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## There is No "I" in NCAA: Why College Sports Video Games Do Not Violate College Athletes' Rights of Publicity Such to Entitle Them to Compensation for Use of Their Likenesses

Mary Catherine Moore

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# THERE IS NO "I" IN NCAA: WHY COLLEGE SPORTS VIDEO GAMES DO NOT VIOLATE COLLEGE ATHLETES' RIGHTS OF PUBLICITY SUCH TO ENTITLE THEM TO COMPENSATION FOR USE OF THEIR LIKENESSES

*Mary Catherine Moore\**

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## I. INTRODUCTION: A NEW BATTLE IN AN OLD WAR

In an online game preview for the "EA Sports NCAA Football 10" video game, the starting quarterback for the University of Florida wears number fifteen and has many of the physical attributes of the former Florida quarterback, Tim Tebow.<sup>1</sup> In the same preview, the simulated University of Texas starting quarterback, "QB #12," has many of the skills and physical attributes of Texas's 2009 Heisman Trophy candidate, number twelve, Colt McCoy.<sup>2</sup> The National Collegiate Athletic Association (NCAA), the University of Florida, Oklahoma University, and all other schools featured in "EA Sports NCAA Football 10" receive a portion of profits from Electronic Arts, Inc. (Electronic Arts), the producer of the video game, for the use of the NCAA's and the schools' logos.<sup>3</sup> The college players arguably depicted in these games receive no form of compensation.<sup>4</sup>

Proceeds from these licensing agreements are substantial. For the year-ended August 31, 2009, the NCAA took in \$594,527,482 in "Television and Marketing Rights Fees," which includes revenues from licensing agreements.<sup>5</sup> While these staggering numbers look more like the figures of a large corporation, the NCAA is a non-profit organization that seeks to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."<sup>6</sup> But as college sports become a bigger business, it is more difficult to maintain a definitive line between college and professional sports.<sup>7</sup> With each new college sports marketing device there is a battle over college athletes' rights to compensation.<sup>8</sup> So far, the NCAA is winning the war over college athlete

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<sup>1</sup> EA Sports, NCAA Football 10 Gameplay, <http://www.easports.com/media/play/feature-video/NCAAFB10CentralGamePlay> (last visited Sept. 4, 2010).

<sup>2</sup> *Id.*

<sup>3</sup> Electronic Arts, Inc., Legal Notices, <http://www.ea.com/2/legal-notice> (last visited Sept. 4, 2010).

<sup>4</sup> NCAA, 2009–10 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS EFFECTIVE AUGUST 1, 2009 § 12.1.2.1 (2009), available at <http://www.ncaapublications.com/productdownloads/D110.pdf> (last visited Sept. 4, 2010).

<sup>5</sup> NCAA, 2008–09 NCAA Membership Report, at 26, available at <http://catalog.proemags.com/publication/cc5da338#> (last visited Sept. 4, 2010).

<sup>6</sup> NCAA, *supra* note 4, § 1.3.

<sup>7</sup> See Matthew G. Matzkin, *Gettin' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for Their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227, 237 (2001) (stating that "[d]espite the ever growing commercial nature of collegiate sports and the NCAA's role in increasing the member institutions' total income, the NCAA still claims its primary goal is preserving the concept of amateurism among its athletes").

<sup>8</sup> See, e.g., James S. Thompson, *University Trading Cards: Do College Athletes Enjoy a Common Law Right to Publicity?*, 4 SETON HALL J. SPORT L. 143 (1994) (discussing college athletes' rights to compensation for use of their likenesses in trading cards); Sean Hanlon & Ray Yasser, "J.J. Morrison" and his Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241

compensation.<sup>9</sup> One of the latest battles in this war is the increasing drive to compensate college athletes for the use of their likenesses in sports video games like the one described above.<sup>10</sup>

While this issue has been debated since the birth of the college sports video game genre, recent technological advances making video games more lifelike have forced this debate into the courtroom. Since May of 2009, a slew of cases have been filed against Electronic Arts, the licensed producer of the NCAA college football and basketball video games; the NCAA; and the College Licensing Company (CLC), which manages the intellectual property of the NCAA and approximately 200 colleges, universities, bowl games, and athletic conferences (collectively Defendants).<sup>11</sup> These cases have since been combined into a single action titled *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* (the *Likeness Licensing Litigation*).<sup>12</sup> The Amended Complaint for the consolidated case (Amended Consolidated Complaint) alleges, *inter alia*,<sup>13</sup> that the college athletes have been deprived of their right of publicity.<sup>14</sup> To resolve this litigation, the court must decide whether video games appropriate the likenesses of college athletes; and if so, whether college athletes should be compensated for the use of their likenesses in these video games.

This Note will analyze the college athlete's right of publicity in the context of the current legal dispute over the use of college athletes' likenesses in video games. Part II will discuss the right of publicity, the NCAA Bylaws, the *Likeness Licensing Litigation* pertaining to college athletes' rights of publicity, and some of the payment suggestions that have been offered by proponents of student-

(2008) (discussing college athletes' rights to compensation for use of their likenesses in apparel and other merchandise).

<sup>9</sup> See Alfred Dennis Mathewson, *By Education or Commerce: The Legal Basis for the Federal Regulation of the Economic Structure of Intercollegiate Athletics*, 76 UMKC L. REV. 597, 603 (2008) (discussing how courts have refused to allow compensation for college athletes).

<sup>10</sup> See *infra* Part II.E.

<sup>11</sup> Class Action Complaint, *Keller v. Elec. Arts, Inc.*, No. 09-1967-CV (N.D. Cal. May 5, 2009). See, e.g., Class Action Complaint, *O'Bannon v. NCAA*, No. 09-3329-CV (N.D. Cal. July 21, 2009); Class Action Complaint, *Bishop v. Elec. Arts, Inc.*, No. 09-4128-CV (N.D. Cal. Sept. 4, 2009); Class Action Complaint, *Newsome v. NCAA*, No. 09-4882-CV (N.D. Cal. Oct. 14, 2009).

<sup>12</sup> Order Granting Plaintiffs Samuel Michael Keller's and Edward C. O'Bannon, Jr.'s Joint Motion to Consolidate Actions, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. C 09-1967 CW (N.D. Cal. Jan. 15, 2010) (consolidating *Keller v. Elec. Arts, Inc.* (No. 09-01967), *O'Bannon v. NCAA* (No. 09-03329), *Bishop v. Elec. Arts, Inc.* (No. 09-04128), *Newsome v. NCAA* (No. 09-04882), *Anderson v. NCAA* (No. 09-05100), *Wimprine v. NCAA* (No. 09-05134), *Jacobson v. NCAA* (No. 09-05372), and *Rhodes v. NCAA* (No. 09-05378)).

<sup>13</sup> While the Amended Consolidated Complaint states claims for civil conspiracy, unfair business practices, antitrust and breach of contract, this Note will only discuss the right of publicity causes of action.

<sup>14</sup> Amended Complaint Consolidating Amended Class Action Complaint, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* at 135-137, No. C 09-1967 CW (N.D. Cal. Mar. 10, 2010) [hereinafter Amended Consolidated Complaint] (enumerating the right of publicity causes of action). See *infra* Part II.E.

athlete compensation for rights of publicity use. Involved in this discussion is the history of the right of publicity and how it has been applied to video games and college athletes, as well as an explanation of the NCAA bylaws related to a college athlete's amateur status. Part III will evaluate if and how college sports video games are constitutionally protected works under the First Amendment and under states' freedom of speech rights. This part also explains how attempting to compensate college athletes for the use of their likenesses in video games is logistically unrealistic because of the accounting and management expenses that would be incurred in distributing profits to the hundreds of college athletes that would arguably be entitled to compensation. Finally, this Note will conclude that college athletes should not be compensated for the use of their likenesses in video games because video games are expressive works protected by the right to free speech, because college athletes have contractually agreed to give up their right of publicity to play NCAA sports, and because any potential compensation structure would be too costly and convoluted to implement effectively.

