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When Individual Rights Should Tackle Unfair Commercialization: How the Transformative Use Test Should be Tailored to Meet Evolving Technological Needs in Right of Publicity Cases

Caitlin Kowalke

WHEN INDIVIDUAL RIGHTS SHOULD TACKLE UNFAIR COMMERCIALIZATION: HOW THE TRANSFORMATIVE USE TEST SHOULD BE TAILORED TO MEET EVOLVING TECHNOLOGICAL NEEDS IN RIGHT OF PUBLICITY CASES

By Caitlin Kowalke[1]

[1] Caitlin is a 2016 graduate of Mitchell Hamline School of Law. She is currently a practicing member of the California State Bar, advocating for creative professionals in the Los Angeles music industry. The author would like to express deep thanks to Professor Raleigh Levine not only for her insightful feedback during the creation of this piece, but also for her constant encouragement and guidance in pursuing a career in entertainment law.

I. INTRODUCTION

Throughout the United States, professional and amateur sports "generate an insatiable interest in sports and the players themselves."[2] More than ever, prominent companies as well as individual consumers are investing substantial time and money into the enjoyment of their favorite games. As the sports culture grows in America, so do "opportunities for emerging and lucrative markets for sports-themed products."[3] One such prospect is the ever-growing market for sports simulation games.[4] However, through fan participation in fantasy sports leagues and sports video games arises a great public interest in athlete identity, specifically determining the "appropriate boundaries for players' publicity rights against the right of commerce and the interests of the public under the First Amendment."[5]

When the use of an individual's identity has commercial value, that individual should have the exclusive right to control the use of that identity and should be fairly compensated for such a use. The right of publicity operates to protect an individual from this form of exploitation when use of his or her image is lacking the requisite compensation and/or consent. Naturally, in order to profit from the commercial exploitation of an individual's identity, that identity must have acquired some level of value already.[6] Given that celebrities are the "principal parties who have value in their names and likeness," these figures are exceptionally prone to violations of their publicity rights.[7] However, in a recent third circuit holding,[8] the court extended this protection to a former college athlete, who arguably may not possess celebrity status in the traditional sense but has still worked to bring value to his name and likeness. As technology and media avenues advance, courts will likely be forced to assess many cases analogous to this in the not-so-distant future.

Balancing the right of publicity against the interest of free expression under the First Amendment remains a challenge for American court systems, which place great value on both securities. Where the First Amendment prevents the suppression of speech, the right of publicity halts speech that takes advantage of another individual's interest in his or her personal identity.[9] Accordingly, both interests must be equalized so that valuable speech is not suppressed, but an individual's identity is not exploited without his or her consent or due compensation.

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[2] Maureen Weston, *The Fantasy of Athlete Publicity Rights: Public Fascination and Fantasy Sports' Assertion of Free Use Place Athlete Publicity Rights on an Uncertain Playing Field*, 11 CHAP. L. REV. 581, 582 (2008).
[3] *Id.* at 589.
[4] *See* James Montague, *The Rise and Rise of Fantasy Sports*, CNN (Jan. 20, 2010), http://www.cnn.com/2010/SPORT/football/01/06/fantasy.football.moneyball.sabermetrics/.
[5] Weston, *supra* note 2, at 582.
[6] DONALD E. BIEDERMAN, ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 210 (5th ed. 2007).
[7] *Id.*
[8] Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013). *See infra* Section II.
[9] *See* Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1, 3 (2013).

While courts have most recently employed the transformative use test to balance these privileges, it is highly unlikely such a flexible test will continue to rule right of publicity decision-making processes. Courts should be increasingly concerned with the economic harm caused by misappropriation, and should look to intellectual property law standards which could provide more accurate and comprehensive procedures for balancing both rights.

