Whose Right Is It Anyway?: How Recent Cases and Controversies Have Blurred the Lines Between First Amendment Protection and an Athlete's Right of Publicity

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WHOSE RIGHT IS IT ANYWAY?: HOW RECENT CASES AND CONTROVERSIES HAVE BLURRED THE LINES BETWEEN FIRST AMENDMENT PROTECTION AND AN ATHLETE’S RIGHT OF PUBLICITY

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I. INTRODUCTION

There are many benefits to being a professional athlete—fame and adoration are just a couple of them—but the opportunity to make a significant living is chiefly among them. While the primary way for athletes to make money is in direct salary for performance on the playing field, athletes in recent decades have been able to cash in on their persona as a celebrity figure. For most athletes, this identity provides a significant commercial value and can manifest itself in the form of such ventures as endorsements or sale of the athlete’s likenesses or identity. Thus, it would seem quite necessary for athletes to have the ability to protect their personas in order to preserve their personas’ commercial and economic value. However, the rules and laws concerning an athlete’s right to protect his persona are not always clear as to what may violate an athlete’s right of publicity. This has created a very tenuous situation, pitting athletes against others who may seek to capitalize on an athlete’s image, persona, or identity.

This article will first look at the foundations of the right of publicity and how courts have balanced this right against the First Amendment. It will then address some of the recent controversies related to these varying commercial uses of athlete and celebrity identities and shed some light on how different jurisdictions have drawn the line between the right of publicity and the First Amendment. Lastly, it will highlight the need for the U.S. Supreme Court to settle some of the conflicting law among jurisdictions that have balanced First

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Amendment rights against the right of publicity.

II. ORIGINS AND FOUNDATIONS OF THE RIGHT OF PUBLICITY

The Restatement (Third) of Unfair Competition defines violation of a person’s right of publicity as “one who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability for . . . relief.”\(^2\) Furthermore, a person’s name, likeness, or persona is used “for purposes of trade” if it is “used in advertising the user’s goods or services, or [is] placed on merchandise marketed by the user, or [is] used in connection with services rendered by the user.”\(^3\) Therefore, while every person has a right of publicity, which is the right to protect the unauthorized appropriation of his identity for purely commercial purposes, the First Amendment of the United States Constitution allows the use of a person’s identity, name, or likeness even if said use would violate a person’s right of publicity as long as the use of a person’s identity is for expressive purposes, such as news reporting or artistic expression, rather than purely commercial purposes.\(^4\)

In addition, the right of publicity is mainly a creation of state law\(^5\) and has its roots in the right of privacy.\(^6\) Similar to the right of privacy, “the right of publicity protects an individual’s interest in personal dignity and autonomy,” and the appropriation of a person’s name or likeness for the advantage of another has been considered to be one of the four torts constituting the right of privacy.\(^7\) Thus, the main purpose of the right of publicity is to secure a person’s commercial interest in his or her persona or identity against any unjust enrichment by other persons through the use of that identity.\(^8\) Indeed, the right of publicity takes its root in a statute enacted by the New York legislature in 1903, which imposed “criminal and civil liability for unauthorized use of a person’s name, portrait, or picture for ‘advertising

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3. Id. § 47. However, “for purposes of trade” does not include the use or appropriation of a person’s identity for “news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.” Id.
4. Id.; U.S. CONST., amend. I.
5. Some form of the right of publicity, either by common law or by statute, has been adopted by approximately half of the states. ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915, 928 (6th Cir. 2003) (citing J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 6.1 (2d ed. 2005)).
7. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 46.
8. Id.
presents or for the purposes of trade."

However, only once has the U.S. Supreme Court delivered a decision on the right of publicity. In Zacchini v. Scripps-Howard Broadcasting Co., the defendant secretly taped the performance of a "human cannonball" act by the plaintiff and then broadcasted the taped routine on a nightly news program despite the plaintiff not granting the defendant consent to do so. In response to the plaintiff's claim that the defendant's conduct was without his consent and an "unlawful appropriation of plaintiff's professional property," the Court upheld the state law adoption of the right of publicity on the grounds that it is necessary to prevent someone from unjustly enriching themselves through appropriation of another person's identity. Furthermore, the Court held that no societal interest is furthered by allowing someone to get some free aspect of a person's identity, persona, or creation that has market value and for which the public would normally have to pay. However, the issue in Zacchini focused more on the appropriation of the very activity through which an entertainer obtained his reputation in the first place, rather than the appropriation of an entertainer's reputation. Therefore, because the Zacchini case required the U.S. Supreme Court to deal only with the issue of appropriation of an entertainer's work itself, the Court delivered no clear message or general rule "by which to predict the result of conflicts between the right of publicity and the First Amendment." Thus, the issue of whether there should be laws protecting an entertainer's right of publicity to his or her reputation, persona, or identity has been left to the states and federal courts.

9. Id.
11. Id.
12. Id. at 563-64.
13. Id. at 564.
14. Id. at 576 (citing Kalven, Privacy in Tort Law – Were Warren and Brandeis Wrong?, 31 LAW & CONTEMP. PROB. 326, 331 (1966)).
15. Id.
16. Id. The main issue in Zacchini focused around the secret taping and subsequent broadcasting of an entertainer's "human cannonball" act rather than any appropriation of the entertainer's likeness, identity, or persona. Id. at 563-64. Therefore, while the Zacchini decision highlights the U.S. Supreme Court's view that there does exist a right of publicity, the exact parameters of how that right extends to appropriations of an entertainer's identity besides appropriations of the entertainer's original work, such as a broadcast of an athlete performing in a game or competition, has not been addressed by the U.S. Supreme Court.
17. J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 8.27 (2d ed. 2005).
Although the U.S. Supreme Court did not weigh in on the right of publicity until 1977, courts as far back as the 1950s began to recognize athletes’ rights to protect the commercial value of their identity. In what is considered to be the first recognition of the existence of a cause of action for violation of a person’s right of publicity, the Second Circuit held in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* that the common laws of New York gave professional baseball players a right of publicity to the commercial value of their photographs. The Second Circuit based its rationale on the fact that it was “common knowledge” that prominent persons, including athletes, “would feel sorely deprived if they no longer received money for authorizing advertisements.” The court refused to label the right of publicity as a “property” right but did allow persons who owned such a right to make an exclusive grant of their right, which would bar any other persons except those who had been granted this right to use the owner’s likeness.

