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AUNT JEMIMA'S FINAL STAND, BUT ELVIS HAS NOT LEFT THE BUILDING: IN SEARCH OF MOORINGS FOR THE RIGHT OF PUBLICITY AND THE LANDES-POSNER SAFE HARBOR

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ABSTRACT

The right of publicity protects against the appropriation of an individual's name and likeness for purely commercial purposes. The right was first formally recognized under the rubric of the right of publicity in 1953. The cause of action is now characterized by its ill-defined legal parameters both in terms of its scope of coverage and whether, and for what period, the right survives post-mortem. Courts and state legislatures have produced a patchwork of widely divergent approaches to these issues and have struggled to define the lines of demarcation between the right of publicity and the First Amendment right to freely publish that which is expressive, newsworthy, and of legitimate public interest.

The haphazard development of the right has been fueled by the explosion of "celebrityhood" and the rise of a myriad of media outlets where public recognition is frequently a fleeting commodity. Justifications for the recognition of the right of publicity have been several and varied, ranging from economic apologies to the philosophical concept of self-autonomy. This article espouses a unified justification for recognition of the right and reviews the recent landmark decisions defining the parameters of First Amendment protection for nonconsensual, uncompensated use of name and likeness.

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I. INTRODUCTION

The title to this article bespeaks to the explosion of claims, over the past four decades, under the rubric of "the right of publicity."[1] America has become a nation obsessed with celebrities.[2] Through much of the twentieth century, the attainment of celebrity status was limited to the mediums of print, radio, and cinema. Under these conditions, individuals who would attain celebrity status faced a far more difficult climb when contrasted to the present

[1] Hunter v. Pepsico, Inc., No. 14 C 06011, slip op. at 1 (N.D. Ill. Feb. 18, 2015), *aff'd*, No. 15-1424 (7th Cir. Nov. 6, 2015) (order dismissing lawsuit brought by alleged relatives of Anna Short Harrington (Aunt Jemima) seeking recovery in excess of $2 billion for the misappropriation of her likeness by Quaker Oats and others); Presley's Estate v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); Presley v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987) (decisions concluding that the right to commercially utilize the name and likeness of Elvis Presley was a transferable and descendible right that survived Presley's death). Matthew Belloni, *Clint Eastwood Sues Furniture Company for Selling 'Eastwood' Chairs*, THE HOLLYWOOD REPORTER (Apr. 7, 2012), http://www.hollywoodreporter.com/thr-esq/clint-eastwood-lawsuit-inmod-furniture-company-309347 (reporting Clint Eastwood's filing of a lawsuit in a California superior court against a furniture company and a website alleging the commercial appropriation of Eastwood's identity and persona in its marketing of furniture); *Arnold Schwarzenegger Files $10 Million Lawsuit,* COURTHOUSE NEWS SERVICE (May 13, 2014) http://www.courthousenews.com/2014/05/13/67850.htm (reporting Arnold Schwarzenegger's filing of a lawsuit in a California superior court against Arnold Nutrition Group and others for misappropriating his name as purported endorser of fitness and nutritional products).

[2] *See, e.g.*, Chrysler Sumner, *Is Celebrity Obsession Just Another Way Americans Detach From Their Lives?*, OPPOSING VIEWS (Mar. 17, 2015), http://www.opposingviews.com/i/columns/america-s-celebrity-obsession-getting-out-control (analyzing the strong trend towards escapism among Americans through preoccupation with the life of celebrities); Keturah Gray, *Celebrity Worship Syndrome Abounds*, ABC NEWS (Sept. 23, 2014), http://abcnews.go.com/ Entertainment/story?id=101029 (discussing the identification by psychologist of "celebrity worship syndrome"); Carlin Flora, *Seeing by Starlight: Celebrity Obsession*, PSYCHOLOGY TODAY (July 1, 2004), https://www.psychologytoday.com/articles/200407/seeing-starlight-celebrity-obsession (reviewing psychological studies on Americans' preoccupation with celebrity).

qualifications for national or international recognition.[3] The previous limitations for entry into the pantheon of celebrityhood have been lifted with the explosion of multimedia that operates in a

[3] *See, e.g.*, RICHARD SCHICKEL, INTIMATE STRANGER: THE CULTURE OF CELEBRITY (1985) (tracing the history of celebrity in western culture and its linkage to the history of communication technology). Graeme Turner, *The Mass Production of Celebrity: 'Celtoids', Realty TV and the 'Demonic Turn'*, 9(2) INT'L J. CULTURAL STUDIES, 153 (2006) (analyzing the explosion of celebrity and the shrinking distance between television and reality). Admittedly, some of those who have gained celebrity status did so through infamous accomplishments. *See* JONATHAN EIG, GET CAPONE, 270-73 (2010) (observing the widespread newspaper coverage of Chicago mobster Al Capone). *See also* BILL JAMES, POPULAR CRIME REFLECTIONS ON THE CELEBRATION OF VIOLENCE (2011) (tracing the cultural influence of high profile criminal cases such as Lizzie Borden, the Lindbergh baby kidnapping, and O.J. Simpson).

In a 2012 decision issued by the United States District Court for the Central District of California, the Court in a case involving postmortem use of Albert Einstein's image for commercial purposes, cogently articulated the conflict created by the explosion of media and the rights of privacy and publicity in the following terms:

> "In addition to First Amendment implications, there is another consideration. In the 57 years since Albert Einstein died, the means of communication have increased and so has the proclivity of people to use them frequently. Journalists, academics and politicians frequently issue pronouncements about the impact on society, both in the United States and around the globe, of the dizzying explosion in the tools of communication. New devices and platforms have been developed, including smart phones, personal computers, social networks, email, Twitter, blogs, etc. These technologies have caused a swift and dramatic, but still developing, impact on ordinary life. It has become a truism that their speed, their accessibility, and their popularity appear to have changed social norms regarding privacy and public expression. But it is not yet clear what this should mean for the protection of such rights as the right of privacy, the right of expression and the right of publicity."

Hebrew Univ. of Jerusalem v. Gen. Motors, 903 F. Supp.2d 932, 941 (C.D. Cal. 2012).

myriad of venues on a twenty-four hour cycle.[4] In tandem with the burgeoning number of media outlets, the class of individuals deemed eligible for recognition as nationally celebrated personalities has grown at a frenzied pace. America's anointing of celebrity status is no longer generally limited by the parameters of Hollywood or extraordinary achievement in fields such as politics, sports, literature, or exploration.[5] Rather, celebrities of the twenty-first century run the gamut of occupations and life experiences from the makers of duck calls[6] to those whose sole accomplish-

[4] *See, e.g.*, FREDERICK LEVY, 15 MINUTES OF FAME: BECOMING A STAR IN THE YOUTUBE REVOLUTION (2008).

[5] *See* Tomas Charmorro-Premuzic, *Kim Kardashian: Why We Love Her and the Psychology of Celebrity Worship*, THE GUARDIAN, http://www.theguardian.com/media-network/media-network-blog/2014/aug/14/kim-kardashian-psychology-celebrity-worship-social-media (last visited Aug. 14, 2015). The journalist sagely notes the divorce of "celebrity" from achievement in the following terms:

> "Celebrities have been around since Alexander the Great, whose face became a public emblem reproduced in coins, tableware, and jewelry, even before his death. The difference is that the contemporary celebrity is not necessarily associated with any form of talent, achievement, or power. In other words, famous people have always been celebrated, but the last decade has seen an unprecedented rise of the empty celebrity cult, that is, our tendency to worship people just because they are famous, without any regard for what they are famous for."

Id. The words of Newton N. Minon, head of the FCC, were more than prophetic when over 50 years ago be observed – "But when television is bad, nothing is worse… I can assure you that you will observe a vast wasteland." Newton N. Minon, Address to the Nat'l Assoc. of Broadcasters: Television and the Public Interest (May 9, 1961).

[6] *See* Ariel Miller, *The Construction of Southern Identity Through Reality TV: A Content Analysis of Here Comes Honey Boo, Duck Dynasty and Buckwild*, 4 ELON J. OF UNDERGRADUATE RESEARCH IN COMMC'NS 1 (No. 2, 2013) (examining the portrayal of southern culture in reality television).

ment is the securing of a role on a reality television where devotees may follow everyday events on an hourly or daily basis.[7]

With the growing ambit of celebrityhood has been the ever expanding recognition that the luminary's name and likeness has potentially great commercial value in the field of product endorsement or even in the mere sale of the celebrity's likeness.[8] The icon's commercial value is not limited to appropriation of his name or likeness, but rather, has expanded to include popularized phrases of the individual, characteristics associated with the personality, and items closely associated with the individual.[9] The

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[7] *See, e.g.*, THE TRUMAN SHOW (Paramount Pictures 1998) (social science themed fictional motion picture concerning an individual who unknowingly is living his entire life in a reality television show). *See also Big Brother*, http://www.cbs.com/shows/big_brother/news/1002621/ (last viewed Mar. 17, 2015) (online advertisement for the CBS reality series "Big Brother" advertising a 24/7 live feed feature).