II. THE RYAN HART CASE

In 2007, nearly 49 million spectators were recorded attending college football games across the nation.[10] In a successful attempt to capitalize on the college football frenzy, Electronic Arts, Inc. created NCAA Football 2006. While the company previously created National Football League simulation games, NCAA Football 2006 allowed players to simulate the *full* college football experience, including stadiums, mascots, and players.[11] The virtual-reality-based game allowed each player to manipulate the actions of more than 100 college football teams to create his or her ideal fantasy matchup.[12]

Today, Ryan Hart works as a professional in the financial services industry.[13] However, from 2002 until 2005, he held the position of quarterback for the Rutgers football team.[14] Despite Hart's current absence from any organized football team, his legacy on the field lives on, alongside thousands of other athletes, in the aforementioned NCAA Football simulation video game.[15] An unnamed avatar that shares Hart's jersey number, height, weight, biography, and playing statistics appears as a possible selection for players in the virtual reality game.[16] Furthermore, the player statistics also listed Hart's home state, hometown, college team name, and graduating year.[17] It is certain that such attention to detail by Electronic Arts was done in desire to simulate a realistic gaming experience by allowing fans to control the moves of digital copies of their favorite players, as there is no question that the NCAA franchise relies on realism and detail for its success.[18] In response to the comparable avatar present in game, Hart argued that Electronic Arts' use of his image went too far and took advantage of his persona for commercial gain.[19]

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[10] Bryan Curtis, *The National Pastime(s)*, N.Y. TIMES (Feb. 1, 2009), http://www.nytimes.com/2009/02/01/weekinreview/01curtis.html?_r=0.
[11] *Hart*, 717 F.3d at 146.
[12] Adam Liptak, *When It May Not Pay to be Famous*, N.Y. TIMES (June 1, 2013), http://www.nytimes.com/2013/06/02/sunday-review/between-the-first-amendment-and-right-of-publicity.html?_r=0.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Hart v. Elec. Arts, Inc., 717 F.3d 141, 146 (3d Cir. 2013).
[18] Ronald S. Katz, *When Rights of Publicity Trump 1st Amendment*, LAW360 (May 22, 2013), https://www.law360.com/articles/444030/when-rights-of-publicity-trump-1st-amendment.
[19] *Hart*, 717 F.3d at 147.

Hart sued the game's manufacturer, Electronic Arts, stating the company should have requested his permission in use of his identical likeness, and also commented that a licensing agreement for such use should have been offered.[20] However, Electronic Arts argued that Hart's amateur status, which allowed him to play at the collegiate level, barred him from receiving any form of payment or licensing agreement the company would have offered him.[21] In the United States District Court, summary judgment was granted in favor of Electronic Arts on the ground that NCAA Football was "shielded from right of publicity claims by the First Amendment."[22] However, on appeal, the Third Circuit ultimately sided with Hart.[23]

The Third Circuit acknowledged that courts employ various balancing approaches in addressing the right of publicity against First Amendment guarantees.[24] Ultimately the court accepted use of the transformative use test, where a balance is sought to be struck between a celebrity's right to profit from his image and the value of the new expressive work by considering "the purpose and character of the use."[25] In applying the test to this case, the majority concluded that the avatar too closely mirrored Ryan Hart, and that the simulated game did not "alter or transform the player's identity in a significant way."[26] The court further stated, "[d]ecisions applying the transformative use test invariably look to how the celebrity's identity is used in, or is altered by, other aspects of the work."[27] The majority opinion primarily focused on the image of Ryan Hart, looking only at the present similarities between the player himself and the avatar present in the video game.

[20] It is important to note that in 2011, the United States Supreme Court did hold video games deserving of full First Amendment protection. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2742 (2011). *See also* Liptak, *supra* note 12.
[21] *Hart*, 717 F.3d at 146.
[22] *Id.* at 147.
[23] *Id.* at 145.
[24] *See infra* Section V(b).
[25] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001).
[26] *Hart*, 717 F.3d at 166.
[27] *Id.* at 169.