Although some courts have gone beyond the Second Circuit’s opinion in *Haelan Labs* and have specifically stated that publicity rights are a “form of property protection” allowing people to benefit from “the full commercial value of their identities,” courts have differed as to what the correct approach is in defining the parameters of publicity rights and in determining when the First Amendment right to freedom of expression trumps these publicity rights. Therefore, to better understand how an athlete or celebrity’s right of publicity might be defined, it is necessary to take a look at some of the controversies concerning athlete and celebrity publicity rights that have arisen in recent years.

19. See generally *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2nd Cir. 1953).
20. *ETW*, 332 F.3d at 929 (citing *Haelan Labs*, 202 F.2d at 866). Furthermore, the Second Circuit is also credited with coining the phrase “right of publicity” as the name for a person’s right to the value in his photograph. *Id.* While the defendant argued that the baseball players’ only right was that of privacy, a personal and non-assignable right to not have their feelings hurt by a publication, the Second Circuit held that the players had an assignable right of publicity in addition and independent to the right of publicity granted in New York by statute. *See Haelan Labs.*, 202 F.2d at 868.
22. *Id.* The court stated that the right of publicity would be effective only if such a grant were possible. *Id.*
III. THE BOBBLEHEAD DEBATE: THE FIRST AMENDMENT VS. THE RIGHT OF PUBLICITY

The world of sports is a competitive business, and in recent years many, teams have turned to bobblehead giveaways at games to attract fans to their home games. Although these bobbleheads are often quite the hit with fans, they also represent a significant controversy when it comes to the athletes or celebrities used as the likeness for the bobbleheads. When teams such as the Seattle Mariners have a promotion giving away bobblehead dolls depicting the likenesses of their current players, the team does so with a player’s consent.

But what if athletes or celebrities do not want their likenesses to be used in the production of a bobblehead? What rights do those people have to protect against any unpermitted use of their likenesses in the production of a bobblehead? Although the U.S. Supreme Court has acknowledged that a right of publicity exists, the highest court in the United States has never addressed how the right of publicity applies to these questions. However, there have been some recent cases, and a notable controversy involving famed actor and politician Arnold Schwarzenegger, that show how the right of publicity is applied in the context of bobbleheads and similar products bearing the likeness of a given person.

One example that provides some insight as to how a famous figure's likeness may be used is the controversy concerning a bobblehead bearing the likeness of famous actor and politician Arnold Schwarzenegger. The bobblehead doll in question depicted Schwarzenegger in a suit while holding a...
gun and wearing an ammunition belt over his shoulder. The bobblehead doll was manufactured and sold by Ohio Discount Merchandise, Inc. (ODM) without any permission from Schwarzenegger or Oak Productions, a California corporation established by Schwarzenegger to manage his rights of publicity.

Subsequent to the discovery of the bobblehead doll, counsel for Oak Productions sent a cease-and-desist letter to ODM. In response to the letter, ODM called counsel for Oak Productions and took the stance that Schwarzenegger's name and likeness could be used without his permission because he was a politician, thus putting his name and likeness in the "public domain." Ultimately, the two parties later reached a settlement whereby all bobbleheads depicting Schwarzenegger with a gun would be discontinued and that ODM could manufacture and sell a Schwarzenegger doll that was approved by Oak Productions.

Even though the parties settled, the controversy still left many important questions unanswered. The main issue concerning the bobblehead was whether Schwarzenegger had the right to prevent the bobblehead from being created without his permission or whether the bobblehead was protected artistic expression under the First Amendment. To understand the merits of

32. Id. at 552. Furthermore, the packaging of the bobblehead contained several pictures of Schwarzenegger from various points in his life, such as his bodybuilding career, acting career, and political campaign. Id. Because of its more literal depiction, there was less controversy over the package than the doll. Id.

33. Id. at 551-52.

34. Id. at 552-53. Schwarzenegger's letter ordered ODM to stop manufacturing and selling the bobblehead and to make a substantial payment to Oak Productions so to compensate Schwarzenegger for the damage that ODM caused by creating and selling the bobblehead. Id.

35. Id. at 553. When ODM refused to stop selling and marketing the bobblehead dolls, Oak Productions filed a Complaint against ODM in Los Angeles County Superior Court seeking damages and a preliminary and permanent injunction against the sale of the bobblehead dolls based upon ODM's alleged violation of Schwarzenegger's common-law right of publicity. Id. at 553-54. ODM then filed an Answer and Cross-Complaint seeking a declaration from the court that the Schwarzenegger bobblehead dolls were not a violation of Schwarzenegger's right of publicity and were instead protected by the First Amendment. Id. at 554.

36. Id. at 555. Also, part of the settlement was an agreement that a "substantial portion" of all sales of both the gun-holding and gun-less Schwarzenegger bobbleheads would be donated to Schwarzenegger's charity. Id.


each side on this debate and, thus, understand what rights of publicity a public figure might have, it is important to look at the applicable laws that ultimately would have weighed upon the California courts in resolving the lawsuit had it not been settled.