[8] W. Anson, L. Lodes, & D. Noble, *Valuing a Celebrity's Right of Publicity*, ENTM'T LAW & FINANCE, http://www.lawjournalnewsletters.com/issues/ljn_entertainment/28_2/news/157756-1.html (last visited Feb. 2013) (reviewing the mandatory valuation of rights of publicity for purposes of protecting intellectual property with a focus on 2012 Olympic 100 and 200 meter gold medalist Usain Bolt and National Basketball Association MVP Derrick Rose).

[9] *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098-1011 (9th Cir. 1992) (punitive damage award in excess of $2,000,000,000 based upon radio commercial's misappropriation of a singer's voice through deliberate imitation); White v. Samsung Elec. Am., 971 F.2d 1395 (9th Cir. 1992) (reversing trial court's dismissal of right of publicity claims ultimately resulting in a $400,000 damage award to Vanna White of the television show Wheel of Fortune based upon Samsung's misappropriation of her "likeness" in creating an advertisement utilizing a robot, dressed in a blond wig, gown, and jewelry, posing next to a Wheel of Fortune-like game board); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (damage award to singer Bette Midler based upon television commercial's misappropriation of her voice by deliberate imitation); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831(6th Cir. 1983) (misappropriation of Johnny Carson's introductory phrase "Here's Johnny" in advertisements by a portable toilet company); Motsenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (damages awarded for utilization in advertisement of racing car bearing distinctive characteristics of the car driven by racing star Motsenbacher despite no use of his personal image in the advertisement). The Restatement Third of Unfair Competition adopts this expanded view

commercial value of the media personality's name and likeness continues, and potentially increases, with death.[10]

II. A BRIEF HISTORY OF "THE RIGHT OF PUBLICITY"

A. Recent Expansion of the Right of Publicity

Predictably, the growth of the cult of the celebrity and the expanding recognition of the commercial value of one's name and likeness has resulted in the evolution of a field of law designed to allow the media personality to personally control the commercial value of his name and likeness.[11] Moreover, numerous state legislatures, coupled with groundbreaking judicially-created remedies, have instituted legal mechanisms by which these commercial rights are deemed descendible and capable of intervivos or post-mortem transfer or licensing.[12] Thus, the personality enjoys the benefit of

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of the right of publicity to encompass more than the mere use of the name or likeness of the individual in noting that a wrongful appropriation encompasses nonconsensual use of "the person's name, likeness, *or other indicia of identity*…" RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (emphasis added).

[10]Dorothy Pomerantz, *The Top-Earning Dead Celebrities*, FORBES, http://www.forbes.com/ sites/dorothypomerantz/2011/10/25/the-top-earning-dead-celebrities/ (last visited Mar. 17, 2015) (observing that in the 12 month period, prior to the article, the estate of Michael Jackson had brought in $170 million). The article lists the top fifteen earning deceased celebrity estates including, for example, those of Elvis Presley, Marilyn Monroe, Elizabeth Taylor, and "Peanuts" creator Charles Schulz.

[11]*See generally,* JAMES MCCARTHY, THE RIGHT OF PUBLICITY AND PRIVACY (2d ed. 2014) [hereinafter MCCARTHY, PUBLICITY] (recognized authoritative work on the evolution and law governing the right of publicity and the right of privacy).

[12] *See, e.g.,* Price v. Hal Roach Studios, 400 F. Supp. 836 (S.D.N.Y. 1975) (one of the earliest decisions recognizing the of the right of publicity involving the comedy team of Stan Laurel and Oliver Hardy). The right of publicity, defined by state law, has subsequently been recognized in numerous states as being a transferable and descendible right either through legislation or by common law creation. *See, e.g.,* CAL CIV. CODE §3344.1(f)(1) & (g) (Westlaw 2000) (recognizing 70-year post-mortem protection for the right of publicity with requirement of registration of the individual's name as a prerequisite to recovery of damages); TEX. PROP. CODE ANN. §26.001 e*t. seq.* (Westlaw 2012) (recognizing a transferable right of publicity with a 50-year post-mortem exclusivity of use

passing on the fruits of celebrityhood to his progeny or other heirs.[13]

With the exponential growth in media outlets for the potential appropriation of the celebrity's name and likeness, there has been a corresponding explosion of litigation involving the assertion of right of publicity claims.[14] Thus, the last year has witnessed a lawsuit in which the purported relatives of Aunt Jemima filed suit against Quaker Oats seeking $2 billion dollars in compensation, plus a share of future revenue from sales of products bearing her likeness.[15]

B. The Birth and Growth of the Right of Publicity

The right to control the appropriation of one's name or likeness can be traced back to as early as Queen Victoria's attempts in the nineteenth century to limit the creation and dissemi-

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prior to the name entering the public domain). Nineteen states have enacted legislation recognizing the right of publicity via statute while 28 states recognize the right via common law. Michael Faber, *Right of Publicity*, http://rightofpublicity.com/statutes (last viewed Mar. 17, 2015) [hereinafter Faber, *Publicity*]. Professor Faber of the University of Indiana McKinney School of Law has created a website dedicated to tracing the origin and tracking legal development and recent decisions concerning the right of publicity.

[13] The recognition of the discernibility of the right of publicity conversely allows the celebrity to prohibit the use of his name, likeness, and image post-mortem. Most recently, Robin Williams, through creation of a trust, bequeathed rights to his name and likeness to a charitable organization. Moreover, Williams qualified the bequeathment with the restriction that no authorized endorsements utilizing Williams can be made until at least August 11, 2039—25 years after his death. Eriq Gardner, *Robin Williams Restricted Exploitation of His Image for 25 Years After Death*, THE HOLLYWOOD REPORTER (Mar. 30, 2015), http://www.hollywoodreporter.com/thr-esq/robin-williams-restricted-exploitation-his-785292.

[14] *See* Eriq Gardner, *What's in a Name?,* ABA JOURNAL (Nov. 1, 2010), http://www.abajournal.com/ magazine/article/whats_in_a_name (observing the explosive growth of commercial appropriation litigation).

[15] Hunter v. Pepsico, Inc., No. 14 C 06011, (N.D. Ill. Feb. 18, 2015), *aff'd*, No. 15-1424 (7th Cir. Nov. 6, 2015) (case did not survive a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim).

nation of prints of her and the immediate family's portraits.[16] The contours and nature of the legal right of the individual to protect commercial appropriation of her name and likeness initially grew slowly and with ill-defined parameters.[17] Originally, the right to protect against commercial appropriation of one's name and likeness was deemed to be an element of the right of privacy or as otherwise stated, the "right to be left alone." This right of privacy first gained general recognition with a renowned law review article co-authored by Louis Brandeis and Samuel Warren in 1890.[18] However, during the mid-twentieth century, courts commenced to distinguish the "right of privacy" from the right to protect against

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[16] *See* George Smith, *The Extent of the Protection of the Individual's Personality Against Commercial Use: Towards a New Property Right,* 54 S.C. LAW REV. 1, 5 & n.19 (2002) (citing Prince Albert v. Strange, 64 Eng. Rep. 293 (1849)).

[17] *Compare* Haelan Labs, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (recognizing the right of professional baseball players to assign the right to utilize their likeness to a chosen baseball card company), *with* Paulsen v. Personality Posters, 59 Misc.2d 444, 448, (N.Y. Sup. Ct. 1968) (tracing the history of New York courts' refusal to extend the statutory right of privacy to redress commercial appropriation of one's likeness); O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1942) (refusing to recognize a cause of action for All-American football player Davey O'Brien based upon Pabst Blue Ribbon's nonconsensual use of his likeness, without consent, on a beer calendar). Much confusion in the development of the law on the right of publicity is attributable to the propensity of some courts to continue to treat the right of publicity as rooted in the right of privacy as opposed to its recognition as an economic right. Jean-Paul Jassy and Kevin Vick, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMM. LAW 14, 14 & n.8 (2011-2012) (citing McBee v. Delica Co., Ltd., Civ. No. 02-198-P.C., 2004 WL 2634465, at *3 (D. Me. Aug. 19, 2004)) ("the right of publicity flows from the right of privacy"). Recent litigation involving the right of publicity reflects the problematic attempted synthesis of the explosion of the cult of the personality with an all-encompassing media coverage, and the perfecting of video replications of deceased celebrities. *See, e.g.*, Douglas G. Baird, *Does Bogart Still Get Scale? Rights of Publicity in the Digital Age*, John M. Olin Program Law and Economics Working Paper No. 120 (2001), *available at* http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1177&context=law_and_economics [hereinafter *Bogart Gets Scale*] (contending that the ability to produce digitalized reproduction of celebrities should not open uncompensated use in movies and television).