Leading up the Court's decision, The Screen Actors Guild and several different players' unions filed amicus briefs in support of Hart, suggesting that athletes, actors, and other celebrities must be allotted the right to control the use of their identities and to financially reap the benefits of their fame.[28] Conversely, advocates in the movie industry, book publishers, and news organizations argued publicly that allowing celebrities to control speech concerning their own public images directly disregarded principles held in the First Amendment.[29] In a statement on behalf of Electronic Arts, the company's lawyer, Jake Schatz, indicated the importance of this case as future legal precedent in saying, "[t]he reach of this decision extends far beyond video games. If it stands, all creators of expressive works that depict real individuals, including filmmakers, biographers and journalists, would face a stark choice: liability or self-censorship."[30] While the court ultimately sided with Hart, this decision did set precedent in future right of publicity cases in the Third Circuit in its decision to utilize the transformative use test. Of greater importance is the likelihood that the *Hart* case will serve as a catalyst for courts to recognize the need for a more cohesive balancing test. There is a strong possibility that media surrounding the *Hart* case will result in added pressure for the Supreme Court to consider taking on modern right of publicity cases in an attempt to create a more applicable standard for the future.

III. DEFINING THE RIGHT OF PUBLICITY

The right of publicity is in place to protect each individual's right to the exclusive commercial use of his or her own name and likeness.[31] This guarantee seeks to protect each individual from the exploitation of that individual's fame or notoriety without his or her consent.[32]

In 1960, William Prosser authored an article that is widely viewed as the stimulus to the creation of the right of publicity.[33] In his findings, Prosser divided the right of privacy into four distinctive categories.[34] While the first three categories have not created substantive legal appreciation, the fourth category has. This category, which he referred to as the "appropriation" of the plaintiff's name or likeness for commercial purposes, has since developed into the right of publicity doctrine.[35] Legal recognition for the right itself also finds significant support in the tort of "invasion of privacy by appropriation," which provides that an individual's likeness, image, or identity cannot be used by another without express authorization.[36] In short, the right of publicity grants each individual a property interest in his or her own identity.[37]

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[28] Liptak, *supra* note 12.
[29] *Id.*
[30] *Id.*
[31] *See* Toffoloni v. LFP Publ'g Grp., LLC, 572 F.3d 1201, 1205 (11th Cir. 2009).
[32] *Hart*, 717 F.3d at 151.
[33] William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).
[34] *See generally id.*
[35] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 571–72 (1977) (citing William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960)).
[36] *Hart*, 717 F.3d at 150 (citing J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY §1:23 (2d ed. 2012)).
[37] *Hart*, 717 F.3d at 150 (quoting Edison v. Edison Polyform Mfg. Co., 64 A. 392, 394 (N.J. Ch. 1907)).

The application of the right of publicity is broad,[38] and while celebrities typically exercise the right, it is available to all individuals.[39] Multiple rationales support the right of publicity's protection of an individual's interest in his or her own identity.[40] Many rationales have a moral basis, in that our society tends to disapprove of attempts to ride on the coattails of another's "time, effort, skill, and even money."[41] Meanwhile, there are economic rationales to keep in mind as well. Such arguments focus on incentivizing individuals to "expend the time, effort and resources necessary to develop talents and produce works that ultimately benefit society as a whole."[42] In a related concern, the right of publicity also works to protect consumers from advertisers who falsely present their product as being endorsed by a particular individual.[43]

IV. INTERACTION BETWEEN THE RIGHT OF PUBLICITY WITH THE FIRST AMENDMENT

While few courts have expressly addressed the issue, the right of publicity often conflicts with the First Amendment.[44] Frequently, free speech is raised as an affirmative defense in right of publicity lawsuits.[45] Given that the First Amendment protects speech from proscription by the government, yet protection is granted through the right of publicity, the government allows certain suppression of one individual's speech in order to protect the rights of another.[46] The tension that exists between the two rights creates conflict, often resulting in legal action by the individual. The balance between the right of publicity and the First Amendment has to be carefully considered because "the very importance of celebrities in society means that the right of publicity has the potential of censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irrelevant or otherwise attempt to redefine the celebrity's meaning."[47]

