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## FOREWORD

It is with great pleasure that I present Volume 2, Issue 1 of the *Sports and Entertainment Law Journal (Journal)*. This Issue marks the conclusion of an extremely productive year for the *Journal*. And since Issue 1 of Volume 1, the *Journal* has edited and published dozens of print articles for our readers, selected from scores of submissions. To that end, the word is out: When it comes to sports and entertainment law, Arizona State means business.

With our third Issue, the fruits of momentum and dedication to quality scholarship are obvious. The lead article, by attorney and standout Arizona State alumni Ben Glicksman, dives head first into the “broken” NCAA student-athlete compensation system and navigates the choppy waters of amateurism. Lateef Mtima, professor of law and director/founder of the Institute for Intellectual Property (IP) and Social Justice at Howard University, calls for a socially balanced application of IP law in the digital information age. *Journal* Managing Editor Matthew Hamilton charges the avoided issue of religious discrimination in athletics, through the context of hockey player, Jason Bailey, and his civil suit against the Anaheim Ducks.

Natasha Brison, Thomas Baker III, and Kevin Byon explore advertising and marketing laws and prescribe a dose of urgent caution to athletes and endorsers. Lastly, Kellen Bradley discusses how Title IX, for all its virtue, has lost its teeth with respect to college athletics, and calls for a wholesale re-examination of the statute to end near-certain discrimination under its antiquated language. As if these fantastic articles were not enough, commentary by *Journal* editors abound Issue 3. Please enjoy the diverse opinions and unique ideas of some of our finest editors.

It is really no secret that the world of sports and entertainment law evolves at a blistering gait. To that end, we strongly encourage your submission for future issues. To ensure the *Journal's* continued success, we have replaced the graduating executive board with experienced editors and leaders and added faculty advisor Myles Lynk (a renowned professor, as well as an ethics and NCAA athletics expert).

Finally, I would like to thank all of the editors and authors for your tremendous work on the *Journal*. Working with all of you has been a joy, and I wish you all the best of luck in your future endeavors.

*Kellen W. Bradley*  
*Editor-in-Chief*



# GAME CHANGE: LETTING STUDENT-ATHLETES EARN A LIVING

Ben Glicksman \*

## I. INTRODUCTION

A recent report issued by the National College Players Association (NCPA) advocacy group determined that the average fair market value of top-tier college football and men's basketball players is over \$100,000.<sup>1</sup> This figure came out as part of a joint study by the NCPA and the Drexel University Department of Sports Management.<sup>2</sup> The report describes the current system of awarding scholarships to National Collegiate Athletic Association (NCAA) athletes as “[t]he suppression of wages of an unnamed labor force . . . [constituting] a pay for play system.”<sup>3</sup> The average student-athlete at a Football Bowl Subdivision (FBS) school is earning below the poverty line.<sup>4</sup>

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\* J.D., Harvard Law School, 2011; B.A. Journalism and Mass Communication, Barrett Honors College, Arizona State University. Ben is a litigation associate at Kravit, Hovel & Krawczyk in Milwaukee, Wisconsin. He would like to thank lifelong friend Matt Storey for being constantly available to bounce ideas off during frequent sports conversations and Jordan Myers for her tremendous help in editing this article.

1. *Report Makes Case for Paying Players*, ESPN (Sept. 12, 2011), [http://espn.go.com/college-sports/story/\\_/id/6962151/advocacy-group-says-top-college-athletes-worth-six-figures](http://espn.go.com/college-sports/story/_/id/6962151/advocacy-group-says-top-college-athletes-worth-six-figures).

2. *Study: “The Price of Poverty in Big Time College Sport”*, NAT'L C. PLAYERS ASSOC., <http://www.ncpanow.org/research?id=0024> (last visited Apr. 12, 2012) (hereinafter *NCPA Price of Poverty*).

3. *Id.* at 3.

4. *Id.*, “The average FBS ‘full’ scholarship athlete earns less than the federal poverty line by \$1874 on campus and \$1794 off campus.” Additionally, the study finds “The percentage of FBS schools whose “full” athletic scholarships leave their players in poverty is 85% for those athletes who live on campus; 86% for athletes who live off campus.”

Suggesting that college athletes should receive more compensation than simply a scholarship is not a new idea. Sports columnist Michael Wilbon suggests that football and men's basketball players should be paid because those two sports generate the biggest television contracts for the NCAA.<sup>5</sup> As Wilbon succinctly puts it: "[F]ootball and men's basketball players get paid; lacrosse, field hockey, softball, baseball, soccer players get nothing. You know what that's called? Capitalism. Not everything is equal, not everything is fair."<sup>6</sup> Rick Morrissey of the *Chicago Sun-Times* proposes that student-athletes receive weekly stipends of \$50 to \$100 per week.<sup>7</sup>

## II. RECENT SCANDALS HAVE INTENSIFIED SCRUTINY OF THE CURRENT STUDENT-ATHLETE COMPENSATION SYSTEM

The motivation for sports journalists' and fans' focus on compensating student-athletes has been brought to the forefront by scandals involving the prestigious football programs at Ohio State University and the University of Miami. At both institutions, student-athletes were given money and other forms of compensation because they were members of the football team. The benefits received violated two NCAA bylaws: Article 12, involving amateurism, and Article 16, involving impermissible extra benefits for athletes.<sup>8</sup>

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5. Michael Wilbon, *College Athletes Deserve to be Paid*, ESPN (July 18, 2011), [http://espn.go.com/college-sports/story/\\_/id/6778847/college-athletes-deserve-paid](http://espn.go.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid).

6. *Id.*

7. Rick Morrissey, *Time to Pay College Athletes*, CHICAGO SUN TIMES (Aug. 27, 2011), <http://www.suntimes.com/sports/morrissey/7286394-452/time-to-pay-college-athletes.html>.

8. NCAA Division I Manual, NAT'L COLLEGIATE ATHLETIC ASS'N, available at <http://ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual.aspx>. The 2011-2012 Division I Manual took effect August 1, 2011 (hereinafter NCAA Division I Manual).

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- A. *Buckeyes players received improper benefits leading, to NCAA penalties, firing of the head coach, and Terrelle Pryor leaving school to go to the National Football League.*<sup>9</sup>

Just before Christmas 2010, word spread that six Ohio State Buckeyes football players had received improper benefits and were subject to NCAA sanctions.<sup>10</sup> The NCAA investigated reports that players had received tattoos in exchange for signing autographs,<sup>11</sup> “a violation of the NCAA’s rule against discounts linked to athletic personae.”<sup>12</sup> Quarterback Terrelle Pryor, offensive tackle Mike Adams, running back Dan Herron, wide receiver DeVier Posey, and defensive lineman Solomon Thomas were each suspended for five games, while linebacker Jordan Whiting was suspended for one game to open the 2011 season.<sup>13</sup>

As the story unfolded, it came out that the five Ohio State players<sup>14</sup> who were suspended for five games had sold memorabilia to a Columbus, Ohio, tattoo artist for money and tattoos.<sup>15</sup> The NCAA discovered these infractions before Ohio

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9. A comprehensive timeline detailing incidents from December 23, 2010, through July 8, 2011, by Bill Bender of *Sporting News* can be found at <http://aol.sportingnews.com/ncaa-football/story/2011-07-08/ohio-states-scandal-a-timeline>.

10. Dan Tylicki, *Ohio State Football: Scandal Rocks Buckeyes Program*, BLEACHER REPORT (Dec. 23, 2010), <http://bleacherreport.com/articles/552005-ohio-state-football-suspensions-latest-on-terrelle-pryor-2011-fallout/entry/36743-ohio-state-football-scandal-rocks-buckeyes-program>.

11. *Id.*

12. Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/print/2011/10/the-shame-of-college-sports/8643/>.

13. Tylicki, *Scandal Rocks Buckeyes Program*, *supra* note 10.

14. From this point forward, this Article will reference only five Ohio State suspended players: Pryor, Herron, Adams, Posey, and Thomas. Jordan Whiting’s suspension will not be addressed.

15. Andy Staples, *Buckeyes, Big Ten Show They Can Rival Both SEC’s Teams and Ethics*, SI.COM (Jan. 5, 2011), <http://sportsillustrated.com>.

State played the Arkansas Razorbacks in the 2011 Sugar Bowl, but “[t]he school, the conference and the NCAA worked together to dig up a rule that allowed the school to delay the suspensions until next season because Ohio State didn’t properly educate the players.”<sup>16</sup> Ohio State defeated Arkansas in the Sugar Bowl 31-26.<sup>17</sup>

There was criticism that the five players would be able to avoid the consequences altogether by entering the 2011 National Football League (NFL) Draft, but Ohio State head coach Jim Tressel all but guaranteed that would not happen. “‘We told them they would have to make the decision on the NFL prior to leaving for the bowl game,’ Tressel said at his first Sugar Bowl news conference. ‘It wouldn’t be fair to not face the consequences down the road.’”<sup>18</sup>

Of course, it would not all be so simple for the Ohio State football program. On March 9, 2011, Tressel was suspended for the first two games of the 2011 season and fined \$250,000 after an e-mail exchange revealed that he was aware of the NCAA infractions as early as April 2010, but failed to inform the school’s NCAA compliance staff or athletic director.<sup>19</sup> Tressel resigned amid the continuing scandal on May 30, 2011,<sup>20</sup> after having been encouraged to step down as head coach.<sup>21</sup>

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[cnn.com/2011/writers/andy\\_staples/01/05/sugar.bowl.ohiostate.arkansas/index.html#ixzz1ZAm3JAhV](http://cnn.com/2011/writers/andy_staples/01/05/sugar.bowl.ohiostate.arkansas/index.html#ixzz1ZAm3JAhV).

16. *Id.*

17. *Id.*

18. *Jim Tressel: Terrelle Pryor Will Return*, ESPN (Dec. 30, 2010), <http://sports.espn.go.com/nfl/bowls10/sugar/news/story?id=5970169>.

19. *Jim Tressel Suspended 2 Games, Fined*, ESPN (Mar. 9, 2011), <http://sports.espn.go.com/nfl/news/story?id=6194162>.

20. *Jim Tressel Tenders Resignation*, ESPN (May 31, 2011), <http://sports.espn.go.com/nfl/news/story?id=6606999>.

21. Mike Wagner, Ken Gordon, and Jill Riepenhoff, *Sources: Ohio State Coach Jim Tressel Was Encouraged to Resign*, COLUMBUS DISPATCH (May 30, 2011), <http://www.dispatch.com/content/stories/sports/2011/05/30/ohio-state-news.html>.

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Eight days after Tressel's resignation, star quarterback Terrelle Pryor announced that he was leaving Ohio State University a year early and hoped to enter the NFL's supplemental draft.<sup>22</sup> ESPN's *Outside the Lines* "reported that a friend of Pryor's, who requested anonymity, says he witnessed the quarterback autographing memorabilia in 2009-10 a minimum of 35 to 40 times and that Pryor netted anywhere from \$20,000 to \$40,000 last year for doing so."<sup>23</sup> Pryor's saga ended August 22, 2011, when the Oakland Raiders selected him in the third round of the NFL's supplemental draft.<sup>24</sup>

While pleading its case to the NCAA, Ohio State self-imposed a two-year probation for its football program and vacated all wins from the 2010 football season, including its Sugar Bowl victory over Arkansas.<sup>25</sup> Ohio State admitted that Tressel lied and allowed ineligible players to play through his failure to report that those players had sold memorabilia to a tattoo parlor owner.<sup>26</sup> The school also conceded that it had committed major violations of NCAA regulations, but said it should not face harsher punishment because no school official, other than Tressel, was aware of the violations.<sup>27</sup>

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22. *Terrelle Pryor Exiting OSU Amid Scandal*, ESPN (June 8, 2011), <http://sports.espn.go.com/nfl/news/story?id=6636768>.

23. *Id.*

24. *Raiders Draft Terrelle Pryor*, ESPN (Aug. 23, 2011), [http://espn.go.com/nfl/story/\\_id/6885024/terrelle-pryor-oakland-raiders-supplemental-draft](http://espn.go.com/nfl/story/_id/6885024/terrelle-pryor-oakland-raiders-supplemental-draft).

25. Randy Ludlow, *Ohio State Vacates Wins from 2010 Football Season, Places Program on Probation*, COLUMBUS DISPATCH (July 8, 2011), <http://www.dispatch.com/content/stories/sports/2011/07/08/0708-ohio-state-pleads-case-to-ncaa.html>.

26. *Id.*

27. *Id.*

- B. *Miami Hurricanes football came under serious scrutiny after booster Nevin Shapiro claimed to have provided numerous players with improper benefits.*

College boosters wield a great deal of power within university athletic departments.<sup>28</sup> Boosters get their names on stadiums,<sup>29</sup> dictate coaching hires,<sup>30</sup> and even listen in as coaches call plays.<sup>31</sup> There are also boosters who garner power through improper relationships with student-athletes.

For eight years, University of Miami booster Nevin Shapiro provided improper benefits to numerous Hurricanes football and men's basketball players.<sup>32</sup> Shapiro, "incarcerated for his role in a \$930 million Ponzi scheme, has told *Yahoo! Sports* that he provided thousands of impermissible benefits to at least 72 athletes from 2002 through 2010."<sup>33</sup>

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28. David Briggs, *UConn Controversy Shines Light on Influence of College Boosters*, COLUMBIA TRIBUNE (Feb. 6, 2011), <http://www.columbiatribune.com/news/2011/feb/06/uconn-controversy-shines-light-on-influence-of/>

29. Mike Fish, *Most Powerful Boosters*, ESPN (Jan. 12, 2006), <http://sports.espn.go.com/ncf/news/story?id=2285986>. T. Boone Pickens has donated nearly \$300 million to Oklahoma State University and the school's football team plays in Boone Pickens Stadium.

30. *Id.* Missouri booster Wayne Sells pushed the school to hire Quin Snyder over Bill Self to coach the men's basketball team.

31. Michael Rosenberg, *Nike's Phil Knight Has Branded Oregon Into National Power*, SI.COM (Jan. 7, 2011), [http://sportsillustrated.cnn.com/2011/writers/michael\\_rosenberg/01/06/oregon.knight/index.html](http://sportsillustrated.cnn.com/2011/writers/michael_rosenberg/01/06/oregon.knight/index.html).

Oregon booster Phil Knight has spent over \$300 million on Oregon Ducks athletics. The new basketball arena is named after his son and during football games Knight has a headset that lets him hear coaches call in plays, which allows him to "go over to the whiteboard in his suite and diagram the play for his guests."

32. Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO! SPORTS (Aug. 16, 2011), [http://sports.yahoo.com/investigations/news?slug=cr-renegade\\_miami\\_booster\\_details\\_illicit\\_benefits\\_081611](http://sports.yahoo.com/investigations/news?slug=cr-renegade_miami_booster_details_illicit_benefits_081611).

33. *Id.*

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The list of improper benefits Shapiro alleges that he provided includes “cash, prostitutes, entertainment in his multimillion-dollar homes and yacht, paid trips to high-end restaurants and nightclubs, jewelry, bounties for on-field play (including bounties for injuring opposing players), travel and, on one occasion, an abortion.”<sup>34</sup> While serving as a Miami booster, Shapiro was also co-owner of Axxcess Sports & Entertainment, the agency “that signed two first-round picks from Miami, Vince Wilfork and Jon Beason, and recruited dozens of others while Shapiro was allegedly providing cash and benefits to players.”<sup>35</sup>

Some former and current Hurricanes named by Shapiro have spoken out about his allegations. Antrel Rolle, a former Hurricane and current NFL player named by Shapiro,<sup>36</sup> said, “He’s angry. If you get 20 years in prison, some things like that happen, you’re gonna find someone to take it out on, right? I guess we got to bite that bullet. We understand our place and we understood our place back then when we were in college. We also understand what he’s trying to do.”<sup>37</sup>

Notably absent from Rolle’s protest was an outright denial of Shapiro’s allegations.<sup>38</sup> Much of what Shapiro alleged has been corroborated through other sources.<sup>39</sup>

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34. *Id.*

35. *Id.*

36. *Id.* “As word spread – and it spread fast – guys were just coming up to me. By the time the next season came around, I even recall Antrel Rolle and Sean Taylor, they were just coming off their freshman years and not really stars yet, just walking up and introducing themselves and wanting to get in on the party,” Shapiro said.

37. Gabriel Perna, *Miami Hurricanes Scandal: The Accused Lash Out Against Nevin Shapiro*, INT’L BUS. TIMES (Aug. 18, 2011), <http://www.ibtimes.com/articles/200037/20110818/university-of-miami-nevin-shapiro-miami-hurricanes-football-antrel-rolle-jonathan-vilma.htm>.

38. *Id.*

39. Robinson, *Renegade Miami Booster*, *supra* note 32. “In an effort to substantiate the booster’s claims, Yahoo! Sports audited approximately 20,000 pages of financial and business records from his bankruptcy case, more than 5,000 pages of cell phone records, multiple interview summaries

Shapiro breached multiple parts of at least four NCAA bylaws, including bylaw 11 (impermissible compensation to coaches), 12 (amateurism), 13 (improper recruiting), and 16 (extra benefits for student-athletes). “Perhaps most troubling is Shapiro’s sustained impropriety could trigger the NCAA’s ‘willful violations’ exception to its four-year statute of limitations. Under bylaw 36.2.3, an investigation can expand beyond the statute if information reveals that an individual tied to a university has engaged in ‘a pattern of willful violations’ over a sustained period beyond the previous four years.”<sup>40</sup>

NCAA President Mark Emmert responded to the allegations brought against the University of Miami one day after the *Yahoo! Sports* investigation was published.<sup>41</sup> Emmert is quoted in an NCAA press release as saying:

If the assertions are true, the alleged conduct at the University of Miami is an illustration of the need for serious and fundamental change in many critical aspects of college sports. This pertains especially to the involvement of boosters and agents with student-athletes. While many are hearing about this case for the first time, the NCAA has been investigating the matter for five months. The serious threats to the integrity of college sports are one of the key reasons why I called together more than 50

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tied to his federal Ponzi case, and more than 1,000 photos. Nearly 100 interviews were also conducted with individuals living in six different states. In the process, documents, photos and 21 human sources – including nine former Miami players or recruits, and one former coach – corroborated multiple parts of Shapiro’s rule-breaking.”

40. *Id.*

41. NCAA Press Release, NCAA President Mark Emmert Responds to Miami Allegations, NAT’L COLLEGIATE ATHLETIC ASS’N (Aug. 17, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/August/NCAA+President+Mark+Emmert+responds+to+Miami+allegations>.

presidents and chancellors last week to drive substantive changes to Division I intercollegiate athletics.<sup>42</sup>

Shapiro claimed that he was not the first person filling this role for University of Miami athletics:

“Here’s the thing: Luther Campbell was the first uncle who took care of players before I got going,” Shapiro said, referring to the entertainer notorious for supplying cash to Miami players in the 1980s and 1990s. “His role was diminished by the NCAA and the school, and someone needed to pick up that mantle. That someone was me. He was ‘Uncle Luke,’ and I became ‘Little Luke.’”<sup>43</sup>

Luther Campbell responded to the allegations by filing a suit against Shapiro for slander and defamation.<sup>44</sup> This was not the first time Campbell had been mentioned in the context of providing improper benefits to Miami football players, including giving money to players for knocking out opposing players.<sup>45</sup>

In the immediate aftermath of Shapiro’s claims, eight players on the 2011 Hurricanes were suspended by the NCAA

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42. *Id.*

43. Robinson, *Renegade Miami Booster*, *supra* note 32.

44. Susan Miller Degnan, *Luther Campbell Sues Former University of Miami Booster Nevin Shapiro*, *MIAMI HERALD* (Sept. 22, 2011), <http://www.miamiherald.com/2011/09/22/2418100/luther-campbell-sues-former-university.html#ixzz1ZBMV7xrK>.

45. Paul Salman, *Miami Hurricanes: ESPN 30 for 30 The U: Proud of Being Dirty*, *BLEACHER REPORT*, <http://bleacherreport.com/articles/308476-miami-hurricanes-espn-30-for-30-the-u-proud-of-being-dirty>. “Miami dealt with accusations of their players accepting money from local (and nationally best selling) rapper Luther Campbell who set bounties on opposing players, they had coaches arrested for possession of steroids, and they had players arrested for various run ins with the law.”

and, in order to regain eligibility, were required to repay any improper benefits they received.<sup>46</sup> Olivier Vernon was suspended six games; Aravious Armstrong and Dyron Dye were both suspended four games; and Marcus Forston, Sean Ryan Spence, Adewale Ojomo, Travis Benjamin, and Jacory Harris were each suspended one game.<sup>47</sup> Harris, the Hurricanes' starting quarterback, issued a public apology for his role in the scandal.<sup>48</sup>

### III. THE CURRENT COMPENSATION FOR NCAA FOOTBALL STUDENT-ATHLETES IS INSUFFICIENT

The NCAA manual for Division I athletics lists sixteen Principles for Conduct of Intercollegiate Athletics in Article 2.<sup>49</sup> The principle most commonly raised when discussing whether or not to pay college athletes is Bylaw 2.9, The Principle of Amateurism. The Principle of Amateurism states, "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."<sup>50</sup>

Under Article 15, the NCAA requires that "[a]n institution shall not award financial aid to a student-athlete that exceeds the cost of attendance that normally is incurred by

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46. NCAA Press Release, Eight Miami Football Student-athletes Must Sit Out Games and Repay Benefits, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 30, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/August/Eight+Miami+football+student-athletes+must+sit+out+games+and+repay+benefits>.

47. *Id.*

48. *Jacory Harris Regrets Role in Scandal*, ESPN (Sept. 9, 2011), [http://espn.go.com/college-football/story/\\_/id/6948245/jacory-harris-apologizes-role-miami-hurricanes-scandal](http://espn.go.com/college-football/story/_/id/6948245/jacory-harris-apologizes-role-miami-hurricanes-scandal).

49. NCAA Division I Manual, *supra* note 8, p. iii.

50. *Id.* at p. 4.

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students enrolled in a comparable program at that institution.”<sup>51</sup> The student-athlete typically cannot receive compensation above and beyond that amount as part of an athletic scholarship. Total cost of attendance “is an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.”<sup>52</sup> The NCAA provides two financial aid streams for student-athletes that are neither improper benefits nor factored into calculations regarding normal cost of attendance at a school.<sup>53</sup>

One bylaw violated both in the Ohio State and Miami infractions was 15.01.3: “Any student who receives financial aid other than that administered by the student-athlete’s institution shall not be eligible for intercollegiate athletics competition.”<sup>54</sup> There are exceptions for aid received from family members or “[a]warded solely on bases having no relationship to athletics ability.”<sup>55</sup> Receiving money for signing autographs or merely by virtue of being on a team constitutes improper financial aid. This bylaw terminates a student-athlete’s amateur status if that athlete is able to earn money related to his or her athletic ability beyond the money received in the form of a scholarship.