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

the appropriation of one's name and likeness by commercial interests:

> "[A] man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth. This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures."[19]

[19] Haelan Labs, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

Thus, this distinct legal cause of action designed to redress commercial appropriation of one's name or likeness was first labeled "the right of publicity" in a decision of the United States Third Circuit Court of Appeals published in 1953.[20] The right of publicity gained further refinement with a 1960 law review article in which William Prosser identified four types of privacy torts and distinguished "the right to be left alone" from the right to protect against the commercial appropriation of one's name and likeness.[21]

Commencing in the 1970's, numerous states, pioneered by California,[22] have in rapid order judicially and legislatively provided legal protection for the right of publicity.[23] Many states have enacted legislation recognizing the right of publicity as a right that survives the individual's death and is both a transferable and descendible right.[24]

III. FIRST AMENDMENT LIMITATIONS ON THE RIGHT OF PUBLICITY

A. The Hazy Line of First Amendment Protection

From the time of its recognition, the right of publicity has enjoyed an uneasy relationship with the freedom of speech and expression guaranteed by the First Amendment.[25] The natural

[20] *Id.*

[21] William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) [hereinafter Prosser, *Privacy*] (Prosser defined four distinct privacy torts including: (i) intrusion upon seclusion; (ii) public disclosure of embarrassing facts; (iii) false light; and (iv) commercial appropriation of name or likeness). *Accord* Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954). Nimmer's article was similarly groundbreaking in its articulation of the right of publicity as a distinct cause of action created for the protection of the commercial value of name and likeness.

[22] *See* Faber, *Publicity, supra* note 12.

[23] *Id.*

[24] *See* Faber, *Publicity*, *supra* note 12 and accompanying footnote text (comprehensively providing the text of statutes and judicial decisions extending the right post-mortem).

[25] *See*, *e.g.,* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 577 (1977). The *Zacchini* case is the only time the United States Supreme Court has specifi-

tension between the right of publicity and these First Amendment protections has continued on to the present day. One recent decision, defining the parameters of the right of publicity described the First Amendment limitation on the cause of action in the following terms:

> "The Supreme Court in *Procunier v. Martinez* noted that the protection of free speech serves the needs 'of the human spirit — a spirit that demands self-expression,' adding that '[s]uch expression is an integral part of the development of ideas and a sense of identity.'[26] Suppressing such expression, therefore, is tantamount to rejecting "the basic human desire for recognition and [would] affront the individual's worth and dignity."[27] Indeed, First Amendment protections have been held applicable to not only political speech, but to 'entertainment [including, but certainly not limited to] motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works.'[28] Thus, '[t]he breadth of this protection evinces recognition that freedom of expression is not only essential to check tyranny and foster self-government but also intrinsic to individual liberty and dignity and instrumental in society's search for

cally addressed the right of publicity and its relationship to the First Amendment. *See infra* notes 81 through 88 and accompanying text.

[26] Procunier v. Martinez, 416 U.S. 396, 427 (1974).

[27] *Id.*

[28] Tacynec v. City of Phila., 687 F.2d 793, 796 (3d Cir. 1982).

> truth.'[29] 'The interest in safeguarding the integrity of these protections therefore weighs heavily in any balancing inquiry.'"[30]

Thus, courts and legislatures have circumscribed the right of publicity by recognizing First Amendment limitations on claims for commercial appropriation. These First Amendment limitations most notably include prohibiting the celebrity from claiming a commercial appropriation when his name or likeness is employed in a newspaper or magazine article,[31] or when incorporated into an expressive work of art, literature, or film constituting something more than a mere naked use of the name or likeness for commercial gain.[32] While universally recognized that the right of publicity

[29] Dun & Brad-Street, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 787 (1985) (Brennan, J., dissenting).

[30] Hart v. Elec. Arts, Inc., 717 F.3d 141, 149-50 (3d Cir. 2013).

[31] First Amendment's restrictions on the right of publicity, with respect to dissemination of information concerning a celebrity, has resulted in numerous decisions concluding that commercial misappropriation claims were precluded in the circumstance of the news or entertainment media's employment of the individual's name or likeness in a publication qualifying as the reporting of newsworthy events. *See, e.g.*, New Kids on the Block v. News Am. Publ'g Inc., 971 F.2d 302, 309-10 (9th Cir. 1992) (newspaper deemed to have First Amendment protection in commercial appropriation case in which the newspaper used New Kids' name in 900-number telephone survey to determine most popular band member); Lisby v. Cincinnati Monthly Publ'g Corp., 904 F.2d 707 (6th Cir. 1990) (utilization of plaintiff's photograph in a publication with six wedding dolls was not a commercial appropriation); Nelson v. Maine Times, 373 A.2d 1221 (Me. 1977) (newspaper's publication of an Indian boy in a pastoral setting did not constitute an invasion of privacy); The Restatement Third of Unfair Competition describes these First Amendment exemptions from claims of commercial appropriation of one's name or likeness in the following terms: "use 'for purposes of trade' does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses." RESTATEMENT (THIRD) OF UNFAIR COMPETITION §47 (1995).

[32] *See* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003) (artist's creation and sale of portrait of Tiger Woods not deemed a commercial appropriation because of the transformative nature of the work in its inclusion of other legendary golfers in the background and the implication that Woods would join

is limited by the First Amendment with regard to publications that are newsworthy or an original artistic expression, the legal decisions seeking to apply the constitutional limitation are, to say the least, varied and conflicting.[33]

B. The Supreme Court Decision in *Zacchini v. Scripps-Howard Broadcasting Co.*

Despite the numerous conflicting lower court decisions, the Supreme Court of the United States has on only one occasion addressed the issue of First Amendment limitations on the right of publicity.[34] In *Zacchini v. Scripps-Howard Broadcasting Co.*, the underlying dispute arose out of the performance at an Ohio county fair of a human cannonball act in which Hugo Zacchini was shot some 200 feet into a net.[35] A local television station, without the performer's consent, filmed Zacchini's entire 15 second act and

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this "revered group"); Mine O'Mine, Inc. v. Calmese, No. 2:10-CV-00043-KJD-PAL, 2011 WL 2728390, *8-9 (D.Nev. July 12, 2011) (creation of cartoon character "Shaqtus" constituting half-human, half-cactus depiction of Shaquille O'Neal was sufficiently transformative as to not constitute an appropriation of the likeness of O'Neal); Winter v. D.C. Comics, 69 P.3d 473 (Cal. 2003) (comic book's depiction of renowned musicians Johnny and Edgar Winter was not a commercial appropriation of their person since the characters were transformative characters as half-worm, half-human offspring). *Cf.* Comedy III Prod., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 810 (Cal. 2001) (sale of t-shirts with a charcoal drawing of the Three Stooges constituted a commercial appropriation of name and likeness as the drawings were not artistically expressive, but rather, were unadorned depictions of the individuals).

[33] *See infra* notes 53 through 69 with authority therein cited and accompanying text (reviewing various judicial tests seeking to draw lines of demarcation between the First Amendment right of expression and the right of publicity). One commentator in describing the ill-defined lines of demarcation drawn in cases implicating right of publicity claims and defenses based on the First Amendment right of freedom of speech and expression has aptly summarized that "[t]he form of speech protected under the First Amendment in right of publicity cases is a mystery awaiting a solution." Shubba Ghosh, *On Bobbling Heads, Paparazzi and Justice Hugo Black*, 45 SANTA CLARA L. REV. 617, 635 (2005).