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[38] K.J. Greene, *Intellectual Property Expansion: The Good, The Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521, 536–38 (2008).
[39] *Id.*
[40] Such rationales may include: (1) a judgment of moral disapproval for the appropriation of another's efforts, (2) an interest in the economic effort, and (3) an interest in protecting consumers from false advertisements of endorsement. Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 54 (1994).
[41] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977) ("No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.").
[42] Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 206 (1993).
[43] *Id.* at 231–32.
[44] *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 805 (Cal. 2001) (stating that "[a]lthough surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment.").
[45] *See e.g.*, *Comedy III Prods.*, 21 P.3d at 810; Winter v. DC Comics, 69 P.3d 473, 477 (Cal. 2003).
[46] Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 5 (2002).
[47] *Comedy III Prods.*, 21 P.3d at 803.

Video games and other related media are unambiguously defined "speech" within the meaning of the First Amendment.[48] In 2011, the Supreme Court expressly concluded that video games are protected within the bounds of the First Amendment as they "communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music), and through features distinctive to the medium (such as the player's interaction with the virtual world)."[49] Since it is established that the NCAA video game is a work that is deemed to be "speech" within the meaning of the First Amendment, the next step is to determine how to balance the protection afforded by that Amendment against competing interests.[50]

While it may appear that such a balancing test should be easily ascertainable, the context in which an individual claims that his right of publicity has been infringed can change the analysis. As the nature of alleged infringement in right of publicity cases has evolved over time, courts have differed in the scope in which they categorize types of commercial use, and in turn whether or not certain alleged infringers have a valid First Amendment defense.[51] The development of sports-related games through advancements in technology, as seen in the *Hart* case,[52] and court determinations as to the alleged "exploitation" of publicity rights illustrate the inconsistent application of the right of publicity doctrine and First Amendment jurisprudence.[53] Furthermore, these cases lend valid support to the argument that the time has come for the U.S. Supreme Court to develop an instructive standard for courts to consistently apply to right of publicity cases that also implicate First Amendment considerations.[54]

[48] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011).
[49] *Id.*
[50] Hart v. Elec. Arts, Inc., 717 F.3d 141, 150 (3d Cir. 2013).
[51] Richard Karcher, *The Use of Players' Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 PENN. ST. L. REV. 557, 560, 566 (2007).
[52] *Supra* Section II.
[53] Timothy J. Bucher, *Game On: Sports-Related Games and Contentious Interplay Between the Right of Publicity and the First Amendment*, 14 TEX. REV. ENT. & SPORTS L. 1, 2 (2012).
[54] *Id.*

V. CURRENT MEASUREMENTS OF THE RIGHT OF PUBLICITY

a. Zacchini v. Scripps-Howard Broadcasting Co.

In *Zacchini v. Scripps-Howard Broadcasting Co.*, the United States Supreme Court first explicitly examined the intersection of the First Amendment and right of publicity.[55] Not only was this case the first examination of right of publicity doctrine by the Supreme Court, it was also the last. Zacchini, a self-proclaimed "human cannonball," filed suit against the broadcasting company that aired the entirety of his performance at a local county fair.[56] The Court ruled that the network had violated Zacchini's right of publicity,[57] and more specifically found that the goal of the right of publicity is "analogous to the goals of patent and copyright law" in that such protections should serve to protect an individual's ability to "reap the reward of his endeavors."[58] Based on the facts presented in *Zacchini*, the Court held that the news broadcast deprived Zacchini of the economic value of his performance, since allowing viewers to see the performance for free would likely drive downwards the number of viewers willing to pay for the same viewing experience.[59] As a matter of strict legal precedent, *Zacchini* remains the only guiding principle for lower courts in considering right of publicity cases. However, not all courts embrace and follow its holding.[60] Over time, state and federal courts have developed inconsistent standards, which have created a wide discrepancy in how right of publicity cases are decided.[61]

[55] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).
[56] *Id.* at 563.
[57] *Id.* at 565–66.
[58] *Id.* at 573.
[59] *Id.* at 575–76.
[60] *See, e.g.*, Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 970 (10th Cir. 1996).
[61] Mark Conrad, *The Right of Publicity in the Digital Age-Doctrinal Tensions, Common Law Theories and Proposals for Solutions*, 24 COMPUTER LAW & SECURITY REPORT 407, 4014–16 (2008).