Lou Holtz, a College Football Hall of Fame inductee and former head coach,<sup>56</sup> supports the NCAA position that college athletes should not be compensated beyond what they already receive. In his ESPN college football segment “Dr. Lou,” Holtz said:

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51. *Id.*, Bylaw 15.01.6 at p. 192.

52. *Id.*, Bylaw 15.02.2 at p. 192.

53. *Id.* Under Bylaw 15.01.6, there are exceptions carved out for the Special Assistance Fund, Bylaw 15.01.6.1, and for Student-Athlete Opportunity Fund, Bylaw 15.01.6.2.

54. NCAA Division I Manual, *supra* note 8, Bylaw 15.01.3 at p. 191.

55. *Id.*

56. *Holtz Headlines '09 Hall Class*, ESPN (July 18, 2009), <http://sports.espn.go.com/ncf/news/story?id=4332457>.

A lot of people are saying, “If we pay football players, we wouldn’t have all these scandals that are plaguing major universities today.” I say, “nonsense.” If an individual comes from a poor background, he qualifies for a . . . Basic Economic Opportunity Grant, which means he can receive \$4,500 a year for clothing, travel, spending money, et cetera. And unlike a student loan, this money does not need to be repaid. In addition, every major conference has what they call an “emergency fund.” If you have to go home for a death or something, they will pay for all your entire expenses. And unlike when I was coaching, an individual can now have a job, even though he is on scholarship, to subsidize his income.<sup>57</sup>

Holtz summarized his point as the following: “budget your money.”<sup>58</sup>

The NCPA disagrees with Holtz’s position. “For the 2009-2010 academic year, the average annual scholarship shortfall (out of pocket expenses) for Football Bowl Series (FBS) ‘full’ scholarship athletes was \$3,222.”<sup>59</sup> The NCPA study also found that the average student-athlete at an FBS

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57. Lou Holtz, *Dr. Lou: Pay for Play?*, ESPN (Sept. 2, 2011), <http://espn.go.com/video/clip?id=6922128>.

58. *Id.*

59. NCPA *Price of Poverty*, *supra* note 3, at p. 4. The NCPA’s first recommendation (found on p. 5) suggests increasing scholarships by \$3,222 for both football and men’s basketball. By the NCPA’s figures, “A \$3222 scholarship increase would cost approximately \$32.8 million for 85 scholarship players from each of the 120 FBS football teams, and \$14.2 million to do the same for 13 scholarship players on each of the 338 Division I basketball teams that offer scholarships. The total would be about \$47 million annually.”

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school on full scholarship has total earnings below the federal poverty line.<sup>60</sup>

The scholarships provided by student-athletes are not always sufficient for covering living expenses and money needed to enjoy the college experience, let alone money needed for helping out the student-athlete's family.<sup>61</sup> The question is whether the NCAA should sanction and oversee a new stream of income for these student-athletes or force them to seek out that income in secret.

### IV. STUDENT-ATHLETES SHOULD BE ALLOWED TO EARN WHAT THEY CAN FROM ENDORSEMENT DEALS AND PERSONAL SERVICES

Professor Allen Sack of the College of Business at the University of New Haven (previously a member of the 1966 University of Notre Dame national championship football team) argues that the sum of tuition, room, board, and fees creates a scholarship salary cap for student-athletes.<sup>62</sup> Professor Sack's position is that:

[N]o good reason exists for preventing athletes from engaging in the same entrepreneurial activities as their celebrity coaches. Big-time college athletes should be able to endorse products, get paid for speaking engagements

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60. *Id.*, *supra* note 4.

61. *Ohio State Football Players Sanctioned*, ESPN (Dec. 26, 2010), <http://sports.espn.go.com/ncf/news/story?id=5950873>. Ohio State athletic director Gene Smith suggested that the players took the cash benefits to help their families. *NCAA Delivers Postseason Football Ban*, ESPN (June 11, 2010), <http://sports.espn.go.com/los-angeles/ncf/news/story?id=5272615>. The NCAA ruled that former University of Southern California (USC) running back Reggie Bush received improper benefits including a house that his family lived in without paying rent. This led to USC football being banned from the postseason for the 2010 and 2011 seasons.

62. *Id.*

and be compensated for the use of their likenesses on licensed products. They should be allowed to negotiate an actual contract with the N.B.A. as part of a final project in a finance class, and have an agent. These athletes are working their way through college by playing professional college sports. It is time to accept this reality and move on.<sup>63</sup>

Former University of Georgia wide receiver A.J. Green was suspended for four games at the start of the 2010 college football season for selling his 2009 Independence Bowl jersey for \$1,000.<sup>64</sup> Michael Wilbon, a proponent of Sack's free market view toward student-athlete compensation, supported Green:

If somebody is willing to give A.J. Green \$750 or \$1,000 or even \$2,500 for his Georgia Bulldogs jersey, fine, good. If one of his teammates, a tackle, can fetch only \$50 for his jersey, then it'll be a good marketing lesson for both of them. It's called supply and demand, and if both men are fortunate enough to reach the NFL it'll be a lesson worth learning because that dynamic will exist their entire careers. If a soccer player can't get a dime for his jersey, well, there's a realization in that, too.<sup>65</sup>

This Article supports the Sack-Wilbon position on student-athlete compensation. In addition to financial aid in

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63. Allen Sack, *March Money Madness*, N.Y. TIMES (Mar. 18, 2009), <http://roomfordebate.blogs.nytimes.com/2009/03/18/march-money-madness/>.

64. *NCAA Upholds A.J. Green's Suspension*, ESPN (Sept. 18, 2010), <http://sports.espn.go.com/nfl/news/story?id=5585220>.

65. Wilbon, *College Athletes Deserve to be Paid*, *supra* note 5.

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current scholarship structure, the NCAA should amend Article 12 on amateurism, Article 15 on financial aid, and Article 16 on awards, benefits, and expenses.<sup>66</sup> In making the recommended bylaw changes, the NCAA will allow student-athletes the opportunity to open additional streams of income by signing endorsement agreements and selling items associated with their athletic achievements without losing their eligibility to compete.

- A. *The NCAA must allow student-athletes to sell autographs, sign endorsement deals, and earn money through personal services, even when the opportunity is created solely by virtue of being an athlete.*

The simplest form of the argument to allow broader revenue streams for student-athletes is this: if a college freshman has a piano scholarship, is so good at piano that she is paid to give lessons, and signs a paying endorsement deal with a local piano store, that freshman will be congratulated by her peers and celebrated by her school. Most importantly, that freshman will keep her scholarship for all four years with no reprisal.

Under NCAA Bylaw 16.01.1, however,

A student-athlete shall not receive any extra benefit. Receipt by a student-athlete of an award, benefit or expense allowance not authorized by NCAA legislation renders the student-athlete ineligible for athletics competition in the sport for which the improper award, benefit or expense was received. If the student-athlete receives an extra benefit not

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66. NCAA Division I Manual, *supra* note 8.

authorized by NCAA legislation, the individual is ineligible in all sports.<sup>67</sup>

The student-athlete cannot endorse products and is limited in his ability to sell products related to his sport.<sup>68</sup>

What makes the NCAA rules even more convoluted is that if the student on the piano scholarship were also a student-athlete, her endorsement deal would have to be scrutinized to make sure any extra benefit is “determined on a basis unrelated to athletics ability.”<sup>69</sup> In fact, “Such compensation may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.”<sup>70</sup> If this hypothetical student could not prove that her compensation was based entirely on musical ability, she would be ineligible if she accepted the endorsement deal and corresponding paycheck.

The NCAA does allow student-athletes to give paid lessons in their sports.<sup>71</sup> But some conditions apply: school facilities cannot be used,<sup>72</sup> playing lessons are not allowed,<sup>73</sup> the school must document who the lesson was given to and the fee collected,<sup>74</sup> and the student-athlete may not use “his or her name, picture or appearance to promote or advertise the

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67. *Id.* at p. 217.

68. *Id.* at p. 71, Bylaw 12.4.2.3 “Athletics Equipment Sales. A student-athlete may not be employed to sell equipment related to the student-athlete’s sport if his or her name, picture or athletics reputation is used to advertise or promote the product, the job or the employer. If the student-athlete’s name, picture or athletics reputation is not used for advertising or promotion, the student-athlete may be employed in a legitimate sales position, provided he or she is reimbursed at an hourly rate or set salary in the same manner as any nonathlete salesperson.”

69. *Id.*, at p. 217, Bylaw 16.02.3.

70. *Id.*, at p. 71, Bylaw 12.4.1.1.

71. *Id.*, Bylaw 12.4.2.1.

72. *Id.* Bylaw 12.4.2.1(a).

73. *Id.* Bylaw 12.4.2.1(b).

74. *Id.* Bylaw 12.4.2.1(c).

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availability of fee-for-lesson sessions.”<sup>75</sup> These requirements severely inhibit the student-athlete’s ability to create business.

*B. The current NCAA scholarship system is an unreasonable restraint of trade and needs to be adjusted to allow student-athletes a wider range of opportunities to earn money while in school.*

The Sherman Antitrust Act of 1890 is a federal statute designed to limit cartels and monopolies.<sup>76</sup> Under Section 1 of the Sherman Act, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”<sup>77</sup> Courts require three elements to find a violation of Section 1: “(1) a contract, combination or conspiracy; (2) affecting interstate commerce; and (3) an unreasonable restraint of trade.”<sup>78</sup> The NCAA is not exempt from antitrust laws.<sup>79</sup>

In *National Collegiate Athletic Ass’n v. Oklahoma Board of Regents*, the University of Oklahoma and University of Georgia sued the NCAA for unreasonable restraint of trade regarding televising college football.<sup>80</sup> At issue was the NCAA’s television plan, which was designed to prevent schools from appearing on television to the detriment of stadium attendance.<sup>81</sup> Under the plan in effect from 1982 through 1985, the NCAA and television networks Columbia Broadcasting System and American Broadcasting Company

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75. *Id.* Bylaw 12.4.2.1(f).

76. 15 U.S.C. § 1 (2004).

77. *Id.*

78. *Richter Concrete Corp. v. Hilltop Basic Res., Inc.*, 547 F. Supp. 893, 917 (S.D. Ohio 1981).

79. *See, e.g., Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (hereinafter *NCAA v. Oklahoma Board of Regents*).

80. *Id.* at 88.

81. *Id.* at 90-93.

made broadcast agreements that allowed networks to negotiate directly with schools to air football games.<sup>82</sup> The agreement limited schools to no more than six total appearances and four national appearances, and no member was “permitted to make any sale of television rights except in accordance with the basic plan.”<sup>83</sup>

Not wanting to be tied to the NCAA’s broadcast plan limitations, members of the College Football Association (CFA) signed a separate deal with the National Broadcasting Corporation (NBC).<sup>84</sup> The NCAA responded by publicly announcing that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract.<sup>85</sup> The NCAA also made it clear that any sanctions would not be limited to the football programs of CFA schools, but would extend to other sports as well.<sup>86</sup>

At trial, the District Court held that the NCAA violated the Sherman Act through its controls over the televising of college football games.<sup>87</sup> “The District Court defined the relevant market as ‘live college football television’ because it found that alternative programming has a significantly different and lesser audience appeal.”<sup>88</sup> The NCAA did not fare any better on appeal. According to the Tenth Circuit Court of Appeals, the television plan constituted illegal *per se* price fixing.<sup>89</sup> The Supreme Court affirmed.<sup>90</sup>

The current NCAA scholarship regime constitutes an antitrust violation because it is a concerted action among the NCAA member schools to keep student-athletes subject to a base scholarship agreement. Under *Copperweld Corp. v.*

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82. *Id.*

83. *Id.* at 94.

84. *Id.* at 94-95.

85. *Id.* at 95.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 97 (citing 707 F.2d at 1152).

90. *Id.* at 88.

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*Independence Tube Corp.*, the Supreme Court held that Section 1 of the Sherman Act applies to separate entities working in concert and does not reach wholly unilateral conduct.<sup>91</sup> The Court determined that “[c]oncerted activity subject to Section 1 is judged more sternly than unilateral activity under Section 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused.”<sup>92</sup> In *United States v. Yellow Cab Co.*, the Supreme Court said:

The fact that these restraints occur in a setting described . . . as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.<sup>93</sup>

NCAA scholarships are contractual agreements between student-athletes and NCAA member schools, but the arrangement does not begin with a scholarship. The formal relationship between a school and most student-athletes begins with the signing of a national letter of intent.<sup>94</sup> The current

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91. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

92. *Id.*

93. *U.S. v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947).

94. In its frequently asked questions on Letters of Intent, the NCAA website says “The National Letter of Intent (NLI) is a binding agreement between a prospective student-athlete and an institution in which the institution agrees to provide a prospective student-athlete who is admitted to the institution and is eligible for financial aid under NCAA rules athletics

structure, binding student-athletes from the letter of intent onward, is an antitrust violation.

There can be no doubt that college athletics involves interstate commerce, meeting the second prong of the antitrust test. In *National Collegiate Athletics Ass'n v. Miller*, the Ninth Circuit explained that:

[C]ourts have consistently held that the NCAA . . . is engaged in interstate commerce in numerous ways. It markets interstate intercollegiate athletic competition.<sup>95</sup> The NCAA schedules events that call for transportation of teams across state lines and it governs nationwide amateur athlete recruiting and controls bids for lucrative national and regional television broadcasting of college athletics.<sup>96</sup>

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aid for one academic year in exchange for the prospective student-athlete's agreement to attend the institution for one academic year. All colleges and universities that participate in the NLI program agree to not recruit a prospective student-athlete once he or she signs an NLI with another college or university. Therefore, a prospective student-athlete who signs an NLI should no longer receive recruiting contacts and calls and is ensured an athletics scholarship for one academic year. The NLI must be accompanied by an institutional financial aid agreement. If the prospective student-athlete does not enroll at that institution for a full academic year, he or she may be subject to specific penalties, including loss of a season of eligibility and a mandatory residence requirement.”  
[http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/NCAA/Legislation+and+Governance/Eligibility+and+Recruiting/Faqs/nli\\_financial\\_aid.html](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Legislation+and+Governance/Eligibility+and+Recruiting/Faqs/nli_financial_aid.html)

95. See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101-02 (1984) (finding by implication that NCAA was engaged in interstate commerce and was subject to antitrust regulation).

96. *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993) (citing *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 378 (D. Ariz.1983); *accord Hennessey v. Nat'l Collegiate Athletic Ass'n*, 564 F.2d 1136, 1150 (5th Cir. 1977)).

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Finally, there is the subjective determination that the NCAA scholarship system involves an unreasonable restraint of trade. The student-athletes are subject to NCAA bylaws that severely limit their ability to earn a living: “Any student who receives financial aid other than that administered by the student-athlete’s institution shall not be eligible for intercollegiate athletics competition, unless it is specifically approved under the Association’s rules of amateurism”<sup>97</sup> or is received from someone the student-athlete is legally dependent on, awarded solely on a basis unrelated to athletics, or “[a]warded through an established and continuing program to aid students.”<sup>98</sup> Thus, all money earned related to athletics must come from the institution-given financial aid package and no outside sources.

The alternative presented would be to forego college and try to play professionally. This, however, would be difficult, as the NFL requires a player to wait three years after high school graduation before entering the NFL Draft.<sup>99</sup> The NBA requires players to spend one year after high school in some other pursuit, be it college or a foreign basketball league, before being draft-eligible.<sup>100</sup> The NCAA has no control over the draft conditions of professional sports, but the NCAA is the beneficiary and the compensation system created through scholarships inhibits many student-athletes from earning to their fullest potential even before turning professional.

If the NCAA is treated as a single entity and not judged by its member schools, it would be more difficult for a court to

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97. NCAA Division I Manual, *supra* note 8, Bylaw 15.01.3 at p. 191.

98. *Id.*

99. NFL Collective Bargaining Agreement, Article XVI, Section 2(b).

100. NBA Collective Bargaining Agreement, Article X, Section 1. For a detailed look at the legal issues involving age restrictions, see Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731 (2006).

declare a violation of Section 2 of the Sherman Act.<sup>101</sup> Under that section:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

In *United States v. Grinnell Corp.*, the Supreme Court said:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.<sup>102</sup>

The NCAA would meet part one of the two-pronged test because the NCAA dominates intercollegiate athletics.<sup>103</sup> On part two, however, the antitrust challenge under Section 2 would fail: although the NCAA is the dominant force in

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101. 15 U.S.C. § 2 (2004).

102. *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

103. The National Association of Intercollegiate Athletics (NAIA) has 270 member schools. There are 340 NCAA Division I schools, 290 in Division II, and 436 in Division III.

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college athletics, this is largely the result of the NCAA putting a superior product on the field.

*C. Title IX would not be violated under the current proposal because the opportunities would be equal across genders.*

Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>104</sup> The key to Title IX compliance with regard to college athletics is creating an equal number of opportunities for men and women.<sup>105</sup>

There are ten factors that determine if a school has created an equal number of opportunities for men and women.<sup>106</sup> The predominant factor addressed in most instances is “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”<sup>107</sup> Under this proposal to open new financial avenues for student-athletes, there is no Title IX violation with regard to this factor.

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104. 20 U.S.C. § 1681 (1986).

105. *Kelley v. Bd. of Trustees*, 35 F.3d 265, 268 (7th Cir. 1994) (“the pertinent regulation allows schools to field single-sex teams in certain circumstances but requires that they “provide equal athletic opportunity for . . . both sexes.” 34 C.F.R. § 106.41(c).).

106. 34 C.F.R. § 106.41(c). (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.

107. *Kelley*, 35 F.3d at 268.

The equal opportunity factor that might raise an issue is publicity.<sup>108</sup> But this should not be a problem for any NCAA member institution because Title IX turns on equal opportunities, not equal results. In 1979, the Department of Health, Education, and Welfare (HEW) clarified “equal opportunity” under Title IX.<sup>109</sup> In order to effectively accommodate the interests and abilities of student-athletes, NCAA institutions must provide opportunities for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules, which equally reflect their abilities.<sup>110</sup>

There are three ways, under the HEW clarification, for schools to be in compliance with Title IX. Schools can comply by (1) making participation opportunities for each gender proportionate to enrollment; (2) failing to have proportionate participation opportunities, but showing “history and continuing practice of program expansion which is demonstrably responsive to the developing interest[s] and abilities of the members of that sex”; or (3) showing that the interests and abilities of the underrepresented sex are fully and effectively accommodated under the current program.<sup>111</sup> Giving student-athletes the ability to endorse products and allowing them to sell shares of future potential professional sports earnings meets the first HEW compliance path. The opportunity for student-athletes to engage in the proposed endeavors would not be limited based on gender as any student-athlete could take advantage of the opportunity. Additionally, these proposals do not offend the publicity factor of Title IX compliance because all student-athletes are given equal opportunities to seek out these agreements.

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108. *Supra* note 106. Publicity is factor 10.

109. *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88, 96 (W.D. Va. 2007).

110. 44 Fed.Reg. 71,413, 71,413 (Dec. 11, 1979).

111. *Id.*

V. CONCLUSION

The current student-athlete compensation system in the NCAA is broken. Amending or rescinding arcane NCAA bylaws to allow student-athletes more opportunities to earn money above the table is becoming increasingly necessary. The NCAA now recognizes that present limitations on student-athletes' ability to earn income have become untenable.<sup>112</sup> The proposed changes suggested by this Article would dramatically raise the ceiling on student-athletes' ability to maximize income while retaining eligibility.

College is a training ground where students learn, grow, and prepare to become working, productive members of society. It is a place to learn a skill that can generate income. Many NCAA student-athletes already have skills that have brought them accolades and recognition. It is wrong to curtail these individuals' abilities to earn money simply because of outdated notions of amateurism.

Additionally, allowing student-athletes the opportunity to earn money for their athletic prowess while in school may encourage more students to complete their degrees instead of leaving early to play professionally. While a 2010 NCAA report suggested that college football graduation rates were at an all-time high of sixty-nine percent, many of the top performing schools were below average (e.g., both the University of Oklahoma and University of Arizona had graduation rates below fifty percent).<sup>113</sup> If the NCAA truly puts the student first in student-athlete, then a change must be made to help keep players in school.

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112. *NCAA Pushes \$2k Increase for Athletes*, ESPN (Oct. 25, 2011), [http://espn.go.com/college-sports/story/\\_/id/7143961/ncaa-weighing-2000-payments-student-athletes](http://espn.go.com/college-sports/story/_/id/7143961/ncaa-weighing-2000-payments-student-athletes).

113. Steve Wieberg, *NCAA Football Grad Rates at All-time High, but Top Schools Falter*, USA TODAY (Oct. 27, 2010), [http://www.usatoday.com/sports/college/2010-10-27-ncaa-graduation-rates-study\\_N.htm](http://www.usatoday.com/sports/college/2010-10-27-ncaa-graduation-rates-study_N.htm).

Allowing student-athletes to endorse products and use their fame to earn money, as Michael Wilbon and Professor Allen Sack suggest, would help keep players in school and teach them valuable lessons about economics.<sup>114</sup> The NCAA must allow student-athletes to use their skills and notoriety to earn additional income beyond what scholarships provide.

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114. It may also make student-athletes more forgiving about use of their images and likenesses after graduation. The NCAA is presently defending against a class action lawsuit brought by former UCLA basketball star Ed O'Bannon and eleven others over alleged antitrust violations stemming from the NCAA's use of those images and likenesses in television commercials, video games, and elsewhere. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, Nos. 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010). For more information, see Michael McCann, *O'Bannon v. NCAA Could Impact More Than Videogames*, CNN.SI.COM (July 21, 2009), [http://sportsillustrated.cnn.com/2009/writers/michael\\_mccann/07/21/ncaa/index.html](http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa/index.html).

# ATHLETE-STUDENTS, NOT STUDENT-ATHLETES: WHY IT'S TIME FOR NCAA ATHLETES TO GET PAID

Alissa Abril

Mr. Glicksman is correct in stating the NCAA should not curtail a student-athlete's ability to earn money, "simply because of outdated notions of amateurism."<sup>1</sup> It is hypocritical to restrict a student-athlete's ability to earn additional income because of their status as amateurs while the increased commercialization of intercollegiate athletics, particularly football and basketball, challenges the notion that student-athletes are students first and athletes second.<sup>2</sup> His proposal, however, is not without fault.

Elite student-athletes will have a large earning power. For instance, Terrelle Pryor allegedly made between \$20,000 to \$40,000 in one year of selling autographed memorabilia.<sup>3</sup> While at a private university this income would be insufficient to cover a student-athlete's expenses, less expensive state schools that are strapped for cash may be reluctant to award a scholarship to a student-athlete with a sizeable endorsement salary.<sup>4</sup> Mr. Glicksman also argues that allowing student-

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1. Ben Glicksman, *Game Change: Letting Student-Athletes Earn a Living*, ARIZ. ST. SPORTS & ENT. L.J. (May 2012).

2. See generally Joel Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011), <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all> (college football and men's basketball generate more than \$6 billion in annual revenue— more than the NBA).