## II. BACKGROUND: THE RIGHT OF PUBLICITY, THE LIKENESS LICENSING LITIGATION, AND EVERYTHING IN BETWEEN

### A. RIGHT OF PUBLICITY

1. *Origins of the Right of Publicity.* The year 1953 marked the birth of the right of publicity.<sup>15</sup> The seminal case, which primarily concerned intentional interference with contractual relations over the sale of baseball cards, is now noted for its assertion that "in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph . . . [t]his right might be called a 'right of publicity.'"<sup>16</sup> In the year following this case, Professor Melville B. Nimmer wrote an article that became the substantive foundation of the right of publicity.<sup>17</sup> This article recognized the inadequacy of privacy laws in governing the use of celebrities' personas.<sup>18</sup> It also set out guidelines for what and who the right of publicity covers.<sup>19</sup> After *Haelan* and the Nimmer article, courts began to define the parameters of the right of

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<sup>15</sup> 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:26 (2d ed. 2005).

<sup>16</sup> *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

<sup>17</sup> See Melville B. Nimmer, *The Right of Publicity*, 19 *LAW & CONTEMP. PROBS.* 203 (1954); Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 *BULL. COPYRIGHT SOC'Y* 111 (1980) (stating the importance of Nimmer's article to the development of the right of publicity); 1 MCCARTHY, *supra* note 15, § 1:27.

<sup>18</sup> Nimmer, *supra* note 17, at 204–09 (discussing how privacy rights are inadequate because (1) they only apply when the celebrity has been defamed and (2) they are nonassignable).

<sup>19</sup> *Id.* at 212 (professing that the right of publicity should apply when the likeness is used for endorsement purposes, and that the right should be available to everyone so long as their likeness has commercial value).

publicity. Since then, the protection of this right has been afforded to an individual's identity, which includes one's physical likeness,<sup>20</sup> voice,<sup>21</sup> and name or nickname.<sup>22</sup>

The right of publicity is a property right distinct from trademark, copyright, and privacy law.<sup>23</sup> Through judicial precedent and the enactment of state statutes, the right of publicity has become clearly defined.<sup>24</sup> It is now recognized as "a right inherent to everyone to control the commercial use of identity and persona and recover in court damages and the commercial value of an unpermitted taking."<sup>25</sup> As of 2009, thirty states recognize the right of publicity in some form.<sup>26</sup>

2. *Free Speech and the Right of Publicity.* This right of publicity does not come without limitations.<sup>27</sup> The First Amendment right to free speech must be balanced with an individual's right of publicity.<sup>28</sup> In 1977, the United States Supreme Court decided its first, and only, right of publicity case.<sup>29</sup> In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court, in a five to four decision, held that the First Amendment right to free speech restricts an individual's claim to a right of publicity.<sup>30</sup> The language of this decision creates only a narrow rule, but one definite takeaway is that the First Amendment does not bar all right of publicity

<sup>20</sup> See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (holding that a well-known professional driver was entitled to relief for the misappropriation of his likeness where an advertisement used a person and car that could reasonably be mistaken for the driver).

<sup>21</sup> See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (deciding that an advertisement using a "sound alike" of a famous singer created a cause of action in tort).

<sup>22</sup> See *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (stating that a famous basketball player who changed his name has an action for violation of his right of publicity against a car company that used his former name in an advertisement).

<sup>23</sup> J. Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names*, 11 MARQ. SPORTS L. REV. 195, 198 (2001).

<sup>24</sup> See 1 MCCARTHY, *supra* note 15, § 6:3 (discussing the development and status of the right of publicity in the fifty states).

<sup>25</sup> 1 *id.* § 1:3.

<sup>26</sup> 1 *id.* § 6:3 (stating that as of March 2009, "courts have expressly recognized the right of publicity as existing under the common law of 20 states. Of those, eight also have statutory provisions broad enough to encompass the right of publicity. In addition, ten states have statutes which, while some are labeled 'privacy' statutes, are worded in such a way that most aspects of the right of publicity are embodied in those statutes.").

<sup>27</sup> JAMES CHARLES SMITH ET AL., *PROPERTY: CASES AND MATERIALS* 24 (Vicki Been et al. eds., Aspen Publishers 2d ed. 2008); see McCarthy & Anderson, *supra* note 23, at 198 (describing how the right of publicity is not unbridled, but limited by free speech considerations).

<sup>28</sup> SMITH ET AL., *supra* note 27, at 24.

<sup>29</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977); 2 MCCARTHY, *supra* note 15, § 8:24.

<sup>30</sup> *Zacchini*, 433 U.S. at 578 (holding that while state laws may give media privilege to broadcast matters of public interest, the First Amendment requires such privilege with matters that would otherwise be protected by the right of publicity).

claims.<sup>31</sup> Thus, it has been left to the states to balance the interests between the right of publicity and free speech.<sup>32</sup> Courts have created different tests for determining what the right of publicity should protect.<sup>33</sup> The general conclusion of these tests is that a violation of one's right of publicity is recognized only when the individual's persona is appropriated for purely commercial purposes.<sup>34</sup> While the effect is the same, there are different methods that courts use to achieve this conclusion.

One such test is definitional in nature. The issue is whether the likeness is used in "commercial speech" or "communicative speech."<sup>35</sup> If the persona is used without authorization in commercial speech, it is a violation of the individual's right of publicity; however, if the use is communicative, the work is protected free speech.<sup>36</sup> This does not wholly restrict unauthorized uses of an individual's persona in products that are sold for profit.<sup>37</sup> Rather, where the plaintiff's likeness is used directly for a commercial purpose, such as a billboard or television product advertisement, the individual whose persona is appropriated will be protected by the right of publicity.<sup>38</sup>

A second test asks whether the plaintiff's persona is "wholly unrelated" to the substance of the work, or if it is "simply a disguised commercial advertisement for the sale of goods or services."<sup>39</sup> This "Rogers test," from the Second Circuit case *Rogers v. Grimaldi*, applies only to "expressive works."<sup>40</sup> A work is expressive if it passes a two-part test. The first part asks if the plaintiff's likeness has artistic relevance to the underlying work.<sup>41</sup> If the answer is no, then it is not protected by the First Amendment.<sup>42</sup> If the likeness does have artistic

<sup>31</sup> 2 MCCARTHY, *supra* note 15, § 8:27.

<sup>32</sup> *See* 2 *id.* § 6:3 (enumerating the states that recognize the right of publicity).

<sup>33</sup> *See* 2 *id.* § 8:23 (showing how different courts have balanced the right of publicity and the First Amendment right to free speech).

<sup>34</sup> *McCarthy & Anderson, supra* note 23, at 198.

<sup>35</sup> *Id.* at 202.

<sup>36</sup> *Id.*

<sup>37</sup> *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (stating the fact that the advertisement in question was paid for was immaterial to a determination of whether the First Amendment provided protection); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 868 (Cal. 1979) ("The First Amendment is not limited to those who publish without charge . . . the activity . . . does not lose its constitutional protection because it is undertaken for profit."); *ETW Corp. v. Jireh Publ'g, Inc.*, 99 F. Supp. 2d 829, 836 (N.D. Ohio 2000) (deciding that a portrait of a professional athlete that was sold for profit was not a violation of the athlete's right of publicity because it is an artistic work).

<sup>38</sup> *See, e.g., Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (stating that the use of a famous athlete's name in an advertisement commercial was not newsworthy, so it was not entitled to First Amendment protection).

<sup>39</sup> *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989) (citing *Frosch v. Grosset & Dunlawp, Inc.*, 75 A.D.2d 768, 769 (N.Y.A.D. 1980)).

<sup>40</sup> 2 MCCARTHY, *supra* note 15, § 8:71.

<sup>41</sup> *Rogers*, 875 F.2d at 999.

