

## The NCAA as Publicity Enemy Number One\*

### I. INTRODUCTION

Over a century after its inception, the National Collegiate Athletic Association's (NCAA) purpose has evolved from preventing athletes' injuries<sup>1</sup> to preventing their profits. The NCAA limits an athlete's compensation to tuition, fees, room and board, transportation, and books.<sup>2</sup> Athletes are not allowed to hold jobs or profit from promotional opportunities.<sup>3</sup> The NCAA justifies these restrictions, rightly or wrongly, by championing amateurism. "A basic purpose of [the NCAA] is 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>4</sup>

Commentators have commonly and passionately argued that athletes should be allowed to solicit employment or promotional opportunities afforded by their fame.<sup>5</sup> However, this Note analyzes issues arising when college athletes' likenesses are appropriated for financial gain with the NCAA's approval—whether college athletes should be compensated under current law for unauthorized uses of their likenesses that are facilitated and approved by the NCAA.

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\* Bill Cross. J.D. Candidate 2011, University of Kansas School of Law.

1. See Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 675 (2003).

2. See NCAA, NCAA DIVISION I MANUAL, art. 15, at 169–92 (2008–2009) (describing permitted financial aid).

3. *Id.* art. 12, at 60–76.

4. NCAA, NCAA CONSTITUTION, art. 1.3.1, at 1 (2008–09).

5. See, e.g., Marc Jenkins, *The United Student-Athletes of America: Should College Athletes Organize in Order to Protect Their Rights and Address the Ills of Intercollegiate Athletics?*, VAND. J. ENT. L. & PRAC., Spring 2003, at 39, 45–47 (suggesting student-athletes form a union); Vladimir P. Belo, Comment, *The Shirts off Their Backs: Colleges Getting Away With Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133, 156 (1997) (arguing that college athletes should receive payment for sales of jerseys with their numbers); Jonathan L. H. Nygren, Note, *Forcing the NCAA to Listen: Using Labor Law to Force the NCAA to Bargain Collectively with Student-Athletes*, 2 VA. SPORTS & ENT. L.J. 359, 362 (2003) (arguing that college athletes could leverage labor law to lobby for greater benefits).

This analysis will focus on a case awaiting trial before the United States District Court for the Northern District of California, *Keller v. Electronic Arts, Inc.* The NCAA and its licensing arm, College Licensing Company (CLC), are also named as defendants.<sup>6</sup> The plaintiff, Sam Keller, played football for Arizona State University from 2003 to 2005, and for the University of Nebraska in 2007.<sup>7</sup> He states, among other claims, that Electronic Arts, Inc. (EA) and the NCAA violated his right of publicity, and that the NCAA breached a contract by allowing EA to use his likeness.<sup>8</sup>

The conflict stems from EA's popular NCAA Football and NCAA March Madness series, which simulate NCAA Division I football and basketball games. Every Division I team is represented by name, and EA painstakingly recreates home stadiums and arenas.<sup>9</sup> EA paid the NCAA, through CLC, for an exclusive license to this trademarked information.<sup>10</sup> According to the licensing agreement, the NCAA and its member institutions are required to approve every game produced under the agreement.<sup>11</sup>

In these games, every player is represented as realistically as possible, with one exception: their names are replaced with positions and jersey numbers.<sup>12</sup> Keller, a quarterback whose jersey bore number five, was known in NCAA Football 2008 as "QB No. 5."<sup>13</sup> Everything else about QB No. 5, down to hair color, weight, and home state,<sup>14</sup> is copied from the real-life Sam Keller.<sup>15</sup> "[V]irtually every real-life Division I football or basketball player . . . has a corresponding player in Electronic Arts' games with the same jersey number, and virtually identical height, weight, build, and home state."<sup>16</sup>

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6. Class Action Complaint at 2, *Keller v. Electronic Arts, Inc.*, No. C 09-1967 CW (D. Cal. Feb. 8, 2010), 2010 WL 530108 [hereinafter *Keller Complaint*].

7. *Id.* at 11.

8. *Id.* at 17-18, 20.

9. *Id.* at 3.

10. *Id.*

11. *Id.* at 4.

12. *Id.* at 4-9.

13. *Id.* 6-9.

14. Although the home states are correct, the hometowns are intentionally inaccurate, if only by a few suburbs. Andy Latack, *Quarterback Sneak*, LEGAL AFFAIRS, Jan./Feb. 2006 at 69, 69. For example, University of Southern California quarterback Matt Leinart's hometown is Santa Ana, California, but QB #11, Leinart's digital counterpart in NCAA Football 06, hails from La Habra, California—about fifteen miles away from Santa Ana. *Id.*

15. *Keller Complaint*, *supra* note 6, at 4.

16. *Id.*

This is not the first time EA's officially licensed video games have caused legal trouble,<sup>17</sup> nor is it likely to be the last.<sup>18</sup> Keller's complaint is unique, however, in its inclusion of the NCAA. Keller accuses the supposed champions of amateurism of tainting his own amateur status.<sup>19</sup>

Because student-athletes, unlike their fellow college students, are not allowed to hold jobs, they technically live below the poverty line,<sup>20</sup> but this is not a fair assessment of student-athletes' typical lives. At most major colleges, athletes live in the best student apartments, eat specially prepared meals, and take advantage of one-on-one training and tutoring provided by athletics departments.<sup>21</sup> Fairness, rather than need, is the reason college athletes should be compensated for unauthorized use of their likenesses. Amateurism is not a valid reason to withhold such compensation.

## II. BACKGROUND

The largest body of right-of-publicity case law comes from California, home to many of the celebrities and entertainment companies who are parties to publicity law suits.<sup>22</sup> Several recent right-of-publicity cases have been tried in federal district courts in the Ninth Circuit, under diversity jurisdiction.<sup>23</sup> "Consequently, the Ninth Circuit has developed its own body of 'California' law on the subject of a[] . . . right of publicity."<sup>24</sup> Because of the scarcity of case law outside of California, courts nationwide typically analyze all existing case law when deciding

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17. See, e.g., *Neal v. Electronic Arts, Inc.*, 374 F. Supp. 2d 574 (W.D. Mich. 2005) (discussing a professional football player who sued for invasion of privacy for use of his likeness in Madden NFL Football, the court upheld summary judgment and issued a \$1000 Rule 11 sanction on plaintiff's lawyer after finding that EA's use was "clearly licensed." *Id.* at 579.

18. Recently, EA successfully defended an antitrust suit based on its exclusive license with the National Football League. *Pecover v. Electronic Arts, Inc.*, 633 F. Supp. 2d 976 (N.D. Cal. 2009). That agreement, which licenses NFL trademarks to EA to the exclusion of other video game manufacturers, is substantially similar to EA's license from the NCAA.

19. See Keller, Complaint, *supra* note 6, at 17, 20.

20. *60 Minutes: College Sweatshops?* (CBS television broadcast Jan. 6, 2002), available at <http://www.cbsnews.com/stories/2002/01/03/60minutes/main323042.shtml>.