[34] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

[35] *See id.* at 563.

broadcasted it on the nightly newscast.[36] Zacchini accordingly brought an action for violation of his right of publicity with the Ohio Supreme Court concluding that the claim was barred by the television station's First Amendment right to broadcast the act, without compensation to Zacchini, as a newsworthy event of public interest.[37] In a 5-4 decision, the United States Supreme Court reversed the Ohio Supreme Court's decision, concluding that the First Amendment's protection did not bar Zacchini's claim for misappropriation of the act.[38] Justice Byron White's majority opinion readily acknowledged the First Amendment's protection for the dissemination of newsworthy events, but concluded that this constitutional shield was trumped by Zacchini's right to enjoy the fruits of his vocational labor and the valuable economic inducement to expend the time and labor necessary for the creation of such entertainment.[39]

C. Recent Pronouncements on the Right of Publicity and Its First Amendment Restrictions

The parameters of the First Amendment's protection for works that purport to be artistic or expressive in nature have been thoroughly examined in the last four years through a series of lawsuits brought by former college and professional football and basketball players utilized in EA Sports video games. The EA Sports video games are characterized by the realism with which they portray hundreds of identifiable former players in the video creations of sporting events.[40]

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[36] *Id.* at 563-564.
[37] *See generally* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).
[38] *Id.* at 576-79.
[39] *Id.* at 576-579. The critical texts of Judge White's opinion with respect to the economic interests of Zacchini are hereafter quoted at length. *See infra* notes 42-43.
[40] *Hart*, 717 F.3d 141 at 146 (3rd Cir. 2013); Keller v. Elec. Arts, Inc., 724 F.3d 1268, 1271 (9th Cir. 2013)/ *See generally*, O'Bannon v. Nat. Collegiate Athletic Assoc., 7 F.Supp.3d 955 (N.D. Cal.); *see also* Davis v. Elec. Inc., 775 F.3d 1172 (9th Cir. 2015) (affirming the district court's denial of a Motion to Strike based upon alleged First Amendment protection). The cases implicating First Amend-

As a prerequisite to analyzing the substance of the *EA Sports* decisions, a review will be initially undertaken of the basic justifications for recognition of a cause of action for the right of publicity and the recognized judicial tests for determining whether or not an expressive or artistic work is subject to First Amendment protection from a claim of commercial appropriation.

IV. UNDERLYING JUSTIFICATIONS FOR RECOGNITION OF A RIGHT OF PUBLICITY

A. Incentives for Individual Accomplishment and Preventing Unjust Enrichment

Historically, the right of publicity primarily finds its justification in economic theories. There are related but divisive strands to the economic rationale underlying the right of publicity.[41] A repeated apology for the right of publicity is its ability to incentivize an individual to engage in the labor and employ the ingenuity necessary to create a lucrative public image.[42] A second economic

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ment limitations on right of publicity claims arise in connection with numerous models of expression. *See, e.g.,* S. Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994) (First Amendment protection extended to publisher and movie studio); New Kids on the Block v. News Am. Publ'g Inc., 971 F.2d 302, 309-10 (9th Cir. 1992) (recognizing First Amendment protection for newspaper survey concerning the band); Montana v. San Jose Mercury News, 40 Cal. Rptr. 2d 639, 640 (Cal. Ct. App. 1995) (First Amendment protection afforded for newspaper's dissemination of a Joe Montana poster).

[41] Law professor Michael Madow, in a 1993 article, offered a spirited and well-reasoned response in opposition to each of the prominent justifications for recognition of the right of publicity. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 205-28 (1993) [hereinafter *Private Ownership*].

[42] *See, e.g.*, *Zacchini*, 433 U.S. at 576-77 (1977). Justice White, writing for the majority in *Zacchini,* justified the extension of protection to Zacchini's act in the following terms:

> "Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to

justification for the right of publicity is preclusion of unjust enrichment by those who would commercially capitalize upon the individual's labor associated with attaining celebrity status.[43] The

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> the public. This same consideration underlies the patent and copyright laws long enforced by this Court."

Id. at 576. Professor Madow rejects the "incentive" justification on grounds that the economic rewards that come to the celebrity in terms of salary, royalties, and similar remuneration constitute sufficient motivation to create a public image and no evidence is offered to suggest that the right of publicity engenders greater incentive. *Private Ownership*, *supra* note 41, at 208-16. Parenthetically, Madow observes that in our media driven culture, the attainment of celebrity status is not necessarily the result of hard work and creative effort, but can instead be bestowed by virtue of infamous criminal acts or scandal. An example is Donna Rice, implicated in the Gary Hart sex scandal, and subsequently signed to a contract to endorse No Excuses Jeans. *See id.* at 179-82.

[43] Justice White, in his *Zacchini* majority opinion, additionally urged the unjust enrichment justification:

> "Much of its economic value lies in the 'right of exclusive control over the publicity given to his performance;' if the public can see the act free on television, it will be less willing to pay to see it at the fair. The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. 'The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. 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.'"

Zacchini, 433 U.S. 562 at 576-77 (1977) (citing Kalven, *Privacy in Tort Award Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 325, 331 (1966)). Professor's Madow urges that the unjust enrichment theory is deficient as virtually all celebrities do not create their persona from whole cloth, but rather, incorporate or build upon the works of performers that preceded them. Thus, no unjust enrichment is occurring since all celebrities, to a greater or lesser extent, are merely constructing a creation utilizing that which preceded them. *Private Ownership, supra* note 41, at 184-96. Madow additionally cogently attacks the premise that celebrity is somehow inevitably the product of the labor and talent of the celebrity. *Id.* Madow's point seems well taken given the prolific rise of celebrityhood without noteworthy accomplishment. *See id.* and accompanying text. *See also* Steven Semeraro, *Property's End: Why Competi-*

unjust enrichment apology bears close relationship to the moral defense of philosopher John Locke that one is entitled to enjoy the fruits of her labor.[44]

Judge Richard Posner and University of Chicago Professor William Landes also offer an alternative economic justification that legal recognition of the commercial value of one's name and likeness, as a property right, insures that the optimal value will be received in the market place from the licensing of the right to commercially utilize one's name and image.[45] Posner and Landes' explanation of the underpinnings of the right of publicity is deemed a preferred apology by this author and their theory is explored at further length in Part VII of this article.[46]

B. The Personal Autonomy Justification

In addition to the Locke "fruit of one's labor's" philosophical justification[47] one author has urged that the right of publicity find its raison d'etre in the Kantian notion of personal autonomy and the right to control the use of one's own person.[48] Indeed, the "personal autonomy" justification was elegantly articulated in an early twentieth century opinion from the Georgia Supreme Court in *Pavesich v. New England Life Insurance Company.*[49] In recog-

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tion Policy Should Limit the Right of Publicity, 43 CONN. L. REV. 753, 776 (2011) [hereinafter *Property's End*].

[44] JOHN LOCKE, TWO TREATISES OF GOVERNMENT, §§ 25-33, 44 (Peter Laslett ed., Cambridge Univ. Press 1970) (1690).

[45] *See* Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978) [hereinafter Posner, *Privacy*]; Richard Posner & William Landes, *The Economic Structure of Intellectual Property Law*, 222-26 (Harvard Univ. Press 2003) [hereinafter Posner, *Intellectual Property*].

[46] *See* Posner, *Intellectual Property*, *supra* note 45; *infra* notes 100-12 and accompanying text.

[47] *See* Michael Schoenberger, *Unnecessary Roughness: Reconciling Hart and Keller with Standard Befitting the Right of Publicity*, 45 CONN. L. REV. 1875, 1884-85 (2013).

[48] *See id.* (citing Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity,* 49 DUKE L.J. 383 (1999)).

[49] *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

nizing a cause of action for commercial appropriation of one's likeness, the *Pavesich* court stated the following:

> "The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law is also embraced within the right of personal liberty. Publicity in one instance and privacy in the other is each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy."[50]

As with a Lockean "fruits of labor" justification, a central flaw with the "personal autonomy" justification for the right of publicity is that individuals do not unilaterally develop their celebrity or public persona in a vacuum. For example, it is highly doubtful that political persona Joe the Plumber worked tirelessly towards the goal of defining and preserving his personhood as a precursor to being projected on a national stage.[51] Moreover, recognition of

[50] *Id.* It is noteworthy that while the *Pavesich* court appeals, on one hand, to a natural law of personal autonomy as justification of a right to prevent misappropriation for commercial purposes, the court subsequently adopts the rational of an earlier decision observing that one has a "property" right in his likeness comparable to the property right held by the author of a literary composition. *Id.* at 77-79 (citing Robertson v. Rochester Folding Box Co., 64 N.E.2d 442 (N.Y. 1901)).

[51] Joe the Plumber is Samuel J. Wurzelbacher who acquired the nickname and media attraction in the course of a spontaneous discussion with Barack Obama, held in Wurzelbacher's front yard, during Obama's 2008 campaign tour of the neighborhood. Michael James, *In Working Class Ohio, Obama Meets Amorous Dogs, Skeptical Plumber*, ABC NEWS (Oct. 13, 2008),

such a broad right to personal autonomy naturally conflicts with the right of other individuals to utilize the celebrity's name and likeness in pursuing their recognized right of free expression so prominent in decisions espousing the First Amendment.[52]

V. JUDICIAL TESTS FOR EXPRESSIVE CREATIONS MERITING FIRST AMENDMENT PROTECTION

A. The Predominant Use Test

In the wake of *Zacchini* and the Supreme Court's decision to refrain from articulating a generalized test for First Amendment restrictions on the right or publicity, three distinct judicially-created tests have been employed in misappropriation cases where-in First Amendment protection for creative expression is claimed.