3. *Terrelle Pryor Exiting OSU Amid Scandal*, ESPN (June 8, 2011), <http://sports.espn.go.com/nfl/news/story?id=6636768>.

4. See Steve Yanda, *NCAA Deciding Whether to Give Stipends to Student-Athletes*, WASH. POST (Feb. 21, 2012), <http://www.washingtonpost>.

athletes the opportunity to earn money while in school may discourage leaving college early for a professional career. Although this may entice some to stay, it is unclear how this would deter those who have the talent to compete at the professional level, especially when a professional career would likely guarantee them more money. Alternatives to Mr. Glicksman's proposal, however, would create more problems than they would solve.

Last year, NCAA President Mark Emmert proposed allowing schools to increase the value of annual scholarships by as much as \$2,000, "to more closely approach the full cost of attending college."<sup>5</sup> The proposal was met with swift backlash from numerous Division I schools who were concerned with the legislation's cost, exclusion of financial need as a factor, and its intention to be available only for student-athletes who receive full scholarships.<sup>6</sup> Moreover, an extra \$2,000 a year may not be enough for some student-athletes to resist the temptation of making even more money through prohibited means.

Another proposal is that schools could create a trust fund in escrow for student-athletes that would be funded from television rights payments, and then pay student-athletes who graduate and do not break any NCAA rules.<sup>7</sup> The problem with this plan, however, is that a low-income student-athlete with current financial need may find it difficult to turn down

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com/sports/colleges/ncaa-deciding-whether-to-give-stipends-to-student-athletes/2012/02/21/gIQAfTqASR\_story.html (Division I schools were concerned with an NCAA proposal to allow schools to increase scholarships by \$2,000 a year because the rule did not make financial need a consideration).

5. *NCAA Pushes \$2k Increase for Athletes*, ESPN (Oct. 25, 2011), [http://espn.go.com/college-sports/story/\\_/id/7143961/ncaa-weighing-2000-payments-student-athletes](http://espn.go.com/college-sports/story/_/id/7143961/ncaa-weighing-2000-payments-student-athletes).

6. Yanda, *supra* note 4.

7. Ben Cohen, *The Case for Paying College Athletes*, WALL STREET J. (Sept. 16, 2011), <http://online.wsj.com/article/SB10001424053111904060604576572752351110850.html>.

immediate money for money in the future. Furthermore, elite student-athletes like Terrelle Pryor and Reggie Bush are more likely to receive outside money and gifts and have the skill set and ambition to leave school early to enter the professional arena. It is difficult to see how this proposal would be effective for these students. From a financial standpoint, this plan could have negative ramifications for sports other than football and basketball because the money from those television contracts help fund revenue-losing sports.<sup>8</sup>

One thing is clear— from Reggie Bush to Ohio State, the scandals that have rocked the NCAA make it clear that the student-athlete compensation system is flawed. Purists argue student-athletes are students first and should be more focused on their education than marketing themselves, but the lucrative nature of NCAA football and basketball make it clear that such a belief is a pipe dream. By continuing to confine student-athletes to living off inadequate scholarship money, the NCAA is begging for more scandals to mar collegiate sports. If the NCAA is truly dedicated to its Principle of Amateurism, it is time to scale back lucrative contracts and place more emphasis on the development of the student and not the athlete. As long as the NCAA continues to treat student-athletes as athlete-students, however, it should not force students to abide by principles that the NCAA itself has long ago disregarded.

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8. Drew Lipsky, *NCAA Pay for Play Debate: Should College Athletes Get Paid?*, RIVAL.COM (Dec. 29, 2011), <http://rivals.yahoo.com/ncaa/football/news?slug=ycn-10768013>.



# A MIDDLE GROUND APPROACH TO A PLAY-FOR-PLAY SYSTEM

Casey Johnson

The pay-for-play debate has become a timely issue as recent scandals have further sparked a national dialogue concerning NCAA athletes' market value and their current inability to cash in on it. The subject has become virtually inescapable.

At issue are two competing interests. On one hand, proponents of a student-athlete compensation system point to a National College Players Association (NCPA) study that found that the average student-athlete at an FBS school on full scholarship has total earning below the federal poverty line.<sup>1</sup> They highlight not only the fact that the people who produce the revenue are precluded from receiving even a nominal portion of the profit, but that the NCAA rules are fraught with inherent contradictions and inconsistencies and need serious revision. Meanwhile, the NCPA is countered by the NCAA who unyieldingly resists demands that it amend its longstanding Principle of Amateurism. Supporters such as Lou Holtz argue that in addition to scholarships student-athletes have access to the Basic Economic Opportunity Grant, emergency funds and other financial resources that reduce the need for an overhaul of the current system. While the NCPA argues that college is a landscape where students should grow

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1. *The Price of Poverty In Big Time College Sport*, NAT'L C. PLAYERS ASS'N, at 3, available at <http://www.ncpanow.org/research?id=0024> ("The average FBS 'full' scholarship athlete earns less than the federal poverty line by \$1874 on campus and \$1794 off campus." Additionally, the study finds "The percentage of FBS schools whose "full" athletic scholarships leave their players in poverty is 85% for those athletes who live on campus; 86% for athletes who live off campus.").

and prepare to become productive members of society by learning how to generate income, Lou Holtz and the like assert that learning to operate with a budget is an equally crucial experience.

In a debate where there is so much on the line for each party there can be little doubt that the discourse will continue to escalate until some form of change is implemented. The discussion truly is inescapable. Yet, Mr. Glicksman manages to advance an argument encouraging reform that favors the student-athlete without resorting to a position that devolves into an all-or-nothing demand for a pay-for-play arrangement.

While Mr. Glicksman contends that the “present limitations on student-athletes’ ability to earn income have become untenable,” he also recognizes that a system that pays players out of individual athletic department budgets is impracticable and infeasible.<sup>2</sup> By now everyone recognizes that men’s basketball and football programs - and more specifically, the players – generate most of the money for their athletic departments. Of course, it makes sense that the student-athletes responsible for netting their university enormous television contracts, drawing sell-out crowds and thereby subsidizing athletic programs that don’t generate enough revenue to be self-sufficient should be entitled to a modest share of the profits. As much sense as it makes, the NCAA and Title IX supporters would never go for it. If you’re going to pay your starting quarterback a \$1,000 stipend for every game, you’re going to have pay your school’s women’s field hockey

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2. Michael Wilbon, *College Athletes Deserve to be Paid*, ESPN (July 18, 2011), [http://espn.go.com/college-sports/story/\\_id/6778847/college-athletes-deserve-paid](http://espn.go.com/college-sports/story/_id/6778847/college-athletes-deserve-paid). Wilbon writes, “Don’t get me wrong, paying players out of individual athletic department budgets is beyond impractical; it’s probably not feasible. Because so many athletic departments run at a deficit, it’s difficult to make the case that schools should pay regular salaries to athletes, even football players who produce more income than anybody.”

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goalie the same amount.<sup>3</sup> Furthermore, Title IX is a federal law, not an NCAA regulation; there's simply no way around it.

Instead of belaboring the issue, Mr. Glicksman proposes a middle-ground solution that, in lieu of outright payment, allows student-athletes to engage in entrepreneurial pursuits. Mr. Glicksman recommends altering NCAA bylaws to "allow student-athletes the opportunity to open additional streams of income by signing endorsement agreements and selling items associated with their athletic achievements without losing their eligibility to compete." Inevitably, certain student-athletes on certain athletics teams at certain universities will be able to command far more for their time and services, but as Michael Wilbon says, "You know what that's called? Capitalism."<sup>4</sup> The disparity between student-athlete earnings and the tremendous financial benefits that their respective universities collect cannot be resolved in one fell swoop. Mr. Glicksman's proposal signifies a step in the right direction – a willingness to negotiate an equitable solution that can sufficiently represent the interests of all parties involved.

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3. Mark Schlabach, *Examining Pay-for-Play Proposals*, ESPN (July 15, 2011), [http://espn.go.com/college-sports/story/\\_/id/6768411/pay-play-proposals-ncaa-student-athletes](http://espn.go.com/college-sports/story/_/id/6768411/pay-play-proposals-ncaa-student-athletes).

4. Wilbon, *supra* note 2.



# WHAT'S MINE IS MINE BUT WHAT'S YOURS IS OURS: IP IMPERIALISM, THE RIGHT OF PUBLICITY, AND INTELLECTUAL PROPERTY SOCIAL JUSTICE IN THE DIGITAL INFORMATION AGE

Lateef Mtima \*

“That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”<sup>1</sup>

## INTRODUCTION

The centuries old struggle over intellectual property protection continues today in the perennial conflict between the “IP haves” and the so-called “IP have-nots.”<sup>2</sup> Those who have

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1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARVARD L. REV. 193 (1890).

2. See, e.g., Beryle R. Jones, *An Introduction to the European Economic Community and Intellectual Properties*, 18 BROOK. J. INT'L L. 665 (1992); Peter K. Yu, *Three Questions that Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTEL. PROP. L. 412 (2008); Geoffrey R. Scott, *A Comparative View of Copyright as Cultural Property in Japan and the United States*, 20 TEMP. INT'L & COMP. L.J. 283, 356 (2006); Llewellyn Joseph Gibbons, *Do as I Say (Not as I Did): Putative*

canonized the products of their creative and innovative endeavors as forms of property insist that these boundaries be held sacrosanct by all others, whereas many of those who have not applied such status to their cultural and inventive output find such restrictions incomprehensible, unreasonable, or simply unfair, and often because these protections are praised as inviolate only when such characterization serves the interests of the established IP stakeholders. While some scholars and commentators have attempted to analyze and pose solutions to such conflicts as problems of technological and cultural incompatibility (e.g., technologically and economically advanced societies naturally appreciate the need for strong IP rights; unsophisticated, developing societies don't get it, but with education they can be uplifted into the fold)<sup>3</sup> in many

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*Intellectual Property Lessons for Emerging Economies from the Not So Long Past of the Developed Nations*, 64 SMU L. Rev. 923 (2011).

3. See, e.g., Cynthia M. Ho, *Biopiracy and Beyond: A Consideration of Socio-Cultural Conflicts With Global Patent Policies*, 39 U. MICH. J. L. 433, 533 (2006) ("[B]ecause [non-Western] objections to patents sometimes stem from misunderstanding the underlying science, as well as a misunderstanding of patent rights, providing patent owners with the ability to clarify issues would be in the best interests of all."); Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 402 (2003) ("Copyright Law has always been about stakeholders. In the late nineteenth century, Anthony Trollope blamed American book piracy on 'the book selling leviathans.' A century later, Professor Jessica Litman told us that 'the only way that copyright laws get passed in this country is for all of the lawyers who represent the current stakeholders to get together and hash out all of the details among themselves.' Since then, commentators have discussed at length the gaps between the 'copyright-rich' and copyright poor and between the haves and have-nots in the copyright system . . . . Today, a *copyright divide* exists between those who have stakes in the existing copyright regime and those who do not. On one side of the divide are the stakeholders, who are eager to protect what they have under the existing regime . . . . On the other side of the divide are the nonstakeholders. These nonstakeholders neither understand nor believe in the copyright system . . . . Unless the nonstakeholders understand why copyright needs to be protected and until they become stakeholders or potential stakeholders, they will not be eager to abide by copyright laws or consent to stronger copyright

ways, the problem is really not all that complex. For the most part, many of the current skirmishes are little more than modern manifestations of the familiar problem of Western attitudes of imperialism,<sup>4</sup> which tend to permeate developed nation/corporate IP owner 21st century notions of IP propriety.<sup>5</sup> Summarily put: that which I possess, and which

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protection."); Chidi Oguamanam, *Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy*, 9 WAKE FOREST INTELL. PROP. L.J. 104 (2009); Peter K. Yu, *Intellectual Property Rulemaking in the Global Capitalist Economy*, in THE INTELL. PROP. RIGHT DOMAIN IN CONTEMP. CAPITALISM (Birgitte Andersen ed., Routledge forthcoming 2011) (adapted from 82 IND. L.J. 827); Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries By Building Creative Industries*, 97 KY. L.J. 79, 81-82 (2008) ("Most discussions about intellectual property and development tend to center on high-level, somewhat abstract debates about technology transfer, relations between rich and poor countries, the fairness of the international intellectual property system, and concerns about distributive justice.")

4. See Imperialism, DICTIONARY.COM, <http://dictionary.reference.com/browse/imperialism> (last visited Jul. 17, 2011) ("the policy of extending the rule or authority of an empire or nation over foreign countries, or of acquiring and holding colonies and dependencies."); see Doris Estelle Long, *Traditional Knowledge and the Fight for the Public Domain*, 5 J. MARSHALL REV. INTELL. PROP. L. 317, 321 (2006) ("One of the interesting things in talking to indigenous peoples about the public domain is the response they provide. The concept of the public domain does not currently exist in many indigenous communities except in the form of "your public domain" versus "my cultural heritage." When asked, indigenous peoples often respond with the same question. "How come 'public domain' is my stuff?. Yours is copyrightable and mine is in the public domain. How did that happen?" The answer, of course, is that we have developed a nice approach to protection. New works get protected. Their works have been around too long. Therefore, we all get to use them.").

5. See Christopher May, *Commodifying the 'Information Age': Intellectual Property Rights, the State and the Internet*. SCRIPT-ED, Vol. 1, Iss. 3 at 408, 411 (2004), available at <http://www.law.ed.ac.uk/ahrc/script-ed/issue3/May.doc> ("[W]hile the [TRIPS] agreement imposes a complex and wide ranging set of requirements on signatories, at the core is a particular set of norms regarding the treatment of knowledge as property. These norms underpin the entire agreement and are based on the notion that

incidentally provides me some measure of power, dominance, or other advantage, should be afforded special, protected status, and that status should be recognized and revered by universal law. On the other hand, that which *you* possess, if I desire to exploit it, is the kind of thing that should be ecumenically acknowledged as freely available to any and all who are capable of developing and applying it to productive use (coincidentally, the very use that *I* to intend to undertake).

In other words, what's mine is mine; what's yours is ours.

Today, such attitudes and policies of "IP Imperialism" not only account for many of the perennial international clashes over intellectual property rights and protection, but they also help to fuel many domestic IP controversies in the American digital information age. Whereas the established, corporate purveyors of intellectual property consistently call for stronger IP protections when their property interests are at stake,<sup>6</sup> where new forms and uses of IP are at issue, they often

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the private ownership of knowledge as property is a major spur to continued economic development and social welfare. They further emphasise the development of knowledge as an individualised and proprietorial endeavour, and the legitimate reward of such individualised effort. Most obviously TRIPs includes a robust norm of commodification of knowledge and information, which in itself should alert us to the fact that the 'information age' is capitalist business-as-usual, utilising previously established legal structures to ensure that capitalists' ability to commodify important and profitable assets and resources continues into the so-called 'information age'.").

6. See David Leonhardt, *The Real Problem With China*, N.Y. TIMES (Jan. 11, 2011),

<http://www.nytimes.com/2011/01/12/business/economy/12leonhardt.html>;  
Michael Cieply, *Support for Antipiracy Bill*, N.Y. TIMES (May 15, 2011),  
<http://mediadecoder.blogs.nytimes.com/2011/05/15/support-for-antipiracy-bill>;  
*Microsoft Calls for Stronger IP Protection*, THOMAS NET (May 23, 2011), <http://news.thomasnet.com/companystory/Microsoft-Calls-for-Stronger-IP-Protection-847229>;  
Patrick Fogarty, *Major Record Labels and the RIAA: Dinosaurs in a Digital Age?*, 9 HOUS. BUS. & TAX L. J. 140, 141 (2008);  
Neil Weinstock Netanel, *Impose a Commercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 26 (2004);

take the opposite position, urging that such properties ought to be freely available for exploitation, or that any recognized property rights and interests be curtailed in favor of more traditional kinds and uses of intellectual property (e.g., the kinds and uses of intellectual property that they already control).<sup>7</sup>

Many current disputes involving the still developing intellectual property right of publicity provide illustrative examples of the IP Imperialist viewpoint. As a relatively new property interest and one innately personal to individuals, the right is beyond the immediate reach of corporate IP stakeholders. Consequently, as new technological uses for individuals' personas and images arise, corporate IP purveyors often argue that property rights not be recognized in connection with these uses (such that the resulting publicity properties would be free for exploitation by anyone, including, of course, corporate IP purveyors) or that any legal rights afforded be very narrowly drawn or construed (such that corporate IP purveyors can still make some use of these properties within their overall IP enterprises).<sup>8</sup> Of course, with regard to access

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Ankur Srivastava, *The Anti-Competitive Music Industry and the Case for Compulsory Licensing in the Digital Distribution of Music*, 22 *TOURO L. REV.* 375, 385-87 (2006); Sara M. Ford, Note, *Compulsory Licensing Provisions under the TRIPS Agreement: Balancing Pill and Patents*, 15 *AM. U. INT'L L. REV.* 941, 946 (2000). These have successfully resulted in various amendments to American intellectual property laws. *See, e.g.*, Anticybersquatting Consumer Protection Act; Trademark Dilution Revision Act of 2006; The Digital Millennium Copyright Act; *see also* S. 968: Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, 112th Cong. (2011-2012); The Patent Reform Act of 2011.

7. *See, e.g.*, *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134 (9th Cir. 2006) discussed *infra*; *see also* *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Sinatra v. Goodyear Tire & Rubber Co.*, 978 F.2d 1093 (9th Cir. 1992); *Jules Jordan Video, Inc. v. 144942 Canada, Inc.*, 617 F.3d 1146 (9th Cir. 2010).

8. Katie Thomas, *Ex-Players Join Suit vs. N.C.A.A.*, *N.Y. TIMES* (Mar. 10, 2010), <http://www.nytimes.com/2010/03/11/sports/ncaabasketball>

to new technological uses for the more traditional IP property interests that corporate IP purveyors already control, they vehemently argue in the other direction.<sup>9</sup>

This Article discusses how IP Imperialism in all its manifestations (including its analytical offspring, the American IP Commoditization Precept) is a socially and politically counter-productive policy which contravenes the social utility and social justice objectives which underlie American intellectual property law,<sup>10</sup> including those mores perpetuated through the right of publicity. Part I briefly discusses the

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/11colleges.html; Pete Thamel, *N.C.A.A. Fails to Stop Licensing Suit*, N.Y. TIMES (Feb. 8, 2010), <http://www.nytimes.com/2010/02/09/sports/ncaabasketball/09ncaa.html>; Anastasios Kaburakis et al., *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry*, ENT. AND SPORTS LAWYER, Volume 27, Number 2, Summer 2009, available at <http://www.kaburakis.com/wp-content/uploads/2009/09/kaburakis.pdf>.

9. Of course, this is not a new trend. See *Fortnightly Corp. v. United Artists TV, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. System, Inc.*, 415 U.S. 394 (1974); *Panavision Intern., L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998), *holding modified* by *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006); *Sony Corp. of Am. v. Universal Studios, Inc.* 464 U.S. 417 (1984); *Sony Computer Ent. Am., Inc. v. Gamemasters*, 87 F. Supp. 2d 976 (N.D. Cal. 1999); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *i4i Ltd. Partn. v. Microsoft Corp.*, 598 F.3d 831 (Fed. Cir. 2010), *cert. granted*, 131 S. Ct. 647 (2010), *aff'd*, 131 S. Ct. 2238 (2011).

10. See, e.g., Neil Weinstock Netanel, *Impose a Commercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 77-78 (2004) ("[C]opyright industries have repeatedly exhibited a path-dependent resistance to licensing or engaging in new technological methods of exploitation that might endanger their traditional profit centers. Indeed, they have a long history of seeking to reap monopoly rents through anticompetitive collusion, blocking new entrants, and paying off gatekeepers for consumer attention. In the multimedia and Internet contexts, copyright industries have also engaged in protracted cross-sectoral turf battles, leaving would-be licensees with the highly complex, costly task of seeking multiple, overlapping permissions. This institutional conservatism and balkanization does not inspire confidence that, if only given control, the industries would make their full store of cultural expression readily available at reasonable prices.").

development of IP Imperialism in the American intellectual property psyche and its role in the formation of American IP law and policy, including the rise and entrenchment of the IP Commoditization Precept, which has dominated the American IP landscape for more than a century.

Part II then focuses specifically on the right of publicity, its doctrinal facets and social objectives, and the complications raised by the advent of digital information technology in the creation and use of this kind of intellectual property interest. Part II also applies the tenets of IP social justice toward interpreting and applying publicity rights, particularly in the digital information context, and demonstrates how, in contrast to IP Imperialism, this approach achieves both the specific and general social utility objectives underlying the law.

In Part III, four cases which involve right of publicity disputes are analyzed as presenting meaningful but for the most part overlooked opportunities for the application of IP social justice principles to right of publicity problems. In the first three cases, *Brooks v. The Topps Co., Inc.*, *Brown v. Electronic Arts, Inc.*, and *Laws v. Sony Music Entertainment, Inc.*, the courts fail to consider important IP social utility and social justice considerations implicated by the right of publicity; in the fourth case, *Facenda v. N.F.L. Films, Inc.*, the court appears cognizant of the social utility/social justice aspects of the publicity right, and resolves the disputes therein in a more socially balanced and responsible manner.

Finally, Part IV sets forth an IP social justice framework for interpreting and applying the right of publicity in the digital information and related contexts. This Part will delineate a right of publicity social justice analytical spectrum, and identify important IP social justice issues and questions that courts should be sensitive toward in resolving right of publicity conflicts and disputes.

## I. THE RISE OF AMERICAN IP IMPERIALISM

A. *Early American IP Policies: What's Yours is Ours*

In America's nascent years, quasi-imperialistic<sup>11</sup> policies toward intellectual property rights were held as serving the nation's immediate interests as a developing country. While the colonial pioneers didn't have much intellectual property of their own to protect,<sup>12</sup> there was a storehouse of pre-existing protected material that could be critical to the new nation's cultural advance and technological development.<sup>13</sup> The great works of literature and technological achievements of the day were considered to emanate from Europe, and to the former colonial subjects, there didn't seem to be anything wrong in appropriating such in the cause of American national

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11. While America's IP policies were certainly self-serving at this point, they were only "quasi-imperialistic" given that i) there was no "what's mine is mine" element to those policies and this juncture and ii) the imperialistic element of conquest was absent; given the historical relationship between America and her former colonial rulers, the misappropriation in this instance was more akin to under aged teens taking the keys to the family car without permission.

12. See Bill Ivey, arts inc. 3 ("Before 1900 the American extension of [its] cultural mainstream, when measured against its European antecedents, came up short – a thin trickle compared to its Old World headwaters. In the eighteenth and nineteenth centuries the artistic achievements dotted across our hardscrabble frontier didn't add up to anything approximating the scope and quality found in Europe. True, colonial artisans designed a few gracefully rendered utilitarian objects – well-crafted furniture and elegantly understated silverware and serving pieces; in addition, some notable buildings executed in the classical revival style were scattered through Washington, DC, and other big cities. A few master painters of landscapes and portraits had emerged but not a unique New World vision. America still measured itself against European leadership in the visual arts.").