21. See, e.g., Editorial, *Student-Athletes Above Others, Literally*, OREGON DAILY EMERALD, Jan. 25, 2010 at 2, available at <http://www.dailyemerald.com/student-athletes-above-others-literally-1.1085046>.

22. Thomas Glenn Martin, Jr., Comment, *Rebirth and Rejuvenation in a Digital Hollywood: The Challenge Computer-Simulated Celebrities Present for California's Antiquated Right of Publicity*, 4 UCLA ENT. L. REV. 99, 113 (1996).

23. *Id.*

24. *Id.*

right-of-publicity cases.<sup>25</sup> Given the Ninth Circuit's influence in this area, the *Keller* result could have nationwide impact.

*A. Right of Publicity: When Is It Misappropriated?*

The prevailing view is that the right of publicity exists by common law in every state, regardless of whether a legislature or court has expressly recognized it.<sup>26</sup> Indeed, it is included in the American Law Institute's Restatement (Third) of Unfair Competition.<sup>27</sup> This is indicative of the national nature of the right of publicity. The common law right has evolved transcontinentally for over fifty years. Predictably, California and New York have contributed most of the case law.<sup>28</sup>

1. California and New York Play Volleyball with the Right of Publicity

Coincidentally, the common law right of publicity has its origins in sports. The Second Circuit was the first to recognize the right in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>29</sup> Haelan and Topps were both in the chewing-gum business and both sought the endorsement of a baseball player.<sup>30</sup> Topps deliberately induced the player to allow Topps to use his photo, in violation of the player's contract with Haelan.<sup>31</sup> Topps contended that the contracts were merely a liability release as to any cause of action the player would have against Haelan for invasion of privacy "because a man has no legal interest in the publication of his picture other than his right of privacy, i.e., a personal and non-assignable right."<sup>32</sup> The court responded by establishing an assignable right separate from the right to privacy.<sup>33</sup>

Prior to that decision, a plaintiff wishing to recover for misuse of his photo would be required to sue under one of the four invasion-of-privacy

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25. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 622–23 (6th Cir. 2000).

26. Jonathan L. Faber, *Indiana: A Celebrity-Friendly Jurisdiction*, 43 RES GESTAE, No. 9, Mar. 2000.

27. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). The cause of action was previously located within the umbrella of invasion of privacy. RESTATEMENT (SECOND) OF TORTS § 652 (1965).

28. See *infra* Part II.A.1.

29. 202 F.2d 866, 868 (2d Cir. 1953). New York state courts later held that, contrary to the holdings of federal courts interpreting New York law, the right of publicity was not separate from the right to privacy. *Brinkley v. Casablancas*, 80 A.D.2d 428, 439–40 (N.Y. App. Div. 1981).

30. *Haelan Labs., Inc.*, 202 F.2d at 867.

31. *Id.*

32. *Id.* at 868.

33. *Id.*

causes of action.<sup>34</sup> To recover for misappropriation under privacy law, courts required a showing of “ridicule or humiliation” as a result of the misappropriation.<sup>35</sup> The Second Circuit, in establishing a separate cause of action, did away with that requirement in right-of-publicity actions:

We think that, in addition to and independent of that right of privacy . . . 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 . . . . 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.<sup>36</sup>

After the Third Circuit recognized an analogous cause of action,<sup>37</sup> California started to refine the right of publicity. In its first contribution to the now extensive case law on the topic, the Ninth Circuit sustained a cause of action for a race car driver whose car was misappropriated for a cigarette advertisement.<sup>38</sup> No longer did a plaintiff have to prove publication of his picture to maintain a claim.<sup>39</sup>

Among the most common defenses to this new cause of action was, predictably, First Amendment free speech protection.<sup>40</sup> The United States Supreme Court intervened in *Zacchini v. Scripps-Howard Broadcasting Co.*, recognizing the right of publicity even in the face of “the strong countervailing right of the media . . . to report on newsworthy matters in the public interest.”<sup>41</sup> Almost simultaneously, New York federal courts were expanding the cause of action beyond photographs. In *Ali v. Playgirl, Inc.*, the district court granted boxing legend Muhammad Ali an injunction against distribution of a magazine that

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34. See *Belo*, *supra* note 5, at 135–39. Those causes of action included intrusion upon seclusion, public disclosure of private facts, false-light publicity, and appropriation of name or likeness. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

35. *Belo*, *supra* note 5, at 136 (quoting J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.8 (1989)).

36. *Haelan Labs., Inc.*, 202 F.2d at 868.

37. *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 485–93 (3d Cir. 1956) (discussing the recognition of the cause of action in the states where the plaintiff was injured).

38. *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 822, 827 (9th Cir. 1974).

39. *Id.* at 824–25.

40. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) (holding that the First Amendment does not allow broadcasting an entertainer’s entire act without his permission); *Mendonsa v. Time Inc.*, 678 F. Supp. 967, 970–71 (D. R.I. 1988) (noting that the media’s privilege to publish newsworthy information comes with limitations).

41. H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM. J.L. & ARTS 1, 7 (1992).

featured a photo of a nude black man in a boxing ring.<sup>42</sup> In doing so, the court held that the common law right of publicity was meant to deter misuse of a plaintiff's "portrait or picture," and that included any representation that was "recognizable as likenesses of the complaining individual."<sup>43</sup>

With the cause of action firmly established by eastern courts,<sup>44</sup> California state and federal courts took the ball and ran with it, continuing to expand the forms of likenesses protected by the common law right of publicity and defining the boundaries of the First Amendment defense.

In *White v. Samsung Electronics America, Inc.*, print advertisements showed a robot dressed like game-show hostess Vanna White, turning tiles on a Wheel of Fortune board.<sup>45</sup> White recovered for a common law right-of-publicity violation.<sup>46</sup> The Ninth Circuit held that the robot was not a likeness of White, but also that the common law right of publicity was not limited to name or likeness.<sup>47</sup> The court declined to draw any limits around the right, stating only that it was possible to evoke celebrities' identities in the minds of consumers "without resorting to obvious means such as name, likeness or voice."<sup>48</sup> The Ninth Circuit also has allowed common law right-of-publicity claims for use of former names<sup>49</sup> and voice imitators.<sup>50</sup>

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42. 447 F. Supp. 723, 725 (S.D.N.Y. 1978).

43. *Id.* at 726. The "portrait or picture" language was originally in the New York right of privacy statute, but the court noted that courts did not distinguish between the statutory "right of privacy" cause of action and the common law "right of publicity" cause of action. *Id.* at 728.

44. See *supra* notes 37–38, 41 and accompanying text (*Zacchini* reached the U.S. Supreme Court from Ohio state courts).

45. 971 F.2d 1395, 1396 (9th Cir. 1992).