In 2003 the Missouri Supreme Court, sitting en banc, articulated what is commonly known as the "Predominant Use Test" in *Doe v. TCI Cablevision.*[53] In *TCI Cablevision*, professional hockey player Anthony "Tony" Twist brought a commercial appropriation claim based upon publication of the Spawn comic book series which included a character named Anthony "Tony Twist" Twistelli.[54] The Missouri Supreme Court announced that in order to ascertain whether First Amendment protection should preclude

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http://blogs.abcnews.com/politicalpunch/2008/10/in-working-clas.html. Subsequently, Wurzelbacher appeared in a series of commercials concerning conversion of analog television to digital and was hired to make a series of videos explaining the DTV conversion. *See Joe the Plumber Now Pitchman for Analog-to-Digital Coupons*, BOSTON HERALD (Nov. 25, 2008), http://www.bostonherald.com/news/ us_politics/view/; Eric Taub, *The Digital TV Transition: More Confusion*, N. Y. TIMES (Dec. 27, 2008, 7:04 PM), http://bits.blogs.nytimes.com/2008/12/22/the-digital-tv-transition-confusion-reigns/?_r=0. *See also, The Joe the Plumber Book is Coming Soon*, L. A. TIMES (Nov. 18, 2008), http://latimesblogs.latimes.com/jacketcopy/2008/11/the-joe-the-plu.html.

[52] *See, e.g., supra* notes 25-32 and accompanying text. *See also,* Stacey L. Gogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1182-83 (2006).

[53] Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).

[54] *Id.* at 365.

the claim, it would utilize a test inquiring as to whether the product was predominately exploitative of the person's name and likeness, or alternatively, whether the work was primarily expressive:

> "If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some 'expressive' content in it that might qualify as 'speech' in other circumstances. If, on the other hand, the pre-dominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight."[55]

The court in *TCI Cablevision* concluded that the Twistelli character, while having a metaphorical reference, was nevertheless primarily used by the comic book creators to exploit the commercial value of the plaintiff's person and was not within the ambit of the First Amendment's protection of expressive work.[56]

The Predominant Use Test has, however, been roundly criticized. Specifically it is deemed subjective in nature, essentially requiring the presiding judge, or judges, to act as an art critic in divining whether a literary or other purported artistic work is primarily intended to commercially exploit the celebrity's name or likeness, or alternatively, if the creator primarily intended to create

[55] *Id.* at 374 (quoting Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity – Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003)).
[56] *Id.*

something artistic in nature with the celebrity's identity constituting a mere raw material.[57]

B. The Rogers Test

A second test for determining whether First Amendment protection precludes a commercial appropriation cause of action originated in a trademark case. In *Rogers v. Grimaldi*,[58] the Ninth Circuit Court of Appeals was confronted with a setting in which a right of publicity claim was brought against the producers and distributors of a Fellini film entitled *Ginger and Fred.* Movie star Ginger Rogers brought an action claiming that her right of publicity was violated by utilization of the film's title given her universally acclaimed film collaborations with Fred Astaire.[59] Notably, the film was not about Ginger Rogers and Fred Astaire, but rather, followed the lives of two fictional Italian cabaret performers.[60] In crafting what is now known commonly as the "Rogers' Test," the court observed that the law of Oregon would not "permit the right of publicity to bar the use of a celebrity's name title in a movie title unless the title was wholly unrelated to the movie or was simply a disguised commercial advertisement for the sale of goods or services."[61] The court then concluded the title was not an attempt to exploit the names of Ginger Rogers and Fred Astaire.[62] Shortly thereafter, the issue had been raised as to whether the Rogers Test was only applicable to analysis of First Amendment protection in the setting wherein the celebrity's name is employed in the title of the work.[63]

C. The Transformative Use Test

Finally, the California Supreme Court articulated the "Transformative Use Test" in the case of *Comedy III Productions*

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[57] *See, e.g.,* Hart v. Elec. Arts, Inc., 717 F.3d 141, 154 (3d Cir. 2013).
[58] Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).
[59] *Id.* at 996-97.
[60] *Id.*
[61] *Id.* at 1004-05.
[62] *Rogers*, at 1003-1005.
[63] *See Hart*, 717 F.3d at 154-55.

v. Gary Saderup.[64] The court in *Saderup* considered a right of publicity claim within the context of the creation and sale of charcoal drawings and lithographs of the Three Stooges.[65] The drawings were a literal depiction of the comedy characters and the court concluded that the likeness of the Three Stooges was not "one of the 'raw materials' from which [t]he original work [was] synthesized", but instead, "the very sum and substance of the work:"[66]

> "When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist. . . . [However], when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity."[67]

The Transformative Use Test has not been restricted to applications of California law,[68] but also was subsequently employed

[64] Comedy III Prod., Inc. v. Gary Saderup Inc., 21 P.3d 797, 808-10 (Cal. 2001).
[65] *Id.* at 800
[66] *Id.* at 809.
[67] *Saderup,* 21 P.3d at 808.
[68] *See e.g., Keller*, 724 F.3d at 1273-1279 (9th Cir. 2013); Hilton v. Hallmark Cards, 580 F.3d 874, 890 (9th Cir. 2009); *Winter*, 69 P.3d at 473 (Cal. 2003) (holding a comic book's depiction of renowned musicians Johnny and Edgar Winter was not a commercial appropriation of their persons since the characters were transformative characters as half-worm, half-human offspring).

by courts applying other states' law, including the Third Circuit in its decision in *Hart v. Electronic Arts, Inc.*[69]

VI. THE EA SPORTS LAWSUITS

The recent Electronic Arts and similar decisions represent the growing adoption of the Transformative Use Test as the preferred test for determining whether First Amendment protection of expression precludes a right of publicity claim.[70] The EA Sports NCAA video football games created a vehicle ripe for claims of commercial misappropriation of name and likeness. Since 1993 Electronic Arts has, among their numerous videos games, offered for sale a yearly selection of NCAA football games.[71] The Third Circuit in *Hart* provided a succinct and accurate depiction of the EA Sports NCAA video football format and experience:

> "A typical play session allows users the choice of two teams. 'Once a user chooses two college teams to compete against each other, the video game assigns a stadium for the match-up and populates it with players, coaches, referees, mascots, cheer-leaders and fans.'In addition to this 'basic single-game format,' EA has introduced a number of additional game modes that allow for "multi-game" play.

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[69] *See Hart*, 717 F.3d at 158-66 (applying New Jersey law); Mine O'Mine, Inc. v. Calmese, Case No. 2:10-CV-00043, 2011 WL 2728390, at *8-9 (D. Nev. July 12, 2011) (applying Nevada law).

[70] *See* cases cited *supra* notes 68-69.

[71] Electronic Arts offers videos games in numerous areas of sports, including but not limited to PGA golf, rugby, soccer, cricket, baseball, basketball, NASCAR stock car racing, hockey, and extreme sports. EA SPORTS, http://www.easports.com/ (last visited Mar. 20, 2015). The EA Sports video games are characterized by their remarkable true to life recreations of sports venues and real life participants. *See id.*

> In no small part, the NCAA Football franchise's success owes to its focus on realism and detail — from realistic sounds, to game mechanics, to team mascots. This focus on realism also ensures that the 'over 100 virtual teams' in the game are populated by digital avatars that resemble their real-life counterparts and share their vital and biographical information. Thus, for example, in NCAA Football 2006, Rutgers' quarterback, player number 13, is 6'2" tall, weighs 197 pounds and resembles Hart. Moreover, while users can change the digital avatar's appearance and most of the vital statistics (height, weight, throwing distance, etc.) certain details remain immutable: the player's home state, home town, team, and class year."[72]

In the *Hart* litigation, former Rutgers University star quarterback Ryan Hart, brought suit against Electronic Arts for the unauthorized use of his likeness in an EA Sports NCAA Football video game.[73] It was undisputed that Hart was utilized as an identifiable figure in the video game as were hundreds of former collegiate football players.[74] Virtually identical issues were presented in the action brought by former Arizona State and Nebraska quarterback Sam Keller.[75] In each case, the EA Sports video game afforded the game participant the ability to alter the individual avatar's appear-

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[72] *Hart*, 717 F.3d at 146.
[73] *Id.*
[74] *See id.* at 146. The Hart litigation was a class action lawsuit encompassing plaintiffs "similarly situated" collegiate athletes.
[75] *See Keller*, 724 F.3d at 1271-72 (9th Cir. 2013) (affirming that the First Amendment did not preclude Keller's right-of-publicity claim against Electronic Arts).