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



relevance, the second part asks if the use of the likeness “explicitly misleads as to the source or the content of the work.”<sup>43</sup> If the answer to the second part is yes, the work is not protected by the First Amendment.<sup>44</sup> This second part of the test seeks to balance the risk that the use of a celebrity’s likeness may be mistaken as endorsement with the risk of unconstitutionally restricting artistic expression.<sup>45</sup>

A third way to resolve whether a work deserves First Amendment free speech protection is to determine whether the work is “transformative.”<sup>46</sup> In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the California Supreme Court borrowed this factor of the fair use test from copyright law.<sup>47</sup> The question, as posed by this court, is “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.”<sup>48</sup> In answering this question, the court must consider if the celebrity’s likeness is the “sum and substance” of the work, and whether the imitative or creative elements of the work predominate.<sup>49</sup> This test has been adopted especially in the context of visual artistic works that appear in a non-advertising context.<sup>50</sup>

In 2003, the California Supreme Court applied the “transformative” test set forth in *Comedy III* to a case in which plaintiffs claimed that characters in a series of comic books violated their rights of publicity.<sup>51</sup> In *Winter v. DC Comics*, the characters in question were half-human, half-worm brothers whose last name was “Autumn.”<sup>52</sup> The Winter Brothers, well-known singers, alleged that the characters constituted illegal appropriations of their likenesses.<sup>53</sup> The court decided that because the plaintiffs’ likenesses were only part of the “raw materials” that made up the creative characters and not the “sum and

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* at 1001 (stating that “Ginger and Fred” was not explicitly misleading because there was only a slight risk that the title would imply endorsement, which was outweighed by the danger in restricting artistic expression).

<sup>46</sup> *See Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (establishing what is now known as the “transformative” test to determine whether a work is entitled to First Amendment protection) [hereinafter *Comedy III*]. *See, e.g.*, *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001); *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003) (both applying the “transformative” test).

<sup>47</sup> *Comedy III*, 21 P.3d at 807–08.

<sup>48</sup> *Id.* at 809.

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* at 802 (acknowledging that the “transformative” test did not concern commercial speech or advertising in this case). *See also* 2 MCCARTHY, *supra* note 15, § 8:72 (discussing the contexts in which the “transformative” test should be used).

<sup>51</sup> *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003).

<sup>52</sup> *Id.* at 476.

<sup>53</sup> *Id.*

substance," the comic books were protected by the First Amendment as "transformative."<sup>54</sup>

3. *The Right of Publicity Applied to Video Games.* One specific setting in which the "transformative" test has been applied is in video games.<sup>55</sup> These cases reaffirm the basis of the "transformative" test, that a video game must add "new expression" beyond mere imitation of the celebrity.<sup>56</sup> In *Kirby v. Sega of America, Inc.*, a California case, the court declared that "[v]ideo games are expressive works entitled to as much First Amendment protection as the most profound literature."<sup>57</sup> The *Kirby* court acknowledged that differences in the plaintiff and the game's character were sufficient to constitute "something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>58</sup> Thus, the video game in *Kirby* was granted First Amendment protection based on the determination that the game was an "expressive work" that was transformative in nature.<sup>59</sup>

4. *The College Athlete's Right of Publicity.* For purposes of this Note, a survey of the law of the right of publicity would be incomplete without discussing how it has been applied to college athletes. Most right of publicity sports cases concern professional athletes, which may be due in part to the NCAA amateurism rules that restrict college athletes.<sup>60</sup>

One case that dealt with the "celebrity" of a college athlete is *Abdul-Jabbar v. General Motors Corp.*, in which General Motors used the name of a former college athlete and referenced his college achievements in an advertisement.<sup>61</sup> While the plaintiff was not in college at the time the advertisement was created, the court acknowledged the misappropriation of the plaintiff's college likeness.<sup>62</sup> While there has not been extensive application of the right of

<sup>54</sup> *Id.* at 477–78.

<sup>55</sup> See *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607 (Cal. Ct. App. 2006); *Romantics v. Activision Publ'g, Inc.*, 532 F. Supp. 2d 884 (E.D. Mich. 2008) (both applying the "transformative" test to right of publicity claims in video games).

<sup>56</sup> See *Kirby*, 50 Cal. Rptr. 3d at 616–17 (stating that the video game in question was transformative because it added creative elements to create new expression).

<sup>57</sup> *Id.* at 615. See also *Romantics v. Activision Publ'g, Inc.*, 574 F. Supp. 2d 758, 765 (E.D. Mich. 2008) (stating that video games are expressive works protected by the First Amendment right to free speech); *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 444 F. Supp. 2d 1012, 1039 (C.D. Cal. 2006) (holding that the disputed video game "clearly" qualified for First Amendment protection as an "artistic work"); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2004) (holding that the video games at issue were expressive and protected by the First Amendment).

<sup>58</sup> See *Kirby*, 50 Cal. Rptr. 3d at 615 (holding that the game was protected under the test set forth in *Comedy III*, 21 P.3d 797 (Cal. 2001)).

<sup>59</sup> *Id.* at 618.

<sup>60</sup> See *supra* Part II.B (discussing the NCAA amateurism rules).

<sup>61</sup> *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996).

<sup>62</sup> See *id.* at 409 (stating that the athlete's college persona clearly identified the plaintiff in the advertisement).

publicity to college athletes, *Abdul-Jabbar* shows that the likeness of a college athlete is one that is protected by the right of publicity.<sup>63</sup>

#### B. NCAA AMATEURISM BYLAWS

Each year, the NCAA publishes the NCAA Manual, which includes Operating Bylaws that govern the member institutions of the NCAA and their athletes (the Bylaws).<sup>64</sup> The Bylaws require athletes to remain “amateurs” in their sports.<sup>65</sup> This amateurism requirement is enforced to maintain the boundary between college and professional sports.<sup>66</sup> One way that a college athlete can lose their amateur status is to accept pay or a promise of pay based on their sport.<sup>67</sup>

There are multiple forms of prohibited pay under the Bylaws.<sup>68</sup> These forms include, but are not limited to, salary, gratuity, certain educational expenses, payments based on performance, and preferential treatment, benefits or services.<sup>69</sup> It is crucial to note that these prohibited forms of pay apply not only to compensation actually received while in college, but also to pay promised to be received following the completion of participation in NCAA athletics.<sup>70</sup>

Compensation for the use of a college athlete’s name or picture is specifically addressed in the Bylaws.<sup>71</sup> Section 12.5.2.1(a) states that an individual will not be eligible to participate in intercollegiate athletics if the individual “[a]ccepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind.”<sup>72</sup> Section 12.5.2.2 asserts that if a college athlete’s name or picture is used on commercial items without that individual’s knowledge, the college athlete, or the institution on behalf of the

<sup>63</sup> See *id.* (holding that the plaintiff alleged sufficient facts to state a right of publicity claim under California statutory and common law).

<sup>64</sup> This Note references the 2009–2010 version of the Bylaws printed for Division I member schools. Manuals for different years and different athletic divisions may differ slightly.

<sup>65</sup> See NCAA, *supra* note 4, § 12 (containing the bylaws governing amateurism and how a college athlete retains amateur status).

<sup>66</sup> *Id.* § 12.01.2 (“Member institutions’ athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.”).

<sup>67</sup> *Id.* § 12.1.2 (listing the ways that an individual loses amateur status, including using “athletic skill (directly or indirectly) for pay in any form in that sport” and accepting “a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation”).

<sup>68</sup> See §§ 12.1.2.1–.7 (listing the prohibited forms of pay).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* § 12.1.2(a)–(b).

<sup>71</sup> See *id.* § 12.5.2 (regarding impermissible promotional activities).