13. See, e.g., Peter Ku, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 336-44 (2003) (discussing widespread American IP piracy during the nation's formative era.); Llewellyn Joseph Gibbons, *supra* note 1, at 936-40.

progress.<sup>14</sup> Indeed, having fought a war to gain independence from colonial control, America's leaders and populace were not likely to be overly concerned with the trivialities of foreign rights in intangible property, especially if such concerns stood in the way of nation building.<sup>15</sup> And surely if it seemed reasonable to capture, enslave, and otherwise subjugate and degrade other *people* in the cause of American agricultural and industrial "progress", the misappropriation of a few stories and songs was hardly an affront to the national conscience.<sup>16</sup>

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14. Such misappropriation policies, however, were a double-edged sword. *See* Bill Ivey, arts inc. 3 ("By the mid-1800's an indigenous American literary voice would be heard, but even writers who had been at work for decades had only begun to achieve recognition that approached their European and English counterparts. This situation was abetted by the widespread piracy of English titles by U.S. publishers. By ignoring copyright and paying no royalties to European and British authors, prices of U.S. editions of foreign works were consistently lower than their homegrown counterparts."). *See also* Peter Ku, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 345 (2003).

15. *See* Charles H. Norchi, *The Legal Architecture of Nation-Building: An Introduction*, 60 ME. L. REV. 281, 289 (2008) ("Nation-builders drafting constitutional texts and codified laws must sift through both the myth system and the operational code in order to determine which processes of community decisions are both authoritative and controlling. A newly drafted constitution may be a myth while what people actually do in informal settings is the accepted code of operation.").

16. *See, e.g.*, KENNETH STAMP, *THE PECULIAR INSTITUTION*, 196-97 (1956) ("In the customary phraseology of the ante-bellum codes, South Carolina's slaves were 'deemed held, taken, reputed and adjudged in law to be chattels personal, in the hands of their owners and possessors and their executors, administrators and assigns, to all intents, constructions and purposes whatsoever.' Slaves had the attributes of personal property everywhere, except in Louisiana (and Kentucky before 1852) where they had the attributes of real estate.") Indeed, even as America began to appreciate the need for protecting her own intellectual property, her domestic intellectual property policies reflected the nation's imperialistic ancestry. *See also* Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency and Development)*, 40 U.C. DAVIS L. REV. 717, 740-41 (2007) ("[T]he American patent system encouraged a more diverse composition of

Thus, notwithstanding the fact that the Founding Fathers provided for the granting of intellectual property rights in the very first article of the Constitution,<sup>17</sup> American disregard for the intellectual property rights of *others* prevailed throughout the 19th century.<sup>18</sup> As American inventors and authors became increasingly prolific in their inventive and creative output however, attitudes regarding domestic protection for innovative and expressive works evolved, and the social benefit of providing secular incentives and rewards to authors and inventors began to be appreciated. With the advent of revolutionary means of mass production and distribution of expressive and innovative works, the commoditization perception of intellectual property began to take root in the American socio-economic psyche.

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inventors through broadened access to opportunities for investing in, exploiting, and deriving income from inventive activity. However, because of the historical realities of race and slavery, the extent of this beneficial distributive impact on black inventors was illusory at best . . . . The early American patent system beckoned many poor white inventors to achieve wealth and recognition through a quasi-egalitarian patent system that facilitated investment in their lucrative ideas. The same opportunities did not await black inventors, whose contributions white society tended to ignore when the commercial value of a black invention was uncertain. In cases where commercial promise was more readily apparent, black inventions were subject to appropriation without attribution. State laws governing property and contract expressly precluded slaves from applying for or holding property. Presumably, this proscription included slaves being precluded from owning patents.").

17. U.S. CONST. art. I, § 8, cl. 8 (bestowing upon Congress the authority "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

18. See, e.g., Steven Wilf, *Copyright and Social Movements in Late Nineteenth-Century America*, 12 THEORETICAL INQUIRIES L. 123, 125 (2011). Indeed the United States politely declined participation in the Berne Convention and similar international intellectual property treaties and agreements; add cites identifying other conventions and treaties the US did not join in until after it obtained technological dominance.

To bring the lively arts to an increasingly eager public, a new American arts system and new 'arts industries' grew dramatically during the first three decades of the twentieth century . . . . Music of all kinds made its way onto molded shellac 78 rpm discs, introduced by Columbia Records in 1904; by 1921 record sales totaled \$16 million, a figure that would increase tenfold over the next decade. In 1920 there were 20,000 silent movie theaters operating across the country, screens fed, in mid-decade, by fifteen film studios . . . . But cultural change always exacts a price. The rise of vernacular art made possible by technology enriched America's expressive life, but the market-driven system producing films, records, and broadcasts evolved with little attention to the way the creation and distribution of art in America linked up to 'Life, Liberty, and the Pursuit of Happiness.' The problem lay not with these transforming technologies, and certainly not with the blues musicians, movie stars, and vaudevillians who provided early cultural 'content.' Instead, the public interest was subverted by the business practices that made up the rules and laid out the playing field for producing and consuming our modern mainstream culture.<sup>19</sup>

Intellectual property protection was now recognized as vital to American technological and cultural progress,<sup>20</sup> and moreover, the right to produce and distribute commercially the fruits of intellectual endeavor would soon be regarded as just as

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19. Bill Ivey, arts inc. 7, 9.

20. Steven Wilf, *supra* note 18, at 125.

important as the need for basic protection itself.<sup>21</sup> And thus was the American IP Commoditization Precept born: American intellectual property law and policy would eventually become dominated by attitudes that regarded intellectual property works like so much chattel - commodities to be invested in and then commercially exploited for profit.<sup>22</sup>

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21. Bill Ivey, arts inc. 11-12 (“Movies, records, and broadcasts became America’s dominant expressive forms, but in most instances there was no single ‘author’ of these new art products. So who would own the musical or dramatic content? The obvious answer was to place ownership and control of the finished product – the film, radio show, or disc – with the corporation that had assembled the creative team, financed the project, and distributed it to audiences . . . The groundwork was firmly in place to permit corporations to, in effect, create and own the rights to new works of art...Because corporations own or control some of the most representative and influential American art products of the past one hundred years, it should be no surprise that questions of ownership, access, gatekeeping, and price continually challenge any effort to understand and advance our cultural rights.”).

22. See, e.g., Doris Estelle Long, *Democratizing Globalization: Practicing the Policies of Cultural Inclusion*, 10 CARDOZO J. INT’L & COMP. L. 217 (2002) (“Culture and intellectual property appear to have gotten a divorce during the latter decades of the Twentieth Century.”); Victoria F. Phillips, *Commodification, Intellectual Property, and the Quilters of Gee’s Bend*, 15 J. GENDER SOC. POL’Y L., 359, 370-75 <http://www.wcl.american.edu/journal/genderlaw/15/2phillips.pdf?rd=1>; Christopher May, *Commodifying the ‘Information Age’: Intellectual Property Rights, the State and the Internet*. SCRIPT-ED, Vol. 1, Iss. 3 at 408, 411 (2004), available at <http://www.law.ed.ac.uk/ahrc/script-ed/issue3/May.doc> (“The rights of capitalists to commodify information and knowledge as they see fit are . . . regarded as the naturally ‘just’ rights of ownership. This attempts to raise commercial rights to exploit information and knowledge to the same level as human rights. Although this may be legitimate it is hardly uncontroversial, given that sometimes the exercise of these commercial rights is at the cost of the human rights of users . . .”). These attitudes and policies directly contradict the express social utility mandates of the Constitutional Intellectual Property Clause. See, e.g., Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, 55 N.Y.L SCH. L. REV. 77, 80-86 (2011); Stacy F. McDonald, *Copyright for Sale: How the Commodification of Intellectual Property Distorts the Social Bargain Implicit in the Copyright*

B. *America as IP Super-Power: What's Mine is Mine*

Germinated in the latter years of the nineteenth century, the American IP Commoditization Precept flowered into full-blown IP Imperialism in the twentieth century. In the global market place, the United States not only took its place in the international IP community,<sup>23</sup> but became a staunch advocate for the recognition of strong intellectual property rights, particularly as the nation shifted from a goods-based to an information-based economy.<sup>24</sup> Recognition and respect for the

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*Clause*, 50 HOW. L.J. 541 (2007); David S. Olson, *Taking the Utilitarian Basis for Patent Law Seriously: The Case for Restricting Patentable Subject Matter*, 82 TEMPLE L. REV. 181, 183, [http://www.temple.edu/law/tlawrev/content/issues/82.1/82.1\\_Olson.pdf](http://www.temple.edu/law/tlawrev/content/issues/82.1/82.1_Olson.pdf); Michelle Fowler, *To Protect And...To Profit: The Trademarking of the LAPD As An Example of Expanding Intellectual Property Rights*, 74 S. CAL. L. REV. 1623, 1627, 1632-33, <http://www-bcf.usc.edu/~usclrev/pdf/074605.pdf>; Edward T. Saadi, *Sound Recordings Need Sound Protection*, 5 TEX. INTELL. PROP. L.J. 333, 335-36 (1997) ("The United States Constitution explicitly grants to Congress the power to pass laws governing copyright. The purpose behind this grant of authority is to encourage the creation of works of artistic and scientific value by providing the incentive of an exclusive monopoly over the benefits of that creation for a limited time . . . . The congressional purpose in granting these exclusive rights was purely utilitarian; it was not based upon the natural rights of authors in their works.").

23. See, e.g., Christopher May, *Commodifying the 'Information Age': Intellectual Property Rights, the State and the Internet*. SCRIPT-ED, Vol. 1, Iss. 3 at 408, 411 (2004).

24. See, e.g., Marshall Leaffer, *International Copyright from an American Perspective*, 43 ARK. L. REV. 373 (1990); Anita B. Frohlich, *Copyright Infringement in the Internet Age—Primetime for Harmonized Conflict-of-Laws Rules?*, 24 BERKELEY TECH. L.J. 851, 856 (2009). (Noting that "[t]he accession of the United States to the Berne Convention initiated a gradual reconsideration of international copyright law while contemporaneously creating new challenges when foreign copyright law was involved."); Christopher May, *Commodifying the 'Information Age': Intellectual Property Rights, the State and the Internet*. SCRIPT-ED, Vol. 1, Iss. 3 at 408, 410 (2004) ("In addition to the advantages to be gained by having a tougher multilateral enforcement mechanism, the US government (alongside allies in the EU) wanted to move the international regulation of IPRs into the new

expressive and innovative endeavors of others, however, especially those of non-Western cultures, did not keep pace.<sup>25</sup>

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WTO (from the WIPO) because their negotiators felt that they were more likely to gain agreements to their advantage by linking these issues to the international trade regime.); Peter Drahos, *Developing Countries and International Intellectual Property Standard-setting, Study Paper 8*, COMMISSION ON INTELL. PROP. RTS., [http://www.iprcommission.org/papers/pdfs/study\\_papers/sp8\\_drahos\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf) (“The disappointments of the 1970s in intellectual property standard-setting led the US in the 1980s to adopt a strategy of forum-shifting . . . . In fora such as WIPO, UNCTAD and UNESCO, the US faced the problem that developing country blocs could defeat its proposals on intellectual property or advance their own. The US began to argue the issue of intellectual property protection should become the subject of a multilateral trade negotiation within the General Agreement on Tariffs and Trade (GATT). The GATT was a forum in which the US was the single most influential player. Largely due to the efforts of the US and the US big business community the Ministerial Declaration, which in 1986 launched the Uruguay Trade Round, listed the trade-related aspects of intellectual property rights as a subject for negotiation.”);

Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REGULATION, at 37 (2007), available at <http://www.cato.org/pubs/regulation/regv30n3/v30n3-6.pdf>; Shayerah Ilias & Ian F. Fergusson, *Intellectual Property Rights and International Trade, Congressional Research Service*, available at <http://www.ieceusa.org/policy/eyeonwashington/2011/documents/iprtradeagreements.pdf>.

25. See, e.g., Doris Estelle Long, *Traditional Knowledge and the Fright for the Public Domain*, 5 J. MARSHALL REV. INTELL. PROP. L. 317, 319 (2006) (“If you were to ask me what the role of the United States is in the protection of the traditional knowledge, I would essentially say “not a whole lot.”); Marci Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613 (1996); Jerome Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT’L L. 747, 813 (1989); Shayerah Ilias & Ian F. Fergusson, *Intellectual Property Rights and International Trade*, available at <http://www.ieceusa.org/policy/eyeonwashington/2011/documents/iprtradeagreements.pdf>; Peter Drahos, *Developing Countries and International Intellectual Property Standard-setting, Study Paper 8*, at p. 5, COMMISSION ON INTELL. PROP. RTS., available at [http://www.iprcommission.org/papers/pdfs/study\\_papers/sp8\\_drahos\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf) (“[With regard to] developing countries [ability to] influence outcomes in the international intellectual property standard-setting process....developing countries have comparatively little influence. The

Most incendiary to many third world and other developing nations was the fact that not only did the United States and the former Colonial Powers seek to define unilaterally what would qualify as protectable intellectual property,<sup>26</sup> at the same time

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main reason lies in the continued use of webs of coercion by the US and EU, both of which remain united on the need for strong global standards of intellectual property protection.”) Various commentators have explored this problem as one of “cultural imperialism”, which is generally understood to denominate the externally imposed prioritization of Western cultural values over competing values held by non-Western cultures. *See, e.g.*, Cynthia M. Ho, *Biopiracy and Beyond: A Consideration of Socio-Cultural Conflicts With Global Patent Policies*, 39 U. MICH. J. L. 433, 467-70 (2006) (employing the term “patent imperialism” to reference the issue in the biopiracy context). While cultural imperialism (and of course racism) provide the collective foundation for Western Colonialism and Post-War political imperialism, IP Imperialism is only partially derived from a false sense of racial and cultural superiority. IP Imperialism stratagems are further “legitimized” by unabashed self-interest coupled with a deliberate cognizance of the concomitant power and resources to fuel those interests. *See, e.g.*, Rosemary Coombe, *The Recognition of Indigenous Peoples’ and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 281 (2001) (“To the extent that patents on innovations derived from traditional knowledge may only be challenged after they have been granted, an enormous financial and administrative burden is put upon indigenous people and the NGOs that represent community interests. For example, it took organized international ecofeminists five years and hundreds of thousands of dollars to successfully challenge the Grace Company’s neem-based patents and they were dealing with a very clear case of appropriation of widely known, published prior art. Although litigation serves an important symbolic role in helping to focus the public’s attention on this issue, continuous monitoring and challenging of patents requires resources that are well beyond the capacities of all but the most well-funded NGOs.”) From this perspective IP Imperialism is not “inherently evil”, but rather, a quasi-aristocratic principle of privilege and entitlement, perpetrated behind a façade of public interest and global uplift.

26. *See, e.g.*, Doris Estelle Long, *Democratizing Globalization: Practicing the Policies of Cultural Inclusion*, 10 CARDOZO J. INT’L & COMP. L. 217, 220-24 (2002) (“[S]ince at least the negotiation of the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) as part of the Uruguay Round under GATT, a growing divide between the forces of “traditional” copyright and those who seek broader protection for

they seemed utterly unconcerned about respecting sovereign and national rights in the commodities the West desired, such as the natural and indigenous resources they continued to pilfer from many non-Western countries, usually without even the pretense of fair compensation.<sup>27</sup>

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all cultural works has opened. Debates over the right to protect works of cultural patrimony or indigenous art or literature under "traditional" copyright, or even its desirability continue with no clear indication of when a satisfactory conclusion might be expected. This division is merely one example of a much broader rift between developed and developing countries regarding the standards and scope of works which should be subject to protection under domestic intellectual property laws . . . . The North-South debates are also more problematic because behind this division is a history of economic, political and cultural imperialism that makes the power imbalance seem not only unfair, but, more importantly, an unfortunate continuation of past practices, albeit in a different guise."); Jo Recht, *Intellectual Property in Indigenous Societies: Culture, Context, Politics, and Law*, VI DARTMOUTH L.J., 277, 282-83, available at <http://www.dartmouthlawjournal.org/articles/277-298.pdf> ("Western assumptions about ownership and authorship, and the assignment of most indigenous knowledge to the "public domain," allow non-indigenous actors to create their own protectible, derivative subject matter from indigenous raw materials. IPR is double-edged, and both edges cut off indigenous protections and rights. Thus, a Western pharmaceutical company may appropriate indigenous knowledge about a medicinal plant that is deemed by Western intellectual property law to be in the "public domain," and then create commercial products to which it has exclusive rights. The royalties go to the Western company rather than to the indigenous keepers of the knowledge, and the exclusive rights that the company might apply for under Western patent law will make the end products inaccessible to the indigenous population.").

27. See, e.g., Christopher May, *Commodifying the 'Information Age': Intellectual Property Rights, the State and the Internet*. SCRIPT-ED, Vol. 1, Iss. 3 at 408, 419 (2004) ("While the powerful states continue to ensure their capitalists' (intellectual) property is safe-guarded, others will be increasingly threatened by the information age's commodification of their remaining national resources by international Capital (through bio-piracy and the 'theft' of traditional knowledge, for instance). Thus, the 'information age' both enhances the power of states that can effectively control their jurisdiction, and contributes to the weakness of those that do not."); Jo Recht, *Intellectual Property in Indigenous Societies: Culture,*

Domestically there was little challenge to the American IP Commoditization aspects of American IP Imperialism. For

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*Context, Politics, and Law*, VI DARTMOUTH LAW JOURNAL, 277, 283, available at <http://www.dartmouthlawjournal.org/articles/277-298.pdf> (“[W]hen non-technological products are considered, such as songs, images, paintings, or other forms of traditional cultural expression, outside actors, whether individual or corporate, can take indigenous products deemed by Western law to be free to the public, and establish exclusive rights in the derivative works created from them. This is not an accident: the intellectual property system was expanded and developed in the nineteenth century by the European imperial powers, who used it to preserve for themselves the resources of their colonies. In the contemporary context, one commentator has noted that “WIPO and TRIPS have focused on teaching the poor how to protect the intellectual property of the West.” Conventional intellectual property law, therefore, provides neither a sword nor a shield to protect indigenous subject matter.”); see also Penny Hess, *All Diamonds Are Blood Diamonds: The Truth About the Diamond Trade*, available at [http://apschuru.org/analysis/diamonds/diamonds\\_web.pdf](http://apschuru.org/analysis/diamonds/diamonds_web.pdf); Moyiga Nduru, *Avocados, Diamonds, at Core of Anti-Israel Trade Campaign*, INTER PRESS NEWS SERVICE AGENCY, <http://ipsnews.net/africa/nota.asp?idnews=36331>; Cynthia M. Ho, *Biopiracy and Beyond: A Consideration of Socio-Cultural Conflicts With Global Patent Policies*, 39 U. MICH. J. L. 433, 436, 505-06 (2006) (“Although there is technically no intellectual property infringement in a country that does not have intellectual property laws - for one cannot break a law that does not exist - industry advocates nonetheless successfully claimed that piracy of intellectual property rights was occurring and depriving the U.S. of its just profits. In other words, the piracy argument underlying enactment of TRIPS ignored the strict legal parameters of intellectual property laws.”); Peter Drahos, *Developing Countries and International Intellectual Property Standard-setting*, *Study Paper 8*, COMMISSION ON INTELL. PROP. RTS., available at [http://www.iprcommission.org/papers/pdfs/study\\_papers/sp8\\_drahos\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf) (“The Berne system was run to suit the interests of copyright exporters. Each successive revision of the Berne brought with it a higher set of copyright standards. By the time many countries shed their colonial status, they were confronted by a Berne system that was run by an Old World club of former colonial powers to suit their economic interests. Former colonial powers continued to watch over their former colonies. When eleven Sub-Saharan states joined Berne they were ‘so totally dependent economically and culturally upon France (and Belgium) and so inexperienced in copyright matters that their adherence was, in effect, politically dictated by the ‘mother country’ during the aftermath of reaching independence’.”).

one thing, the American public seemed to have access to as much IP product as it desired and at affordable prices.<sup>28</sup> For another, there were few options available for interacting with IP product other than as a pre-packaged, static commodity. Books, movies, and music recordings were entertaining and often even inspiring; pharmaceuticals were inexpensive and cured most routine ills; even the public's favorite celebrities were manufactured, managed, and marketed by entertainment conglomerates.<sup>29</sup> As with most mass-produced commodities in the industrial age, however, the public had little say in how intellectual property products were produced or what products would be made available, and no ability to "tweak" or customize that which was offered to suit their individual likings. Like children at the end of a hyperactive summer's day, the public happily consumed what was put in front of it, so long as it was familiar or at least superficially gratifying, unconcerned with either the ultimate cost or process involved in the preparation of the intellectual property repast. Neither did there seem to be any cause for alarm toward growing corporate claims of absolute dominion over whatever IP to which they held the legal rights. What was theirs was theirs and

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28. Bill Ivey, arts inc. 7, 8-9 ("[N]ew 'arts industries' grew dramatically [during] the twentieth century....Today, DVDs, movies-on-demand, satellite radio, the iPod, and ring-tones top off the transition begun a century ago: American can engage the performing arts on our own terms, on our own timetable, at home, in the car, or while strolling or jogging in the park . . . . And today DVDs are released mere weeks – sometimes only a few days – after a film has opened on the big screen. The cache of live theater and music on tour persists, but *most* citizens consume *most* performing arts through some form of technology – usually technology that delivers music, drama, and dance right into the living room or the family car.").

29. The Hollywood Studio System During the Golden Age, HOLLYWOOD MOVIE MEMORIES, <http://www.hollywoodmoviememories.com/articles/hollywood-history/hollywood-studio-system-golden.php> (last visited Apr. 12, 2012).

the right of control as well as that of legal title was to be respected by all.<sup>30</sup>

C. *Digital Information Technology: The Challenge to IP Imperialism and Commoditization*

The advent of digital information technology presented the first major challenge to both American IP Imperialism policies and the American IP Commoditization Precept. Through the Internet and related technological advances, people in many non-Western and developing nations gained unprecedented access to American intellectual property, and began to utilize this material as the building blocks for further expressive and innovative works,<sup>31</sup> and concededly, sometimes to engage in unauthorized commercial use and other forms of piracy.<sup>32</sup> For American and other Western IP stakeholders, the

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30. In this regard, American IP Imperialism arguably grew to be even more socially pernicious than its European progenitor, in that in addition to its one way nation state/cultural biases, the added feature of the IP Commoditization Precept further serves to stagnate American cultural and innovation developmental interests as well. See, e.g., Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User Generated Content in the Internet Social Networking Context*, 19 WIDENER L. J. 843 (2010).