First, some commentators have suggested that Schwarzenegger, despite his status as a politician and a public figure, has a right of publicity to his likeness and image, and thus, the bobblehead created by ODM was a violation of his right of publicity.\textsuperscript{40} Because the lawsuit was brought in California, the applicable law that would have been applied to the bobblehead is the "transformative use" test that was created by the California Supreme Court in Comedy III Productions, Inc. v. Saderup.\textsuperscript{41}

In Comedy III Productions, Saderup was an artist with experience in making charcoal drawings of celebrities and created a drawing of the Three Stooges, which was then used for the making of prints and silk screen images for t-shirts.\textsuperscript{42} However, Comedy III Productions owned all the rights to the comedy act known as the Three Stooges and did not consent to Saderup's drawing or to the t-shirts depicting the drawing.\textsuperscript{43} In response, Comedy III Productions sued Saderup for violating its right of publicity to the Three Stooges, and the case eventually reached the California Supreme Court, which balanced Saderup's First Amendment rights against Comedy III Productions' right of publicity.\textsuperscript{44}

Accordingly, the California Supreme Court held that Saderup's drawings were entitled to some protection under the First Amendment because the drawings were "expressive works" and not commercial speech, such as "an advertisement for or endorsement of a product."\textsuperscript{45} Furthermore, the court found that the First Amendment and the right of publicity are often in direct conflict because, while the First Amendment is meant to foster an uninhibited marketplace of ideas by repelling any efforts to limit the open debate on public issues, the right of publicity seeks to prevent the appropriation of a person's likeness for use in such expression.\textsuperscript{46}

\textsuperscript{40} Harder & Self III, supra note 38, at 557-58.
\textsuperscript{41} Comedy III Prods., Inc. v. Saderup, 21 P.3d 797, 808-09 (Cal. 2001).
\textsuperscript{42} Id. at 800-01.
\textsuperscript{43} Id. at 800.
\textsuperscript{44} Id. at 800-02.
\textsuperscript{45} Id. at 802.
\textsuperscript{46} Id. at 803 (quoting Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 458 (Cal. 1979)). Along these lines, the court determined that Saderup's drawings were not afforded any less protection under the First Amendment even though the drawings were a form of non-verbal expression meant for entertainment rather than information, did not contain any discernable message, and appeared in a less conventional avenue of communications such as t-shirts. Id. at 803-04.
Yet, the court still held that, while there is a need for a high degree of protection for noncommercial speech about celebrities, not all expression of this nature trumps a person’s right of publicity. In determining the proper balancing test between an alleged right of publicity and an alleged right to freedom of speech and expression under the First Amendment, the court held that the appropriate test is a transformative use test, whereby the question a court must ask is “whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.” If so, then the use of a person’s likeness or persona is protected by the First Amendment. Consequently, Saderup’s drawings of the Three Stooges were held to not be protected because they were literal depictions of the comedians and contained no transformative or creative contributions. Therefore, the drawings violated Comedy III Productions’ right of publicity.

Although the transformative use test was created by the California Supreme Court, other jurisdictions have adopted the test when drawing the proper balance between the First Amendment and publicity rights. In ETW Corporation v. Jireh Publishing, Inc., the Sixth Circuit addressed the contention between the First Amendment and publicity rights when famed golfer Tiger Woods sued a publishing company for producing one of its artist’s works, which contained a painting of Woods surrounded by other legends of golf at the Augusta National golf course. Woods claimed that Jireh’s publication and marketing of prints of the painting violated his right of publicity because the painting was created without the permission of ETW, the owner of the exclusive right to exploit Woods’ name, image, likeness, and all other publicity rights.

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47. Id. at 804.
48. Id. at 809. The court compared its transformative use test to rulings in similar cases and found that the test was consistent with the ruling in a case whereby a defendant’s production of baseball cards with caricatures and parodies of notable baseball players was protected under the First Amendment due to the significant variation of the cards from actual photographs and depictions of the players. Id. (citing Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 969 (10th Cir. 1996)). In Cardtoons, the Tenth Circuit also took into account the social commentary provided by the cards and the minimal impact the cards would have on the athlete’s ability to benefit from the commercial value of their identities. Cardtoons, 95 F.3d at 73-76.
49. See Comedy III Prods., 21 P.3d at 809.
50. Id. at 811.
51. Id.
52. ETW Corp. v. Jireh Publ’g., Inc., 332 F.3d 915, 918 (6th Cir. 2003). The painting was entitled “The Masters of Augusta” and also included Tiger’s caddy and his final round playing partner’s caddy next to Tiger. Id.
53. Id. at 918, 928.
In determining how best to balance the First Amendment against the right of publicity, the Sixth Circuit acknowledged that there is an inherent tension between the two sets of rights that becomes particularly noticeable when the person seeking to enforce a right of publicity is someone whose personal life is subject to “constant scrutiny and comment in the public media,” such as an athlete and celebrity. Ultimately, the Sixth Circuit adopted the transformative test created by the California Supreme Court, as well as a similar approach used by the Tenth Circuit in Cardtoons, L.C. v. Major League Baseball Player Association. Accordingly, the court held that the painting of Tiger Woods surrounded by golfing legends was a transformed depiction of Tiger Woods and constituted significant expression that should be protected by the First Amendment.

Applying the transformative use test to the Schwarzenegger bobblehead, there is a significant question as to whether the bobblehead constituted a literal depiction of Schwarzenegger or was a creative expression of the famed actor and politician. While some might see the Schwarzenegger bobblehead’s suit and gun as merely imitations meant to invoke various points in Schwarzenegger’s career and thus not a transformation of his likeness, others might see the combination of images of Schwarzenegger from different periods in his career as expressive transformation of Schwarzenegger’s likeness. In addition, some have compared the Schwarzenegger bobblehead to a political cartoon, which is a constitutionally protected form of speech.

54. Id. at 931.
55. Id. at 936 (citing Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959 (10th Cir. 1996)). “Noting that another justification for publicity rights is the prevention of unjust enrichment, the court observed that ‘Cardtoons added a significant creative component of its own to the celebrity identity and created an entirely new product.’” Id. at 932 (citing Cardtoons, 95 F.3d at 976).
56. Id. at 938. When adopting the approach of the Tenth Circuit in Cardtoons, the Sixth Circuit acknowledged the economic incentives associated with the right of publicity, namely to encourage people to produce creative works so as to derive an economic benefit from their identity. Id. Accordingly, the Sixth Circuit held that, because athletes can generate significant income outside their right of publicity, the appearance of creative artwork such as the painting of Woods often will have little effect on an athlete’s commercial value to his likeness. Id. Thus, an artist’s right of expression and subsequent right to profit from that creative enterprise should trump an athlete’s right of publicity if the creative enterprise does not diminish an athlete’s commercial value to his likeness. Id.
57. See Harder & Self III, supra note 38, at 573. The controversy over the Schwarzenegger bobblehead concerned both the doll itself and the packaging in which the doll came in, yet the issue of whether the packaging was a violation of Schwarzenegger’s publicity rights seems to be clearer than that of the doll, namely due to the use of literal photographs of Schwarzenegger on the packaging for the purpose of promoting the bobblehead. Id. at 573-74.
58. Id. at 574.
59. Gallagher, supra note 39, at 593-94.
under the First Amendment. Ultimately, the Schwarzenegger bobblehead lies somewhere in between the drawing of the Three Stooges in Comedy III Productions and the depiction of Tiger Woods surrounded by other legends of golf in ETW.