<sup>72</sup> *Id.* § 12.5.2.1(a).

college athlete, must take steps to stop the prohibited use.<sup>73</sup> In the context of the use of players' names and pictures in video games, these sections have been explained by an NCAA official to mean that "it is not permissible for a commercial company to use the names of student athletes with eligibility remaining in a computerized simulated sports game."<sup>74</sup> However, nothing in these Bylaws specifically governs the use of a college athlete's likeness in a video game.<sup>75</sup> This has become one of the bases of the recent class action lawsuits comprising the *Likeness Licensing Litigation* filed by former college athletes against the NCAA, Electronic Arts, and the CLC.<sup>76</sup>

### C. COLLEGE ATHLETE SCHOLARSHIPS AS CONTRACTS

All NCAA college athletes must sign a series of documents as a prerequisite to eligibility.<sup>77</sup> Courts have held that scholarship documents, such as a letter of intent, create a legal relationship between a college athlete and a university that constitutes a contract.<sup>78</sup> The consideration in the contract is the promise of the university to provide educational financial aid in exchange for the college athlete's promise to maintain eligibility to participate in college athletics.<sup>79</sup> In *Taylor v. Wake Forest University*, a student athlete sued his university for cancelling his scholarship after he refused to participate in the football program.<sup>80</sup> The court, in excusing the school from honoring the scholarship, found a

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<sup>73</sup> *Id.* § 12.5.2.2 (stating "if a student-athlete's name or picture appears on commercial items (e.g., T-shirts, sweatshirts, serving trays, playing cards, posters) or is used to promote a commercial product sold by an individual or agency without the student-athlete's knowledge or permission, the student-athlete (or the institution acting on behalf of the student-athlete) is required to take steps to stop such an activity in order to retain his or her eligibility for intercollegiate athletics").

<sup>74</sup> Matzkin, *supra* note 7, at 238 (citing Letter from Steve Mallonee, Director of Membership Services/Division I Governance, Staff Liaison (Mar. 7, 1999) (on file with the author)).

<sup>75</sup> See Anastasios Kaburakis, *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry: The Keller Forecast*, 27 ENT. & SPORTS L. 1, 15 (Summer 2009) (discussing a July 2008 official interpretation made by the NCAA of the amateurism bylaws that restated Section 12.5.2.2 without discussing its impact on video games).

<sup>76</sup> See *id.* at 16 (acknowledging that the lack of clarity in the NCAA Bylaws provides the framework under which to analyze the *Keller* case); Amended Consolidated Complaint, *supra* note 14, at 3.

<sup>77</sup> See NCAA, *supra* note 4, § 14.1.3 (requiring the college athlete to sign a form relating to information about, *inter alia*, amateurism, with failure to submit such a form resulting in a forfeiture of athletic eligibility).

<sup>78</sup> See, e.g., *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379, 382 (N.C. Ct. App. 1972); *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992) (finding a contractual relationship between college athlete and university).

<sup>79</sup> *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379, 382 (N.C. Ct. App. 1972). See also Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275 (1989) (enumerating how the elements of offer, acceptance, and consideration are achieved in the context of a letter of intent).

<sup>80</sup> 191 S.E.2d at 380–82.

contractual relationship in which the student received the scholarship in exchange for his participation in the school's football program, and stated that the student's failure to participate in the football program was a breach of the contract.<sup>81</sup>

This concept is important because under contract law, a contractual release can extinguish an individual's right of publicity claim.<sup>82</sup> Because these scholarship contracts implicitly adopt the Bylaws into their terms, it has been argued that college athletes contractually give up their right of publicity to play NCAA sports.<sup>83</sup>

#### D. SUGGESTED METHODS OF COMPENSATION FOR COLLEGE ATHLETES

Critics of the NCAA's amateurism rules have suggested various methods to compensate college athletes for the use of their personas. One of these methods is a revenue sharing program that would entail sharing profits produced by a sport and disbursing those profits by percentages based on seniority.<sup>84</sup> The program would allow for additional compensation based on both athletic and academic All-American achievement, and would allow college athletes to enter into endorsement contracts.<sup>85</sup> The driving force behind this proposal is that the colleges that make money off of sports will share it with their athletes, allowing athletes that are able to generate wealth with their image to do so.<sup>86</sup>

Another suggested method of compensation is to establish a trust for college athletes that would be modeled after the International Olympic Committee's (IOC) practice of setting up trust funds for amateur athletes.<sup>87</sup> The college athlete would be able to pay expenses relating to education out of the trust, and would receive the proceeds of the trust at the end of his collegiate career.<sup>88</sup> Under one proposed trust method, each college athlete would have a

<sup>81</sup> *Id.* at 382.

<sup>82</sup> See *Marder v. Lopez*, 450 F.3d 445 (9th Cir. 2006) (holding that a signed contractual release was a ground for dismissing a right of publicity claim).

<sup>83</sup> See Hanlon & Yasser, *supra* note 8, at 295 (discussing how scholarship contracts effectually take away college athletes' right of publicity).

<sup>84</sup> Michael P. Acain, Note and Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307, 337 (1998).

<sup>85</sup> See *id.* at 336–43 (enumerating the forms of compensation that college athletes would be entitled to under a proposed revenue sharing plan).

<sup>86</sup> See *id.* at 353 (stating "A revenue-sharing plan . . . would ensure that those universities making a profit fairly distribute these revenues to the student-athletes who helped raise the funds. Finally, reliance on a revenue-sharing system would break the chains of exploitation binding present-day collegiate athletics.').

<sup>87</sup> Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW J. 25, 45 (1996); Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 18 (1991).

<sup>88</sup> Schott, *supra* note 87, at 45.

trust funded by various sources such as television rights, ticket sales, or booster donations. Student athletes would receive stipends from these trusts based on academic or athletic performance, incentivizing success both on the field and in the classroom.<sup>89</sup> Both of these options would require amendments to the Bylaws relating to amateurism.<sup>90</sup>

#### E. THE LIKENESS LICENSING LITIGATION

1. *The Plaintiffs' Case.* The Amended Consolidated Complaint states multiple causes of action.<sup>91</sup> It alleges in part that the NCAA and the CLC are violating the NCAA amateurism rules by approving the production of the Electronic Arts video games because the games are appropriating the likenesses of college athletes for commercial use.<sup>92</sup> The Amended Consolidated Complaint further alleges that Electronic Arts is intentionally appropriating the likenesses of college athletes, and it shows examples of similarities between real college athletes and the characters in the video games.<sup>93</sup> Based on these allegations, the plaintiff class claims that Electronic Arts, and the NCAA and CLC by association,<sup>94</sup> are in violation of Indiana's and California's right of publicity statutes, and are violating college athletes' common law right of publicity.<sup>95</sup>

The class seeks multiple forms of relief.<sup>96</sup> With regards to the alleged violations of the right of publicity, the plaintiffs seek actual, statutory, and punitive damages; injunctive relief against the future use of college athletes' names and likenesses; declaration that any contract provision or rule limiting the right of college athletes to receive compensation for their alleged injuries is null and void; and seizure and destruction of all video games in Defendants' and other reachable third parties' possessions that infringe on college athletes' rights of publicity.<sup>97</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> See Hanlon & Yasser, *supra* note 83, at 294 (stating that a trust would not work under NCAA amateurism laws because it would be considered promise of pay after completion of college athletics).

<sup>91</sup> Amended Consolidated Complaint, *supra* note 14. This Note will only discuss the causes of action relating to the right of publicity, but the Amended Consolidated Complaint also alleges causes of action for civil conspiracy, violation of the Unfair Competition Act, breach of contract, and unjust enrichment.

<sup>92</sup> *Id.* at 137–39. No right of publicity claim is alleged directly against the NCAA or CLC. However, through counts of civil conspiracy and breach of contract, the plaintiffs allege that the NCAA and CLC are wrongfully assisting Electronic Arts in appropriating the plaintiffs' likenesses.

<sup>93</sup> *Id.* at 51–70.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 135–39; IND. CODE § 32-36-1-1 (2009); Cal. Civ. Code § 3344 (2009).

<sup>96</sup> Amended Consolidated Complaint, *supra* note 14, at 148–49. This Note will only discuss the forms of relief that relate to any potential violation of the right of publicity.