31. See, e.g., Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine For Cyberspace*, 53 FLA. L. REV. 107, 108 (2001) ("[I]nformation technology has empowered ordinary users to become part of the creative process both by its interactive nature and the very architecture of the pennon of the information society, the Internet."); Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REGULATION, at 42 (2007), available at <http://www.cato.org/pubs/regulation/regv30n3/v30n3-6.pdf>.

32. Wendy M. Pollack, Note, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L. REV. 2445, 2446 (2000) ("Digitization of copyrighted materials permits instantaneous, simplified copying methods that produce nearly perfect copies of originals. These copies can be digitally delivered to thousands of Internet users. Decentralization and anonymity in cyberspace have allowed for the widespread dissemination of copyrighted materials without permission from their owners."); Doris Estelle Long, *Democratizing*

“what’s mine is mine” imperialist bastion was no longer an unassailable rampart.<sup>33</sup> Moreover, some non-Western nations

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*Globalization: Practicing the Policies of Cultural Inclusion*, 10 CARDOZO J. INT’L & COMP. L. 217, 229 (2002) (“E-commerce, or at least the promise of electronic commerce, has become the new paradigm for globalization. While figures on Internet growth and its global penetration remain subject to dispute, the reality is that the growth of the Internet as a global communication and marketing medium is unprecedented. Moreover, such penetration is not limited to the so-called developed countries. To the contrary, of the ten fastest growing countries for Internet penetration for the year 2001, almost all of them are so-called developing countries.”); Shayerah Ilias & Ian F. Fergusson *Intellectual Property Rights and International Trade*, available at <http://www.ieeeusa.org/policy/eyewashington/2011/documents/iptradeagreements.pdf>; *China’s Piracy Hurting Its Own Industries*, *World Business*, MSNBC (July 7, 2006), [http://www.msnbc.msn.com/id/13617619/ns/business-world\\_business/t/chinas-piracy-hurting-its-own-industries](http://www.msnbc.msn.com/id/13617619/ns/business-world_business/t/chinas-piracy-hurting-its-own-industries).

33. See, e.g., Michael Wines, *China to Begin Crackdown on Pirated Software in 2011*, N.Y. TIMES (Jan. 7, 2011), <http://www.nytimes.com/2011/01/08/business/global/08piracy.html>; *Internet Piracy and How To Stop It*, N.Y. TIMES (June 8, 2011), <http://www.nytimes.com/2011/06/09/opinion/09thu1.html>. Moreover, some commentators have argued that such developing nation unauthorized uses are not only equitable but a more effective means technology transfer when compared to policies of direct foreign aid. See Gibbons, *supra* note 1, at 954 (“[A] free marketplace in unlicensed intellectual property is more likely to promote economic development in developing countries than either direct foreign aid or incentivized technology transfer. Further, one lesson that may be drawn from history is that those countries that have successfully transitioned from developing or agricultural economies to developed or industrial economies all did so during periods of lax or no transnational enforcement of intellectual property rights. In fact, the development norm in history was not the enforcement of intellectual property rights but, instead, the positive flouting of the intellectual property rights of non-citizens as an aid to national development . . . . The question to be asked may be whether unlicensed uses are more efficient in promoting developmental goals than direct foreign aid or incentives for technology transfer. A market-driven policy for intellectual property or technology transfer that permits access to and use of intellectual property in response to market demand for technology or information in a local developing country’s markets will promote development more efficiently than either direct foreign aid or technology transfers. History teaches that uncompensated intellectual

and various marginalized groups and communities would seize upon Western “digital vulnerability” to gain bargaining leverage with which to redress the “what’s yours is ours” part of the IP Imperialism equation,<sup>34</sup> or otherwise explore the benefits of digital information technology as a means of addressing other intellectual property social deficiencies and injustices.<sup>35</sup>

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property transfers (piracy) as a developmental policy may have much to commend it because uncompensated transfers may mark an attempt to return to the well-worn paths that led to past successful economic development.”).

34. See K.J. Greene, ‘Copynorms,’ *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1180-81 (2008) (“The institutional music industry has resorted to copyright infringement lawsuits to stem massive Internet piracy in recent years . . . . [T]he ‘copynorms’ rhetoric the entertainment industry espouses shows particular irony in light of its long history of piracy of the works of African-American artists, such as blues artists and composers. For many generations, black artists as a class were denied the fruits of intellectual property protection -- credit, copyright royalties and fair compensation. Institutional discrimination teamed with intellectual property and contract law resulted in the widespread under-protection of black artistic creativity. Similarly, black inventors created technical and scientific works that impacted early American industries. Evidence exists that black inventors also faced similar divestiture in the industrial marketplace. The mass appropriation of the work of black artists and inventors reflects the systemic subordination based on race that characterized most of U.S. history.”) The full meaning of the adage “those who seek equity must do equity” is being to resonate within the Western IP Imperialist’s regimes. See, e.g., Doris Estelle Long, *Traditional Knowledge and the Fright for the Public Domain*, 5 J. MARSHALL REV. INTELL. PROP. L. 317, 328 (2006) (“[E]xplor[ing] the imperialism of the 19th century and the imperialism that is being applied to traditional knowledge today...[t]he rhetoric of the two is frightening similar. We can avoid some of the pitfalls of those earlier years if we consider diverse approaches. Access to knowledge, human rights, intellectual property rights, etc. take the best of those approaches and devise a regime that makes sense for all parties.”).

35. See, e.g., Lateef Mtima, *Symposium: Intellectual Property and Social Justice*, 48 HOW. L.J. 571, 572 (2005) (“[T]he digital revolution and similar technological advances present unheralded opportunities though which to confront [intellectual property social inequity] from a socially redeeming

Just as the developing nations began to challenge American IP Imperialism, the American public began to question the IP Commoditization Precept. For the first time, private individuals gained the ability to interact with commercially produced IP product in non-passive ways,<sup>36</sup> and with digital information technology liberating many expressive works from static formats and offering new methods for using and re-using existing works to produce new works and even new forms of intellectual property, the American public became unwilling to forego these creative and pedagogical boons solely on the say so of the IP Commoditization

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vantage point . . . . [T]he new technologies can provide the apparatus through which to achieve a more equitable distribution of the benefits of creative endeavor.”); Robert Sullivan, *Indigenous Culture and Intellectual Property Rights*, D-LIB MAGAZINE, Vol. 8, No. 5, available at <http://www.dlib.org/dlib/may02/sullivan/05sullivan.html>; Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 141-47 (2009); Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, 55 N.Y.L. SCH. L. REV. 77, 101-06 (2011); Steven D. Jamar, *A Social Justice Perspective on the Role of Copyright in Realizing International Human Rights*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. (forthcoming 2011).

36. See, e.g., Neil Weinstock Netanel, *Impose a Commercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 3 (2004) (“P2P file sharing is not just downloading music and movies for free. It is a vehicle for finding works that are otherwise not available, discovering new genres, making personalized compilations, and posting creative remixes, sequels, and modifications of popular works. By engaging in such activities, people who might previously have been passive consumers now assert a more active, self-defining role in the enjoyment, use, and creation of cultural expression.”); Lateef Mtima, *The Changing Landscape of Internet Use and Dissemination of Copyrighted Works: New Tools, New Rules, or the Same Old Regime?*, COMPUTER & INTERNET L., Vol. 24, at 4 (Oct. 2007); Peter S. Menell, *Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 66 (2002); Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega*, 1 J. INTEL. PROP. L. 49 (1993).

establishment.<sup>37</sup> A national grassroots movement to restore the public interest to the core of American IP policy began to take hold, and a growing cross-section of IP stakeholders demanded that the IP Commoditization Precept give way to the Constitution's intellectual property mandates of cultural and innovative progress.<sup>38</sup>

Predictably the American Digital Cultural Revolution has been met with demands for even greater IP protections by the IP Commoditization Establishment.<sup>39</sup> Predictably, but not

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37. See, e.g., Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega*, 1 J. INTELL. PROP. L. 49, 102-03 (1993) ("[There is an] extraordinary array of electronic information tools now available . . . that permit users to experiment with the plastic nature of works in digital form. By plasticity, I mean the ease with which such works can be manipulated, transformed, and/or inserted into other works. Although many authors might prefer for their works to remain as fixed as they have traditionally been in printed form, the genie of plasticity cannot be pushed back into the bottle. Digital manipulation is here to stay, for the manipulability of digital data is one of the key advantages of the digital medium.").

38. See, e.g., Peter S. Menell, *Can Our Current Conception of Copyright Law Survive in the Internet Age?* 46 N. Y. L. SCH. L. REV. 63, 133-38 (2002-2003); Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 119-36 (2009); Note, *Spare the Mod: In Support of Total-Conversion Modified Video Games*, 125 HARV. L. REV. 789, 796 (2012) ("The social utility theory of intellectual property argues that lawmakers ought to craft property rights to maximize net social welfare. Ideally, lawmakers will grant enough exclusive rights to stimulate innovation but will not expand the scope of such rights to an extent that would prevent society's enjoyment of those innovations.").

39. See, e.g., Protect IP Act, S. 968: Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, 112th Cong. (2011-2012); Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011-2012), available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.3261>. These Bills would have given the IP Commodization Establishment extraordinary new rights and powers to control intellectual property output in the digital information context and beyond, thereby fortifying and expanding IP Commodization interests at the expense of the public interest and in contravention of the Constitutional IP Mandate that IP rights serve

*consistently*. Because digital information technology not only provides new uses for traditional intellectual property product but has also engendered new kinds of intellectual properties and interests, in the unwavering tradition of American IP Imperialism, some members of the IP Commoditization Establishment have argued that little or no “IP law and order” be extended to these new frontiers. Consequently it is not unusual to find some of the most ardent corporate supporters of stronger IP rights as the means for accommodating digital information technology developments actually arguing *against* strong IP protection, at least when it comes to digital information intellectual property interests outside their control.<sup>40</sup>

Many contemporary right of publicity disputes provide good examples of this IP Imperialist ambidexterity. As a relatively new form of intellectual property, the parameters and contours of these rights were still being charted when digital information technology disrupted a plethora of time-worn IP pretexts and assumptions. Consequently, much of the right of publicity law terrain, both within and without the digital information context, is plainly unsettled, and like the robber barons of old, many IP Imperialists are eager to preserve this “Oklahoma land-grab” state of affairs- at least until they can stake their claims to these new IP territories. However, as discussed in the next Part, the right of publicity offers much more than new IP Commoditization opportunities, and particularly in the digital information context, it can be utilized

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the nation as a whole. An unprecedented national grassroots opposition movement, however, representing interests ranging from the Silicon Valley technology sector to academics and civil rights groups successfully shelved these Bills. *See, e.g., SOPA Bill Shelved After Global Protests from Google, Wikipedia and Others*, WASH. POST, [http://www.washingtonpost.com/business/economy/sopa-bill-shelved-after-global-protests-from-google-wikipedia-and-others/2012/01/20/gIQAN5JdEQ\\_story\\_1.html](http://www.washingtonpost.com/business/economy/sopa-bill-shelved-after-global-protests-from-google-wikipedia-and-others/2012/01/20/gIQAN5JdEQ_story_1.html) (last visited May 2, 2012).

40. *See, e.g.,* *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134 (9th Cir. 2006) (discussed in Part III, *infra*).

to achieve important IP social utility and social justice goals. A brief examination of the development of the right, and the application of IP social justice tenets in its interpretation and application elucidates its full social utility/social justice potential.

## II. THE RIGHT OF PUBLICITY: A DIGITAL AGE OPPORTUNITY FOR IP SOCIAL JUSTICE

### A. *The Origins of the Right of Publicity*

In many ways, the right of publicity is something of the IP bastard child, the unplanned progeny of the intersection of tort right of privacy with trademark (the acknowledged “black sheep” of federal intellectual property law).<sup>41</sup> The genesis of publicity rights can be traced to the landmark law review article by two jurisprudential Young Turks, Samuel D. Warren and Louis D. Brandeis, who defied convention and called for judicial recognition of “a right to be left alone.”<sup>42</sup> Perturbed with the press’s growing encroachment upon private matters and the consequential public fascination with sensationalism,

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41. Whereas trademark rights and interest have been recognized for centuries, American courts and legislators had great difficulty finding a comfortable place for trademark law in the federal IP regime. *See, e.g.*, *Dastar Corp. v. Twentieth Cent. Fox Film Corp.*, 539 U.S. 23 (2003); *see also* Michelle Fowler, *To Protect And...To Profit: The Trademarking of the LAPD As An Example of Expanding Intellectual Property Rights*, 74 S. CAL. L. REV. 1623, 1630, available at <http://www.bcf.usc.edu/~usclrev/pdf/074605.pdf>. As to its influence upon the right of privacy, the latter right is often said to manifest the propertization of tortuous protections and interests, however, the kind of property interest involved is essentially that of a right to control the marketing of one’s persona, particularly as a source identifier. *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189 (1985); *Canal Co. v. Clark*, 80 U.S. 311 (1871); *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90 (1918).

42. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 194 (1890).

Warren and Brandeis' observations could well have been made in the present day.

Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.<sup>43</sup>

Although the right of privacy was not immediately welcomed,<sup>44</sup> courts gradually began to accept the concept that individuals were entitled to some protection from intrusion upon their lives and personas, culminating in a pivotal decision

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43. *Id.* at 196.

44. *See* J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (2d ed. 2006); *see, e.g.*, *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902).

by the Court of Appeals for the Second Circuit in which the court recognized the right of publicity as a distinct specie of the right of privacy. In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>45</sup> the plaintiff had entered into an exclusive contract with a professional baseball player to place his photograph on trading cards. The defendant, however, induced the baseball player to allow it to also use his photograph on trading cards and thereby breach his exclusive agreement. The defendant argued that the baseball player had no legally recognized property interest in his image that he could have assigned to the plaintiff, and consequently plaintiff had no legal interest that the defendant could have invaded. The Court of Appeals disagreed:

We think that in addition to and independent of [a] 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, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.<sup>46</sup>

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45. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 74 S. Ct. 26 (1953).

46. *Id.* at 868.

See also Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203, 203–04 (1954). “Well known personalities . . . do not seek the ‘solitude and privacy’ which Brandeis and Warren sought to protect . . . . However, although the well known personality does not wish to hide his light under a bushel of privacy, neither does he wish to have his name, photograph, and likeness reproduced and publicized without his consent or without remuneration to him.”

Finally in 1960 Dean Prosser published his seminal article charting the various judicial conceptions of privacy rights, in which he outlined four categories of judicially accepted privacy interests,<sup>47</sup> describing the latter most interest as the right to protect one’s image or likeness from misappropriation.<sup>48</sup> Thereafter, both the Restatement (Second) of Torts and the Restatement (Third) of Unfair Competition included the right of publicity, enumerating the elements of the cause of action.<sup>49</sup>

### *B. Enforcing the Right of Publicity*

In general, the right of publicity assures individuals the right to determine when or if others may utilize or exploit their

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47. Dean Prosser enumerated the following four categories of invasion of privacy: intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; public disclosure of embarrassing private facts about the plaintiff; publicity which places the plaintiff in a false light in the public eye; and appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

48. *Id.* This is the interest the *Haelan* court denominated as the right of publicity. *Haelan*, 202 F.2d at 868.

49. See RESTATEMENT (SECOND) OF TORTS (“Plaintiff must prove three elements: (1) the defendant used the plaintiff’s name, portrait, or picture; (2) for purposes of trade or advertising; (3) without written consent”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION (“Plaintiff must prove two elements: (1) Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant’s use; and (2) Defendant’s use is likely to cause damage to the commercial value of that persona.”).

images or personas, as well as the right to participate in the commercial benefits that might be derived from such uses. “The right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity. . . . [It] is a creature of state law and its violation gives rise to a cause of action for the commercial tort of unfair competition.” *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 928 (6th Cir. 2003). *See also* *Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980) (“[T]he famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality.”).<sup>50</sup>

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50. Particularly in so far as celebrities are concerned, the right to control use and exploitation of one’s image or persona can also be asserted under the Lanham Act, through the cause of false endorsement. False endorsement occurs where a person’s image or persona is used in association with a product in a way that is likely to mislead the consuming public as to that person’s sponsorship or approval of the product. “A false endorsement claim based on the unauthorized use of a celebrity’s identity is a type of false association claim, for it alleges the misuse of a trademark, i.e., a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff’s sponsorship or approval of the product.” *Waits v. Frito Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992). “When... a celebrity brings a false endorsement suit under Section 43(a), his ‘celebrity persona’ functions as the ‘mark.’” *Brown v. Electronic Arts, Inc.*, No. 2:09-cv-01598-FMC-RZx at 4-5 (C.D. Cal. 2009); *see also* *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399-1400 (9th Cir. 1992). Likelihood of confusion is generally the controlling issue. *See* *Oil Co. v. Thomas*, 839 F.2d 1183 (6th Cir. 1988) (enumerating an eight factor false endorsement likelihood of confusion test: (1) the level of recognition that the plaintiff has among the segment of the society for whom the defendant’s product is intended; (2) the relatedness of the fame or success of the plaintiff to the defendant’s product; (3) the similarity of the likeness used by the defendant to the actual plaintiff; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant’s intent in selecting the plaintiff; and (8) likelihood of expansion of the product lines). Because right of publicity and false endorsement claims are often raised simultaneously and substantively overlap, the disposition of the one is often difficult to segregate from the resolution of the other. Nonetheless, the

Although the right of publicity is now widely recognized,<sup>51</sup> identifying its parameters continues to be difficult. This is partly due to varying regional privacy customs and values, but it may also be due to the fact that publicity rights often seem to conflict with some of society's most cherished and respected legal and social mores. The most obvious of these conflicts is that with the First Amendment. American society has a revered interest in promoting the accurate discourse of historic and public events, including the roles of public and private individuals in such events. If private individuals were to possess an absolute right to determine when their images or personas could be used or referenced by others, they could effectively censor public discussion and even historical accounts of actual events.<sup>52</sup>

Consequently the right of publicity is often said to end where the First Amendment begins. "[T]he right of publicity cannot be used to prevent someone's name or picture in news reporting. It cannot be used to prevent the use of identity in an unauthorized biography. It cannot prevent use of identity in an entertainment parody or satire, such as that of Rich Little or Saturday Night Live." J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130-31 (1995); *Cardtoons, L.C. v. Major League Baseball Players Assoc.*, 95 F.3d 959,

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principal distinctions between false endorsement and right of publicity claims are (i) "trademark status" for the plaintiff's persona and (ii) the requirement of a likelihood of confusion of the public as to the plaintiff's endorsement of the defendant's product.

51. See MCCARTHY *supra* note 44, at Sec. 6:3; see also Gregory L. Curtner, Atleen Kaur & Suzanne L. Wahl, *Show and Tell: Misappropriation of the Right of Publicity*, COUNSELING CLIENTS IN THE ENT. INDUSTRY 2011, p. 263.

52. *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Mason v. Jews for Jesus*, 2006 WL 3230279 (S.D.N.Y. 2006); *Nussenzweig v. diCorcia*, 832 N.Y.S.2d 510 (N.Y. App. Div. 2007) *certified question answered, order aff'd*, 878 N.E.2d 589 (N.Y. 2007); *Arrington v. New York Times Co.*, 434 N.E.2d 1319 (N.Y. 1982).

969 (10th Cir. 1996) (“[P]arody trading cards receive full protection under the First Amendment. The cards provide social commentary on public figures, major league baseball players, who are involved in a significant commercial enterprise, major league baseball. While not core political speech . . . this type of commentary on an important social institution constitutes protected expression.”). *See also* Vinci v. American Can Co., 591 N.E. 793 (Ohio App. 1990) (permitting unauthorized use of athletes personas where “the mention of the athletes’ names within the context of accurate, historical information was incidental to the promotion [of the partnership] . . . [and] reference to the athletes and their accomplishments was purely informational.”).<sup>53</sup>

In addition to promoting public discourse and historical accuracy, First Amendment concerns also tend to prioritize freedom of artistic expression over publicity interests. For example in *Rogers v. Grimaldi*,<sup>54</sup> the Court of Appeals for the Second Circuit affirmed dismissal of both right of publicity and false endorsement claims brought by film legend Ginger Rogers, as precluded by First Amendment interests. Rogers brought suit in connection with the use of her name in the title of a film, *Ginger and Fred*. The gist of Rogers’ claims was that even though the film was not about the famous Astaire and Rogers dance team, the phrase “Ginger and Fred” invoked her famous persona when used as the title of a film and therefore falsely traded upon that persona to market a work to which she had no connection.

In dismissing Rogers’ claims, the court ruled that any invocation of her persona in this instance was artistically

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53. First Amendment interests similarly curtail false endorsement claims under the Lanham Act. Thus, where a plaintiff raises a false endorsement claim, the interposition of the First Amendment as a defense requires that concerns regarding public confusion be counterbalanced against society’s interest in promoting free expression. *See* ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 928 (6th Cir. 2003).

54. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

relevant to the film, in that while the movie was actually not about Rogers or her former co-star, the title did have some artistic, expressive relationship to the content of the film (a satiric social commentary on the Hollywood Glamour Age) and was not merely a disguised attempt by defendant to trade upon plaintiff's celebrity as a means to promote his product. Consequently the use was protected by the First Amendment:

In light of the [state's] concern for the protection of free expression, [the court] would not expect [the state] to permit the right of publicity to bar the use of a celebrity's name in a movie title unless the title was 'wholly unrelated' to the movie or was 'simply a disguised commercial advertisement for the sale of goods or services.' Here . . . the title 'Ginger and Fred' is clearly related to the content of the movie and is not a disguised advertisement for the sale of goods or services or a collateral commercial product.<sup>55</sup>

If it seems that in a "battle of social utilities" the First Amendment will always prevail over publicity rights, perhaps one reason for such outcomes is that whereas the freedom of speech social utilities are immediately accessible, the social utility of the right of publicity may seem comparatively obscure. The First Amendment promotes democratic discourse and liberty, as well as the unfettered expressive use of facts and ideas; in comparison, what such lofty social goals does the right of publicity promote? Indeed, some scholars have found it

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55. *Id.* at 1004-05. In addition to First Amendment issues, the use of a person in literary expression can also implicate and potentially conflict with the copyright exclusive rights. *See, e.g., Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 636 F.3d 1115 (9th Cir. 2011). The problem of copyright/right of publicity overlaps and conflicts is discussed in Part III, *infra*.

difficult to find *any* social utility justification for the right of publicity.<sup>56</sup> Thus prescribing the right of the publicity can be challenging because courts seem to delineate the right by negative implication, which is to say that courts often seem to construe the right as only covering whatever is “left over” after the important social utilities underlying the First Amendment and higher pecking order social mores have been satisfied.

Unsurprisingly, this difficulty in definition leads to difficulty in enforcement. Not only do varying regional values make it difficult to discern what publicity interests will be recognized in a particular case, but even where the right of publicity interests are relatively concrete, because courts appear eager to subjugate such interests in favor of competing social utilities, the outcomes of right of publicity disputes can be extremely difficult to predict.