While discussion of *Zacchini* is pivotal in any examination of the right of publicity, it is important to address two main points. First, the case presented was not commercial in nature; the disputed footage was presented as part of a local newscast.[62] So, while the court did address the economic harm Zacchini faced, this harm was substantially less than is present in most modern right of publicity cases. Second, in its holding the Court failed to establish any specific test or standard to implement in future right of publicity cases, instead it relied upon a copyright law analysis of the facts.[63] As right of publicity claims have increased, due to advancements in technology and increase in media coverage, courts have been faced with "a more compelling and difficult issue" of exacting a balance between the right of publicity and the First Amendment.[64] In response, post-*Zacchini* courts have pieced together three different balancing tests in an attempt to find appropriate boundaries between the right of publicity and the First Amendment.[65]

b. Modern Tests

Under the predominant purpose test, an unauthorized use of another's identity is protected if the purpose of the work is predominantly expressive.[66] This also means that when the predominant purpose of the product is to make an expressive comment about the individual, the expressive values of the speech are given greater weight in the decision-making process.[67] Conversely, in such cases the same use is an infringement of the right of publicity if the purpose of the work is predominantly commercial.[68] In the *Hart* case, the Third Circuit rejected this test, suggesting it was "subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics."[69] Many other courts have come to the same conclusion, in stating that the predominant purpose test does not provide enough guidance for determining what "predominant" means.[70] Additionally, it does not prove helpful in cases where a work is intended to make an expressive comment but still results in a direct imitation of a celebrity's image.[71]

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[62] *Zacchini*, 433 U.S. at 573.
[63] *Id.*
[64] Conrad, *supra* note 61, at 407.
[65] A few courts have utilized an ad hoc approach, which balances the consequences of restricting a defendant's freedom of expression against the justifications for a plaintiff's right of publicity. However, this balancing test is most often used in conjunction alongside one of the other well-established tests, as an element of the decision-making process. *See Cardtoons L.C.*, 182 F.3d at 972.
[66] Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).
[67] Katz, *supra* note 18.
[68] *Doe*, 110 S.W.3d at 374.
[69] Hart v. Elec. Arts, Inc., 717 F.3d 141, 154 (3d Cir. 2013).
[70] Joseph Gutmann, *It's in the Game: Redefining the Transformative Use Test for the Video Game Arena*, 31 CARDOZO ARTS & ENT. L.J. 215, 220 (2012).
[71] *Id.*

The relatedness test, often referred to as the Rogers Test,[72] does permit "the right of publicity to bar the use of a celebrity's name in a title unless the title was 'wholly unrelated' to the movie or was 'simply disguised commercial advertisement for the sale of goods or services.'"[73] In essence, the relatedness test creates a two-prong assessment to determine if the commercial speech is protected under the First Amendment. The first prong states that the title of the work is unprotected if it has no artistic relevance to the original work.[74] The second prong states that even if relevance exists under the first prong limitation, there is still no protection if the work in question "explicitly misleads as to the source or the content of the work."[75]

The relatedness test may appear inapplicable on its face, given that Hart's name did not appear in the title of the video game at issue; however, some courts have applied the Rogers test beyond the title of a specific work.[76] In the *Hart* case, the Third Circuit rejected this test as a "blunt instrument, unfit for widespread application in cases that require a carefully calibrated balancing of two fundamental protections: the right of free expression and the right to control, manage, and profit from one's own identity."[77] Many courts have rejected this test on similar reasoning, in that it is somewhat unfaithful to the principles of the right of publicity doctrine. As one legal authority stated, "[a] work can be a complete imitation even if there is no explicit deception in it. These works, despite having little to no redeeming creative value on their own would still unquestionably pass the Rogers [relatedness] test."[78] Additionally, similar to objections over the predominant use test, the necessary judgment of creative relevance concerning any given work is far too subjective a measurement to create cohesive standards.