<sup>97</sup> *Id.*

2. *Indiana Statutory Right of Publicity.* The class contends that Electronic Arts is violating Indiana's statutory right of publicity by allegedly appropriating "class members' names, images, likenesses and distinctive appearances without their consent in connection with and for the purposes of advertising, selling and soliciting purchases of its videogames, including its NCAA Football, NCAA Basketball and NCAA March Madness franchises."<sup>98</sup> Electronic Arts is allegedly subject to Indiana law because the claimed unlawful use of the plaintiffs' likenesses occurs through Electronic Arts' sale of video games in the state.<sup>99</sup> The Indiana Code states that an attribute of an individual's personality may not be used for a commercial purpose during the individual's lifetime, or one hundred years after the individual's date of death, without the written consent of the individual or their posthumous representative.<sup>100</sup> "Commercial purpose" is defined as "(1) [o]n or in connection with a product, merchandise, goods, services, or commercial activities. (2) For advertising or soliciting purchases of products, merchandise, goods, services, or for promoting commercial activities."<sup>101</sup>

3. *California Statutory Right of Publicity.* Since Electronic Arts is headquartered in California, and the alleged wrongful conduct of Electronic Arts occurred in California,<sup>102</sup> the class asserts that Electronic Arts also violated California's statutory right of publicity because it allegedly "knowingly and intentionally utilized and continue[s] to utilize the names and likenesses of Right of Publicity Plaintiffs and class members in videogames produced by EA without the consent of Right of Publicity Plaintiffs and class members."<sup>103</sup> The statute states that a person is liable for "knowingly [using] another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent."<sup>104</sup> However, the question under this statute is not only whether the likeness is used in a commercial medium, but also whether the use is "so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a)."<sup>105</sup>

It is important to recognize that the First Amendment preempts state statutes.<sup>106</sup> The state statutes creating a cause of action for right of publicity in both California and Indiana are subject to the First Amendment's restrictions

<sup>98</sup> *Id.* at 135.

<sup>99</sup> *Id.* at 70; IND. CODE § 32-36-1-1 (2009).

<sup>100</sup> IND. CODE § 32-36-1-8 (2009).

<sup>101</sup> *Id.* § 32-36-1-2(1)-(2).

<sup>102</sup> Amended Consolidated Complaint, *supra* note 14, at 70.

<sup>103</sup> *Id.* at 136.

<sup>104</sup> CAL. CIV. CODE § 3344(a) (2009).

<sup>105</sup> *Id.* § 3344(e).

<sup>106</sup> U.S. CONST. art. VI, cl. 2.

on these rights.<sup>107</sup> This means that even if the plaintiffs make out a statutory case for the right of publicity, defendants can escape liability by proving that the work is protected under the First Amendment right to free speech.<sup>108</sup>

4. *California Common Law Right of Publicity.* In California, there are separate causes of action for statutory and common law rights of publicity.<sup>109</sup> As such, the class asserts a separate count to allege that Electronic Arts is violating the California common law right of publicity.<sup>110</sup>

To state a claim for violation of a common law right of publicity, the plaintiff must show “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”<sup>111</sup> However, even if a plaintiff makes out a prima facie case for right of publicity protection, the defendants can plead a number of affirmative defenses.<sup>112</sup>

One important affirmative defense is the transformative use defense.<sup>113</sup> If a work is found to be a transformative use under the “transformative” test, then the work is protected under the First Amendment.<sup>114</sup> The burden lies with the defendant to show that the use is transformative.<sup>115</sup> This defense is an example of how the First Amendment right to freedom of expression limits both the statutory and common law rights of publicity.<sup>116</sup>

<sup>107</sup> See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 821 (8th Cir. 2007) (holding that the First Amendment preempted a right of publicity claim); *Romantics v. Activision Publ’g, Inc.*, 574 F. Supp. 2d 758, 766 (E.D. Mich. 2008) (same).

<sup>108</sup> See *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 616–17 (Cal. Ct. App. 2006) (holding the First Amendment to be a complete defense to statutory and common law claims for right of publicity); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (holding that the First Amendment was a complete defense even though plaintiff established a statutory cause of action under CAL. CIV. CODE § 3344).

<sup>109</sup> See *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (stating that dismissal of the statutory cause of action does not preclude plaintiff’s right to pursue action under common law right of publicity); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (holding that the fact that a plaintiff cannot assert a statutory right of publicity claim does not necessarily preclude a common law right of publicity claim).

<sup>110</sup> Amended Consolidated Complaint, *supra* note 14, at 137.

<sup>111</sup> *Browne v. McCain*, 611 F. Supp. 2d 1062, 1069 (C.D. Cal. 2009) (quoting *White*, 971 F.2d at 1397).

<sup>112</sup> See, e.g., *Browne*, 611 F. Supp. 2d at 1071–73 (analyzing a number of affirmative defenses to the right of publicity the defendants raised); *Romantics*, 574 F. Supp. 2d at 765 (holding that although the plaintiffs had a “cognizable claim,” it was subject to affirmative defenses).

<sup>113</sup> See *Browne*, 611 F. Supp. 2d at 1072 (describing the “transformative use” affirmative defense as a First Amendment bar to a right of publicity claim when the likeness is so transformed so as to become the defendant’s own expression).

<sup>114</sup> See *supra* Part II.A.2 (discussing the “transformative” test).

<sup>115</sup> *Browne*, 611 F. Supp. 2d at 1071.

<sup>116</sup> See *Comedy III*, 21 P.3d 797, 808 (2001) (stating that a transformative use of one’s likeness is entitled to First Amendment protection); *Winter v. DC Comics*, 69 P.3d 473, 479 (2003) (holding that because the work was transformative it was entitled to First Amendment protection).



5. *The Defendants' Arguments.* Before the individual cases were consolidated, the NCAA, the CLC, and Electronic Arts raised numerous defenses<sup>117</sup> and filed motions to dismiss the *Keller* Complaint, from which the allegations in the Amended Complaint are primarily derived.<sup>118</sup> These motions were denied in part and granted in part in the *Keller* action because the defenses were not sufficient to dismiss the plaintiffs' claims as a matter of law.<sup>119</sup> Despite their denial, these motions effectively demonstrate how the Defendants intend to overcome the right of publicity claims throughout the *Likeness Licensing Litigation*.

One significant change in the plaintiffs' position since the filing of the motions to dismiss is that in the *Keller* complaint the Indiana statutory claim was alleged against only the NCAA, whereas in the Amended Consolidated Complaint the Indiana statutory claim is alleged against only Electronic Arts.<sup>120</sup> This is most likely because the court dismissed the *Keller* Indiana statutory claim against the NCAA because the plaintiffs did not sufficiently allege that the NCAA "used" the likenesses as required by the statute.<sup>121</sup> Although the Indiana statutory claim is no longer alleged against the NCAA, Electronic Arts will likely utilize the defense presented in the NCAA's motion to dismiss the *Keller* action in the *Likeness Licensing Litigation*. Other than this difference, the motions to dismiss accurately convey the arguments that the Defendants will pose to combat the plaintiffs' right of publicity claims.

In its motion to dismiss, the NCAA alleged that the plaintiffs failed to establish that their likenesses have "commercial value" as required by the Indiana statute.<sup>122</sup> As this is a prerequisite to establishing a statutory claim, Electronic Arts will likely argue that the plaintiffs cannot show that their likenesses have a commercial value.

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<sup>117</sup> See Defendant NCAA's Notice of Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) and Statement of Relief Sought, *Keller v. Elec. Arts, Inc.*, No. 09-1967-CV (N.D. Cal. July 29, 2009) [hereinafter NCAA Motion to Dismiss]; Electronic Arts, Inc.'s Notice of Motion and Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), *Keller v. Elec. Arts, Inc.*, No. 09-1967-CV (N.D. Cal. July 29, 2009) [hereinafter Electronic Arts Motion to Dismiss] (making separate arguments for dismissal). This Note will only address those defenses relating to the right of publicity claims.

<sup>118</sup> Class Action Complaint, *supra* note 11.

