test, the sincere creative and expressive efforts put forth by the *Madden* development team in pursuit of creating an immersive gaming experience<sup>242</sup> would support a finding that EA had violated the plaintiffs' publicity rights.<sup>243</sup> This goes far beyond ignoring significant expressive elements and, in fact, *punishes* the game's creators for their creative and expressive attempts to faithfully and artfully reproduce the NFL experience.<sup>244</sup> This is an especially unacceptable result where, as in the case of the *Madden* video games, any use of the plaintiffs' likenesses is intended to create a more effective conduit through which the gamers may immerse themselves into the game.<sup>245</sup>

Such a standard would have avoided the overreaching decisions reached by the Third and Ninth Circuits in *Hart* and *Keller*. The standard utilized by those courts effectively ignored all expressive features, artistic elements, and other creative context surrounding the use of the athlete's persona in sports video games.<sup>246</sup> Such an approach fails to consider that even literal depictions of an athlete can be protected in a work that contains significant expressive content.<sup>247</sup> The Crossroads Standard necessitates evaluation of the work as a whole, rather than just the challenged use of the plaintiff's identity. As Judge Thomas Ambro argued in his dissent in *Hart*, such a narrow focus on the plaintiff's likeness alone, rather than on how that likeness was in-

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242. *See id.* at \*11.

243. *See Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, at \*3-4 (N.D. Cal. Feb. 8, 2010), *aff'd sub nom.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013).

244. *See Brown*, 2009 U.S. Dist. LEXIS 131387, at \*11-12 (likening the expressiveness of the *Madden NFL* games to that of artistic paintings depicting realistic portraits of famous professional athletes).

245. *See id.*

246. *See In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268, 1285-86 (9th Cir. 2013) (Thomas, J., dissenting); *see also Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 172 (3d Cir. 2013) (Ambro, J., dissenting).

247. *See ETW Corp. v. Jireh Pub'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003).

corporated into the work, was a flawed means of approaching the tension between the right of publicity and the First Amendment.<sup>248</sup> Rather, it is important to consider the use in the context of the work as a whole, as well as the underlying message and purpose of that work, to determine whether the challenged use actually impinges upon the athlete's right of publicity.<sup>249</sup> The Crossroads Standard does just that.

The biggest problem with the transformative use test, as applied in *Comedy III* and adopted by the Third and Ninth Circuits, is that it is an outdated approach that fails to recognize the modern realities of video games. The courts applying this test have simply neglected to realize that all video games—including “simulations” like *Madden* and *NCAA Football*—are inherently *fantasy*. Video games allow players to live out their dreams and aspirations through the vicarious manipulation of a digital avatar. The creators of the *Madden* and *NCAA Football* games, though modeling the avatars as accurately and realistically to the real-life players as possible, are merely creating a conduit through which the gamer can realize her greatest aspirations. This is an intrinsically transformative and expressive process.

By focusing solely on the likeness, the Third and Ninth Circuits operate on the assumption that it is the likenesses themselves that drive gamers to these games. This misses the point. Gamers do not simply want to see Johnny Unitas throw a pass to Jerry Rice while avoiding a sack from a blitzing Lawrence Taylor; gamers want to *live* that experience. The inflexible and outdated transformativeness approach simply fails to take into account how the avatar, though realistically and

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248. *Hart*, 717 F.3d at 173 (Ambro, J., dissenting); see also *In re Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d at 1285 (Thomas, J., dissenting) (“The majority confines its inquiry to how a single athlete’s likeness is represented in the video game, rather than examining the transformative and creative elements in the video game as a whole. In my view, this approach contradicts the holistic analysis required by the transformative use test.”).

249. Even accepting the propriety of such an argument, this author is of the opinion that the majority in *Hart* misapplied its own approach. The majority cites, with approval, the holding of *ETW Corp. v. Jireh Publishing, Inc.* that a work “consist[ing] of a collage of images in addition to [the athlete’s] image which are combined to describe, in artistic form, a historic event in sports history and to convey a message about the significance of [the athlete’s] achievement in that event” was transformative. *Hart*, 717 F.3d at 161 (quoting *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 938–39 (6th Cir. 2003)). However, the majority then concludes that the use is not sufficiently transformative in part because, “[g]ames such as *NCAA Football* permit users to recreate the setting of a bitter defeat and, in effect, *achieve some cathartic readjustment of history . . .*” *Id.* at 168 (emphasis added). Clearly, the use of players’ identities (and especially players such as Brown and Davis, who are deemed “historic”) constitutes the game creators’ creative attempts to capture important “historic event[s] in sports history and to convey a message about the significance” of games held in high regard by fans of the sport. *Id.* at 161. The majority made no attempt to distinguish the capturing of historic sports events in video games from those in the collage at issue in *ETW*.

faithfully modeled after a real-life person, is transformed into a vehicle for the dreams and desires of the average gamer.

Under the Crossroads Standard, the plaintiffs' class action would be dismissed because it would be unable to overcome First Amendment concerns attaching to the creation of an expressive work under the two-pronged test. Additionally, because the Crossroads Standard would be a universal one, this result would follow no matter what jurisdiction heard the case, something that cannot be said with any semblance of surety under the current right of publicity scheme.

## V. CONCLUSION

In *Henry IV: Part I*, William Shakespeare introduced the idea of "giv[ing] the devil his due."<sup>250</sup> While Shakespeare could hardly have predicted the meteoric rise of the professional athlete's fame and the consequences of life in the limelight that would follow, his words are applicable to the scenario we find ourselves in today. And unfortunately, rather than "stand[ing] to his word" as would Sir John in Shakespeare's work, today's athlete has found increasingly ingenious legal means of preventing the devil from "hav[ing] his bargain."<sup>251</sup> Athletes owe the fame and fortune that they enjoy to the fans who support and adore them.<sup>252</sup> And, as with any deal, that fame and notoriety must be backed by adequate consideration. Professional athletes choose to deal with the public devil, and as Robert Johnson would attest to, the devil always collects on a truant debt.<sup>253</sup>

Unless some action is taken to standardize the law in the area, the right of publicity will continue to be a quagmire of varying tests and inconsistent applications. By allowing the *Davis* litigation to move past the summary judgment stage, the Northern District of California has illustrated this point and symbolized the direction that the right of publicity is heading. The Crossroads Standard suggested by this Comment serves the ultimate purposes of harmonizing widely variant state approaches to the right of publicity, while simultaneously curtailing rapidly bloating publicity rights and ensuring that Shakespeare's prophetic proclamations ring true centuries later. Professional athletes

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250. WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH* act 1, sc. 2.

251. *Id.*

252. See Crawley, *supra* note 11 (analyzing the substantial amount of influence fans can exert over professional sports teams merely by virtue of attendance and ticket sales).

253. See PATTERSON, *supra* note 4, at 10.

fall to their knees before the sports-loving public at the crossroads, and ultimately the devil must get his due.

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