46. After the Ninth Circuit remanded the case in July 1992, the district court ruled for White. The Ninth Circuit summarily rejected the ensuing appeal, and Judge Kozinski famously dissented: "Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority's opinion, it's now a tort for advertisers to *remind* the public of a celebrity." *White v. Samsung Elecs. of Am., Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting). See also *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 809 (9th Cir. 1997) (*Cheers* actor George Wendt's cause of action sustained for unauthorized use of look-alike robots at airport bars).

47. *White*, 971 F.2d at 1397.

48. *Id.* at 1399.

49. See *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996) (General Motors used Kareem Abdul-Jabbar's former name, Lew Alcindor, in advertisement without consent).

50. See *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (Rather than hiring Bette Midler to sing in its ads, Ford "studiously acquire[d] the services of a sound-alike . . . . Its value was what the market would have paid for Midler to have sung the commercial in person."); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1992) (holding that *Midler* standard was applicable to lesser-known singer Tom Waits, and that defendant had appropriated his voice and not merely his

## 2. The Constitutional Defense

In *Zacchini*, the Supreme Court restricted the First Amendment defense, but by no means eliminated it. *Zacchini* was a “human cannonball” whose entire performance was broadcast by the defendant.<sup>51</sup> In rebuffing the defendant’s constitutional defense, the Court analogized the right of publicity to copyright law.<sup>52</sup> The Court stated that “the Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.”<sup>53</sup> Not all right-of-publicity cases can be so neatly compared to the copyright framework. *Zacchini*’s holding appears to be restricted to cases with news media defendants, while the great many cases involve defendants in some form of retail business. Indeed, many states choose to allow *Zacchini*-like appropriations by the news media.<sup>54</sup>

The California Supreme Court summed up the constitutional boundary as follows: “Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of a celebrity’s economic value are not protected expression.”<sup>55</sup> The defendant in *Comedy III* created, without the license-holder’s permission, a t-shirt bearing defendant’s own charcoal drawing of The Three Stooges.<sup>56</sup> Significantly, the drawing was a “reverential portrait[.]” and not a parody or distortion of the celebrity.<sup>57</sup> Under *Comedy III*, even a defendant’s original artwork is not necessarily entitled to First Amendment protection.

*Cardtoons, L.C. v. Major League Baseball Players Association*<sup>58</sup> is a similar case with a different result. Here, the “Cardtoons” in question were caricatures of professional baseball players.<sup>59</sup> In the court’s

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“style”).

51. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563 (1977).

52. *Id.* at 575.

53. *Id.*

54. *See, e.g.*, *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 909 (D.N.J. 1986) (holding that a defendant must have a “commercial purpose” for a plaintiff to recover for right of publicity).

55. *Comedy III Prod. v. Gary Saderup, Inc.*, 21 P.3d 797, 805 (Cal. 2001).

56. *Id.* at 801.

57. *Id.* at 811.

58. 95 F.3d 959 (10th Cir. 1996).

59. For example, six-foot-ten-inch pitcher Randy Johnson was shown as “Cloud Johnson.” *Id.*

estimation, these expressions were commentary on baseball, an important social institution, and were entitled to First Amendment protection.<sup>60</sup> In so holding, the court rejected arguments that *Cardtoons* were entitled to less protection because they were a non-traditional form of expression and because they constituted commercial speech.<sup>61</sup>

*Gionfriddo v. Major League Baseball* directly displays the constitutional balancing that most likely will be used in *Keller*.<sup>62</sup> The California Court of Appeals held that Major League Baseball's use of retired players' names, statistics, and videos from the games are entitled to protection as non-commercial speech.<sup>63</sup> Applications of the constitutional balancing test have yielded the following result, as a general proposition: a defendant can defend right-of-publicity complaints on constitutional grounds if it can show: (1) that it is a member of the news media,<sup>64</sup> (2) that its purpose was not commercial, or (3) that it sufficiently transformed the plaintiff's likeness.

#### B. *Right of Publicity: Who Has It?*

There are two common public policy justifications for the right of publicity: controlling the impact of misuse on the plaintiff's reputation and preventing unjust enrichment of the appropriators.<sup>65</sup> The first policy consideration seems to disfavor non-celebrity plaintiffs. If the plaintiff does not have a public reputation, it cannot be damaged by misuse of his likeness. The second policy consideration, preventing unjust enrichment, favors any plaintiff whose identity helps the defendant make money, regardless of celebrity status. It is unclear whether a plaintiff must attain a threshold level of celebrity before successfully stating a right-of-publicity claim.

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at 963.

60. *Id.* at 969.

61. *Id.* at 969–70.

62. 114 Cal. Rptr. 2d 307 (Cal. Ct. App. 2001).

63. *Id.* at 314, 317. See also Erika T. Olander, Comment, *Stop the Presses! First Amendment Limitations of Professional Athletes' Publicity Rights*, 12 MARQ. SPORTS L. REV. 885 (2002).

64. Courts have consistently allowed the news media to use celebrity photo likenesses even in advertisements “for the periodical itself, illustrating the quality and content of the periodical . . . .” *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 641 (Cal. Ct. App. 1995) (quoting *Booth v. Curtis Publ'g Co.*, 223 N.Y.S.2d 737, 738–39 (N.Y. App. Div. 1962)).

65. *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 134 (Wis. 1979).



### 1. Celebrities Only? The Association Requirement

The list of plaintiffs in many right-of-publicity cases could easily be mistaken for an awards show guest list. Clint Eastwood,<sup>66</sup> Kareem Abdul-Jabbar,<sup>67</sup> Muhammad Ali,<sup>68</sup> Bette Midler,<sup>69</sup> Dustin Hoffman,<sup>70</sup> Vanna White,<sup>71</sup> George Wendt,<sup>72</sup> Jacqueline Kennedy Onassis,<sup>73</sup> Johnny Carson,<sup>74</sup> and infamous street entertainer The Naked Cowboy,<sup>75</sup> have all sued someone for misappropriation of their names or likenesses, and most have been successful. However, plaintiffs need not be widely recognized celebrities to recover in a right-of-publicity case.<sup>76</sup> Anyone whose identity lends value to something without his permission could succeed, at least in California.<sup>77</sup> “Although the unauthorized appropriation of an obscure plaintiff’s name, voice, signature, photograph, or likeness would not inflict as great an economic injury as would be suffered by a celebrity plaintiff, California’s appropriation statute is not limited to celebrity plaintiffs.”<sup>78</sup>

In practice, well-known celebrities have an easier time recovering because their identities are more likely to lend value to something.<sup>79</sup> Plaintiffs have a higher success rate in California courts, but it is difficult to tell from existing case law whether California courts are more generous or simply host more famous plaintiffs.

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66. Eastwood v. National Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997).

67. Abdul-Jabbar v. General Motors Corp., 85 F.3d 407 (9th Cir. 1996).

68. Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978).

69. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

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

71. White v. Samsung Elecs. of Am., Inc., 971 F.2d 1395 (9th Cir. 1992).

72. Wendt v. Host Int’l, Inc., 125 F.3d 806 (9th Cir. 1997).

73. Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984).

74. Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983).

75. Burck v. Mars, Inc., 571 F. Supp. 2d 446 (S.D.N.Y. 2008).

76. See, e.g., Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821, 825–26 (9th Cir. 1974).

77. See *KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 713, 714–15 (Cal. Ct. App. 2000) (sustaining a right of publicity cause of action for non-celebrity models).

78. *Id.* at 717.

79. Compare *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (reversing summary judgment in favor of defendants in case involving *Wheel of Fortune* host Vanna White) and *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1257 (9th Cir. 1997) (upholding a verdict in favor of actor Clint Eastwood in an action against a tabloid newspaper) with *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 627 (6th Cir. 2000) (actor who played supporting role in *Predator* failed to demonstrate that his identity lent value to action figure) and *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40, 41 (N.D. Ill. 1996) (holding that obscure martial artist was not recognizable enough to lend value to *Mortal Kombat* games).

Although there is a general paucity of relevant case law outside New York and California, the Sixth Circuit has been the most insistent on restricting the right of publicity to celebrities.<sup>80</sup> It ruled in favor of former “Tonight Show” host Johnny Carson when a portable toilet purveyor misappropriated his signature introductory phrase, “Here’s Johnny.”<sup>81</sup> Yet, when a supporting actor from *Predator* wanted to be paid for action figures based on his character, the Sixth Circuit upheld summary judgment against him, indicating that *Carson* stood for the proposition that “the right was meant to protect famous celebrities.”<sup>82</sup> Other courts have phrased this requirement in more forgiving language, requiring that a product’s value have an association with the plaintiff’s image,<sup>83</sup> that the plaintiff show significant “commercial value,”<sup>84</sup> or that some of the product’s value be derived from the plaintiff’s identity.<sup>85</sup> In *Smith v. NBC Universal*, the court, applying California law, found that an orca-attack victim’s identity did not add value to a video of the attack, and his right-of-publicity claim was therefore insufficient.<sup>86</sup> “The Episode featured Smith only because he happened to be the victim of the attack.”<sup>87</sup> In other words, the product would have been just as valuable with anyone in Smith’s place.

## 2. Unsuccessful Video Game Plaintiffs

Although lack of notoriety is not a bar to right-of-publicity claims, it can make the claim more difficult, especially when the work in question differs from reality as much as a typical video game. A work that deviates from reality is more likely to be considered expressive, and thus be afforded First Amendment protection. This section examines a pair of plaintiffs who bore remarkable resemblances to video game characters, but whose claims were defeated by summary judgment.

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80. See, e.g., *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (holding that Johnny Carson’s celebrity status gives him standing to recover damages for unauthorized use of “Here’s Johnny” catchphrase); *Landham*, 227 F.3d at 621 (applying *Carson* rule to “fringe actor” plaintiff and upholding summary judgment for defendants).

81. *Carson*, 698 F.2d at 837.

82. *Landham*, 227 F.3d at 622.

83. See, e.g., *McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994) (“A famous individual’s name, likeness, and endorsement carry value and an unauthorized use harms the person by both diluting the value of the name and depriving that individual of compensation.”).

84. *Cheatham v. Paisano Publ’ns, Inc.*, 891 F. Supp. 381, 386–87 (W.D. Ky. 1995).

85. *Smith v. NBC Universal*, 524 F. Supp. 2d 315, 329 (S.D.N.Y. 2007).

86. *Id.*

87. *Id.*

In *Pesina v. Midway Manufacturing Co.*, the plaintiff was a martial artist who modeled for the popular arcade game *Mortal Kombat*.<sup>88</sup> When Midway reformatted the game and sold a home video version, Pesina sued for misappropriation of his likeness.<sup>89</sup> The court found that Pesina's likeness had no commercial value to begin with, as he was not well known.<sup>90</sup> Furthermore, the video game character, "Johnny Cage," was recognizable as Pesina to only six percent of *Mortal Kombat* players polled.<sup>91</sup> The court did not even consider a constitutional defense, as Pesina failed to prove key elements of the claim: that his identity had commercial value, and that his likeness was recognizable.

In *Kirby v. Sega of America, Inc.*, the court found that the "transformative" differences between a real-life pop star and a video game character were enough to validate Sega's First Amendment defense.<sup>92</sup> Those differences included physique, hairstyle, clothing, surroundings, and dance moves.<sup>93</sup> The court concluded that Sega had "added new expression, and the differences are not trivial."<sup>94</sup> Kirby claimed that First Amendment protection applied only to parody or satire, but the court rejected this argument, saying, "Whether the . . . character conveys any expressive meaning is irrelevant to a First Amendment defense."<sup>95</sup>

### C. Right of Publicity: Licensing Issues

The *Haelan Laboratories* court separated right of publicity from the common law right-to-privacy torts because the privacy torts were purely personal rights.<sup>96</sup> In order to protect the value of a recognizable plaintiff's identity, it was necessary to create a commercial right in his identity, which he could assign to others.<sup>97</sup> In other words:

[T]he effect . . . is to recognize or create an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of

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88. 948 F. Supp. 40, 41 (N.D. Ill. 1996).

89. *Id.* at 42.

90. *Id.*

91. *Id.*

92. 50 Cal. Rptr. 3d 607, 614–15 (Cal. Ct. App. 2006).

93. *Id.* at 615–16.

94. *Id.* at 616.

95. *Id.* at 617.

96. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

97. *See id.* at 869 (holding that the ballplayer in question had assigned his right to Haelan, and Haelan therefore had standing to sue Topps).

trade mark in his likeness. . . . Once protected by the law, it is a right<sup>98</sup> of value upon which the plaintiff can capitalize by selling licenses.

*D. Amateurism as a Contract*

Jeremy Bloom is a world-class skier who withdrew from the 2010 Winter Olympics to devote more attention to community service.<sup>99</sup> It would have been his third Olympic run.<sup>100</sup> He also played college football at the University of Colorado and flirted with professional football.<sup>101</sup> As both an Olympian and a former college player, this phenomenal athlete presents two sides of the amateurism coin. Unfortunately, his drive to the Olympics effectively ended his college career.<sup>102</sup> The NCAA refused to allow him to accept endorsement deals, on which all skiers rely to cover training expenses.<sup>103</sup> When the University of Colorado and Bloom brought suit, the Colorado courts reluctantly upheld the NCAA's ruling.<sup>104</sup>

Bloom's case illustrates with brutal clarity the NCAA's insistence on strict compliance with its amateurism bylaws—the very same bylaws Keller accuses the NCAA of violating. Most importantly for purposes of this Note, Bloom's case, despite its pro-NCAA result, provides a basis for college athletes to sue the NCAA for violating its own bylaws.