The subjugation (and resulting obfuscation) of right of publicity interests, however, is not ineluctable. While at first blush the right of publicity right may not seem an especially

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56. See, e.g., K.J. Greene, *The Right of Publicity: Is the Rent “Too Damn High”?*, COUNSELING CLIENTS IN THE ENT. INDUSTRY 2011, p. 279, 282 (PLI 29016) (“*Right of Publicity: What is it Good for (Absolutely Nothing!*”); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 59 STAN. L. REV. 1161, 1162 (2006); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 178-215 (1993). One explanation for the less than charitable attitudes toward the right of publicity is of course the overreaching and often baseless suits brought by some celebrities seeking to profit from even the most remote associations with their personas. See, e.g., *Lindsay Lohan and E-Trade Settle Milkaholic Baby Lawsuit*, HUFFINGTON POST (Sept. 21, 2010), [http://www.huffingtonpost.com/2010/09/21/lindsay-lohan-et-trade-sett\\_n\\_733657.html](http://www.huffingtonpost.com/2010/09/21/lindsay-lohan-et-trade-sett_n_733657.html). While the dissatisfaction with such abuses is understandable, in the present era of copyright and patent trolls, and the emerging issue of trademark bullying, the problem is by no means restricted to the right of publicity. Just as these abuses do not give rise to calls for the repeal of the copyright, patent, and trademark laws, however, right of publicity misuse is an insufficient basis upon which to do away with publicity rights altogether.

socially relevant form of intellectual property,<sup>57</sup> upon closer analysis it becomes clear that the right of publicity can service important social functions. To identify these functions, however, one must adjust the analytical lens to account for a social justice perspective of the intellectual property law.

*C. The IP Social Utility and Social Justice  
Objectives of the Right of Publicity*

A social justice interpretation of the intellectual property law begins with the identification of social injustices and inequities relevant to a particular area of intellectual property protection. Thus for example, IP Imperialistic exploitation of the expressive output of a marginalized sub-community can be assessed for its impact on the “promote the progress of the arts and sciences” objective underlying the copyright law. Such exploitation at best nullifies the economic incentive to create and at worst, affirmatively discourages such acts as fixation and dissemination by members of exploited groups, who have cause to view such activities as rendering their works more vulnerable to misappropriation.<sup>58</sup> Such

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57. See, e.g., K.J. Greene, *The Right of Publicity: Is the Rent “Too Damn High”?*, COUNSELING CLIENTS IN THE ENT. INDUSTRY 2011, p. 279, 282 (PLI 29016) (“[T]he right of publicity does not deliver the goods the way copyright and patent regimes do – copyright gives us movies, books, music, and patent gives us everything from BMW engine components to little blue pills for men of a certain age. Even trademark law’s harshest detractors concede the efficacy of trademark law’s prevention of consumer confusion in the marketplace of goods. In contrast...publicity rights seem to do little more than to enrich already rich artists and athletes, and to provide a lucrative platform for reality television stars such as Snooki and Paris Hilton.”).

58. See, e.g., Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 126-27 (2009) (“The social engineering aspirations which underlie American copyright law were of sufficient importance to the Framers that they provided for their satisfaction in the very first Article of the Constitution. Included among

instances illustrate an intellectual property social utility/social justice interdependence,<sup>59</sup> a concept which has been explored in various important intellectual property contexts.<sup>60</sup> The social justice implications appurtenant to mass-digitization of copyrighted text and Internet file sharing have been explored by copyright scholars and in major copyright controversies before the courts.<sup>61</sup> Similar issues have been analyzed in the

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those goals is a system for author incentives, intended to help fuel artistic output . . . . When the author incentive function is so widely corrupted that authors from significant segments of the population are systematically deprived of their copyright property rights and incentives, it is not only a problem of copyright social injustice, it also constitutes an assault upon the function of copyright social utility. Creative authors who do not benefit from the copyright regime have little incentive to participate in it. When marginalized groups and communities have no expectation of reward from copyright protection, their members lose the institutional incentive to produce artistic works.”).

59. *Id.*

60. Indeed, the advent of digital information technology has sparked a general refocus of scholarly, policy, and professional attention toward the social utility and social justice obligations of the intellectual property law as a whole. *See, e.g.,* Doris Estelle Long, *Democratizing Globalization: Practicing the Policies of Cultural Inclusion*, 10 *CARDOZO J. INT’L & COMP. L.* 217, 252 (2002) (“[J]ust as human rights and the protection of culture have been raised to an area of international social justice, so too, the protection of the expressions of humankind’s cultural creativity (intellectual property) is worthy of being protected as a matter of social justice, with all the requirements of access and fairness that such social justice requires.”); Rita Hiemes, *Trademarks, Identity, and Justice*, 11 *J. MARSHALL REV. INTELL. PROP. L.* 133, 148 (2011) (“One measure of development and distributive justice, then, is in the mechanisms by which opportunities and access to capabilities are made available to all, means by which inequalities “in the distribution of substantive freedoms and capabilities” are reduced. These freedoms and capabilities could well include property interests in intangibles such as intellectual property. Access to them could certainly assist with improved self-help, self-reliance, and self-confidence, the deprivation of which is a form of poverty.”).

61. *See, e.g.,* *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 686 (S.D.N.Y. 2011). (Discussing the social justice impact of the proposed Google Books Settlement, stating that “supporters of the proposed settlement argue that it would “serve[ ] copyright law’s central purpose of

context of global health crises and pandemics, and other problems relevant to the development of patentable inventions<sup>62</sup> and the enforcement of patents and trademarks in connection with pharmaceutical drugs.<sup>63</sup>

As is the case with other intellectual property rights, the right of publicity can be and has been invoked in the cause of concrete social utility objectives. For example, even the right's harshest critics would acknowledge that the right has been invoked for the socially cognizant purpose of protecting

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advancing knowledge and culture by furthering copyright's social utility and social justice goals through inclusion of those who have been excluded. The Google Books Project furthers these goals by using an accepted copyright mechanism (i.e., a private, court-supervised settlement) to address the novel copyright problems presented by the new technologies, while still preserving the rights of copyright holders.”) (*quoting* Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, 55 N.Y.L. SCH. L. REV. 77, 79–80 (2010); *see also* James Grimmelman, *The Elephantine Google Books Settlement*, 58 J. COPYRIGHT SOC'Y 497, 506-10 (2011); Pamela Samuelson, *Privacy, Property, and Crime in the Virtual Frontier*, 94 MINN. L. REV. 1308, 1319-51 (2010).

62. *See, e.g.*, *Stanford vs. Roche Molecular Systems*, 583 F.3d 832 (Fed. Cir. 2009).

63. *See, e.g.*, Peter Maybarduk, *ACTA and Public Health*, PIJIP Research Paper No. 9, AM. UNIV. WASH. C. OF L. (Washington D.C.); Simone Rose, *Purple Pill*, 48 HOW. L.J. 571 (2005). For an analysis of the social justice opportunities and obligations arising in connection with trademark rights, *see* Rita Hiemes, *Trademarks, Identity, and Justice*, *supra* note 60, at 149, 152 (“[T]he best arguments to support a social justice foundation in trademark and identity law rest on notions of preventing unfair competition and unjust enrichment. These policy goals for recognizing enforceable publicity rights in persona or identity protect the individual as effectively as the corporation . . . . Few scholars have applied this analysis to trademark law, although as a feature of commercial activity trademarks are naturally connected to entrepreneurship and, logically, to personal empowerment . . . . Because trademarks and publicity rights can serve as strong personal property interests, it bears considering, in examination of social and distributive justice principles, whether there is a justice-based argument to be made for helping individuals acquire and protect trademarks and publicity rights.”).

individual privacy and personal dignity.<sup>64</sup> Indeed, in this regard, practitioners and the courts have yet to mine the full social potential of the right of publicity. For example, the problem of negative racial, ethnic, and gender stereotypes implemented through the unauthorized use of individual images or personas could be brought within the ambit of the right. Uses which result in depictions or representations which are not negative per se, but which may be culturally offensive or sacrilegious might also be analytically accessible through right of publicity doctrine.

It is possible to redress or at least curtail these and similar social inequities through the right of publicity. The social utility objectives which undergird the right of publicity can be interpreted to encompass pertinent remedial social justice goals, such as eradicating negative stereotypes and depictions, and culturally offensive representations, at least where individually recognizable personas are involved. Thus, the right to control the use and exploitation of one's persona can be wielded to achieve social as well as individual monetary benefit. In such cases, an analytical interdependence between right of publicity social utility and remedial social justice is identified, and the law can be responsively utilized (and shaped) to advance propitious and mutually reinforcing societal goals.<sup>65</sup> In this way, socially equitable and progressive policies

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64. See, e.g., *Rosa Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003), wherein the civil rights icon brought an action seeking to prevent the use of her name in a rap record using profanity and offensive language. Indeed, this was one of Warren and Brandeis' specific objectives in arguing for the recognition of the right. See Samuel Warren & Louis Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

65. See, e.g., Hiemes, *supra* note 60, at 157 ("The philosophical reasons for promoting individual ownership of identity complement the economic ones, at least from a social justice perspective. One is morally entitled to self-define and even to commercialize one's own persona. At the same time, the opportunity to exploit identity for commercial gain . . . by taking advantage of accidental fame—is one additional opportunity for empowerment through entrepreneurship . . . . In the social justice context,

can be pursued and achieved through strategic invocation and application of right of publicity law and doctrine.

In fact, no less an authority than the United States Supreme Court has articulated an extremely important and time-honored social utility/justice function in connection with the right of publicity. As the Court has observed, the right of publicity provides incentive to individuals to invest effort and resources in the development and stylization of personal attributes and innovations, and to pursue activities and accomplishments of public and popular interest, with the possibility of celebrity, public renown, and attendant commercial reward. *See Zacchini v. Scripps-Howard*

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supporting these individual interests and values is warranted provided the broader societal interests in cultural development and freedom of expression are taken into consideration.”); Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L. J. 47, 55-56 (1994) (“[T]he right of publicity has the potential for safeguarding from unauthorized use any marketable and publicly recognizable attribute of any individual, regardless of whether that person is a celebrity. Moreover, whatever the means through which an individual’s persona comes to have value, that value should be attributable to the persona of the publicity plaintiff who has a right to participate in decisions about how her persona is utilized by others. This is the overall objective which the right of publicity tries to fulfill.”); Note, *Spare the Mod: In Support of Total-Conversion Modified Video Games*, *supra* note 38, at 801 (“The personality theory of intellectual property protection posits that the artist defines herself through art. The creation of artistic works binds the artist to her products. Accordingly, the artist ought to have moral rights over the use of her works.”); Jennifer L. Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3, 4,6 (2001) (“Scholars and courts have isolated four primary policy justifications for the right of publicity: providing incentives for creativity, allowing those who achieve notoriety to enjoy the fruits of their own labor, guarding against consumer deception, and preventing unjust enrichment . . . . The fourth . . . rationale for recognizing the right of publicity is that it prevents publishers from unfairly profiting from a celebrity’s public reputation without sharing some of that profit with the celebrity who worked for that reputation. This moral argument reflects a basic societal belief that it is wrong for ‘free-riders’ or ‘parasites’ to appropriate (and profit from) another person’s hard work.”).

Broadcasting Co., 433 U.S. 562, 573 (1977). “[T]he State’s interest in permitting a right of publicity is in protecting a proprietary interest of the individual in his act to encourage such entertainment . . . . [t]he State’s interest is closely analogous to patent or copyright law, focusing on the right of the individual to reap the reward of his endeavors . . . .”

Moreover, the Court observed that right of publicity social objectives have the same status as those promoted by the copyright law,<sup>66</sup> and enounced that these objectives are not outweighed by those which underlie the First Amendment, especially where an individual’s publicity interest would be completely eviscerated by a purported First Amendment use. “Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the *First* and *Fourteenth Amendments* do not immunize the media when they broadcast a performer’s entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would

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66. “[A state’s] decision to protect [a performer’s] right of publicity . . . rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court.” *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977); *see also* Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1330 (2002) (“[C]elebrities ‘create’ their valuable personas in much the same way that a novelist creates a work of fiction or an inventor a new device. Thus, giving the famous individual a property right in this form of intellectual property has been explained as an incentive to promote future creativity, as a reward for a valuable service to the public, or as a means of preventing unjust enrichment.”); Kwall, *supra* note 65, at 74 (“As a society, we can suffer two general types of harms from the toleration of unauthorized uses of an individual’s persona. One type of harm focuses on the increased potential for consumer deception, and the other focuses on the increased potential for diminished incentives.”).

privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner . . .<sup>67</sup>

When considered in the context of IP social utility, the social justice function of publicity rights become even more significant. Consistent with the Supreme Court's observations, subsequent courts have recognized that in a conflict between the First Amendment and the right of publicity, free speech interests are not the only social utilities at issue.

[H]aving recognized the high degree of First Amendment protection for noncommercial speech about celebrities, we need not conclude that all expression that trenches on the right of publicity receives such protection. The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility. 'Often considerable money, time and energy are needed to develop one's prominence in a particular field. Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. For some, the investment may eventually create considerable commercial value in one's identity.' The present case exemplifies this kind of creative labor. Moe and Jerome (Curly) Howard and Larry Fein fashioned personae collectively known as The Three Stooges, first in vaudeville and later in movie shorts, over a period extending from the 1920's to the 1940's . . . The three comic characters they created and whose names they shared--Larry, Moe, and Curly--possess a kind of mythic status in our

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67. *Id.* at 574-75.

culture. Their journey from ordinary vaudeville performers to the heights (or depths) of slapstick comic celebrity was long and arduous. Their brand of physical humor--the nimble, comically stylized violence, the 'nyuk-nyuks' and "whoop-whoop-whoops," eye-pokes, slaps and head conks . . . created a distinct comedic trademark. Through their talent and labor, they joined the relatively small group of actors who constructed identifiable, recurrent comic personalities that they brought to the many parts they were scripted to play.<sup>68</sup>

Resourceful ingenuity and creativity exercised under challenging socio-economic conditions often spurs the development, refinement, and stylization of personal attributes and individual innovations, which sometimes engender enormous popular culture interest and concomitant commercial potential. However, institutionalized barriers to information, financial capital, and legal support often preclude commercial exploitation by marginalized innovators, while facilitating exploitation by majority enterprises and concerns. The misappropriation or inequitable exploitation of the publicity rights of members of marginalized groups, which have fewer entrepreneurial/access to wealth opportunities,<sup>69</sup> therefore presents an especially inviting opportunity for a social justice oriented application of the right of publicity, as such unfair exploitation undermines the enunciated social utility/justice

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68. *Comedy III Productions, Inc., v. Gary Saderup, Inc.*, 21 P.3d 797, 804-05 (Cal. Super. Ct. 2001).

69. See Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations*, 48 *How. L.J.* 1, 9, 57-58 (2004); Lateef Mtima, *African-American Economic Empowerment Strategies for the New Millennium - Revisiting the Washington-Du Bois Dialectic*, 42 *How. L. J.* 391 (1999).

goals of the right of publicity as well as ecumenical principles of justice.<sup>70</sup>

Thus, to properly assess and balance right of publicity interests against other important societal interests (and thereby delineate socially productive parameters for publicity rights) it is necessary to identify the social utility functions which underlie the right of publicity. Invocation of the overarching social utility goals of the intellectual property law is a cogent mechanism for resolving digital information age IP disputes and balancing the pertinent constituent interests and competing social objectives.<sup>71</sup> Moreover, when intellectual property

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70. The social utility goals which underlie the Lanham Act, including protection against unfair competition and consumer confusion, also resonate with the above enumerated right of publicity social justice objectives. *See* Hiemes, *supra* note 60, at 149. Not only should marginalized individuals derive the commercial benefits from the “persona properties” they develop, but the consuming public should not be misled into supporting products and business unaffiliated with individuals whom they admire and revere. Thus, right of publicity social justice can also be pursued and enforced through the companion federal false endorsement cause of action.

71. *See, e.g.*, Hiemes, *supra* note 60, at 144 (“The relevance of protecting identity from misuse is heightened exponentially by technological advancements in digital communication. Images can be copied from one location, edited, and reposted to another in myriad new ways—some flattering but many not—by anonymous Internet users generally beyond the reach of the law.”) Of course, advances in digital information technology also offer new and socially beneficial opportunities for the development, dissemination, and exploitation of information and ideas, innovative advances, and individual creative expression. The parameters of intellectual property protection must be continuously reassessed to ensure that they complement the immediate and potential boons of such advances, so that technological options and opportunities for social good are not impeded by legal sub-structures incompatible with unanticipated kinds and uses of intellectual property. *See generally* Rebecca Tushnet, *Worth A Thousand Words, The Images of Copyright*, 125 HARV. L. REV. 683 (2012); Steven D. Jamar, *Where Technology & Law Collide: Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843 (2010); Lateef Mtima, *Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Electronic*

disputes are evaluated within the context of social productivity and efficacy, a functional interdependence between IP social utility and IP social justice is typically illuminated: socially propitious mechanisms tend also to be socially just ones (and vice versa). Accordingly, the proper adjudication of right of publicity claims can achieve a beneficial social utility/social justice balance- a balance that is disrupted where the assessment is “IP social justice insensitive” or outright IP Imperialist in perspective.<sup>72</sup>

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*Publishing Frontier?* 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 369, 409-13 (2004).

72. IP Imperialist stratagems thus have the same deleterious effect in both the indigenous culture and marginalized communities contexts. See, e.g., Peter Drahos, *Developing Countries and International Intellectual Property Standard-setting*, Study Paper 8, COMMISSION ON INTELL. PROP. RTS., available

at [http://www.iprcommission.org/papers/pdfs/study\\_papers/sp8\\_drahos\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf) (“Does it matter if the capacity of [developing countries] to influence the [IP] standard-setting process remains weak? . . . . Since intellectual property rights are but one micro-tool of national policy it is difficult to isolate their importance as a variable in development. If, as the World Bank has suggested, development is about expanding the ability of people “to shape their own futures” then we have a prima facie normative reason to be concerned about the loss of national sovereignty of developing countries over standards that impact on sectors such as agriculture, food, environment, health and education.”); Jo Recht, *Intellectual Property in Indigenous Societies: Culture, Context, Politics, and Law*, VI DARTMOUTH L.J., 277, 284, <http://www.dartmouthlawjournal.org/articles/277-298.pdf>, (“Protection of intellectual property in indigenous societies implicates issues of human rights, cultural survival, and physical subsistence of those societies . . . . Primarily . . . when we talk about protecting traditional knowledge we are talking about protecting the livelihoods of the poor.” In 1993, the UN Subcommittee on the Prevention of Discrimination and Protection of Minorities and its Working Group on Indigenous Populations produced “The Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples,” which placed protection of indigenous knowledge into the context of human rights.”); see also Rosemary Coombe, *The Recognition of Indigenous Peoples’ and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 277-78 (2001).

Many courts have found it difficult to attain the proper social utility balance in publicity disputes, in part because they fail to accord proper weight to the social justice attributes of the right of publicity, or to otherwise assess properly the range of social utility interests at issue. The failure to appreciate these social justice objectives fully has led some courts to needlessly restrict right of publicity interests.<sup>73</sup> The next Part discusses four cases which involve right of publicity analyses relevant to divining a more socially cognizant application of the law. In the first three cases, uninformed perceptions of right of publicity social utility objectives led to unduly narrow and in some instances patently unjust applications of the law. In the final case, however, the court's analysis demonstrates how these issues can be assessed in a more socially efficacious manner.

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73. For example some courts have observed that certain social utility objectives which underlie the right of publicity are less important where celebrity interests and incentives are involved. *See, e.g.,* *Cardtoons, L.C. v. Major League Baseball Players Assoc.*, 95 F.3d 959, 969 (10th Cir. 1996). “[E]ven without the right of publicity the rate of return of stardom in the entertainment and sports fields is probably high enough to bring forth a more than ‘adequate’ supply of creative effort and achievement . . . celebrities would still be able to reap financial reward from authorized appearances and endorsements. The extra income generated by licensing one’s identity does not provide a necessary inducement to enter and achieve in the realm of sports and entertainment. Thus, while publicity rights may provide some incentive for creativity and achievement, the magnitude and importance of that incentive has been exaggerated.” While this is true is some cases, it overlooks the realities faced by some members of marginalized communities. It is the prospect of attendant compensation that motivates an inner city youth to pursue a career as a professional athlete in the face of overwhelming statistics that she will likely not have a professional career. And even if she never makes it to the “majors” endorsement opportunities and other exploitation of personal celebrity can provide a path out of poverty, especially for those who also face institutionalized racial impediments.

III. THE RIGHT OF PUBLICITY AND JUDICIAL  
“SOCIAL JUSTICE MYOPIA”

As discussed in Part II, a significant challenge to proper enforcement of right of publicity interests is the judicial misperception that certain hallowed social objectives, such as those that promote free and open discourse, represent the only important social utility interests at issue in disputes over the unauthorized exploitation of such rights. However, while these interests are obviously important, there can be competing and equally important publicity-based social utility and social justice interests also at stake. Society’s interest in promoting notable achievement, social equity, and economic empowerment (particularly in connection with marginalized members of society) through innovative undertakings and/or the development and exploitation of individualized styles and personas can be just as important as its interest in unbridled expression. Consequently it is essential that right of publicity practitioners and commentators assist the courts in identifying the full range of social utility and social justice interests involved in right of publicity cases, in order to preserve the social utility objectives which underlie right of publicity law.

The four cases discussed in this Part explore the issue as one of heightening judicial awareness of the right of publicity social utility/social justice function. In the first case, the issue of judicial insensitivity to right of publicity social utility and social justice objectives as a threshold matter is examined. In the ensuing cases, the problem of balancing important social utilities that may be in conflict with those which underlie publicity rights is analyzed.

*A. Identifying Opportunities for Right of Publicity Social  
Justice: Brooks v. The Topps Company, Inc.*

While the dispute in *Brooks v. Topps Co.*, 86 U.S.P.Q. 2d 1361 (S.D.N.Y. 2007) presented a prime opportunity for a

social justice application of right of publicity law, the decision is instead a paradigm of judicial insensitivity to the right of publicity social utility function. In *Brooks*, Connie Brooks, the daughter of deceased African American Baseball Hall of Famer James Bell brought right of publicity and false endorsement claims in connection with the unauthorized use of her father's image on baseball trading cards. Before his death, Bell had actively exploited his celebrity persona.

Bell granted the National Baseball Hall of Fame permission to use his name and likeness on various products. In 1989, he contracted with Gartlan USA, Inc., to autograph cards that the company would sell along with figurines in his likeness. Following Bell's death, [plaintiff] granted commercial licenses to use Bell's name and images of him. In or around 1994 and 2001, Brooks licensed Bell's name to the Upper Deck Company . . . for use on baseball cards . . . . From approximately September 17, 1993 through June 1, 1994, she licensed Bell's name and a particular image of him to Rodrigues Studio for use on clothing and prints. She also entered into a licensing agreement with General Mills to permit it to print Bell's name and likeness on Wheaties Boxes sold around February 1996. Around mid-1996, she licensed Bell's 'name and likeness' to a company called Crown Crafts, for use on throw blankets." *Brooks*, 86 U.S.P.Q. at 1363.