Furthermore, the Schwarzenegger situation was unique in that California has a common law and statutory “public affairs exception” to right of publicity claims, which states, “no cause of action will lie for the ‘publication of matters in the public interest, which rests on the right of the public to know and the freedom of press to tell it.’” Thus, the question becomes whether the creation and sale of bobbleheads depicting public figures are “publication of matters in the public interest” or commercial ventures lacking any expressive or creative value and are, therefore, in violation of a person’s right of publicity. The Schwarzenegger bobblehead created by ODM seems to contain some political, and thus public, expression by depicting Governor Schwarzenegger in a suit.

Although the dispute between Schwarzenegger and ODM ultimately was not settled definitively by the courts, the lengthy discussion over its merits provides some insight into potential conflicts with bobbleheads in the world of sports. The Schwarzenegger controversy shows that the use of the identities of celebrities or famous persons will be seen as a method for making money, and sports teams are no different as they continue to come up with new promotions and ideas to bring in revenue via fan attendance. An interesting question is where the line would be drawn if a team were to attempt to capitalize on the popularity of famous persons outside of current and former players in its promotions.

For example, what if a team wanted to have a “Barack Obama Day” promotion complete with a “Barack Obama Bobblehead” giveaway? Barack Obama has become President of the United States and a cultural icon, and part

62. Ochoa, supra note 31, at 552. Yet, the packaging for the bobblehead doll seems to suggest more of a commercial purpose. Id.
65. Id.
of his well-known persona is that Obama is an avid sports fan. Therefore, it might make a lot of sense for a team to attempt to attract fans to its home games by advertising a promotional giveaway of a Barack Obama bobblehead. But to what extent could Obama control the use of his likeness? According to Comedy III Productions and ETW, it would seem that Obama’s likeness could be used for commercial use as long as the use constituted artistic expression that went beyond mere reproduction of his visage, thus transforming a reproduction of Obama into an artistic expression.\(^6\) In addition, there is also the matter of a jurisdiction adopting California’s “public affairs exception” or a similar statute, which would prohibit a claim of a breach of a right of publicity if the Obama bobblehead were considered to be a publication in the public interest.

However, due to the lack of uniform application of tests such as the transformative use test or public affairs exception, the problem arises that one jurisdiction may determine an Obama bobblehead to be protected under the First Amendment, whereas another may not. Cases such as ETW show a willingness of federal courts to adopt sensible rules established in different jurisdictions concerning the balance between the First Amendment and the right of publicity, yet as we will see, courts have reached decisions that seem to be in contrast with the decisions reached in cases that have employed either a transformative use test\(^6\) or a similar approach such as that adopted by the Tenth Circuit in Cardtoons.\(^6\) Thus, it would certainly help if the U.S. Supreme Court addressed these conflicts and adopted a universal approach to balancing the right of publicity against the First Amendment.

**IV. FROM “CRAZYLEGS” TO “TONY TWIST” TO VIDEO GAMES – AN ATHLETE’S RIGHT TO PUBLICITY OVER HIS LIKENESS AND IDENTITY**

Although the previous section discussed the appropriation of a person’s likeness for artistic purposes, there have been many cases that have addressed invasions of an athlete’s privacy by appropriating the athlete’s identity for commercial value, namely in the advertising of some product without the athlete’s consent. In cases ranging from the creation of a women’s shaving product with the same name as the nickname of a famous athlete\(^6\) to the use of a famous boxer’s likeness and nickname without explicit mention of the

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66. ETW Corp. v. Jireh Publ’g., Inc., 332 F.3d 915, 928 (6th Cir. 2003); Comedy III Pros., Inc. v. Saderup, 21 P.3d 797, 802 (Cal. 2001).
67. See ETW, 332 F.3d at 928; see also Comedy III Pros., 21 P.3d at 809.
68. Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 969 (10th Cir. 1996).
boxer to even the modified use of a celebrity’s nickname, courts have been willing to adopt a liberal use of the term “identity” and have extended the right of publicity in any situation where the use in question would be easily identifiable with a certain athlete or celebrity and the use is for a commercial purpose.

In Hirsch v. S.C. Johnson & Son, Inc., the plaintiff was a famous football player who had developed the nickname “Crazylegs” as a result of his playing style on the gridiron. The plaintiff sued the defendant after the defendant created and marketed a women’s shaving product called “Crazylegs.” The Wisconsin Supreme Court held that “the right of a person to be compensated for the use of his name for advertising purposes or purposes of trade is distinct from other privacy torts which protect primarily the mental interest in being let alone” and that evidence existed to show that both Hirsch’s legal name and nickname had commercial value. Ultimately, the court held that the use of a person’s nickname rather than their legal name does not preclude a right of action and that “[a]ll that is required is that the name clearly identify the wronged person.” Along these lines, the court held that the defendant may have in fact violated the plaintiff’s right of publicity to his identity and remanded the matter for further findings.