[72] This nickname is derived from the Second Circuit case where it was first implemented. In *Rogers v. Grimaldi*, famous dancer Ginger Rogers filed suit against the producers of a movie that featured characters that imitated Ginger Rogers and Fred Astaire. The main characters of the film were Italian dancers who shared the American stars' identical first names. Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).
[73] *Id.* at 996.
[74] *Id.* at 999 ("In the context of allegedly misleading titles using a celebrity's name, that balance will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever.").
[75] *Id.*
[76] Katz, *supra* note 18.
[77] Hart v. Elec. Arts, Inc., 717 F.3d 141, 147 (3d Cir. 2013).
[78] Guttmann, *supra* note 70, at 220.

As earlier mentioned, in the *Hart* case the Third Circuit decided that the transformative use test was the best means for balancing the right of publicity against First Amendment rights in a video game context. Under the transformative use test, a work that depicts a celebrity enjoys First Amendment protection if it is the artist's creative expression rather than merely an imitation of the celebrity's likeness at issue.[79] More specifically, the Court defined this test as turning on "[w]hether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."[80] In other words, courts are asked to consider whether a product containing a celebrity's likeness is so transformed that it has become "primarily the defendant's own expression rather than the celebrity's likeness."[81] Many jurisdictions have used this test in right of publicity determinations. In doing so, it is important to clarify that in each case the term "expression" denotes an expression of something other than the likeness of the celebrity.[82] While the transformative use test has been successfully utilized in many right of publicity cases, it too relies upon somewhat murky guidelines for application. If courts wish to continue use of this test, they will need to develop more definite standards that more fully appreciate the economic harm that can result during right of publicity cases.

VI. WHAT STANDARDS COULD BE ENACTED TO BALANCE THE RIGHT OF PUBLICITY AGAINST FREEDOM OF EXPRESSION GUARANTEES IN THE FIRST AMENDMENT?

Since the beginning of right of publicity jurisprudence, the Supreme Court has noted that the right of publicity was a property right similar in nature to other intellectual property rights.[83] In *Zacchini*, the Court explicitly found that the goals of the right of publicity doctrine are "analogous to the goals of patent and copyright law" in that they serve to protect an individual's ability to "reap the reward of his endeavors."[84] In a dissenting opinion in the *Hart* case, Judge Ambro stated that the "transformative use [test] must mesh with existing constitutional protections for works of expression."[85] Settling on the transformative use test, the majority in the *Hart* case applied a narrow interpretation to the requirement of transformation in its conclusion that the First Amendment did not protect the defendant from a violation of his right of publicity.[86] However, this conclusion appears to fall in line with the intellectual property law balancing tests, which weigh both free expression interests *and* economic property protection interests.[87] The interpretation of the transformative use test should mirror balancing acts undertaken in the copyright and trademark context, as they are protecting the same interests.

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[79] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808–809 (Cal. 2001).
[80] *Id.*
[81] Guttmann, *supra* note 70, at 220.
[82] Katz, *supra* note 18.
[83] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573 (1977).
[84] *Id. See also supra* Section V(a).
[85] Hart v. Elec. Arts, Inc., 717 F.3d 141, 173 (3d Cir. 2013) (Ambro, J., dissenting).
[86] *Id.* at 169.
[87] *Id.* at 159.