<sup>119</sup> See Order on Defendants' Motions to Dismiss and Electronic Arts' Anti-Slapp Motion to Strike, *Keller v. Elec. Arts, Inc.*, No. 09-1967-CV (N.D. Cal. Feb. 8, 2010) (granting the NCAA's motion to dismiss the Indiana statutory claim with leave to amend, and denying Electronic Arts' motion to dismiss the California statutory and common law claims).

<sup>120</sup> See Class Action Complaint, *supra* note 11, at 18; Amended Consolidated Complaint, *supra* note 14, at 135–39.

<sup>121</sup> Order on Defendants' Motions to Dismiss and Electronic Arts' Anti-Slapp Motion to Strike, *supra* note 119, at 5.

<sup>122</sup> NCAA Motion to Dismiss, *supra* note 117, at 6.

With respect to the California statutory and common law claims, Electronic Arts asserts both First Amendment protection and a state statute exception.<sup>123</sup> It claims multiple grounds for protection under the First Amendment.<sup>124</sup> First, Electronic Arts contends that video games are expressive works, and are consequently protected as “transformative” under the First Amendment.<sup>125</sup> Second, Electronic Arts argues that there is a substantial public interest in sports and athletes that “far outweighs” athletes’ rights of publicity, so these video games are due “substantial constitutional protection.”<sup>126</sup> This argument is the product of litigation over the right of publicity and sports fantasy leagues.<sup>127</sup>

In addition to these First Amendment defenses, Electronic Arts asserts that the plaintiffs’ statutory claim is barred by the “public affairs” exception to the California statute.<sup>128</sup> This statutory exception states that a likeness used “in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required.”<sup>129</sup> Electronic Arts alleges that the statutory exception is intended to protect even more works than the First Amendment.<sup>130</sup> The argument continues that since “public affairs” include works that relate to “popular culture” and “real-life occurrences,” these video games are works “in connection . . . with public affairs” and are therefore protected by California’s statutory exception.<sup>131</sup>

### III. DISCUSSION: COLLEGE ATHLETE COMPENSATION LEGALLY AND THEORETICALLY UNLIKELY

Based on the state of the right of publicity, video games, and college athletics today, the *Likeness Licensing Litigation* plaintiffs should not be entitled to compensation for the Electronic Arts video games for a number of reasons. First, the *Likeness Licensing Litigation* plaintiffs have not met the statutory requirements for a right of publicity claim in either Indiana or California, nor have they met common law requirements in California. Second, video games are protected under the First Amendment as expressive works, and there is no reason that these particular games should be excepted from this classification. Even though the court denied some of these arguments as grounds for dismissing the case as a matter of law, they are still valid defenses that are more

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<sup>123</sup> Electronic Arts Motion to Dismiss, *supra* note 117, at 1.

<sup>124</sup> *Id.* at 7.

<sup>125</sup> *Id.*

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

<sup>127</sup> *See id.* (citing decisions of fantasy league cases for the proposition that public interest in sports and athletes outweighs an athlete’s right of publicity).

<sup>128</sup> *Id.* at 13.

<sup>129</sup> CAL. CIV. CODE § 3344(d) (2009).

<sup>130</sup> Electronic Arts Motion to Dismiss, *supra* note 117, at 17 (citing *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 310 n.10 (9th Cir. 1992)).

<sup>131</sup> *Id.* at 18.

appropriately affirmed after the facts surrounding this dispute are determined.<sup>132</sup> Furthermore, college athletes have essentially signed their right of publicity away to the NCAA and its member schools in exchange for the opportunity to play college sports. Finally, a compensation system for college athletes would have tremendous transaction costs, which, if undertaken, would ultimately reduce NCAA member schools' abilities to award scholarships to other athletes.

#### A. STATUTORY RIGHT OF PUBLICITY REQUIREMENTS ARE NOT MET

Two of the *Likeness Licensing Litigation* causes of action are based on the Indiana and California right of publicity statutes.<sup>133</sup> Both of these statutes have exceptions that allow for some works to use an individual's likeness without consent. The video games in dispute fall under statutory exceptions in both states.

1. *The Indiana Statute.* The Indiana right of publicity statute does not apply to "an entertainment medium that: . . . (ii) does not convey or reasonably suggest that a personality endorses the . . . entertainment medium."<sup>134</sup> This exception applies to the Electronic Arts games because college athletes are not being used to advertise the games. The players on the covers of the games are former college athletes that have given Electronic Arts permission to use their pictures.<sup>135</sup> There are hundreds of virtual college players in this video game; so many, that it is unrealistic to believe that all of them are individually endorsing the video game.

The Indiana statute also states that it does not "affect rights and privileges recognized under any other law that apply to . . . an entertainment medium."<sup>136</sup> This means that it is subject to any privilege extended by the First Amendment. Thus, if these video games are protected by the First Amendment, by the text of this statute and by way of preemption, there is no Indiana statutory cause of action.<sup>137</sup>

2. *The California Statute.* To state a cause of action under the California statute, the use of the individual's likeness must be directly connected with commercial sponsorship.<sup>138</sup> In these games, there are hundreds of virtual

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<sup>132</sup> See Order on Defendants' Motions to Dismiss and Electronic Arts' Anti-Slapp Motion to Strike, *Keller v. Elec. Arts, Inc.*, *supra* note 119, at 10 (rejecting Electronic Arts' defenses "at this stage" of the litigation).

<sup>133</sup> See *supra* Part II.E.2-3 (discussing plaintiffs' statutory causes of action).

<sup>134</sup> IND. CODE § 32-36-1-1(c)(1)(D)(ii) (2009).

<sup>135</sup> See EA, *EA Announces Four NCAA Football 10 Cover Athletes*, <http://www.ea.com/news/ea-announces-four-ncaa-football-10-cover-athletes> (last visited Aug. 12, 2010) (announcing cover athletes whose NCAA eligibility ended before their likenesses were used).

<sup>136</sup> IND. CODE § 32-36-1-1(b) (2009).

<sup>137</sup> See *infra* Part III.B (discussing how Electronic Arts' video games are protected by the First Amendment).

<sup>138</sup> See *supra* Part II.E.3 (discussing the California right of publicity statute).

athletes from which the user can choose. The sheer number of athletes makes it impossible to directly connect any one, in particular, to commercial sponsorship of the games. Since the *Likeness Licensing Litigation* plaintiffs have not proven that their likenesses are directly connected to the commercial sponsorship of the games, they cannot establish a statutory right of publicity claim.

Section 3344(d) exempts from liability works in connection with affairs of public interest.<sup>139</sup> This exception is arguably broader than the protection afforded by the First Amendment because it is “designed to avoid First Amendment questions in the area of misappropriation by providing extra breathing space for the use of a person’s name in connection with matters of public interest.”<sup>140</sup> In *Gionfriddo v. Major League Baseball*, the defendants disseminated statistics, photographs, and factual data about the athletes to the public through websites, game programs and broadcasts.<sup>141</sup> In this case, the “public affairs” exemption was invoked to protect a variety of publications released by the defendant because of baseball’s “pervasive influence” on American culture.<sup>142</sup> College athletics have the same “pervasive influence” in our culture. This is demonstrated by the extensive broadcasting and promotion of college sports each year. The NCAA’s revenues from marketing fees display the public’s interest in college sports.<sup>143</sup> Thus, the reasoning in *Gionfriddo* is applicable to college athletics for the same policy reason of public interest. Consequently, the California statutory right of publicity claim cannot stand because the video games fall within the public affairs exception protected by Section 3344(d).

Even if the games do not fall under the “public affairs” exception, this statute is still subject to the limitations of the First Amendment.<sup>144</sup> Because of the First Amendment’s preemptive power, even if these statutory exceptions are not found to be sufficient, the Defendants will be able to show that these video games are protected by the First Amendment to rebut both the statutory and the common law right of publicity claims.

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<sup>139</sup> See *supra* notes 128–31 and accompanying text (discussing the “public affairs” exception to the California right of publicity statute).

<sup>140</sup> *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 310 n.10 (9th Cir. 1992).