ance.[76] However, the courts, in both *Hart* and *Keller,* acknowledged that video games are subject to First Amendment protection as expressive works:

> "Video games are entitled to the full protections of the First Amendment, because '[l]ike the protected books, plays, and movies that preceded them, video games 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).'"[77]

Nevertheless, the Third Circuit Court of Appeals in *Hart* and the Ninth Circuit Court of Appeals in *Keller* respectively concluded that the ability to alter the appearance of the avatar in the EA

[76] *Hart*, 717 F.3d at 166. The fact that the video game player could alter the avatar presented a unique question as to whether or not the video game was thereby afforded First Amendment protection as "expressive speech." Previously, in a noted California court of appeals decision, the court had ruled that a video game incorporating avatars resembling members of the rock bank *No Doubt* was not subject to First Amendment protection from a right of publicity claim. The court in *No Doubt* emphasized the fact that the avatars were not subject to alteration by the video game player. No Doubt v. Activision Publ'g., Inc., 122 Cal. Rptr. 3d 397, 409-10 (Cal. Ct. App. 2011). In contrast to the *No Doubt* decision is Kirby v. Sega of Am., Inc., 50 Cal. Rptr.3d 607 (Cal. Ct. App. 2006). The *Sega* decision represents the other end of the spectrum in terms of affording First Amendment protection. The avatar utilized in the music video bore strikingly similar physical characteristics and musical catch phrases ("ooh la la") to the lead singer of the group Deee-Lite. Despite the undeniable appropriation of singer Kierin Kirby's attributes, the court concluded that First Amendment protection protected the work as transformative expression based upon other fanciful differences and the work's futuristic setting. *Id.* at 408-09.

[77] *Keller*, 724 F.3d at 1270-71; *Hart*, 717 F.3d at 148.; Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011).

Sports NCAA football game did not render the works sufficiently "transformative" to merit First Amendment protection:

> "The ability to make minor alterations — which substantially maintain the avatar's resemblance to Appellant (e.g., modifying only the basic biographical information, playing statistics, or uniform accessories) — is likewise insufficient, for '[a]n artist depicting a celebrity must contribute something more than a 'merely trivial' variation.'[78] Indeed, the ability to modify the avatar counts for little where the appeal of the game lies in users' ability to play 'as, or alongside' their preferred players or team.[79] Thus, even avatars with superficial modifications to their appearance can count as a suitable proxy or market 'substitute' for the original."[80]

Equally important, in both *Hart* and *Keller*, the analysis of whether the video games were sufficiently "transformative" in nature to merit First Amendment protection was not based upon consideration of the video games in its totality, but rather, focused primarily upon transformative analysis of the individual avatar.[81]

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[78] *Winter*, 69 P.3d at 478-79.
[79] *See No Doubt*, 122 Cal. Rpt. 3d at 411.
[80] *Hart*, 717 F.3d at 168. *See also Saderup*, 21 P.3d at 808; *Winter*, 96 P.3d at 479; *Keller*, 724 F.3d at 1276-77.
[81] *See Hart*, 717 F.3d at 169; *Keller*, 724 F.3d at 1277-78. Both the *Hart* and *Keller* litigation were collectively settled by EA Sports. Specifically, the class action settlement with former NCAA athletes in the *Keller* and *Hart* litigation, and additionally in a class action lawsuit brought by former UCLA basketball star Ed O'Bannon, were estimated to yield up to $40 million dollars in settlement payments by EA Sports with approximations of 100,000 former and

VII. CONCLUSION

A. The Haphazard and Disunified Judicial Development of the Right of Publicity

The explosion of right of publicity litigation in recent decades bears scrutiny as to whether the continued expansion of the legal right is societally beneficial. The present problems of defining the scope of the right and the absence of any consensus concerning the existence or length of a post-mortem right of publicity, are largely attributable to the cause of action's sloppy and ill-defined judicial birth and subsequent evolution. A logical and orderly development of the cause of action was initially impaired by judicial decisions mistakenly analyzing a publicity claim as a mere variation or subset of the general right of privacy.[82] Decades of judicial confusion ensued prior to the commercial appropriation tort being formally recognized in terms of a property right quite distinguishable from the right of privacy espoused by Brandeis and

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current collegiate players to receive respectively $4000. Tom Farrey, *Players, Game Makers Settle for $40M*, ESPN OUTSIDE THE LINES (May 31, 2014), http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm.

[82] *See, e.g.*, Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979) (concluding that the right of publicity is personal to the individual performer and therefore is not a postmortem right); *Pavesich*, 50 S.E. at 74 (identifying the right to prevent commercial appropriation as rooted in the right of privacy); Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443 (N.Y. 1902) (action for young girl's nonconsensual appropriation of photograph for appearance on a flour company's box analyzed in terms of a right of privacy). Notably, subsequent to the *Roberson* decision, New York enacted a statutory right to privacy which was by its terms intended to encompass unauthorized use of name, portrait or picture for advertising purposes. N.Y. CIV. RIGHTS LAW §§ 50-51 (2001 & Supp. 2005). Noted authority Thomas McCarthy in his exhaustive work on the right of publicity, traces its origins in the right of privacy and its subsequent evolution into a separate property right. MCCARTHY, PUBLICITY, *supra* note 11, at §5.8[B], 5-66. *See also* Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case For Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT L.J. 223, 224 (1994) (observing the "forty years of erratic judicial development…" of the right of publicity).

Warren.[83] During the years preceding and subsequent to the landmark decision in *Haelan*,[84] courts struggled to articulate a unified explanation for the right of publicity as it was espoused as a property right, justified in quasi-moral terms as a Lockean right to enjoy the fruits of one's labors.[85] A review of the decisions reflects a confounding trail of inexplicably conflicting decisions on very similar fact patterns.[86]

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[83] *See* Brandeis & Warren, *Privacy*, *supra* note 18 and accompanying text. One commentator has cogently summarized the inadequacy of the right of privacy as a basis from which to develop the right of publicity:

> "By failing to identify how publication of private facts or photographs violated an individual's interests, Warren and Brandeis's article left courts without a normative lodestar against which to measure other alleged invasions, including identity appropriation. Without such guidance, courts were unable to resist. The gravitational pull of formalism as they viewed identity appropriation through the privacy lens."

Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 240 (2005) [hereinafter *Autonomous Self-Definition*].

[84] *See, e.g.*, *Haelan Labs*, 202 F.2d at 866.

[85] *See, e.g.*, *Matthews*, 15 F.3d at 437-38 (asserting that the right of publicity provides inducement for pursuing noteworthy accomplishments and additionally provides a mechanism for the unwarranted dilution of the celebrity's publicity rights through "excessive exploitation of the name and likeness…"); *White*, 971 F. 2d at 1399 (justifying the right of publicity in terms of the celebrity's exclusive right to her publicity value regardless of how the value was obtained); Uhlander v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (espousing the justification of the celebrity's right to the fruits of his labors); Onassis v. Christian Dior-N.Y. Inc., 472 N.Y.S.2d 254, 261 (Sup. Ct. 1984) (prevention of unjust enrichment); Canessa v. J.I. Kislak, Inc., 235 A.2d 62, 76 (N.J. Super. Ct. Law. Div. 1967) (prevention of unjust enrichment).

[86] *Compare White*, 971 F.2d at 1395 (reversal of trial court dismissal ultimately resulting in a $400,000 damage award to Vanna White, famed "letter turner" on Wheel of Fortune, based upon Samsung's misappropriation of her "likeness" in creating an advertisement utilizing a robot dressed in a blond wig, gown and jewelry posing next to a Wheel of Fortune-like game board), *with* Kirby v. Sega of Am., Inc., 50 Cal. Rptr.3d 607 (Cal. Ct. App. 2006). Specifically, the court in *Kirby*, in finding First Amendment protection, emphasized that the depiction of the singer differed from the real life character to the extent of being set in Japanese-style animation and being cast in a 25th century space age

Most notably, the Supreme Court's decision in *Zacchini* exemplifies the continuing struggle that courts have manifested in articulating the basis and parameters of the right of publicity.[87] In fairness to the Court in *Zacchini*,[88] it was only presented with the narrow issue of defining whether the First Amendment proscribed Zacchini's cause of action for the commercial appropriation of the entirety of his fifteen second human cannonball act.[89] The Court

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environment. *Id.* at 610, 618. These variations from the actual singer were deemed to render the character "expressive" in nature as opposed to constituting a bald reproduction of the singer. *Id.* at 618. *Compare* C.B.C. v. Major League, 505 F.3d 818, 823 (8th Cir. 2007) (makers of fantasy baseball game were protected from a commercial appropriation claim in employing players' names and statistics, based upon the First Amendment), *with Uhlaender*, 316 F.Supp. at 1282-83 (finding a violation of the right of publicity by the makers of a baseball board game based upon its employment of major league player's statistics and names and rejecting defense that the information was freely available in the public domain).