The standard adopted by the Wisconsin Supreme Court for determining whether a famed person’s right of publicity over his likeness or persona was violated by some commercial advertising venture is similar to that adopted by other courts. In Ali v. Playgirl, a federal district court applying New York law held that a drawing of a boxer in a magazine constituted an appropriation of the likeness and identity of a famous boxer, Muhammad Ali, because the boxer in the drawing possessed several distinct similarities with the likeness of Muhammad Ali, even though the boxer in the drawing was not specifically

71. See generally Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (holding that the defendant’s use of phrases to advertise its business such as “Here’s Johnny” and the “World’s Foremost Commodian” clearly referenced the plaintiff’s identity and thus constituted an appropriation of the defendant’s identity without his consent).
72. Hirsch, 280 N.W.2d at 131.
73. Id. at 130. The plaintiff sought damages associated with the defendant’s appropriation of the plaintiff’s identity without the plaintiff’s consent, while the defendant claimed that the plaintiff had no right of privacy to his name under Wisconsin law. Id. at 132.
74. Id. at 132.
75. Id. at 137.
76. Id. at 137.
77. Id. at 140.
labeled as being Ali.\textsuperscript{79} While the court acknowledged that New York law, much like other sources of law concerning publicity rights,\textsuperscript{80} allows for the unauthorized use of a person’s picture if it is used in “connection with an item of news or one that is newsworthy,” the court found there was no newsworthy dimension to the use of Ali’s likeness in the magazine.\textsuperscript{81} Accordingly, the court held that the use of Ali’s likeness in the drawing violated his right of publicity and was not protected under the First Amendment.\textsuperscript{82}

The Missouri Supreme Court dealt with a similar situation to that in \textit{Ali}, namely the determination of whether use of a person’s likeness or persona in an artistic work constitutes an appropriation of that person’s identity.\textsuperscript{83} In \textit{Doe v. TCI Cablevision},\textsuperscript{84} the court addressed the issue of a comic book writer using a hockey player’s name and persona as the basis for a comic book character.\textsuperscript{85} Todd McFarlane, the creator of the \textit{Spawn} comic book series and an avid hockey fan, created a character for his comic series named “Anthony ‘Tony Twist’ Twistelli” that was based on a professional hockey player, Anthony “Tony” Twist.\textsuperscript{86} While the comic book Twist and the real-life Twist were different in likeness, they did share similar names and mannerisms.\textsuperscript{87} Accordingly, Anthony Twist sued McFarlane for misappropriation and defamation of his name.\textsuperscript{88}

In balancing Twist’s publicity rights against McFarlane’s seeming use of Twist’s name and persona, the Missouri Supreme Court held that in order to “establish that a defendant used a plaintiff’s name as a symbol of his identity, ‘the name used by the defendant must be understood by the audience as referring to the plaintiff.’”\textsuperscript{89} Accordingly, the court agreed with the plaintiff in holding that the defendant’s use of the plaintiff’s unusual name as well as the plaintiff’s persona “create an unmistakable correlation” between the comic book Twist and the real-life Twist so as to establish the fact that the defendant

\textsuperscript{79} \textit{Id.} at 726-27. Along with bearing a striking likeness to Ali, the boxer in the drawing was identified as “the Greatest,” a common nickname applied to Muhammad Ali. \textit{Id.} at 727.

\textsuperscript{80} \textit{Restatement (Third) of Unfair Competition} § 47 cmt. c (1995).

\textsuperscript{81} \textit{Ali}, 447 F. Supp. at 727.

\textsuperscript{82} \textit{Id.} at 729-30.

\textsuperscript{83} See generally \textit{Doe v. TCI Cablevision,} 110 S.W.3d 363 (Mo. 2003).

\textsuperscript{84} \textit{Id.} at 366.

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textit{Id.}

\textsuperscript{87} \textit{Id.} at 366. The comic book character was a Mafia don and shared the hockey player’s persona as an “enforcer” or a “tough guy.” \textit{Id.} at 367.

\textsuperscript{88} \textit{Id.} at 365. While the misappropriation claim is the main subject of this case, Twist’s name defamation claim was dismissed. \textit{Id.} at 367.

\textsuperscript{89} \textit{Id.} at 370 (quoting \textit{Restatement (Third) of Unfair Competition} § 46 cmt. d (1995)).
did in fact use the plaintiff's name and identity. Combined with evidence that the defendant did gain significant commercial advantage from the appropriation of the plaintiff's name and identity, the court held that the plaintiff did state a proper right of publicity claim against the defendant. Yet, the court still had to balance the plaintiff's publicity rights against the defendant's First Amendment rights, similar to the task other courts employed in cases such as Comedy III Productions and ETW.

To determine whether Twist's publicity rights were trumped by McFarlane's First Amendment rights, the court looked to several different tests, namely the relatedness test established by the Restatement (Third) of Unfair Competition and the transformative use test created by the California Supreme Court. However, the court held that both tests possessed the same weakness: "they both give too little consideration to the fact that many uses of a person's name and identity have both expressive and commercial components." As such, the court adopted a predominant use test that states

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.

Accordingly, the court held that the defendant's use of the plaintiff's name

90. Id.
91. Id. at 371-72. The court found that the plaintiff's introduction at trial of evidence showing that the defendant marketed products directly to hockey fans sufficiently showed that the defendant intended to gain a commercial advantage through the appropriation of the plaintiff's name and identity. Id. at 371-72.
92. Id. at 372.
93. ETW Corp. v. Jireh Publ'g., Inc., 332 F.3d 915, 928 (6th Cir. 2003); Comedy III Prods., Inc. v. Gary Saderup, 21 P.3d 797, 809 (Cal. 2001).
94. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §47 cmt. c (1995). The test created by § 47 "protects the use of another person's name or identity in a work that is 'related to' that person," and the list of examples of such uses includes "'use of a person's name or likeness in news reporting, entertainment or other creative works...[and use] of another's identity in a novel, play, or motion picture.'" Doe, 110 S.W.3d at 373 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION §47 cmt. c (1995)).
95. Comedy III Prods., 21 P.3d at 809.
96. Doe, 110 S.W.3d at 374.
and identity predominantly exploited the plaintiff's identity because there was significant evidence that the defendant gained a commercial advantage from his appropriation of the defendant's name and identity and because defendant admitted that the use of the plaintiff's name and identity was not a parody or any expressive comment on the plaintiff.98

Cases such as these have created a right of publicity concerning the reproduction of an athlete's identity in any sort of medium that may involve the reproduction of an athlete's name, likeness, or persona.99 One medium that involves the reproduction of an athlete's name, likeness, or persona is the video game genre. Recently, there have been two notable challenges to the use of an athlete's name, likeness, or persona in video games.