<sup>141</sup> 141 Cal. Rptr. 2d 307, 314 (Cal. Ct. App. 2001).

<sup>142</sup> *Id.* at 318–19.

<sup>143</sup> See *supra* Part I (showing NCAA’s revenues from television and marketing).

<sup>144</sup> See *supra* Part II.E.3 (discussing First Amendment preemption).

## B. ELECTRONIC ARTS NCAA VIDEO GAMES ARE PROTECTED BY THE FIRST AMENDMENT

It is well settled that video games are a form of expression generally protected by the First Amendment.<sup>145</sup> However, this does not automatically mean that there is no right of publicity claim with regard to video games. In making this determination, the *Rogers* test and the “transformative” test are used to determine whether the likenesses are so transformed so as to be the defendant’s own expression.<sup>146</sup> This process of deciding whether a work is protected by the First Amendment is a factually intensive process, and as such, is not necessarily appropriate for a motion to dismiss standard.<sup>147</sup> Nevertheless, the Electronic Arts games at issue in the *Likeness Licensing Litigation* pass the *Rogers* test and the “transformative” test. The games at issue are similar to other games previously protected; as such, they are entitled to First Amendment protection from college athletes’ rights of publicity claims.

1. *NCAA Video Games Pass the Rogers Test.* Based on the *Rogers* test, there is no violation of the college athletes’ rights of publicity. This requires a two-part analysis.<sup>148</sup> These games pass the first part of the test because the likenesses of the college athletes have artistic relevance to the underlying work. In *Rogers v. Grimaldi*, the use of the title “Ginger and Fred” was considered artistically relevant because it was chosen not to exploit the real Ginger and Fred, but because it had genuine relevance to the story.<sup>149</sup> Here, the likenesses of the college athletes are not just being used to exploit the athletes; they are being used to create the feeling of being “in the game.” The college athletes are artistically relevant to the overall feel of the game.

The second part of the *Rogers* test is satisfied because the video games do not explicitly mislead as to the source or content of the work. In *Rogers*, the court found that although there was some confusion as to the meaning of the “Ginger and Fred” title, it was not explicitly misleading, and therefore the risk of confusion was outweighed by the danger of suppressing an artistically relevant title.<sup>150</sup> The source of the NCAA games is far less confusing than the situation posed in *Rogers*. The college athletes’ likenesses are arguably used as

<sup>145</sup> See, e.g., *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 958 (9th Cir. 2009); *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 444 F. Supp. 2d 1012, 1039 (C.D. Cal. 2006); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2004) (all holding that video games are entitled to First Amendment protection).

<sup>146</sup> See *supra* notes 39–59 and accompanying text (discussing the *Rogers* test and the “transformative” test, as well as the right of publicity in video games).

<sup>147</sup> *Order on Defendants’ Motions to Dismiss and Electronic Arts’ Anti-Slapp Motion to Strike*, *supra* note 119, at 10.

<sup>148</sup> See *supra* notes 39–46 and accompanying text (discussing the *Rogers* test).

<sup>149</sup> *Rogers v. Grimaldi*, 875 F.2d 994, 1001 (2d Cir. 1989). This part of the *Rogers* Court analysis pertained specifically to the Lanham Act, but was later qualified as the same reason for dismissal of the right of publicity claim.

<sup>150</sup> *Id.* at 1001.

virtual characters in the video games. There are hundreds of virtual characters in the games that are only associated with a college team in certain game modes. Thus, there is likely little chance these games mislead purchasers to believe that the college athletes are the source of the content. For these reasons, these video games pass the *Rogers* test and are entitled to protection from the *Likeness Licensing Litigation* right of publicity claims under the First Amendment.

2. *NCAA Video Games Pass the "Transformative" Test.* For the same reasons that the court in *Winter v. DC Comics* decided that the comic books were protected by the First Amendment, the NCAA football and basketball game characters are "transformative" because they are not the "very sum and substance" of the work in question.<sup>151</sup> The NCAA football and basketball video games use jerseys and school information that are properly licensed. The games also have modes that allow a player created by the user to evolve in skill and ability as they continue to play the game with greater frequency.<sup>152</sup> These are elements that do not involve or concern the likenesses of any college athletes, yet are elements that constitute a significant part of the video games. Because the college athletes' likenesses are only a part of the "raw materials," not the "sum and substance" of the video games in question, the video games are expressive works protected by the First Amendment.<sup>153</sup>

3. *NCAA Sports Video Games are Similar to Other Protected Games.* The Electronic Arts games fall in line with other video games that have been protected as expressive works under the First Amendment. The holding in *Kirby v. Sega of America, Inc.* was a result of the court's finding that the character was more than just a literal depiction of the plaintiff.<sup>154</sup> The game character in *Kirby* was similar to the plaintiff in some respects, but there were also a number of differences between the character and the plaintiff. The court noted that the game character wore different types of clothing and further specified differences in physical characteristics.<sup>155</sup> Similarly, the virtual characters in the NCAA games are more than just literal depictions of college athletes. In the majority of the game modes, the characters can be altered and morphed during the course of play to be completely different from any actual college athlete. For example, in "EA NCAA Football 2010" the user can play in the "Road to Glory" mode. In this mode, the user creates a virtual player that starts his career as a high school senior, and then is recruited and changes through his college career as the user plays the game.<sup>156</sup> Thus, some of the virtual players

<sup>151</sup> See *supra* notes 51–54 and accompanying text (discussing *Winter*).

<sup>152</sup> Electronic Arts Motion to Dismiss, *supra* note 117, at 11.

<sup>153</sup> See *Winter v. DC Comics*, 69 P.3d 473, 477–78 (Cal. 2003) (discussing what constitutes "raw materials" and "sum and substance" under the "transformative" test).

<sup>154</sup> 50 Cal. Rptr. 3d 607 (Cal. Ct. App. 2006). See *supra* notes 56–58 and accompanying text (discussing the *Kirby* holding).

<sup>155</sup> *Id.* at 613.

<sup>156</sup> NCAA Football 2010 'Road to Glory Mode' trailer HD, <http://gamevideos.1up.com/video/id/25375> (last visited Aug. 12, 2010).

are more than literal depictions of the athletes, while others are not associated with any actual college athlete at all.

In *Romantics v. Activision Publishing, Inc.*, the court decided that one of the games in the *Guitar Hero* series was protected by the First Amendment from right of publicity claims.<sup>157</sup> The plaintiffs argued that the game did not involve a complex story line because there was no script, story board, character development, or dialogue.<sup>158</sup> A similar argument might be made about the Electronic Arts games because they allow players to pick teams and play football, just like the *Guitar Hero* games allow players to pick a character and song to play on the guitar. However, just as this argument failed in *Romantics*, it must fail here because the games allow players to customize their own play experiences by picking teams and locations that are properly licensed, and by creating teams that develop skills as the game is played.<sup>159</sup> The *Romantics* court held that these customizing capabilities were sufficient to show creativity and classify a game as an expressive work entitled to First Amendment protection.<sup>160</sup> Thus, the intricacies of the Electronic Arts games should afford it the same First Amendment protection.

#### C. COLLEGE ATHLETES HAVE CONTRACTUALLY RELEASED THEIR RIGHT OF PUBLICITY

College athletes that are on athletic scholarship at their playing institution have an implicit contractual relationship with the NCAA to adhere to the Bylaws.<sup>161</sup> The Bylaws make it clear that NCAA college athletes cannot receive any form of compensation for the use of their likenesses.<sup>162</sup> Thus, it follows that college athletes have, in exchange for eligibility to play NCAA sports, given up their right of publicity for the duration of their college sports careers.

Some argue that these scholarship contracts, which restrict the rights of college athletes, are unconscionable contracts of adhesion.<sup>163</sup> However, this view ignores the fact that players with the skill and ability to play at the professional level, generally most of the athletes that have lucrative college careers, have the option of completely forgoing college athletics and signing with a professional league.<sup>164</sup> It also does not consider that many college

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<sup>157</sup> 574 F. Supp. 2d 758, 765 (E.D. Mich. 2008).