1. NCAA Forms

All NCAA athletes sign Form 08-3a, which, among other things, indicates that the student-athlete understands the amateurism rules and that he or she meets the qualifications.<sup>105</sup> Those amateurism rules are contained in Bylaw 12 of the NCAA Handbook.<sup>106</sup> Three portions in particular of Bylaw 12 conspire to prevent the athletes from making money and insulate the NCAA from liability for unauthorized use of their identities. The first prevents athletes from receiving any form of payment:

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98. PROSSER AND KEETON ON THE LAW OF TORTS 854 (W. Page Keeton, ed., 5th ed. 1984).

99. Selena Roberts, *Special Senior Moments*, SPORTS ILLUSTRATED, Dec. 28, 2009, at 88.

100. *Id.*

101. *Id.*

102. See Joel Eckert, Note, *Student-Athlete Contract Rights in the Aftermath of Bloom v. NCAA*, 59 VAND. L. REV. 905, 906–07 (2006).

103. Freedman, *supra* note 1, at 678.

104. *Id.* at 684 n.68.

105. NCAA Form 08-3a.

106. NCAA, NCAA DIVISION I MANUAL art. 12, at 61–76.

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An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

- (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; . . .<sup>107</sup>

The next relevant section of Bylaw 12 specifically prohibits promotional activities:

After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual:

- (a) Accepts 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>108</sup>

Finally, the NCAA requires student-athletes to stop unauthorized use of their likenesses, even if they are unaware of such misuses:

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>109</sup>

Bylaw 12 does allow a player's photo or likeness to be used in a very specific set of self-serving circumstances, including events promoting charitable causes or NCAA championships, wallet-size schedule cards and congratulatory advertisements.<sup>110</sup> And while the NCAA allows athletes to receive compensation for sports besides those in which they compete during college,<sup>111</sup> they are not allowed to receive endorsement

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107. *Id.* art. 12.1.2, at 62–63.

108. *Id.* art. 12.5.2.1, at 73–74.

109. *Id.* art. 12.5.2.2, at 74.

110. *Id.* art. 12.5.1, at 71.

111. *Id.* art. 12.1.3, at 66 (stating that professional athletes are eligible for NCAA sports other than the sport they compete in professionally). Many minor-league baseball prospects take advantage of this rule after their attempts to reach the major leagues stall; they attend college, where they play other sports. See, e.g., Dan Wolken, *Yankees Minor Leaguer C.J. Henry Joins Memphis*

money for any activities.<sup>112</sup> That rule doomed Jeremy Bloom's multisport aspirations.

## 2. *Bloom v. NCAA*<sup>113</sup>

Jeremy Bloom's case is as an example of the NCAA's don't-bend-or-break policy on amateurism. Bloom relied on endorsements to fund his training, coaching, and other expenses related to skiing, a "burdensomely expensive sport."<sup>114</sup> Skiers lucky enough to make a living on the slopes rely on endorsements as their primary source of income.<sup>115</sup>

In February 2002, as Bloom was competing in his first Olympics, the NCAA denied Bloom's request for a waiver of the bylaw restricting endorsement income.<sup>116</sup> That fall, Bloom chose college football over his six-figure endorsement income from Oakley, Under Armour, and Dynastar skis, as well as a modeling contract with Tommy Hilfiger.<sup>117</sup> Bloom sought injunctive relief from the NCAA's ruling on the grounds that his endorsement opportunities pre-existed his student-athlete status and, in fact, had nothing to do with his football abilities.<sup>118</sup> He also classified the NCAA's constitution and bylaws as "unconscionable restraints of trade."<sup>119</sup>

Unconvinced, a Colorado district judge upheld the NCAA's ruling, noting that the bylaws' purpose of fostering amateurism was legitimate and that the rules were not applied in an arbitrary or capricious manner.<sup>120</sup> The court stated, "If Mr. Bloom was allowed to receive the income that is customary for professional skiers, it is not difficult to imagine that some in other professional sports would decide that in addition to direct monetary compensation, that endorsements or promotion of goods would become 'customary.'"<sup>121</sup> The ruling was

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*Basketball Team*, MEMPHIS COMM. APPEAL, Aug. 26, 2008, at A1.

112. NCAA DIVISION I MANUAL art. 12.5.2.1, at 73–74 (declaring student-athletes ineligible if they accept compensation for promotions after enrolling in college).

113. 93 P.3d 621 (Colo. App. 2004).

114. Freedman, *supra* note 1, at 680.

115. *Id.*

116. *Id.* at 678.

117. *Id.* at 680–81.

118. *Bloom*, 93 P.3d at 622.

119. Freedman, *supra* note 1, at 678–79.

120. *Id.* at 683–84.

121. *Id.* at 686 (quoting *Bloom v. Nat'l Collegiate Athletics Ass'n*, No. 02-C-1249, slip op. at 5 (20th Dist. Ct. Colo. Aug. 15, 2002)).

affirmed on appeal in 2004.<sup>122</sup> After two years of college football, Bloom accepted an endorsement deal so that he could afford to prepare for the 2006 Olympics.<sup>123</sup> His college football career was over.<sup>124</sup>

One aspect of the district court's holding, affirmed by the Colorado Court of Appeals,<sup>125</sup> favored athletes. The Colorado courts found that the NCAA's constitution and bylaws constitute a contract between the NCAA and its member schools, and that student-athletes are entitled to contractual protection as third-party beneficiaries.<sup>126</sup> "[T]o the extent Bloom's claim . . . asserts a violation of the duty of good faith and fair dealing that is implied in the contractual relationship between the NCAA and its members, his position as a third-party beneficiary of that contractual relationship affords him standing to pursue this claim."<sup>127</sup>

Third-party beneficiaries do not need to establish privity.<sup>128</sup> They can enforce contracts to the same degree as parties in privity if they are the intended beneficiaries.<sup>129</sup> The theory behind this doctrine is that the promisor has a duty to any intended beneficiaries, whether or not they are parties to the contract.<sup>130</sup> Student-athletes or former student-athletes suing the NCAA no longer need to rely on vague assertions of implied obligations; rather, they can point directly to the NCAA's own rules.<sup>131</sup>

#### *E. Keller Versus EA, NCAA and CLC: Facts and Pleadings*

The NCAA Football video game franchise has come a long way from its first release, and it has been inching closer to misappropriating identities with every summer's new edition. The first edition of the game, then called "Bill Walsh College Football," was released in 1993.<sup>132</sup> It included only twenty-four teams, and no official team names or logos were used.<sup>133</sup> Teams were identified by city and players by

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122. *Bloom*, 93 P.3d at 621.

123. Eckert, *supra* note 102, at 907.

124. *Id.*

125. *Bloom*, 93 P.3d at 621.

126. Eckert, *supra* note 102, at 922.

127. *Bloom*, 93 P.3d at 624.

128. Eckert, *supra* note 102, at 928.

129. *Id.*

130. *Id.*

131. *See id.* ("[T]he NCAA Constitution and Bylaws . . . identify the material obligations the NCAA and its member institutions owe to student-athletes.")