Subsequent to Bell's death, Connie Brooks discovered that The Topps Trading Company, the well-known purveyor of sports trading cards and memorabilia, had engaged in various unauthorized uses of her father's image, whereupon she

undertook extensive efforts to determine the full scope of Topps' unauthorized activities.

Topps's first contact with Brooks occurred in late 2004. Brian Koeberle ("Koeberle"), acting on behalf of Topps, contacted Brooks by telephone to ask if she would license her father's name and likeness for baseball cards to be published in 2005. At this time Brooks did not know, and Koeberle did not mention, that Topps had previously published seven cards depicting Bell. After several telephone conversations, Koeberle sent Brooks an unsolicited proposed license agreement. Under this draft, dated December 17, 2004, Topps would have paid Brooks \$ 5,000 for the non-exclusive right to use Bell's name and image on its trading cards for the year 2005. *Koeberle stated in the cover letter that Brooks had agreed in the telephone call to this offer, but she had not done so.* Brooks rejected this agreement. In early 2005, a friend told Brooks that Topps might have sold a Bell card. Brooks asked Topps about this. On February 15, 2005, she received a letter from Philip J. Carter ("Carter"), Director of Sports/Player Licensing at Topps, enclosing the 2004 eTopps card and one of the 2004 Tribute Hall of Fame cards and saying that Carter was still looking for other cards Topps may have published depicting Bell. Brooks called Carter and told him she wanted Topps to stop engaging in any conduct relating to Bell, requested compensation for the two cards Topps had printed in 2004, and asked if Topps had printed any other Bell cards. In mid-2005, a friend of Brooks showed her one of the 2001

Topps Bell cards. Brooks immediately contacted Carter, who asked questions about the card and said he knew nothing about it but would look into it. In response to further inquiries from Brooks, Carter said he was unable to find any information about the 2001 card or any other Bell card. On June 26, 2005, Topps offered Brooks \$ 35,000 to sign a settlement agreement and release of liability ("Settlement Agreement"). She refused and asked again for an accounting of all of the Bell cards Topps had published. On December 27, 2005, Brooks wrote a letter to Carter demanding a retraction of the erroneous Nickname Statement, a luncheon in her father's honor, and full information about all of the Bell cards Topps had published. Carter responded by offering to publish a correction of the Nickname Statement and to discuss publishing another Bell card on condition that Brooks sign the Settlement Agreement. By letter dated January 31, 2006, Adam Zucker, Carter's successor, provided Brooks with a list of 'all cards of Cool Papa Bell produced by Topps from 2001-2005'.<sup>74</sup>

Although there was no dispute as to Topps' unauthorized conduct, Topps moved for summary judgment on

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74. *Brooks v. The Topps Company, Inc.*, 86 U.S.P.Q. 2d 1361, 1365-68 (S.D.N.Y. 2007) (emphasis added). In addition to producing the trading cards, Topps also affirmatively marketed that Bell endorsed the use of his name and image. "Topps issued promotional materials for both the 2001 and 2004 cards. The 2004 promotional materials contained two statements that Brooks notes in her opposition papers. One footnote in those materials stated in miniscule print that "[a]lthough *these players have agreed to provide these cards for Topps*, we cannot guarantee that all autographs . . . will be received in time for inclusion in this product." *Id.* at 1364 (emphasis added).

the grounds that the statute of limitations had run. The motion was granted by the court. “The relevant New York cause of action, an action for right of publicity claims . . . has a one-year statute of limitations . . . . Under the single publication rule, this limitations period runs from the date of an offending item’s publication, and ‘the dissemination of that same offending item thereafter does not give rise to a new cause of action, nor does it refresh the running of the statute of limitations.’ . . . . The first publication of the most recent baseball card at issue . . . occurred on November 1, 2004. Brooks filed her lawsuit more than one year later, on March 27, 2006.”

The court was unmoved by Brooks’ arguments that the limitations period should be tolled in light of Topps’ evasive actions. “Brooks argues . . . that the discovery rule, under which the statute of limitations would run from the date on which she discovered or reasonably could have discovered the defendant’s actions, should apply here. Brooks does not contend that New York courts have ever found that a right of publicity claim accrues upon discovery, but argues that it should be adopted here in order to avoid depriving her of ‘a reasonable chance to assert a valid claim.’ . . . . Brooks’ request for such an extension is rejected. Under New York law, statutes of limitations ‘cannot be deemed arbitrary or unreasonable solely on the basis of a harsh effect.’ . . . . Brooks next argues that Topps should be estopped from asserting a statute of limitations defense because it concealed the existence of certain cards from her . . . . December 7, 2005 was at least arguably within the limitations period for the non-disclosed 2004 cards. There is no evidence, however, that Topps made affirmative misrepresentations to Brooks within one year of the date the cards were published.”<sup>75</sup>

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75. *Id.* at 1365-66. The court also went out of its way to dismiss plaintiff’s federal claims. “Personal names and photographs are not inherently distinctive, and therefore are ‘protected only if, through usage, they have acquired distinctiveness and secondary meaning.’ . . . . ‘Secondary meaning’ is a term of art referencing a trademark’s ability to identify the

The court's latter finding seems somewhat cursory, and undeniably social utility/justice blind. A reasonable fact-finder could have concluded that Topps had indeed engaged in a well-timed subterfuge, which conveniently came to halt (and with a comprehensive listing of all unauthorized uses of Bell's image) just weeks after the limitations period ran. In addition, Bell's daughter had commenced the litigation as a pro se litigant. These facts would seem to indicate that a weighing of the relevant equities strongly supported the tolling of the statute.<sup>76</sup>

Unfortunately, the court seemed concerned exclusively with the social utilities which underlie the limitation rules, which is particularly unsatisfying in as much as few if any of these utilities were actually implicated in the litigation. For example, the operative facts covered a relatively short and recent time period, and thus the typical concerns over stale evidence, faulty memories, or unavailable witnesses were not issues.<sup>77</sup> Moreover, not only does the court's decision do

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source of the product rather than the product itself" . . . . Factors that may be considered in determining whether a mark has developed secondary meaning include '(1) advertising expenditures, (2) consumer studies linking the mark to a source, (3) unsolicited media coverage of the product, (4) sales success, (5) attempts to plagiarize the mark, and, (6) length and exclusivity of the mark's use.' Plaintiff has presented no evidence relating to four of these six factors. With respect to the fourth and sixth factors, she has described several commercial licensing arrangements, has offered documentary evidence corroborating the existence of one of them, but has provided no evidence of any sales made to the public by the licensees. While Brooks licensed Bell's name commercially on scattered occasions in 1993, 1994, 1996, and 2001, Brooks licensed the image of Bell at issue here on a single occasion. Given this record, no reasonable juror could find that 'the public is moved in any degree to buy an article' displaying Bell's name or image based on the belief that it implies endorsement by his estate, Brooks, or by any unknown source." *Id.* at 1367-68.

76. For an in-depth discussion of the court's disposition of Topps' limitations defense and an alternative analysis of the issue, see Ritu Narula, *Wait, I Didn't Even Know My Picture Was Taken!": Application of the Discovery Rule to A Right of Publicity Claim*, 53 HOW. L.J. 859 (2010).

77. *Id.* at 879-81. See also Russell Christoff v. Nestle USA, 62 Cal. Rptr. 3d 122, 145 (Ct. App. 2007) (wherein in addressing the application of the

nothing to promote statute of limitations' policies, it actually undermines the policies which underlie the right of publicity, as well as general notions of social justice, and further promotes IP imperialist overreaching. The defendant Topps is a major purveyor of IP products which aggressively protects its own IP rights<sup>78</sup> but apparently has no qualms about engaging in the brazenly illegal use of an African American baseball legend's image and persona. The result here is a paradigmatic reinforcement of the "what's mine is mine but what's your is ours" robber baron view of IP rights.

One explanation for the court's narrow approach may have been insensitivity to the social utilities underlying Bell's publicity rights, of which the court seems to take no notice. While there was little societal benefit in allowing the pirated use of Bell's image, there were important social utilities to be served in protecting the rights of a socially marginalized African American sports figure, who achieved a successful baseball career and developed a celebrity persona despite being denied many social and legal rights and advantages.<sup>79</sup> As the Supreme Court observed in *Zacchini*, providing encouragement for this kind of social productivity is one of the central purposes underlying publicity rights.

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statute of limitations, the court directed that on remand the trial court should instruct the jury to determine "whether a reasonable person in [plaintiff's] position had a meaningful ability to discover the [unauthorized] use of his likeness."). A possible reason for the reluctance of the *Brooks* court to consider the tolling issue may be the lack of a framework through which to determine when publicity limitations periods should (or should not) be tolled. A proposal for such a framework is offered in Part IV *infra*.

78. Indeed, the irony that the leading right of publicity case was brought by a trading card company seems to have escaped the court. See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

79. William C. Rhode, *Cool Papa's Stolen Moments*, N.Y. TIMES (Aug. 7, 1990), <http://www.nytimes.com/1990/08/07/sports/sports-of-the-times-cool-papa-s-stolen-moments.html>.

The *Brooks* decision demonstrates the need for threshold judicial sensitivity to the social utility/justice bases for the right of publicity. In a case in which competing social utilities were virtually non-existent, recognition of these important functions of the right would almost certainly have resulted in the opposite outcome.

*B. Balancing First Amendment and Right of Publicity  
Social Utility: Brown v. Electronic Arts, Inc.*

Arguably, the most challenging right of publicity social utility balancing problems are those that involve the First Amendment. Despite the Supreme Court's admonitions in *Zacchini*, when confronted with a First Amendment defense to a claim of publicity rights misappropriation, many courts demonstrate an almost Pavlovian deference to free speech claims.<sup>80</sup>

*Brown v. Electronic Arts, Inc.*, Case No. 2:09-cv-01598-FMC-RZx (C.D. Cal. 2009) provides a recent example. In *Brown*, NFL Hall of Famer Jim Brown brought suit in connection with a video game company's unauthorized use of Brown's "likeness" in the *Madden NFL* video game series,

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80. Indeed, it has been observed that First Amendment concerns play a special role in the judicial curbing of publicity rights. "Because the right of publicity, unlike the Lanham Act, has no likelihood of confusion requirement, it is potentially more expansive than the Lanham Act . . . . Perhaps for that reason, courts delineating the right of publicity, more frequently than in applying the Lanham Act, have recognized the need to limit the right to accommodate *First Amendment* concerns. . . . In particular, three courts, citing their concern for free expression, have refused to extend the right of publicity to bar the use of a celebrity's name in the title and text of a fictional or semi-fictional book or movie . . . . Commentators have also advocated limits on the right of publicity to accommodate *First Amendment* concerns." *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1993) (citing *Treece, Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX.L.REV. 637 (1973)).

interposing both false endorsement and state law invasion of privacy (publicity) claims. Brown alleged that the defendant had misappropriated his name, identity, and likeness by including him in the games as a player on two “historic” teams. Although Brown’s name and jersey number were not used in the games, he argued that the defendant had merely altered his jersey number and made superficial changes to the subject avatar to avoid liability.

In the games, virtual players on current NFL teams wear the names and numbers of real-life players, whereas players on historical teams are anonymous, represented by numbers and roster positions . . . . Brown alleges that [defendant] misappropriated his name, identity, and likeness by including him in the games as a player on two “historic” teams . . . . The character who purportedly represents Brown in the game is anonymous, and wears jersey number 37; Brown wore number 32 . . . . Brown and his doppelgänger have “nearly identical” statistics.”  
*Brown* at \*2-\*3.

In its defense, the defendant argued, *inter alia*, that its unauthorized use constituted literary expression protected by the First Amendment.

In resolving the dispute, the court predicated its analysis somewhat on *Rogers v. Grimaldi*.<sup>81</sup> The court began by noting that the defendant’s use was entitled to full “literary expression” First Amendment status. “It is well established that ‘video games are a form of expression protected by the First Amendment.’”<sup>82</sup> Having found the use to be an expressive one,

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81. See discussion of *Rogers*, 875 F.2d at 1004-05.

82. *Brown* at \*5. Such automatic bestowal of literary expression status to video games, however, is not without criticism. See Ronald S. Katz, *Courts, Sports and Video Games: What’s In A Game?*, LAW 360 (Jan. 4, 2012),

the court then applied the *Rogers* standard of “minimal artistic relevance” as between the Brown’s persona and the work, noting that in its view, the level of relevance of the persona to the subject work need merely be “above zero” to sustain the unauthorized use. Finally, the court observed that in a game in which players can manipulate virtual athletes and franchises, “[u]se of a legendary NFL player’s likeness . . . is clearly relevant.”<sup>83</sup> Consequently, having found the use of Brown’s persona relevant to the video game (and thus not merely a contrived invocation of Brown’s celebrity) the court (i) ruled for defendant on Brown’s false endorsement claim<sup>84</sup> and allowed the use, and (ii) declined jurisdiction over Brown’s state law publicity claim and dismissed the complaint.

Although the *Brown* court resolved only the false endorsement claim, the court’s assessment of the First

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available at <http://www.law360.com/articles/295743/print?section=ip> 1/5 (“[The Supreme Court’s] sweeping references to character, plot and social messages [in connection with video games] are completely irrelevant to such videogames as Pong, which has as its only object getting a moving dot past a moving line. Pong expresses nothing. It’s just a game and, as such, has no claim to First Amendment protection.”) Indeed, video games run the gamut from Pong and Pac Man to Warcraft and involve differing degrees of expressive content. For purposes of balancing competing First Amendment and right of publicity interests, the degree of expressive contribution in a video game should be measured on a case-by-case basis.

83. *Brown* at \*8.

84. *Id.* at \*7-\*8. In connection with Brown’s false endorsement claim the court further found that under *Rogers*, an unauthorized but artistically relevant use of a persona could still be prohibited if the prospect of consumer confusion (as to whether Brown had in fact endorsed the video game) outweighed the public interest in free expression. The court concluded that there was no such likelihood of confusion in the case before it. “The *Madden NFL* character that Brown alleges bears his likeness is one of thousands of virtual athletes in the games. Unlike most of the other characters, this virtual athlete is anonymous: he is identified only by a jersey number and his roster position as a running back. [Moreover] Brown’s name, are not depicted on the games’ packaging or in their advertising [and] Brown has not pointed to any *Madden NFL* promotional materials that feature his name or likeness.” *Brown* at \*5-\*6, \*8.

Amendment interests is highly relevant to right of publicity social utility. Under *Rogers*, the question of the relevance of an expressive use to the subject work is critical in resolving publicity claims because unlike false endorsement claims, there is no secondary assessment as to whether the use is also prohibitively confusing (and therefore impermissible). In this sense, publicity rights are narrower than false endorsement rights, in that once the unauthorized but expressive use is found relevant, the right of publicity analysis is essentially over and the use is allowed.

While the *Brown* court invokes established mechanisms<sup>85</sup> in assessing the plaintiff's claims, its application of these mechanisms reflects a myopic view of the social utility interests implicated in the dispute. First, although *Rogers* and *Brown* both involve the substantive disposition of false endorsement claims,<sup>86</sup> *Rogers* involved the use of a person's name in the title of a work, whereas *Brown* concerns the use of aspects of an individual's persona in the expressive work itself. Thus the application of the *Rogers* minimal artistic relevance standard for evaluating product titles (weighing artistic relevance against disguised product advertising) is somewhat inapt to assessing the kind of unauthorized use of a persona at issue in *Brown* (weighing defendant's expressive contributions against plaintiff's right to control and/or be compensated for the commercial exploitation of her likeness). The application of the *Rogers* standard to the kind of use involved in *Brown* completely ignores the social utilities implicated by the use of

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85. There is no shortage of tests for evaluating the parameters of the right of publicity. *Cf.*, *Rogers with Comedy III Productions, Inc., v. Gary Saderup, Inc.*, 21 P.3d 797, 807 (Cal. Super. Ct. 2001). The variety of tests, their differing assessment emphases, and their derivation from other areas of intellectual property law suggest a compelling need for an overarching right of publicity social utility schema that refits the right into the intellectual property social utility regime.

86. As noted above, however, unlike *Brown*, the court in *Rogers* court went on to also address plaintiff's right of publicity claims.

aspects of an individual's persona (as opposed to merely a person's name) as part of the expressive content of a work.

The approach used by the court in *No Doubt vs. Activision Publishing, Inc.*,<sup>87</sup> which also involved the use of a celebrity persona in a video game, illustrates the weakness of the analysis in *Brown*. In *No Doubt*, a computer generated likeness of the rock band No Doubt was used in certain ways in a video game without the band's permission.<sup>88</sup> Given the nature of the unauthorized use, however, the court did not use the *Rogers* test for evaluating titles but instead referred to the transformation test first enunciated in *Comedy III Productions, Inc., v. Gary Saderup, Inc.*,<sup>89</sup> which assesses whether the user has made some expressive contribution in using the plaintiff's persona, or is merely using the plaintiff's unaltered likeness for to promote its product. The No Doubt court found that the video game simply depicted the band "doing what they do" (performing rock music) and thus there was no expressive contribution by the defendant, and permitted No Doubt to pursue its right of publicity claims.

In [the video game] *Band Hero* . . . no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars

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87. *No Doubt v. Activision Publishing, Inc.*, 122 Cal. Rptr. 3d 397 (Ct. App. 2011).

88. No Doubt had agreed that their likenesses could be used in the game, but complained that Activision went beyond the parties' agreement and used their likenesses in ways they did not and would never consent to. *Id.*

89. *Comedy III*, 21 P.3d at 808 ("This inquiry into whether a work is 'transformative' appears to us to be necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment . . . . When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.").

perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members. That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a videogame that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities.<sup>90</sup>

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90. *No Doubt*, 122 Cal. Rptr. 3d at 410-11. *Accord*, Keller v. Electronic Arts, Inc., 94 U.S.P.Q. 2d 1130, 1135 (N.D. Cal. 2010) (“[Defendant’s] depiction of Plaintiff in ‘NCAA Football’ is not sufficiently transformative to bar his California right of publicity claims as a matter of law. In the game, the quarterback for Arizona State University shares many of Plaintiff’s characteristics. For example, the virtual player wears the same jersey number, is the same height and weight and hails from the same state. EA’s depiction of Plaintiff is far from the transmogrification [in prior cases]. EA does not depict Plaintiff in a different form; he is represented as he what he was: the starting quarterback for Arizona State University. Further . . . the game’s setting is identical to where the public found Plaintiff during his collegiate career: on the football field.”) In *Hart v. Electronic Arts, Inc.*, 808 F. Supp. 2d 757 (D. N.J. 2011) the New Jersey District Court applied the transformation test to the EA video game but reached a different result, primarily because the court focused on the defendant’s contributions to the video game as a whole, including the fact that users can alter the plaintiff’s image using “add-ons” designed by the defendant. While the court acknowledges that the fact that the plaintiff is presented unaltered and in his professional/celebrity setting (the football field) is “problematic” for a finding of transformation, and moreover, “[i]t seems ludicrous to question whether video game consumers enjoy and, as a result, purchase more EA-produced video games as a result of the heightened realism associated with actual players”, it nonetheless concluded that the use was transformative and entitled to First Amendment protection. The problem with this analysis is that it seems to reaching for

Where the unauthorized use of individual's persona merely depicts the individual "as she is", the defendant is not undertaking any expressive statement or contribution but is merely using the persona to create a commercial product and consistent with the Supreme Court's admonitions, the individual should be compensated for the use. By utilizing the *Rogers* test, the *Brown* court failed even to examine the defendant's use for expressive contribution (an examination it appears the defendant would have failed).

Even if the *Brown* court's invocation of the *Rogers* test was appropriate, however, the court's application of the test was neither social utility sensitive nor analytically sound. In constructing and applying its test, the *Rogers* the court duly noted the significance of the defendant's parody/social commentary purpose in finding that the use was artistically expressive. The court in *Brown*, however, made no assessment at all of the expressive content of the subject work, but instead simply presumed that a video game representation of an athletic event is an expressive use, a conclusion not immune to challenge.<sup>91</sup> Indeed, even if the *Madden NFL* video game qualifies as an expressive work overall, as the decision in *No Doubt* demonstrates, whether the use of the plaintiff's persona in the game is *itself* expressive is another matter.<sup>92</sup> Given the

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some kind of "copyright gestalt", allowing the copyrightable elements of the game to color its ultimate characterization of defendant's use of the plaintiff's image; the issue is not whether the game contains creative contributions or whether the defendant provides users with the tools such that *they* might transform the plaintiff's image (which image the court concedes is the reason the user's purchase the game in the first place) but rather, *whether the defendant transformed the plaintiff's image in developing and marketing the game*, which the court expressly notes that the defendant did not do. *Hart*, 808 F. Supp. 2d at 783. Under the *Hart* analysis, a celebrity-image coloring book would pass the transformation test, provided it included ancillary aesthetics and was sold complete with crayons.

91. See, e.g., Katz, *supra* note 83.

92. See also Keller, 94 U.S.P.Q. at 1135 (holding that the court's "focus must be on the depiction of Plaintiff in [the video game] not the game's

right of publicity social utilities at stake, a more than perfunctory assessment of the game's expression aspects was surely warranted.

Finally, important social utility/justice considerations were also ignored in the *Brown* court's "re-articulation" of the *Rogers* test, as calling for a relevance connection between Brown's persona and the work that need be only "above zero."<sup>93</sup> Only under such an all but non-existent standard does the court's emphasis on the historical significance of Brown's accomplishments to support its finding of "relevance" become acceptable.<sup>94</sup> Realistically, notable athletic or other public

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other elements."); Leah M. Chamberlin, *Student Athletes and the Deprivation of Rights of Privacy and Publicity - Are Fantasy Sports Leagues Infringing Upon the Rights of College Athletes? If So, What Constitutes a Viable Solution?* 88 U. DET. MERCY L. REV. 555, 556, 570 (2011) ("Today, there are an estimated thirty million people who participate in fantasy sports. Fantasy sports providers are estimated to bring in close to \$ 1 billion in subscription fees and advertising revenue . . . . While fantasy sports providers are raking in the profits, the athletes . . . are being left in the dust . . . . In allowing big-name corporations to use student athletes' names and identifying characteristics in the promotion of various products, the NCAA is condoning the exploitation of student athletes, the same people it was formed to protect . . . . As former NCAA President Myles Brand wrote in a 2008 article, 'there is a difference between reading about college athletes, having available their performance statistics, but then using that information and those names as commodities in a game that is completely divorced from the purpose and values of intercollegiate athletics.'").

93. As articulated in *Rogers*, an unauthorized use of a persona should be disallowed if the use is "wholly unrelated" to the work." *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1993).