<sup>158</sup> *Id.* at 766 (holding that the customizable game features were sufficiently expressive to warrant First Amendment protection).

<sup>159</sup> Electronic Arts Motion to Dismiss, *supra* note 117, at 10.

<sup>160</sup> *Romantics*, 574 F. Supp. 2d at 766.

<sup>161</sup> *See supra* Part II.C.

<sup>162</sup> *See supra* Part II.B.

<sup>163</sup> *See* Hanlon & Yasser, *supra* note 8, at 294 (stating that athletes have no choice of terms and are compelled to sign these “take-it-or-leave-it” scholarships).

<sup>164</sup> *See* Kaburakis, *supra* note 75, at 20 (discussing athletes’ alternatives to playing college athletics before entering domestic professional sports).

athletes arguably exploit the college scholarship system because they do not fulfill their four-year commitment to their school, choosing instead to terminate their NCAA eligibility to become professional as soon as they are able.<sup>165</sup>

Based on these considerations, college scholarship athletes choose to be bound by the amateurism rules of the NCAA. They are essentially estopped from claiming that they are entitled to compensation because they sign these contracts knowing that they will receive only scholarships.<sup>166</sup> These athletes give up their right of publicity to their school, and implicitly to the NCAA as the governing body of all of its member schools, so they can make no right of publicity claims for the use of their likenesses.<sup>167</sup> These scholarship contracts act as releases of the NCAA college athletes' right of publicity to the NCAA and its member schools.

#### D. PROBLEMS WITH PROPOSED COMPENSATION SCHEMES

The *Likeness Licensing Litigation* plaintiffs seek monetary damages for the alleged violation of their rights of publicity.<sup>168</sup> If the plaintiffs were to prevail in the *Likeness Licensing Litigation*, the court would have to deal with how college athletes should be compensated for the use of their rights of publicity. This presents the complicated issue of college athlete compensation and all of the policy considerations within.

Scholars have suggested numerous forms of compensation for college athletes.<sup>169</sup> All of these pay structures fail for similar reasons. First, compensating college athletes would breed tax and workers compensation issues for schools and athletes alike.<sup>170</sup> Each compensation structure also carries the burden of high transaction costs and the destruction of amateurism in college athletics.

NCAA Division I has 388 member schools<sup>171</sup> that sponsor 6,272 teams.<sup>172</sup> When college athlete compensation is considered, it is important to keep in

<sup>165</sup> See *id.* (discussing the debate over whether amateurism benefits talented athletes or NCAA teams).

<sup>166</sup> See Cozzillo, *supra* note 79, at 1356 (discussing promissory estoppel in the letter of intent as a way of inferring promises implicit in the letter).

<sup>167</sup> See Kaburakis, *supra* note 75, at 20 (expressing that college athletes may have assigned their rights of publicity to schools through their scholarships).

<sup>168</sup> See *supra* Part II.E.1.

<sup>169</sup> See *supra* Part II.D.

<sup>170</sup> See Thomas R. Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal & Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 70–71, 73–75 (2000) (discussing the workers compensation and taxation issues that arise with the suggested compensation of college athletes).

<sup>171</sup> Composition & Sport Sponsorship of the NCAA, [http://www.ncaa.org/wps/ncaa?Key=/ncaa/NCAA/About%20The%20NCAA/Membership/membership\\_breakdown.html](http://www.ncaa.org/wps/ncaa?Key=/ncaa/NCAA/About%20The%20NCAA/Membership/membership_breakdown.html) (last visited Aug. 12, 2010).

<sup>172</sup> Division I APR Data Continue to Reveal Academic Improvement, Some Concerns (2008), <http://www.ncaa.org/wps/ncaa?ContentID=330> (last visited Aug. 12, 2010).



mind the staggering number of individuals involved in this discussion. Some have suggested trusts similar to those formed for Olympic athletes.<sup>173</sup> These are individual trusts, and while there are thousands of Olympic athletes,<sup>174</sup> management of these trusts is more realistic because there are multiple National Olympic Associations (NOAs) to manage the trusts. However, the NCAA is the sole organization that oversees these thousands of college athletes, which would make the management of a trust for each college athlete much more onerous. Even if one large trust is created for all college athletes, there would be thousands of potential college athlete beneficiaries, so the process would require extensive reporting to determine amounts of compensation for each athlete under the trust.

Another major problem with college athlete compensation is the opportunity cost of distributing payments to college athletes rather than member schools. The cost of implementing college athlete compensation for Division I institutions would be an estimated \$30 million annually.<sup>175</sup> Compounding the burden that any form of compensation might affect, many schools are facing treacherous financial times and are being forced to cut budgets, and sometimes entire sports.<sup>176</sup> Currently, this estimated \$30 million goes back to the schools to fund non-revenue producing sports and athletic scholarships.<sup>177</sup> Taking this money away from schools to give it to college athletes does more harm than good. It gives college athletes a small amount of money, but drastically shrinks the ability of schools to create more scholarships and sports for students to play.<sup>178</sup> Thus, college athlete compensation is not something that schools can afford.

#### IV. CONCLUSION: COLLEGE ATHLETES LOSE THE BATTLE AND THE WAR

The line between professional and intercollegiate sports is finer than it has ever been. The battle over the college athlete's right of publicity in video games represents one of the gray areas that clouds the demarcation. However, the outcome of the *Likeness Licensing Litigation* will be one that helps retain the amateurism of intercollegiate athletics by preventing college athletes from being

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<sup>173</sup> See *supra* notes 87–90 and accompanying text (discussing the IOC trust structure).

<sup>174</sup> NOC entry forms received (Aug. 1, 2008), <http://en.beijing2008.cn/news/official/preparation/n214496035.shtml>.

<sup>175</sup> See Hurst & Pressly, *supra* note 170, at 76 (estimating costs based on a monthly stipend of \$300 for athletes, with individual budgets estimated at \$400,000 annually).

<sup>176</sup> See *id.* at 76–77 (discussing how many college athletic programs operate at a loss). See also Mark Schlabach, *ADs Eye Level Financial Field*, ESPN.COM, July 17, 2009, [http://sports.espn.go.com/ncaa/columns/story?columnist=schlabach\\_mark&id=4333252](http://sports.espn.go.com/ncaa/columns/story?columnist=schlabach_mark&id=4333252) (discussing the financial troubles of college athletics programs in 2009).

<sup>177</sup> See Hurst & Pressly, *supra* note 170, at 76–77.

<sup>178</sup> *Id.* (noting that requiring schools to compensate college athletes would force many schools to eliminate non-revenue producing sports).

compensated for the use of their likenesses. This is the correct result for a number of reasons.

Video games are inherently expressive works that are entitled to First Amendment protection from right of publicity claims. Assuming that the college athlete's likeness is actually appropriated, the college sports video games contain enough creative elements that transcend mere imitation to warrant protection under the First Amendment.

The incorporation of NCAA amateurism rules into college scholarship contracts further warrants the dismissal of the *Likeness Licensing Litigation*. College athletes choose to participate in intercollegiate athletics. The athletes sign contracts to play a sport for a school and receive tuition-free education in return. These contracts incorporate the Bylaws that prohibit college athletes from receiving compensation. This prohibition is known to prospective college athletes when they elect to participate in intercollegiate athletics. Awarding compensation for college athletes' rights of publicity would contradict the implicit terms of the scholarship contracts signed by these individuals.

Finally, in terms of practicality, the interests of all are best served by denying college athletes individual compensation. All proposed compensation schemes entail large management and expense burdens that schools and the NCAA would have to bear. These resources, which would be exhausted providing meager compensation to each one of the thousands of college athletes, are best put to use creating additional educational and intercollegiate athletic opportunities for a larger number of athletes. The *Likeness Licensing Litigation* will mark a milestone in the college athlete compensation war. It should reinforce the rule that college athletes are not entitled to compensation for the use of their likenesses because they are, after all, amateur, not professional, athletes.