First, the right of publicity might still play an important role in the likelihood of success for Jim Brown in his lawsuit against Electronic Arts, a prominent video game producer.100 In 2008, Brown filed a lawsuit against Sony and Electronic Arts claiming that the companies used his likeness in a video game without his permission.101 Brown claimed that Electronic Arts' depiction of a character in one of its games constituted false endorsement because the character had the same number, physical features, and played for the same team as Brown.102

However, Brown's lawsuit was dismissed by Judge Florence-Marie Cooper on the grounds that Electronic Arts had the right under the First Amendment to depict characters similar to celebrities.103 In addition, Cooper dismissed Brown's claim on the grounds that game users were unlikely to conclude that Brown had endorsed the video game.104 However, Cooper left open the possibility to file a new lawsuit under a right of publicity claim.105 This suggests that, while Brown's case was dismissed, he may have been successful had he made a right of publicity claim against Electronic Arts rather than employ a false endorsement claim. Thus, Brown's best option may be to

98. Id.
101. Id.
102. Id.
104. Id.
105. Id.
file a new claim against Electronic Arts rather than appealing Cooper’s decision, which is what Brown has currently chosen to do.\textsuperscript{106}

Accordingly, one commentator has suggested that, while Sony and Electronic Arts might try to claim that the character in the video game does not bear Brown’s name or picture, and, thus, there is no appropriation of Brown’s identity, Sony and Electronic Arts will ultimately fail in this claim.\textsuperscript{107} This seems to be correct considering the fact that Brown’s claim is akin to the drawing of Muhammad Ali in a magazine; the creative use bears a striking physical resemblance and surrounding descriptions seem to indirectly identify the person depicted as that of the famous athlete.\textsuperscript{108} However, it is also possible that, in light of a recent decision by the Eighth Circuit,\textsuperscript{109} Sony and Electronic Arts may claim that Brown’s identity as a player is part of the public domain and thus the use of his likeness in a video game is a protected form of expression under the First Amendment.

Yet, the depiction of an athlete in a video game is different from the situation addressed by the Eighth Circuit,\textsuperscript{110} and this was highlighted in another case that involved a challenge to the use of the likeness of collegiate athletes in a video game.\textsuperscript{111} In \textit{O’Bannon v. NCAA}, former collegiate basketball player Ed O’Bannon filed a lawsuit against the NCAA claiming that former athletes should be compensated for the NCAA’s use of the images and likenesses of the athletes in video games and other forms of commercial venture such as television advertisements and sporting apparel.\textsuperscript{112} Recently, a district court denied the NCAA’s motion to dismiss O’Bannon’s lawsuit and consolidated that case with a case involving similar claims, \textit{Keller v. NCAA}.\textsuperscript{113} In addition, that same court – in a separate ruling – stated that Electronic Arts’ depiction of collegiate athletes in its video games not only did not satisfy the transformative use test but also that the use of the athletes’ identities and


\textsuperscript{107} Karcher, supra note 99.


\textsuperscript{109} See generally C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P., 505 F.3d 818 (8th Cir. 2007) (addressing the athlete’s potential right to publicity over statistics from played games versus the First Amendment rights of other persons using those statistics in fantasy sports games).

\textsuperscript{110} The issue in Brown’s case involves the use of his likeness rather than information from games in which he played, which has been considered to be akin to the reporting of the news. See Hurtado, supra note 100; see also C.B.C., 505 F.3d at 823-24.


\textsuperscript{112} Id.

\textsuperscript{113} Id.
Whose Right Is It Anyway?

Whose Right Is It Anyway? likenesses was not of public interest and should not be granted First Amendment protection in this context. Thus, the court specifically distinguished the use of a person’s likeness and identity in a video game from the mere publishing of statistics and other relevant information on the grounds that the First Amendment does not automatically trump the right of publicity in the video game context. However, as we will see, courts have extended First Amendment protection to the use of a person’s identity when the use is mere publishing of information, such as in the context of fantasy sports.

V. Fantasy Sports and the Right of Publicity

In recent years, the popularity of fantasy sports games has exploded in the U.S., becoming a multimillion-dollar industry, and an important question has arisen as to whether athletes and their respective leagues have a right of publicity to the statistics used to play fantasy sports games. In a groundbreaking case between Major League Baseball (MLB) and a fantasy sports games provider, both a district court and a federal appellate court, the Eighth Circuit found that the First Amendment right to informational speech shields the use of sports statistics from a right of publicity by the players and their leagues. Ultimately, the Eighth Circuit’s ruling creates precedent in contrast with the rulings in other cases dealing with the balancing of publicity rights against First Amendment concerns. As a result of this contrast, it is difficult to ascertain exactly when an athlete may have a right of publicity. The Eighth Circuit’s public domain approach seems to blur the lines between speech that is protected by the First Amendment even though it might normally encroach upon a person’s right of publicity, such as the use of a person’s biographical information, and speech that is not protected by the

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114. Id. The court held that the use of an athlete’s identity and likeness in a video game went beyond the mere publishing of public information because video games allow for control of a character rather than for the mere use of information. Thus, as described in Footnote 110, the use of a person’s likeness in the video game does not receive the same First Amendment protection that the publishing of information receives.

115. Id.


118. C.B.C., 443 F. Supp. 2d at 1077.


First Amendment. Therefore, the U.S. Supreme Court may need to take an active role in the future in settling this conflict of law, perhaps by establishing rules that allow for the use of a person’s identity, such as name and biographical information, only for newsworthy purposes or informing the public.

The case between MLB and C.B.C. Distribution and Marketing, Inc. (CBC) arose when MLB’s media and internet arm, Advanced Media (BAM), obtained an exclusive contract with the MLB Player’s Association (MLBPA) for the use of “[r]ights and [t]rademarks for exploitation via all interactive media,” which included statistics from major league games. Previously, the MLBPA had contracted with CBC to allow CBC to use the same trademarks, including major league game statistics that CBC would use in its online fantasy baseball service. When MLBPA’s contract with CBC ended and MLBPA formed a new contract with BAM, BAM claimed an exclusive privilege to such rights as the use of statistics and sought a deal with CBC whereby CBC would contract with BAM for the use of the rights and trademarks for exploitation via all interactive media, including game statistics for fantasy sports.