[87] Justice White, in the *Zacchini* majority opinion, offers underlying economic justifications for the right of publicity in terms of providing inducement for extraordinary achievement and to preclude unjust enrichment by those who would commercial appropriate. *Zacchini*, 433 U.S. at 576-77. *See supra* notes 42-43.

[88] *Zacchini*, 433 U.S. at 565-66.

[89] In this respect, the Supreme Court's actions in *Zacchini*, in drawing a narrow opinion on the facts presented, is quite laudable in terms of not seeking to impose a global directive for courts to apply in the myriad factual scenarios they would subsequently be confronted within future right of publicity cases. While providing clear directives that the First Amendment right of newsworthiness did not subsume the right of publicity claim, the Court left for state and federal courts, sitting in diversity cases, to refine the parameters of the First Amendment and the right of publicity in fifty distinct laboratories of federalism. *But see* Douglas G. Baird, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1186 (1978) [hereinafter *Human Cannonballs*]. Baird critiques the *Zacchini* decision in failing to further clarify the First Amendment's restrictions on the right of publicity claim generally:

> "Concentrating on the facts before it at the expense of the underlying broader issues, the majority left lower courts with little guidance in resolving the tension between incentive and access. The cloudy boundary between rights of performance

was therefore not charged with the responsibility of carefully defining the parameters of the right of publicity and providing an all-encompassing line of demarcation between the First Amendment and the right of publicity.[90] Nevertheless, the Supreme Court's analysis and decision in *Zacchini* case demonstrates the ad hoc nature of a myriad of decisions in this field. In the end, all that can really be gleaned from *Zacchini*, in terms of the right of publicity, is: (i) the First Amendment does not permit the media, under the rubric of newsworthiness, to film the entirety of a carefully honed and constructed human cannonball act;[91] (ii) individuals are entitled to the fruits of their labor;[92] (iii) the right of publicity acts as an inducement, analogous to patents and copyrights, to invest the time and effort in the creation of one's act;[93] and (iv) a right of publicity is compatible with the First Amendment with definition of that compatibility left for later decisions.[94]

B. The Triumph of Legal Realism in the Development of the Right of Publicity

The *Zacchini* Court, in its careful decision limited to the facts of the case, manifests a very telling aspect of numerous deci-

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> and the first amendment may ultimately harm both press and performer by achieving unprincipled results."

Id. at 1204. In fairness, Baird thereafter critiques Justice Powell's dissent in *Zacchini* as imposing too restrictive a test for First Amendment restrictions on lower courts resolving right of publicity cases the multitude of factors present in determining newsworthiness. *See id.* at 1204-06.

[90] *See Zacchini*, 426 U.S. at 565-66.

[91] *See id.* at 578-79.

[92] *See id.* at 576-77.

[93] *Zacchini*, 426 U.S. at 576.

[94] *See id.* at 577-79. The factual nature of *Zacchini*, with the television station's appropriation of the performer's entire act, was uniquely extreme when compared to the multitude of right of publicity cases. More often, the celebrity's entire act is not appropriated, but rather, selected aspects of the celebrity are appropriated such as a famed phrase (*i.e.* "Here's Johnny") or other portions of the overall persona. *See, e.g., supra* note 9. In short, the facts of the *Zacchini* case did not lend themselves well to a comprehensive test that would be applicable to the myriad scenarios in which commercial appropriations disputes arise.

sions in their application of the right of publicity. In particular, the failure of the courts to reach any expanded consensus on the parameters of the right of this commercial appropriation tort is largely explainable in terms of legal realism and judicial restraint. Oth-Otherwise stated, decisions in the realm of the right of publicity may, to a greater or lesser extent, be the product of a visceral sense of fairness.[95] What could be equitable in concluding that Zacchini's life's work of perfecting a human cannonball act could be freely distributed for public consumption and he thereby be deprived of the value of the act?[96] In a similar vein, it simply seems innately unfair that EA Sports should derive millions upon millions of dollars in profits from sales of video games, while collegiate players such as Hart and Keller, so integral to the video game's success, receive nothing.[97] Unfortunately, the courts have frequent-

[95] Legal realism is the school of thought, presaged by the works of Oliver Wendell Holmes, asserting that judicial decisions are not the result of pure legal reasoning, but rather, are largely a product of the judge's beliefs and psychological prejudices. It is not ironic that the term "right of publicity" was first utilized by the famed advocate of judicial realism, Jerome Frank. *Haelan Labs*, 202 F.2d at 868.

[96] *See* Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity?*, 20 COLUM.-VLA J.L. & ARTS 123, 127-28 (1996) ("In fact, the decisions [regarding the right of publicity] do not tend to include justifications for placing what is, after all, called a public image, within the plenary control of private individuals. Rather, the courts tend to assume that, if someone hones an image, that person generally has the right to capture the benefit of all its uses."). *Autonomous Self-Definition, supra* note 83 at 229 & n.70. McKenna makes the point that courts frequently claim that the right of publicity is steeped in economic value, but offers no reasoned argument as to why economic value should be allocated to the celebrity. *Id.*

[97] *See Hart*, 717 F.3d at 171 (Ambro, J., dissenting) ("[W]ere this case viewed strictly on the public's perception of fairness, I have no doubt Hart's position would prevail."). Decisions concerning right of publicity claims within the context of video games evidence the judicial realism that permeates the decisions. While uncompensated college football stars such as Keller and Hart are successful, notorious criminals, or their successors, are deemed unworthy of compensation when the criminal's image or names are employed in video games. *See* Dillinger, LLC, v. Elec. Arts, Inc., 795 F.Supp.2d 829, (S.D. Ind. June 15, 2011) (right of publicity claim implicating use of name of notorious gangster John Dillinger in EA Sports series of videogames based on The Godfa-

ly chosen not to undertake the in-depth reasoning necessary to determine whether society generally is benefitted from the creation of an individual's monopoly over commercial use of his name and likeness or why. Instead, the judiciary has generally elected merely to resort to conclusory phrases such as "unjust enrichment" or the "fruit of one's labor" to justify their decision on the right of publicity.[98]

This fundamental fairness, case-by-case model for resolution of right of publicity disputes is inadequate given the rise of the celebrity with no corresponding noteworthy accomplishments.[99]

C. The Landes-Posner Model as a Proposed Unifying Justification for the Right of Publicity

Even with this evolution in the nature of "celebrityhood," a preferable approach for resolution of the right of publicity cases is to be found in the Poser-Landes economic model.[100] Judge Posner and Professor Landes deem publicity an intangible with a market

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ther dismissed on grounds that use of Dillinger's name in the video games was comparable to a literary work subject to First Amendment protection); Noriega v. Activision/Blizzard, Inc., 41 F.Supp.3d 885 (Sup. Ct. L. A. Cnty. 2014) (presently incarcerated and former Panamanian dictator, Manuel Noriega's right of publicity claim for use of his name and likeness in the popular video game "Call of Duty: Black Ops II" stricken with the court finding the use was "transformative").

[98] *See* cases cited *supr*a note 85. *See also Human Cannonballs*, *supra* note 89, at 1204. *See generally* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809 (1935); Karl N. Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431, 443 (1930). *See also Autonomous Self-Definition, supra* note 83, at 244 & n.93 (articles by exponents of legal realism concerning the propensity of courts to utilize mired, formalistic language in lieu of in-depth legal reasoning in their decision).

[99] *See No Talent, No Problem: 25 Stars Who Are Famous for Doing Nothing at All*, RADAR ONLINE, http://radaronline.com/photos/no-talent-no-problem-25-stars-who-are-famous-for-doing-nothing-at-all/photo/1020977 (last viewed June 10, 2015) (chronicling 25 individuals and groups who have attained fame through appearance on reality television shows or other similar mediums without displaying any particular accomplishment apart from their existence).

[100] *See supra* note 45 and authority therein cited.

value that, in the absence of recognition of a property right, would be inefficiently allocated and needlessly devalued:

> "There is a perfectly good economic reason for assigning the property right in a photograph used for advertising purposes to the photographed individual: this assignment assures that the advertiser to whom the photograph is most valuable will purchase it. Making the photograph the communal property of advertisers would not achieve this goal."[101]

The rationale of furthering economic efficiency as the basis for a right of publicity is sometimes referenced as the tragedy of the commons.[102] Otherwise stated, privatizing a commons for grazing insures that the value of the pasture is not diluted by opening it to all sheepherders.[103] If all sheep were freely allowed to graze the commons, the pasture would be inefficiently used as overgrazing would occur without any animals receiving sufficient sustenance from the pasturelands.[104] Similarly, privatizing publicity rights insures that the value of the celebrity's name and likeness will not be economically diluted by tarnishing or overexposure which could occur if unfettered public access to the name and likeness were available.[105]

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[101] Posner, *Privacy*, *supra* note 45.