132. *Bill Walsh College Football* for Sega Genesis (Electronic Arts 1993).

133. *Id.*

number.<sup>134</sup> The second version of Bill Walsh College Football used fictitious bowl names,<sup>135</sup> presumably to avoid licensing issues.

The next generation of EA college football games, released in 1995 and 1996, added real bowl names and the ability to create players, and it included every Division I team.<sup>136</sup> These were also the first games to use photos of former college players on the cover.<sup>137</sup> NCAA Football 1999 (released in 1998) included, for the first time, actual fight songs, actual crowd chants, and the ability to edit player names.<sup>138</sup> For example, Tennessee's QB No. 16 could easily be re-named "Peyton Manning." The game also included the "EA Sports MVP" Trophy, awarded at the end of a completed season just like the Heisman Trophy.<sup>139</sup> By the time NCAA Football 2003 was released, several postseason awards had acquired their real-life names (the Heisman, most notably).<sup>140</sup> Players' heights, weights, and hometowns were matched to their real-life counterparts.<sup>141</sup>

In perhaps the final straw, recent versions of NCAA Football have made it easy to prepare and share complete team rosters with other users.<sup>142</sup> After only a few minutes of downloading, those pesky positions and numbers can be replaced by every player's actual name. QB No. 5 would become Sam Keller, and all of his teammates would be similarly transformed, in one fell swoop.

Keller's complaint makes several other, less objective, allegations about recent versions of NCAA Football: EA matches equipment preferences such as "wristbands, headbands, facemasks and visors."<sup>143</sup> "When players have unique highly identifiable playing behaviors, Electronic Arts attempts to match those as well."<sup>144</sup> Finally, Keller alleges that EA collects detailed questionnaires from equipment managers of college teams to perfect their digital replications of college

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134. *Id.*

135. *Bill Walsh College Football 95* for Sega Genesis (Electronic Arts 1994).

136. *College Football USA 96* for Sega Genesis (Electronic Arts 1995).

137. *College Football USA 97* for Sega Genesis (Electronic Arts 1996). This is still EA's practice. One of four different first-year professional football players appears on the cover of NCAA Football 2010, each in his college uniform. *NCAA Football 10 Covers Announced*, EA Sports press release, April 24, 2009.

138. *NCAA Football 1999* for PlayStation (Electronic Arts 1998).

139. *Id.*

140. *NCAA Football 2003* for PlayStation 2 (Electronic Arts 2002).

141. *Id.*

142. *NCAA Football 10* for PlayStation 2 (Electronic Arts 2009).

143. Keller Complaint, *supra* note 6, at 7.

144. *Id.* at 8.



football (and basketball) players.<sup>145</sup> In response, the defendants say that there is no contract between the NCAA and its student-athletes and that EA does not use athletes' likeness, but only items licensed to it by the NCAA, such as jerseys, logos and stadiums.<sup>146</sup> In its motion to dismiss, EA pled that its work is expressive and entitled to First Amendment protection.<sup>147</sup>

Keller stated seven causes of action, including conspiracy among the defendants and antitrust violations.<sup>148</sup> This Note is concerned only with the breach of contract and right of publicity claims.

### III. ANALYSIS

The EA Sports games in question, NCAA Football and NCAA March Madness, satisfy all the elements of the common law right-of-publicity tort, and the defendants should not succeed in asserting First Amendment protection. Given the NCAA's history of prohibiting student-athletes from earning income,<sup>149</sup> there is little doubt that Keller would have been severely punished if he had personally sold EA a license to use his characteristics in the way it currently does. Yet, the NCAA has no problem profiting from the officially licensed software. What is the reason for this Catch-22? The obvious answer, which Keller will argue, is that the NCAA and EA conspired to appropriate student-athletes' likenesses. The latter portions of this section consider two other possibilities: that college athletes simply do not have rights to publicity and that student-athletes license their rights to publicity to the NCAA when they sign letters of intent to play college athletics.

#### A. *EA's Video Games Violate Student-Athletes' Rights of Publicity, if Such Rights Exist*

The appropriation in *Keller* almost certainly exceeds the *White* (California) and *Ali* (New York) standards, where names were not used,

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145. *Id.*

146. Defendant NCAA's Notice of Motion to Dismiss the Complaint at 1–2, *Keller v. Elec. Arts Inc.*, No. 4:09-cv-01967-CW (N.D. Cal. July 29, 2009), 2009 WL 2364163 [hereinafter NCAA's Motion to Dismiss].

147. Electronic Arts Inc.'s Notice of Motion to Dismiss the Complaint at 1, *Keller v. Elec. Arts Inc.*, No. 4:09-cv-01967-CW (N.D. Cal. July 29, 2009), 2009 WL 2364160 [hereinafter Electronic Arts Inc.'s Motion to Dismiss].

148. Keller Complaint, *supra* note 6, at 4–6.

149. See, e.g., *Bloom v. Nat'l Collegiate Athletics Ass'n*, 93 P.3d 621, 625–26 (Colo. App. 2004).

but the characters were still easily recognized as the plaintiff. In *White*, a robot dressed as Vanna White violated her right of publicity.<sup>150</sup> In *Motschenbacher*, an image of the plaintiff's distinctive automobile violated his right of publicity.<sup>151</sup> Here, digital football players are dressed like their real-life counterparts and given the same physical characteristics, positions, jersey numbers, and hometowns. The distinctiveness of video game Keller is greater than that of robot White or Motschenbacher's car. This should compensate for the disparity in fame, if one exists.

EA's video games are clearly commercial products and are not part of the news media. Therefore, if the defendants in *Keller* are to succeed on their First Amendment defense, they must show that NCAA Football and NCAA March Madness are "transformative" enough to be afforded the same protections as works of art.<sup>152</sup> EA cites *Gionfriddo* and *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*<sup>153</sup> as proof of a rule that the public interest in sports always outweighs an athlete's interest in his right of publicity.<sup>154</sup> Keller correctly distinguishes use of real-life statistics, as seen in the cases EA cites, from a video game's replication of real-life players in an alternate reality.<sup>155</sup>

The First Amendment argument puts EA in the odd position of arguing that its video games represent real-life—and thus fit the "public interest in sports" argument<sup>156</sup>—while simultaneously arguing that its works are transformative enough to be afforded the same protection as the trading cards in *Cardtoons*.<sup>157</sup> However, under *Comedy III*, the controlling California decision, "reverential portraits" violate the right of publicity.<sup>158</sup> Furthermore, EA's own decision to generously compensate professional athletes depicted in its games acknowledges the weakness of the Constitutional defense in this case.<sup>159</sup> If this defense was strong, EA could save a hefty sum by refusing to pay the pros.

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150. *White v. Samsung Elecs. of Am., Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1993).

151. *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 822 (9th Cir. 1974).

152. *See supra* Part II.A.2.