In response to BAM’s offer, CBC filed a complaint stating that it feared it would be sued by BAM if it continued with its fantasy games operations and sought an injunction against BAM to prevent it from interfering with CBC’s sports fantasy games business. CBC and the MLPBA then filed a counter-claim against CBC arguing that “CBC violated the players’ right of publicity based on CBC’s exploiting the rights of players including their names, nicknames, likenesses, signatures, jersey numbers, pictures, playing records and biographical data... via all interactive media with respect to fantasy baseball games.”

In assessing the players’ right of publicity claim, the federal district court looked to several factors, including whether CBC violated the players’ right of publicity via obtaining a commercial advantage by appropriating the players’ rights; whether CBC had in fact appropriated the players’ identity through use of the players’ names; and some of the policy concerns applicable to the

121. Id.
122. C.B.C., 443 F. Supp. 2d at 1081.
123. Id. at 1080-81. As part of the contract, CBC agreed that, upon termination, it would have no right to use any of the rights or trademarks that it had the right to use when the contract was in effect. Id. at 1081.
124. Id. at 1081.
125. Id. at 1081-082.
126. Id. at 1082.
players' right of publicity, including whether CBC's use of the players' rights was a harmful or excessive use that diluted the players' value in their identity.\textsuperscript{127} The district court also looked to whether CBC's speech involved in its fantasy sports games was expression protected under the First Amendment.\textsuperscript{128} Ultimately, the court held that CBC did not violate the players' right of publicity and that, even if it had, the First Amendment protects CBC's speech in fantasy sports games because CBC uses players' names and records, which are already in the public domain, and also because CBC's right of freedom of expression would be "totally extinguished," thus ending completely CBC's operation of its fantasy sports business, if the players' right of publicity were to prevail.\textsuperscript{129}

On appeal, the Eighth Circuit looked at prior cases that dealt with similar reproduction of in-game information.\textsuperscript{130} In Gionfriddo v. Major League Baseball, the plaintiffs were several baseball players who claimed that MLB's publication of programs containing in-game performances and related activities on its website for viewing violated the players' right of publicity.\textsuperscript{131} In Gionfriddo, a California court of appeals found that the First Amendment requires that publicity rights "be balanced against the public interest in the dissemination of news and information . . ."\textsuperscript{132} and that, despite the claims of the players, the publication of game video and related activities depicting the players is akin to the dissemination of news and information rather than commercial speech, which is entitled to a reduced level of constitutional protection.\textsuperscript{133} Consequently, the Eighth Circuit in C.B.C. looked at the holding in Gionfriddo and was persuaded by the fact that, because the "public has an enduring fascination in the records set by former players and in memorable moments from previous games . . . 'the recitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball's website] command a substantial public interest,'" and thus should be protected by the First Amendment from right of publicity claims.\textsuperscript{134}

Accordingly, the Eighth Circuit held that, while the players do have right of publicity in their names and statistics used in fantasy sports games, the First

\begin{flushleft}
\textsuperscript{127} See id. at 1084-091. \\
\textsuperscript{128} Id. at 1091-902. \\
\textsuperscript{129} Id. at 1098-099. \\
\textsuperscript{130} See generally Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307 (Ct. App. (2001)). \\
\textsuperscript{131} Id. at 310-11. \\
\textsuperscript{132} Id. at 313 (citing Gill v. Hearst Publ'g, 40 Cal. 2d 224, 228 (1953)). \\
\textsuperscript{133} Id. at 314-16. \\
\end{flushleft}
Amendment trumps that right of publicity because the players' names and statistics in CBC's fantasy games "is all readily available in the public domain, and it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone." In addition, the Eighth Circuit found that CBC’s use of the players’ names and statistics would not significantly impact the players’ ability to generate income from playing baseball because the players received handsome compensation already for their participation in games and endorsements.

However, other courts dealing with personal information of an athlete or celebrity have held that the public nature of a person’s biographical information does not automatically allow it to trump that person’s right of publicity. For example, the Ninth Circuit held in *Abdul-Jabbar v. General Motors Corporation* that, even though information such as a basketball player’s name and biography may be newsworthy, not all such newsworthy information is automatically privileged via the protection of the First Amendment against right of publicity claims. Because the defendant used information regarding the plaintiff’s identity in an advertisement as opposed to a news account, the defendant’s use of the plaintiff’s identity was a violation of the plaintiff’s right of publicity. Therefore, the Ninth Circuit’s ruling seems to be in conflict with the Eighth Circuit’s ruling in *C.B.C.* because, even though CBC was publishing “newsworthy” information, the publication was not for the purpose of a news account but rather a gaming venture designed to generate profit for CBC.

Other courts have acknowledged a plaintiff’s right of publicity when a defendant has appropriated the plaintiff’s identity for use in a game. In *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, a New York court held that the appropriation of the plaintiff celebrity’s name and career information for use in a game based upon the celebrity was not for the act of disseminating news or educating the public, but rather, it was to sell a commercial product, and thus, the appropriation was a violation of the plaintiff’s right of publicity. As applied to *C.B.C.*, such a holding would render CBC’s use of the players’ names and statistics as a violation of the players’ right of publicity.

135. *Id.* at 823.
136. *Id.* at 824.
139. *Id.*
140. See generally *Rosemont*, 340 N.Y.S.2d 144.
141. *Id.* at 146-47.
because CBC published said facets of a player’s identity not for disseminating news or educating the public but rather for selling a commercial product.