American copyright laws are aimed at promoting both the creation and publication of expression.[88] As stated in *Eldred v. Ashcroft*, the Supreme Court has clarified that "by establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[89] Similar to the right of publicity, the tension between the First Amendment and copyright law has long been discussed in the American legal system. The Supreme Court has determined that this tension may be eased through application of the idea versus expression dichotomy and the fair use defense.[90] The idea versus expression dichotomy mandates that the "idea" which gives rise to the fixed work will remain in the public domain, while the "expression" produced from the idea may be protected by copyright.[91] Conversely, the fair use defense[92] guides courts, by way of a series of required elements, in determining whether use of a previously protected expression is an infringement on that expression.[93]

The transformative use test is recognizably derived from copyright's fair use defense.[94] Accordingly, it is fair to state the interests and incentives outlined in copyright law protections should also be reflected in the treatment of right of publicity conflicts. The underlying incentive of the right of publicity doctrine is to provide an individual with the opportunity to make "the investment required to produce a performance of interest to the public."[95] A paralleling interest underlies copyright law principles, which work to promote the creation and publication of free expression by establishing a marketable right to the use of one's creative expression.[96] Given both sets of laws strive to protect the same basic privileges regarding potential use of expression for a commercial nature and economic gain, the interpretation of the transformative use test should mirror the evaluations utilized in copyright cases.[97]

[88] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).
[89] *Id.* (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)).
[90] Bartholomew, *supra* note 9, at 12.
[91] Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 323 (1989).
[92] The fair use defense, codified in §107 of the 1976 Copyright Act, requires the evaluation of: (1) the purpose and character of the use, including whether such use is of commercial nature; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. §107 (2012).
[93] Michael J. Madison, *A Patter Oriented Approach to Fair-Use*, 45 WM. & MARY L. REV. 1525, 1554 (2004).
[94] Golan v. Holder, 132 S. Ct. 873, 890–91 (2012); *see generally* 17 U.S.C. §107 (2012).
[95] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977).
[96] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).
[97] *Id.*

Similar in nature to copyright law, trademark law also strives to promote economic efficiency in the marketplace through elimination of consumer confusion. Trademark law also requires consideration of the distinction between noncommercial and commercial channels of speech.[98] Trademark law emphasizes commercial concerns through its protection of business identity as the origin of any good or service.[99] Viewing a specific mark to determine ownership is no different than differentiating a source of content by focusing on the specific use of a celebrity image.[100] In right of publicity cases, the origin would not be a company, but the individual at issue instead. Therefore, in theory, courts would be asked to consider whether use of any given celebrity image in a new work is so recognizable as to cause audience members to believe that the individual is connected to the new work. Direct consideration of the economic interests, as trademark law allows, would help guarantee that the application of the transformative use test clearly addressed the economic interests which are often overlooked in right of publicity decision making processes.

Is there likely a balancing test that would successfully evaluate *all* right of publicity claims? Given the factual specificity of these cases, probably not. However, it is certain that both fair use considerations and potential economic harms should be evaluated to determine whether an individual's right of publicity has been infringed upon. Courts should be working to implement a fair use standard, consisting of a set of well-defined elements, to first evaluate whether an individual's identity has been used unfairly. Furthermore, while reasoning was outlined earlier[101] dismissing the effectiveness of the relatedness test, it should not be discounted in its entirety. It appears that courts tend to discredit this standard primarily due to the highly specific and generally inapplicable nature of the first requirement for an artistic relationship between the title of the work and the identity being misused. However, in mandating that consumers cannot be misled as to the source of the content of the work in question, the second part of this analysis process mirrors goals of intellectual property consistently. By merging the fair use doctrine with the economic protections of the relatedness tests, courts would be far more successful in evaluating right of publicity cases in their entirety.

[98] Bartholomew, *supra* note 9, at 52.
[99] *Id.* at 80.
[100] *Id.* at 41.
[101] See *supra* Section V(b).

VII. CONCLUSION

The right of publicity doctrine significantly constrains the dissemination of ideas and information by placing limits on who can use celebrity images, and in what context. While the American court system has noted the tension between the First Amendment and the right of publicity, our system is still lacking a consistent method for resolving conflict between the two theories of law. In order to maintain the right of publicity while still protecting the First Amendment, it is crucial that the courts work to adopt a uniform standard for balancing the right of publicity against the freedom of expression. In looking to intellectual property law assessments for guidance, it is likely courts will be able to more consistently evaluate both free expression interests and the economic property protection interests in determining future right of publicity cases.

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