153. 505 F.3d 818 (8th Cir. 2007).

154. Electronic Arts Inc.'s Motion to Dismiss, *supra* note 147, at 12.

155. Keller's Opposition to Electronic Arts' Motion to Dismiss at 11, *Keller v. Elec. Arts Inc.*, No. CV-09-1967-CW (N.D. Cal. Sept. 1, 2009), 2009 WL 2920920 [hereinafter Keller's Opposition].

156. *Id.*

157. *See id.*

158. *Comedy III Prods. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001).

159. *See Parrish v. Nat'l Football League Players, Inc.*, No. C 07-00943 WHA, 2009 WL 88484, at \*3 (N.D. Cal. Jan. 13, 2009).

*B. Do NCAA Division I Athletes Have Rights of Publicity?*

1. Student-Athletes' Identities Have Value

Applying the public policy justifications of the right-of-publicity cause of action, it is clear that, at the very least, student-athletes *should* have a cause of action against EA's use of their video game likenesses. Otherwise, EA and the NCAA will continue to be unjustly enriched by the value of players' identities. The other policy justification—protection of the plaintiff's reputation—is less applicable, but still valid. If a player's digital doppelganger is rated poorly or depicted unflatteringly, it may affect public opinion of the player.<sup>160</sup> But unjust enrichment is the main policy concern.

By any standard used in right-of-publicity opinions to date, student-athletes should have a right of publicity in EA's use of their video game likenesses. If the plaintiff is included in the product merely by coincidence, his identity is unlikely to have added any value to the product. If the plaintiff is a well-known celebrity in the minds of the defendants when the product was made, he can almost certainly state a claim. Sam Keller finds himself in a middle ground: he is not a well-known celebrity, but the game-makers clearly had Keller in mind when they created QB No. 5. Under the standard applied in California, the epicenter of right-of-publicity case law, a plaintiff's identity need only add value to the product.<sup>161</sup> EA's college sports games have dominated the market because of their exclusive licenses with the NCAA. There simply is not a market for sports games with fictional players, especially when it must compete with games that imitate real-life players with EA's precision.<sup>162</sup>

Most other phrasings of the standard favor student-athletes as well. For the reasons just discussed, the plaintiffs have significant "commercial value,"<sup>163</sup> and some of the product's value is "derived from

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160. For a humorous and very vulgar representation of a player's response to a poor video game rating, see Juan Turlington, *Ethan Albright Strikes Back*, THE PHAT PHREE <http://www.the-phatphree.com/features.asp?SectionID=2&StoryID=3159> (satirical letter from worst-rated player in EA's "Madden NFL Football 2007" to game's namesake, John Madden). "My agility rating on your game is 33. It makes it sound like I just topple over if I start walking too fast." *Id.*

161. See *supra* notes 46–48 and accompanying text.

162. EA's slogan for its sports division is "if it's in the game, it's in the game," but it is often shortened to "it's in the game." *E.g.*, *NCAA Football 2003* for PlayStation 2 (Electronic Arts 2002). The abbreviated slogan, intentionally or not, draws less attention to the games' meticulous, possibly tortious, imitation of real sports.

163. *Cheatham v. Paisano Publications, Inc.*, 891 F. Supp. 381, 386 (W.D. Ky. 1995).

[their] identity.”<sup>164</sup> Other cases require a valuable association with the plaintiff’s image.<sup>165</sup> For proof of such an association, one need only read any reviews or online discussion of the games. This reviewer is discussing QB No. 15 on the Florida Gators in the most recent edition of *NCAA Football*: “Take for example, Tim Tebow from the Florida Gators: Tebow wins the Heisman trophy in my first year of play, is voted the best QB in the U.S., takes his team to the National Championship, and has stats to die for.”<sup>166</sup> Virtually any time a digital player is discussed in an Internet forum, he is referred to by real-life name. For example, a discussion on a popular video game website, *gamefaqs.com*, asks gamers to list the most overrated players in *NCAA Football ‘10*. “Tarheelfan3202” insisted that Michigan’s DT #68 had not earned his high rating, but did not refer to the video game character by position and number: “Overrated—Mike Martin (91 overall). He wasn’t even a starter last year though he was a solid step in for Johnson and Taylor. He doesn’t miss tackles, but he didn’t play enough to warrant that 91. I’d say 87.”<sup>167</sup> Direct comparisons of the digital players to the corresponding real-life student-athletes are commonplace, and the games cater to consumers who know the true identities of the digital athletes by allowing consumers to edit the players’ names.<sup>168</sup>

There is a clear association by the games’ consumers between the digital characters and real-life college athletes. The players’ identities and characteristics increase the value of EA’s games almost immeasurably. It is arguable that student-athletes’ identities lack value because they are forbidden by the NCAA from making money from their identities as athletes.<sup>169</sup> If student-athletes were allowed to do so, they surely would profit financially. The principles of equity should bar the NCAA from using its own bylaw to shield itself and other defendants from the simple truth that college athletes’ likenesses are valuable.

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164. *Smith v. NBC Universal*, 524 F. Supp. 2d 315, 329 (S.D.N.Y. 2007).

165. *See supra* notes 76–78 and accompanying text.

166. Dakota Grabowski, *NCAA Football 10—Review*, PLANET XBOX 360, [http://www.planetxbox360.com/article\\_7094/NCAA\\_Football\\_10\\_-\\_Review](http://www.planetxbox360.com/article_7094/NCAA_Football_10_-_Review) (last visited Mar. 30, 2010).

167. *Gamefaqs.com*, Most underrated/overrated player on your team, <http://www.gamefaqs.com/boards/genmessage.php?board=958704&topic=49927205> (last visited Mar. 2, 2010).

168. *Supra* notes 138–42 and accompanying text.

169. *Cf. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007) (“[M]ajor league baseball players . . . can earn additional large sums from endorsements and sponsorship arrangements.”).

## 2. Keller States a Stronger Claim Than Previously Unsuccessful Video Game Plaintiffs

Although no plaintiff has succeeded in a right-of-publicity claim for use of his likeness in a video game, the groundwork has been set. In *Pesina*, only the plaintiff's martial-arts motions were copied.<sup>170</sup> The court noted that *Pesina* would have prevailed if he could show that his identity was "inextricably intertwined" with the digital character.<sup>171</sup> Here, Keller played quarterback, wearing jersey number five, at the University of Nebraska in 2007 at the same height and weight as his digital counterpart. QB No. 5 exists entirely because Keller played college football. Because more than merely his motions are copied, and he is unmistakably the inspiration for QB No. 5, Keller is more likely than *Pesina* to prove that his identity is "inextricably intertwined" with QB No. 5.