In Uhlaender v. Henricksen, a federal district court held that the defendant’s appropriation of several hundred baseball players’ names and sporting activities and accomplishments for the use in a computer baseball game constituted an unauthorized appropriation of the plaintiffs’ rights to their names and statistics for commercial use. In its opinion, the court held that a name has commercial value only because the “public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality” and that to allow such publicity to destroy a right to sue for appropriation of said name would be to negate any cause of action because only through public recognition does the name have any value at all to make “its unauthorized use enjoинable.” Similar to the Rosemont holding, the holding in Uhlaender would not allow CBC to appropriate the players’ identities just because such information is available in a public domain.

Ultimately, the differing approaches adopted by courts such as the Eighth and Ninth Circuits, as well as a New York and a Minnesota federal court, might warrant future action by the U.S. Supreme Court if courts continue to reach different decisions based upon similar fact situations. Some commentators have suggested a “primary use” standard should be adopted that would allow for an expression to be protected against right of publicity claims only if the use constitutes those expressions, such as news reporting or artistic uses, protected by the First Amendment. Applying the test to C.B.C. would again render CBC’s actions as a violation of the players’ rights because CBC’s primary use in using the players’ identities was for a commercial purpose. This test is akin to that adopted by the court in Doe and may help connect cases such as Rosemont, Doe, and Uhlaender with the CBC case.

Although it remains to be seen whether there will be future cases that conflict with the Eighth Circuit’s ruling in C.B.C. and thus possibly warrant the attention of the U.S. Supreme Court, the conflict between the First Amendment and the right of publicity appears to require a more definite resolution than has been reached so far, yet this is not to say that some of the approaches adopted in various courts are not helpful.

143. Id.
145. Karcher, supra note 6, at 581.
146. Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).
Courts adopting the transformative test\textsuperscript{147} have attempted to protect a person's right of publicity to their identity as much as possible up until the point where the use of that person's identity constitutes an expression of ideas or free speech and should thus be protected by the First Amendment.\textsuperscript{148} In addition, the Abdul-Jabbar and Rosemont courts have shown that, while newsworthy uses of a person's identity will be protected by the First Amendment, uses that are not designed for reporting the news, such as gaming or advertisement ventures, will not be protected by the First Amendment, even though they contain information that is accessible in the public domain, and will thus be subject to right of publicity claims.\textsuperscript{149}

However, the Eighth Circuit's public domain approach\textsuperscript{150} appears to ignore situations where the use of information concerning a person's identity is public knowledge or newsworthy yet might not warrant First Amendment protection from right of publicity claims because the purpose of the use of a person's identity is primarily for commercial purposes and adds no artistic or expressive element. The Eighth Circuit may feel that athletes generate enough income from their playing and endorsement roles,\textsuperscript{151} yet other courts have held that, regardless of this consideration, people still has a right of publicity to their identity.\textsuperscript{152} Therefore, if it has the opportunity in the future, the U.S. Supreme Court should take an active role in clearly delineating the line between the First Amendment and the right of publicity by not allowing First Amendment protection to the use of a person's identity when the purpose of said use is not for any newsworthy purpose and when the use does not add any artistic or expressive element.

Alternatively, if the U.S. Supreme Court declines to weigh in on any further cases dealing with the tension between the First Amendment and the right of publicity, the U.S. Congress may need to create some definitive federal law, under its Commerce Clause powers,\textsuperscript{153} that clearly states what

\textsuperscript{147}. ETW Corp. v. Jireh Publ'g., Inc., 332 F.3d 915, 936 (6th Cir. 2003); see also Comedy III Prods., Inc. v. Saderup, 21 P.3d 797, 809 (Cal. 2001).

\textsuperscript{148}. ETW, 332 F.3d at 936; see also Comedy III Prods., 21 P.3d at 809.

\textsuperscript{149}. Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 416 (9th Cir. 1996); Rosemont, N.Y.S.2d at 146.

\textsuperscript{150}. C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P., 505 F.3d 818, 823-24 (8th Cir. 2007).

\textsuperscript{151}. Id. at 824.

\textsuperscript{152}. See generally Abdul-Jabbar, 85 F.3d 407; see generally Rosemont, 340 N.Y.S.2d 144; see generally Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970).

\textsuperscript{153}. U.S. CONST., art. I, § 8, cl. 3. This clause gives the U.S. Congress the power to regulate commerce among the states and would seem to apply in this situation because an athlete's identity may be appropriated for commercial uses that transcend state borders, such as the sale of merchandise on the Internet or in a nationally published advertisement.
uses of a person's identity will and will not be protected under the First Amendment.

VI. CONCLUSION

There is a significant tension between commercial uses of a player's identity and the free expression of ideas. Courts have been willing to protect a player's right of publicity over commercial use of their identity as long as the use is not a transformative use of the player's identity or an expression of that person's identity as protected by the First Amendment, such as news reporting or political commentary. Although it is necessary to protect free speech, some courts, such as the Eighth Circuit, have blurred the lines between commercial and expressive speech and have created a situation where an athlete's identity may be exploited for profit despite a seemingly strong and identifiable need for protection. It is this very struggle between the right of publicity and the First Amendment right to free speech\textsuperscript{154} that has led to a great deal of litigation between competing parties over a commercial venture.

Although many state and federal courts have weighed in on the parameters of an athlete or celebrity's right of publicity, the differing opinions of these various courts has created a murky situation. Some courts have adopted the relatedness test employed in the Restatements\textsuperscript{155} or applied a transformative use test in balancing First Amendment interests against publicity rights;\textsuperscript{156} other courts have found these tests to be weak and unable to completely address the true conflict between these two sets of rights.\textsuperscript{157} Because of the division among courts in determining where to draw the line between commercial use and free expression of a player's identity, it may be necessary for the U.S. Supreme Court to step in and settle some of these conflicting opinions. In an ever-changing world where new types of media are being sought out to market and monetize the popularity of sports, the main contributors to this popularity, the athletes, may need stronger protections to ensure that their livelihood and rights are protected.

\textsuperscript{154} U.S. CONST., amend. I.
\textsuperscript{155} ETW Corp. v. Jireh Publ'g., 332 F.3d 915, 930-31 (6th Cir. 2003).
\textsuperscript{156} Id.; see also Comedy III Prods., Inc. v. Saderup, 21 P.3d 797, 809 (Cal. 2001).
\textsuperscript{157} Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).