[102] *See Property's End*, *supra* note 43, at 771 & n.89 (citing Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244-45 (1968)). Hardin was the originator of the phrase "Tragedy of the Commons" in suggesting the pursuit of self-interest, even rationally, can work to the detriment of the whole by depicting resources in an inefficient manner.

[103] *Id.*

[104] *See* Posner, *Intellectual Property*, *supra* note 45, at 223.

[105] The British term "face wearout" is utilized as a shorthand for the phenomena of the value of a celebrity's name and likeness being diluted through overexposure. *See Private Ownership*, *supra* note 41, at 222.

The economic efficiency apology is most appealing in providing an in-depth explanation for societal recognition of the right of publicity without mere resort to reliance on rhetorical phrases such as the "fruits of one's labor" or "unjust enrichment".[106] Moreover, the Posner-Landes model provides an effective apology for recognizing a right of publicity claim even when the individual has done nothing noteworthy or is by chance thrust into fame. In essence, the market itself arbitrates the value of the individual's publicity rights without reference to how celebrityhood was attained. The laws of supply and demand will determine the value of the individual's right of publicity regardless of whether attained by accomplishment or fortuitous circumstances.

The Posner-Landes approach additionally offers an underlying justification for recognizing a post-mortem right of publicity and considerations in determining its length.[107] Moreover, the Posner-Landes economic approach provides guidelines for regulating free use of the right of publicity in areas such as newsworthiness and parody.[108]

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[106] *See*, *e.g.*, *supra* note 85 and cases therein cited. For example, Landes and Posner offer a thorough, economic-based explanation on why recognition of the right of publicity only negligibly encourages investment for the individual to become a celebrity. *See* Posner, *Intellectual Property*, *supra* note 45, at 223. *See also id.* at 224-26 (providing an in-depth analysis that economic efficiency is justified through recognition of a right of publicity).

[107] *See generally* William Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57, 59-62 (2005) [hereinafter Posner, *Economics Approach*]. *See also* Posner, *Intellectual Property*, *supra* note 45, at 228-31. While these articles generally discuss the justification for postmortem copyright, they would appear to be equally applicable to a postmortem right of publicity.

[108] *See generally*, Posner, *Economics Approach*, *supra* note 107, at 62-66 (setting forth the economic justification for fair use in the copyright realm). *See also* Posner, *Intellectual Property*, *supra* note 45, at 88-90. Posner's article provides economic justification for fair use and emphasizes the fact that intellectual property law does not protect ideas, but rather the expression of those ideas. *See also* Posner, *Economics Approach*, *supra* note 106, at 62-67. Thus, there is nothing inconsistent with the Posner-Landes economic approach to the right of publicity and the attempts in the EA Sports decision to define grounds for

This economic model, premised upon maximizing the value of the celebrity's name and likeness, has been attacked on several grounds, including the extent to which publicity rights should be treated as property.[109] Several commentators contend that unlike the grazing commons, the individual's identity is not a commodity that can be exhausted through overuse since the celebrity's name and likeness is infinitely reproducible unlike the grass in the commons.[110] Secondly, the maximization of economic value theory is attacked on grounds that the free proliferation of publicity rights actually can result in an actual increase in the value of the celebrity's likeness as in the case of Elvis Presley.[111] However, the flaws in these protestations are evident upon further examination. First, the fact that there can be infinite replications of the celebrity's likeness does not lead to the inevitable conclusion that the value of the image is not diluted by infinite usage. The example is well taken that the Disney Company, for good reason, does not overexpose its multitude of cartoon characters, but rather practices careful husbandry by avoiding overexposure of characters, such as Mickey Mouse, to preclude dilution of their value.[112] Moreover, if the

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deeming a work to be sufficiently expressive to merit First Amendment protection. *Id.*

[109] William Prosser early on observed that debates over whether the right of publicity constitute a property right are meaningless and unnecessary as it is sufficient to conclude that compensation for the use of name and likeness is a right that should be recognized. Prosser, *Privacy*, *supra* note 21, at 406.

[110] *See Private Ownership*, *supra* note 41 at 220-25; *Autonomous Self-Definition*, *supra* note 83, at 268-69.

[111] *Autonomous Self-Definition*, *supra* note 83, at 270-71 & n.203. It is ironic that McKenna selects Elvis Presley as the example of the increase in the value of a likeness through continued exposure. While it is true that there have been multiple parodies and impersonations of Elvis Presley, the image of Presley and the use of his name and likeness for commercial purposes has been carefully guarded by his heirs in multiple legal proceedings. *See, e.g.*, Presley's Estate v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); Presley v. Crowell, 733 S.W.2d 89 (Tenn. App. 1987).

[112] Posner, *Intellectual Property*, *supra* note 45, at 224-25. Landes and Posner further observe that if Humphrey Bogart's name and likeness were free for anyone to use that the value of the character would likely be degraded by tarnishing, boredom, and confusion. *Id.* at 224. *Cf. Bogart Gets Scale*, *supra* note 17, at 10-11 (concluding that the right of publicity claims for deceased celebri-

right of publicity is a commodity that is in unmitigated supply, the question must be raised as to why companies will pay extraordinary prices for use of this right with respect to some celebrities as opposed to simply moving on to use of a celebrity with a lower price tag for licensing rights.

D. The E.A. Sports Decision as a Commendable Approach to the Right of Publicity and Public Access

The Electronic Arts litigation highlights the problems created in the application of the right of publicity in an America that has been revolutionized by a dizzying media explosion and corresponding technological advancement. A century ago, a marketable right of publicity in collegiate football players would not have been a pressing legal issue with the exception of those rare players, such as Red Grange, who gained national recognition through the medium of the newspaper.[113] In the Golden Era of Sports that was the 1920's, there would have been no issue as to the utilization of avatars of hundreds of collegiate football players in a nationally marketable video game because the technology did not exist to create such a product. One hundred years later, the unmitigated growth in technology and the media has led to the proliferation of right of publicity cases at an unmitigated rate.[114]

Given the cloud of uncertainty that surrounds the application and defining parameters of the right of publicity, it is recommended

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ties, such as Bogart, should be applicable to attempts to digitalize the deceased celebrity for purposes of utilizing the deceased's persona in films or commercials).

[113] *See* MARK INABINETT, GRANTLAND RICE AND HIS HEROES, THE SPORTSWRITER AS MYTHMAKER IN THE 1920'S (1994) (observing how sports legends, of the 1920's, such as Red Grange, Babe Ruth and Jack Dempsey were transformed into national icons through the descriptions of their exploits by famed sportswriter Grantland Rice).

[114] The earliest located case in which professional athletes successfully prosecuted claims for commercial appropriation for their use in a board game occurred in 1967 when a challenge was made by professional golfers Arnold Palmer, Gary Player, Doug Sanders to the use of their names, uniform numbers and statistical information in a board game). Palmer v. Schonhorn Enterprises, Inc., 232 A.2d 458 (N.J. 1967).

that the formulation of the Transformative Use test represents a laudable attempt to create a functional standard for judicial determinations as to First Amendment limitations on the right.[115] Moreover, it is urged that the movement of some states towards recognition of a descendible right of publicity that lasts for one hundred years, or conceivably in perpetuity, is not a welcomed development.[116] Paralleling copyright law[117] in allowing the right to survive the celebrity's death by seventy years seems sufficient time to fulfill the articulated purpose of incentivizing the individual to pursue socially valuable accomplishments and prevent unjust enrichment. Given its checkered development, the only assuredness as to the future of the right of publicity will be ever-increasing litigation and subjective determinations of the claims.

[115] *Hart*, 717 F.3d. at 158-163 (tracing the history of the Transformative Use Test and analyzing why it is a preferred test for determination of whether the First Amendment precludes a right of publicity claim).

[116] *See* IND. CODE § 36-1-8 (Westlaw 2012) (recognizing statutorily that a right of publicity survives for 100 years after the death of the individual); TEN. CODE ANN. §25-1105(a) (Westlaw 2012) (creating potentially a right of publicity in perpetuity). *See generally* Posner, *Economics Approach*, *supra* note 107, at 59-60 (offering a formula for determining the optimal length of copyright and suggesting that an extension of 70 years after the creator's death versus 51 years would yield only trivial economic benefit).

[117] 17 U.S.C. §302 (Westlaw 2012).