The digital imitation of the plaintiff in *Kirby* was more egregious than that in *Pesina*, but the defendant was still able to identify distinct differences between the real-life Kirby and the supposed digital copy.<sup>172</sup> Indeed, the *Kirby* Court noted that Kirby's digital counterpart, a twenty-fifth-century reporter, was "unlike any public depiction of Kirby."<sup>173</sup> EA made, and continues to make, every effort to imitate student-athletes. If EA could help it, nothing about QB No. 5's appearance or identity would be different from Keller's. Given EA's commitment to imitating life, its claim that NCAA Football is entitled to the protection afforded to an expressive work is shaky.<sup>174</sup> There is not nearly as much "transformation" of reality as in *Kirby*. EA's goal is the opposite; it has gone to great lengths to obtain as much imitable information as possible. The scope of its license with the NCAA seems to grow every year.

### C. *Does the Alleged Contract Affect the Relationship Between Athletes and the NCAA as to Rights of Publicity?*

In his Opposition to the NCAA's Motion to Dismiss, Keller insists that a contract exists between the athletes and the NCAA by virtue of Form 08-3a.<sup>175</sup> He also claims standing as a third-party beneficiary to

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170. *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40, 42 (N.D. Ill. 1996).

171. *Id.*

172. *Kirby v. Sega of America, Inc.*, 50 Cal. Rptr. 3d 607, 613 (Cal. Ct. App. 2006).

173. *Id.*

174. *See supra* Part III.A.

175. Keller's Opposition, *supra* note 155, at 8-9.

challenge the bylaws as a contract between the NCAA and its member institutions.<sup>176</sup> If the *Bloom* decision is given any weight,<sup>177</sup> Keller will be able to state a claim against the NCAA for violating its amateurism bylaws as a third-party beneficiary. If the court finds that Keller was an actual party to the contract by virtue of Form 08-3a, the NCAA could conceivably argue that the bylaws grant it a license to student-athletes' rights of publicity.

1. Does the NCAA Possess a License to Student-Athletes' Rights of Publicity?

The bylaw governing the limits of the use of a student-athlete's appears outdated. The bylaw considers trading cards and "film or videotape,"<sup>178</sup> but does not address more modern media. For example, Internet ads that randomly select photos from social-networking sites may show an athlete's self-posted photo. Could this endanger that athlete's eligibility? The bylaws are silent. They are likewise silent on video games.

Nothing in the NCAA's constitution or bylaws indicates, nor has any party in *Keller* yet suggested, that the NCAA possesses licenses to student-athletes' rights of publicity. The NCAA bylaws patently grant the NCAA a license to use a player's picture or likeness in certain limited situations.<sup>179</sup> The bylaws allow the NCAA, or a third party acting on the NCAA's behalf, to use an enrolled player's likeness "to generally promote NCAA championships or other NCAA events, activities or programs."<sup>180</sup> It also grants member schools a license to use the athletes' likenesses to promote charitable and educational events, and to distribute, but not sell, trading cards with photos of enrolled athletes.<sup>181</sup> Because the use of college athletes in video games does not fit any of these categories, the bylaws do not appear to assign athletes' rights to publicity to the NCAA in a way applicable to the *Keller* case.

The NCAA's position in *Keller* is simply that it did not use Keller's image in any way.<sup>182</sup> If anyone is guilty of appropriation, in the NCAA's

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176. *Id.*

177. *Bloom v. Nat'l Coll. Athletic Ass'n*, 93 P.3d 621, 624 (Colo. App. 2004).

178. NCAA, NCAA Manual art. 12.5 at 71-74.

179. *Id.*

180. *Id.*

181. *Id.*

182. NCAA's Motion to Dismiss, *supra* note 146, at 5-6.

view, it is EA.<sup>183</sup> The NCAA's arrangement with EA, however, is nothing more than a clever way to expand the bounds of its license. The bylaws clearly limit the ways in which the NCAA (or any other party) may profit from an athlete's likeness, yet the NCAA facilitated and, in fact, profited from the video games. If the court finds that EA violated Keller's right of publicity, the NCAA should be guilty by association.

2. Does the NCAA Have an Affirmative-Contractual Duty to Protect Student-Athletes' Rights of Publicity?

The NCAA has tried to insulate itself from claims like Keller's by stipulating that it is the responsibility of the athletes—not the NCAA or the universities—to protect their rights of publicity.<sup>184</sup> Keller admits that the NCAA has not licensed EA to use student-athletes' names or likenesses.<sup>185</sup> Instead of relying on a license theory, Keller pleads that, by reviewing and approving the games, and profiting from the games' success, the NCAA itself used his likeness in a way that satisfies the elements of the right-of-publicity cause of action and violates the NCAA bylaws.<sup>186</sup> The NCAA denies that it is a party to any contract with its athletes.<sup>187</sup> This Note has focused on establishing that student-athletes can succeed as plaintiffs in right-of-publicity actions. If Keller establishes that his right was violated, he will succeed against EA, and the case against the NCAA will be decided by this contract issue.

The NCAA should be estopped from denying the existence of a contract. If an athlete unilaterally licensed his right of publicity to EA, the NCAA would not hesitate to sanction that athlete under its bylaws. The bylaws specify instances where the NCAA has a license to athletes' images; outside the scope of this license, it would be equitable to make profiting from an athletes' likeness a two-way street. That is, if the athlete is forbidden from profiting, the non-licensed party should be forbidden from profiting as well. While the NCAA may not have a duty to protect an athlete's right of publicity from independent third parties, the *Keller* court should read the bylaws to forbid the NCAA from participating in and profiting from tortious appropriation of its athletes' likenesses.

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183. *See id.*

184. NCAA MANUAL art. 12.5.2.2 at 74.

185. Keller Complaint, *supra* note 6, at 4.

186. Keller's Opposition, *supra* note 155, at 4.

187. NCAA's Motion to Dismiss, *supra* note 146, at 10–11.

## IV. CONCLUSION

Developments in recent right-of-publicity cases and the contractual standing afforded student-athletes by *Bloom v. NCAA* set the stage for heated arguments in *Keller v. EA*. Given the recognizability of the digital football players, the enormous profits generated by the exclusive licensing agreement between the NCAA and EA, and the weakness of the defendants' First Amendment arguments, Keller is poised to become the first plaintiff to win a major right-of-publicity case for use of his likeness in a video game.

The court should not construe the NCAA's bylaws as the NCAA would like. Doing so would allow the NCAA, as it did here, to profit from any use of a student-athlete's likeness, even if the bylaws do not license the NCAA to do so, and even if the bylaws prohibit the athlete from so profiting. Such a result would be inequitable, given the NCAA's approval of the games and substantial profits from its agreement with EA. If EA's games violated Keller's right of publicity, the NCAA should also be liable.

If Keller is compensated even a modest amount, the damage to the NCAA (and EA) could foreseeably be enormous. Every athlete depicted in NCAA Football or NCAA March Madness, both long-running video game franchises, could state a claim on the exact same facts, subject to the statute of limitations. Just as significant is the NCAA's loss of credibility if it is held to have violated its most sacred bylaws by licensing athletes' likenesses and subsequently approving EA's infringement on their rights of publicity.