94. In *Rogers*, the relevance of Ginger Rogers' persona to the expressive work at issue was akin to that of parody: the film was about two fictional and unglamorous Italian dancer contemporaries of the Rogers and Astaire team, and was intended as a social commentary on Hollywood and television facades and hypocrisies. By comparison, a film on the history of dance throughout the world entitled *Ginger and Fred* should not satisfy the *Rogers* test merely because Rogers and Astaire's accomplishments are important in the field; such a result would conflate "historical" and "relevant" and render inert the *Rogers*' relevance requirement.

achievement will almost always have some historical value. Thus, under the *Brown* analysis it therefore becomes difficult to conceive of any notable achievement that would be “irrelevant” to any work or product concerning the same subject matter.<sup>95</sup> A more socially attuned and equitable application of the *Rogers* test would recognize that although Jim Brown’s exploits are indeed a part of football history, not every invocation of Brown’s accomplishments or attributes are exclusively or even principally historical in purpose or effect. The inclusion of Brown’s “statistical attributes” as an avatar in a commercially distributed video game or similar product might be undertaken for reasons of historical accuracy and experience authenticity, or merely for reasons of commercial marketing appeal, *or for a combination of these purposes*.<sup>96</sup>

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95. See *Nature’s Way Products, Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245, 253 (D. Utah 1990) (“[Defendants]...are using an historical fact to market a different product . . . . Defendants’ historical exception argument, if granted, would work to cause essentially every right of publicity case to fail on the basis that every truthful reference to a famous person in connection with an advertised product could be considered to be ‘historical information.’ Because ‘historical information’ is being used in the instant case to market a product that is independent of the information itself, defendants’ argument is without merit and is rejected.”) Moreover in *Rogers*, the relevance of Ginger Rogers’ persona to the expressive work at issue was akin to that of parody: the film was about two fictional and unglamorous Italian dancer contemporaries of the Rogers and Astaire team, and was intended as a social commentary on Hollywood and television facades and hypocrisies. By comparison, a film on the history of dance throughout the world entitled *Ginger and Fred* should not satisfy the *Rogers* test merely because Rogers and Astaire’s accomplishments are important in the field.

96. Indeed, the *Rogers* court made this observation in connection with the unauthorized use of a persona in the title of an artistic work. “Titles, like the artistic works they identify, are of a hybrid nature, combining artistic expression and commercial promotion. The title of a movie may be both an integral element of the film-maker’s expression as well as a significant means of marketing the film to the public.” *Rogers*, 875 F.2d at 998. See also *Rosa Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (discussing use of plaintiff’s name as a song title and holding that “the *First*

Consequently, to grant automatically First Amendment protection to the use of a historical or otherwise socially significant persona in an expressive work is to ignore both the commercial realities and social equities implicated by such uses, and in right of publicity disputes, to provide a windfall to some defendants. “Moreover, Activision’s use of life-like depictions of No Doubt performing songs is motivated by the commercial interest in using the band’s fame to market *Band Hero*, because it encourages the band’s sizeable fan base to purchase the game so as to perform as, or alongside, the members of No Doubt. Thus, insofar as the depiction of No Doubt is concerned, the graphics and other background content of the game are secondary, and the expressive elements of the game remain ‘manifestly subordinated to the overall goal of

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*Amendment* cannot permit anyone who cries "artist" to have *carte blanche* when it comes to naming and advertising his or her works, art though it may be . . . . If the requirement of ‘relevance’ is to have any meaning at all, it would not be unreasonable to conclude that the title *Rosa Parks* is *not* relevant to the content of the song in question. The use of this woman’s name unquestionably was a good marketing tool - *Rosa Parks* was likely to sell far more recordings than *Back of the Bus* - but its use could be found by a reasonable finder of fact to be a flagrant deception on the public regarding the actual content of this song and the creation of an impression that Rosa Parks . . . had also approved or sponsored the use of her name on Defendants’ composition . . . . We believe that Parks’ right of publicity claim presents a genuine issue of material fact regarding the question of whether the title to the song is or is not ‘wholly unrelated’ to the content of the song. A reasonable finder of fact . . . upon consideration of all the evidence, could find the title to be a ‘disguised commercial advertisement’ or adopted ‘solely to attract attention’ to the work.” *Parks*, 329 F.3d at 447, 453-54, 461. There is no reason that aspects of a legendary football Hall of Famer persona could not be used in a similar hybrid manner in a football video game, thereby rendering the expression at least partially commercial speech in nature and diluting its First Amendment status. See J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 137 (1995) (“[C]ommercial speech...is a form of free speech but is not given nearly as much protection as traditional political or entertainment speech.”).

creating a conventional portrait of [No Doubt] so as to commercially exploit [its] fame.”<sup>97</sup>

As the Supreme Court has noted, “No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.”<sup>98</sup> The *Brown* decision demonstrates how a “knee-jerk” First Amendment categorization of a possibly expressive but nonetheless unauthorized use of a persona might inadequately assess the societal and constituent interests

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97. *No Doubt v. Activision Publishing, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Ct. App. 2011). *See also* Hiemes, *supra* note 60, at 158 (“An individual’s interests in identity protection should not be lesser than—or greater than—First Amendment interests or other social and cultural norms law seeks to foster and protect. They are central to the individual’s rights to self-determination and freedom. Indeed, although courts are not as likely to recognize for non-celebrities the powerful publicity rights granted to [prominent individuals and celebrities], there is no justification under social justice theories to deprive other individuals of the right to prevent misappropriation of their identities or commercial exploitation by others. If we are to allow commodification of identity we should give universal access to such rights.”); *Comedy III Productions, Inc., v. Gary Saderup, Inc.*, 21 P.3d 797, 807 (Cal. Super. Ct. 2001) (“It is admittedly not a simple matter to develop a test that will unerringly distinguish between forms of artistic expression protected by the First Amendment and those that must give way to the right of publicity . . . . What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame through the merchandising of the ‘name, voice, signature, photograph, or likeness’ of the celebrity.”).

98. *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. 2849, 2857 (1977) (citing Kalven, *Privacy in Tort Law - Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROB. 326, 331 (1966)); *see also* J. Thomas McCarthy, *supra* note 97, at 131. (“While some criticize the right of publicity as posing the danger of invading our free speech rights, in fact, for all practical purposes, the only kind of speech impacted by the right of publicity is commercial speech -- advertising. Not news, not stories, not entertainment and not entertainment satire and parody -- only advertising and similar commercial uses.”).

implicated in the dispute.<sup>99</sup> Moreover, the failure to employ a more socially nuanced approach tends to promote IP imperialist overreaching. Whereas the NFL and its licensees aggressively protect their copyright and trademark interests, it seems that to them, publicity rights are fair game- or at least subject to conservative interpretation and application.<sup>100</sup> Aiding and abetting such IP imperialist social ambidexterity may serve conglomerate IP commoditization interests, but it contravenes right of publicity social utility and undermines pervasive respect for the IP regime.<sup>101</sup>

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99. See *Keller v. Electronic Arts, Inc.*, 94 U.S.P.Q. 2d 1130, 1136 (N.D. Cal. 2010) (holding that even where First Amendment protections are relevant to an unauthorized use “it does not follow that these protections are absolute and always trump the right of publicity”) and *cf.* *Hart v. Electronic Arts, Inc.*, 808 F. Supp. 2d 757, 769-71 (D. N.J. 2011) (wherein the court appears to embrace an “either commercial speech or expressive use” Hobson’s choice, overlooking the possibility a hybrid commercial motivation and result).

100. Katie Thomas, *Ex-Players Join Suit vs. N.C.A.A.*, N.Y. TIMES (Mar. 10, 2010), <http://www.nytimes.com/2010/03/11/sports/ncaabasketball/11colleges.html>; Anastasios Kaburakis et al., *NCAA Student-Athletes’ Rights of Publicity, EA Sports, and the Video Game Industry*, ENT. AND SPORTS LAWYER, Volume 27, Number 2, Summer 2009, available at <http://www.kaburakis.com/wp-content/uploads/2009/09/kaburakis.pdf>; see also *Keller*, 94 U.S.P.Q. 2d at 1130 (in which plaintiff alleges that the NCAA prohibits student athletes from commercially exploiting their personas and in turn, takes advantage of that prohibition to exploit their personas for its own pecuniary benefit.).

101. See, e.g., *Comedy III*, 21 P.3d at 811 (disallowing the unauthorized use where “the marketability and economic value of [the resulting] work derives primarily from the fame of the celebrities depicted.”); Matthew G. Matzkin, *Getting’ Played: How the Video Game Industry Violates College Athletes’ Rights of Publicity By Not Paying for Their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227, 236-37 (2001) (“In 1999, the NCAA granted CBS television exclusive broadcasting rights to the NCAA Division 1A Men’s Basketball Tournament for eleven years at a price of approximately six billion dollars. The net income from college football bowl games in 1993 through 1994 totaled \$ 40.7 million. The television revenue alone from the 1993 through 1994 bowl games totaled \$ 36 million . . . . However, these figures do not adequately represent the income derived from college

In addition to the paradigmatic extremes of the genuinely expressive use of a persona versus its use to promote a commercial product or work, there may be instances in which the purpose or impact of the use of a persona is “mixed”, e.g., both expressive and promotional, such that any pertinent First Amendment interests may be limited or even nominal. In mixed expressive/promotional use situations, the issue may not be that of the plaintiff’s publicity interests being at odds with a compelling societal interest in free speech, but rather, simply one of deciding as between the plaintiff and the defendant how the fruits of the commercial exploitation of the plaintiff’s persona should be allocated. In such cases, a more balanced assessment of the competing free speech and publicity social interests requires that the court (i) assess the case-specific social utilities promoted by each interest, and (ii) weigh the relevant equities as between the plaintiff and defendant in deciding whether the unauthorized use should be permitted without remuneration to the plaintiff. Such an approach acknowledges the social importance of the right of publicity, and further, adheres to the Supreme Court’s admonitions regarding the preservation of the right of publicity development incentives and social benefits.<sup>102</sup>

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athletics, as they encompass only national receipts of the two largest men’s sports, basketball and football. Member institutions also receive hefty receipts from the regular season ticket sales for both men’s and women’s sports and the licensing of products bearing institutional athletic logos. For example, in 1996, the University of Michigan collected close to 4.9 million dollars in royalties from the sale of licensed products bearing the University’s athletic emblems.”); Note, *Spare the Mod: In Support of Total-Conversion Modified Video Games*, 125 Harv. L. Rev. 789, 800 (2012) (“A more fruitful approach within [the labor theory of intellectual property protections] may be to move away from traditional Lockean labor theory and toward an analysis based on equity theory. This approach focuses on distributive justice based on individual contributions to a joint venture. Equity theory essentially says that what is fair is what is proportional. When determining how to divide surpluses, individuals rely on a complex social index comprising empathetic preferences and a natural sense of fair play.”).

102. See discussion in Part II, *infra*.

C. *Reconciling Competing Intellectual Property Social Utilities: Laws v. Sony Music Entertainment, Inc.*

Increasingly, courts are being confronted with another difficult social utility balancing problem in resolving right of publicity disputes, that of preserving any authorized copyright interests that favor allowing the unauthorized use of publicity rights subsumed within the work. Whereas a wholly unauthorized expressive work may require the invocation of the First Amendment to insulate the unauthorized publicity use, an authorized expressive work will implicate traditional copyright interests, such as the right to reproduce or distribute the work which may conflict with any legitimate publicity rights also present in the work. Similar to the First Amendment versus right of publicity cases, however, courts seem to have difficulty placing publicity interests on par with copyright interests, and here too, often display a “knee-jerk” deference to copyright claims.

*Laws v. Sony Music Entertainment, Inc.* provides a particularly interesting example of the problem, as the publicity interests involved are not only subtle, but extremely significant from an IP social justice perspective. The plaintiff Debra Laws was an Elektra recording artist and Elektra held the copyrights in Laws’ sound recordings. When Laws initially signed with Elektra, however, the company expressly agreed that “we or our licensees shall not, without your prior written consent, sell records embodying the Masters hereunder for use as premiums or in connection with the sale, advertising or promotion of any other product or service” (emphasis added).<sup>103</sup>

Elektra subsequently granted Sony a license to sample a segment from one of Laws’ recordings into a recording by recording artist Jennifer Lopez, whereupon Laws brought suit

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103. *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1136 (9th Cir. 2006).

against Sony for misappropriation of her name and voice.<sup>104</sup> Sony ultimately moved for summary judgment, on the grounds that Laws' suit was essentially one for unauthorized reproduction of her copyrighted sound performance, which claim Sony argued was preempted by the copyright law.<sup>105</sup> Laws argued, however, that her misappropriation claims were substantively different from claims for copyright infringement. "Laws . . . contends that the subject matter of a copyright claim and a right of publicity claim are substantively different. She argues that a copyright claim protects ownership rights to a work of art, while a right of publicity claim concerns the right to protect one's persona and likeness. Sony, by contrast, contends that the subject matter of a right of publicity in one's voice is not different from a copyright claim when the voice is embodied within a copyrighted sound recording. Sony argues that once a voice becomes part of a sound recording in a fixed tangible medium it comes within the subject matter of copyright law."<sup>106</sup>

The court agreed with Sony's reasoning that because it had used a copyrighted recording of Laws' voice, her state misappropriation rights were subsumed within the copyrights attendant to that recording. "[W]e think it is clear that federal copyright law preempts a claim alleging misappropriation of one's voice when the entirety of the allegedly misappropriated vocal performance is contained within a copyrighted medium . . . [Moreover] Sony did not use Laws's image, name, or the voice recording in any promotional materials. Her state tort action challenges control of the artistic work itself and could hardly be more closely related to the subject matter of the Copyright Act."<sup>107</sup>

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104. Laws also commenced a breach of contract action against Elektra. *Id.* at 1143 n. 5.

105. Having assigned her copyrights to Elektra, Laws lacked standing to assert a copyright infringement claim against Sony.

106. *Laws*, 448 F.3d at 1139.

107. *Id.* at 1141-42.

The court further held that to the extent that Laws' state law claims required an "extra element" beyond those which constitute a claim for copyright infringement, these elements were insufficiently distinctive to avoid copyright preemption. "Laws contends that her right of publicity claim under *California Civil Code* § 3344 requires proof of a use for a 'commercial purpose,' which is not an element of a copyright infringement claim. She concedes that a right which is the 'equivalent to copyright' is one that is infringed by the mere act of reproduction; however, she argues that her claim is not based on Sony's mere act of reproduction, but 'is for the use of . . . Laws'[s] voice, the combination of her voice with another artist, and the commercial exploitation of her voice and name in a different product without her consent . . . . [However] The mere presence of an additional element [in this case 'commercial use'] is not enough to qualitatively distinguish Laws's right of publicity claim from a claim in copyright. The extra element must transform the nature of the action. Although the elements of Laws's state law claims may not be identical to the elements in a copyright action, the underlying nature of Laws's state law claims is part and parcel of a copyright claim."<sup>108</sup>

While this is in some ways a close analytical case, similar to the court in *Brown*, the court in *Laws* seems unduly deferential to the copyright interests implicated in the case—almost to the point of ignoring settled federal intellectual property law preemption precedent.<sup>109</sup> Moreover, the court

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108. *Id.* at 1144. For a similar copyright preemption analysis, see also *Toney v. L'Oreal, USA, Inc.*, 384 F.3d 486, 491-92 (7th Cir. 2004) (holding that "because the exercise of the [defendant copyright holder's] rights to reproduce, adapt, publish, or display the photos would also infringe upon [the plaintiff's] right to publicity in her likeness in photographic form, her publicity right is equivalent to the rights encompassed by copyright listed in § 106.").

109. See, e.g., *Kewanee Oil Co. vs. Bicorn Corp.*, 416 U.S. 470 (1974); Leonard A. Wohl, *Federal Preemption of the Right of Publicity in Sing-*

once again fails to give proper weight to the full range of social utilities which support the plaintiff's right of publicity interests.

With respect to defendant's copyright claims, the court's preemption analysis certainly leaves something to be desired. The court's reading of the additional element test is unduly constrained, and moreover, the court seems to presume that the presence of a copyright in the original sound recording used by Sony completely negates the possibility of additional, alternative intellectual property rights and interests in, as well as non-copyright uses for the work. Courts and commentators have long recognized the possibilities for co-existing intellectual property rights in a single work, and have afforded due consideration to each such interest.<sup>110</sup> In a reactionary effort to protect the sanctity of copyright, the court overlooks the fact that a copyrighted work can be used for an exclusively promotional purpose, one unrelated to the work itself or its expressive message.<sup>111</sup>

While Sony's sampling use of Laws' recording certainly involved some expressive intentions and effects, it was also arguably a use undertaken to provide "street cred" to the Jennifer Lopez recording and thereby to promote it (and Lopez) to the "urban" and R&B commercial markets. From this perspective, the copyright expressive social utilities involved are limited, whereas the right of publicity social utilities that are at risk are extremely important. Moreover, when considering the issue of intellectual property social justice, the Lopez promotional impact becomes a critical factor

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*Alike Cases*, 1 FORDHAM ENT. MEDIA & INTELL. PROP. L. FORUM 47 (1990).

110. *Dastar Corp. v. Twentieth Cent. Fox Film Corp.*, 539 U.S. 23 (2003); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Mazer v. Stein*, 347 U.S. 201 (1954).

111. One common example is the use of vintage, classic or "art house" cinema posters to promote a specific movie theater; the theater may have no plans to actually show the subject films but rather, is attempting to promote itself as a venerable purveyor of important, high quality cinematic entertainment.

in balancing the interests at stake in the dispute. Consistent with the tradition of American IP Imperialism, the recording industry has a long history of using the creative talents, innovations, and stylizations of African American artists to promote the records and careers of white artists.<sup>112</sup> Indeed, this

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112. See, e.g., NELSON GEORGE, THE DEATH OF RHYTHM 'N' BLUES 108 (1988) ("Blacks Create and then move on. Whites document and then recycle. In the history of popular music these truths are self-evident"); JOHN COLLIS, THE STORY OF CHESS RECORDS 117 (1998); JAMES LINCOLN COLLIER, THE MAKING OF JAZZ: A COMPREHENSIVE HISTORY 106 (1978); see also Neela Kartha, *Digital Sampling and Copyright Law in the Social Context: No More Colorblindness!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 219-23, 232-34 (1997) ("The compulsory license made it possible for white artists to shanghai the African-American songbook. Pat Boone was notorious for covering Little Richard's music, and eventually, songs "by niggers for niggers" realized a catalog value as great as those of Tin Pan Alley tunesmiths. Another unfortunate reality was that the Black songwriters and performers did not always understand the value of publishing rights which ended up being owned by white record companies. A great deal of revenue was generated by white groups covering Black hits . . . . Eric Clapton is an excellent example of an artist who reached long term fame using a lot of unoriginal music and styles taken from Black artists . . . . When he was with John Mayall's Bluesbreakers he recorded (blues artist) Freddie King's "Hideaway," Otis Rush and Willie Dixon's "All Your Love," Robert Johnson's "Ramblin' On My Mind," and later, with the rock group Cream, he recorded "Crossroads," another Robert Johnson song. When he was with Derek and the Dominos he recorded Willie Dixon's "Evil," Elmore James's "The Sky Is Crying," and later in his solo career he imitated reggae music. He recorded some music in Jamaica (not including "I Shot the Sheriff") where he recorded Peter Tosh's "Whatcha Gonna Do." How would Eric Clapton's career fare a "total concept and feel" analysis like that set forth in *Roth Greeting Cards v. United Card Co.*?"); Henry Self, *Digital Sampling: A Cultural Perspective*, 9 UCLA ENT. L. REV. 347, 352-53 (2002); *Copynorms supra* note 34, at 1184-85, 1188-89 ("In the context of cultural production, Ellisonian invisibility is concrete in all its bitter irony. In the face of prolific and innovative Black musical creativity, 'Whites [in the 1920s] often vehemently denied that African Americans had made any contribution to the creation of jazz. New Orleans "Dixieland" musicians . . . made it a point of honor never to mix with Black musicians or acknowledge their talents.' In later years, it was widely conceded that 'though African-Americans had certainly invented ragtime and jazz, these

may well have been the reason Laws negotiated the “no promotional use of other artists” clause of her contract. As a “cross-over” recording artist, Jennifer Lopez has been marketed to majority audiences and has enjoyed a multifaceted entertainment career in the recording, television, movie, and now fragrance industries.<sup>113</sup> To the extent that Lopez’s mega-celebrity is fueled by the vocal stylings of a lesser known African American R&B recording artist, the right of publicity social justice implications warrant serious consideration—certainly more consideration than that given by the *Laws* court.

While the problem of mixed “expressive/promotional” use of publicity rights is as challenging here as it is in the First Amendment context, once again it is not intractable. In the next case, the Court of Appeals for the Third Circuit also confronts the problem, and demonstrates a right of publicity social utility/social justice sensitivity more highly attuned than that demonstrated in *Laws* or the other cases discussed thus far.

*D. Assessing the “Social Utility Authenticity” of Publicity Defenses: Facenda v. N.F.L. Films, Inc.*

In *Facenda v. N.F.L. Films, Inc.*, 542 F. 3d 1007 (3rd Cir. 2008) the court was confronted with the same intersection of copyright and right of publicity problem that was at issue in

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musical styles were being brought to their highest levels by [White] outsiders.” (quoting BURTON W. PERETTI, *JAZZ IN AMERICAN CULTURE* 42-43 (1993)); Evans C. Anyanwu, *Let’s Keep it on the Download: Why the Educational Use Factor of the Fair Use Exception Should Shield Rap Music from Infringement Claims*, 30 RUTGERS COMPUTER & TECH. L.J. 179, 181-82 (2004); Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess and Unfair Use*, 37 RUTGERS L.J. 277, 350-51 (2006); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby-LatCrit Theory and the Sticky Mess of Race*, 10 LA RAZA L.J. 499, 512-13 (1998).

113. Nicole La Porte, *J. Lo, The People’s Pop Star*, N.Y. TIMES (May 13, 2011), <http://www.nytimes.com/2011/05/15/fashion/jennifer-lopez-the-peoples-pop-star.html?pagewanted=all>.

*Laws*, however, this court employed a more nuanced analysis and reached a very different outcome. In this case, the estate of well-known football commentator John Facenda brought suit when the NFL used portions of Facenda's voice-over work from previously authorized copyrighted programs in a new, unauthorized program concerning the football video game *Madden NFL 06*. In essence, the NFL "sampled" portions of Facenda's voice-over recordings from one program into another. Facenda's Estate claimed that the use of Facenda's voice falsely suggested that Facenda endorsed the video game and also violated Facenda's right of publicity under Pennsylvania law. Just as Sony argued in *Laws*, the NFL argued that the copyrights it held in the original NFL programs that Facenda narrated gave it the right to re-use portions of those works in subsequent expressive works.<sup>114</sup>

As did the court in *Brown*, the *Facenda* court began its false endorsement analysis by invoking the *Rogers* test, however it first considered the threshold question as to whether the unauthorized use was in fact expressive, as opposed to merely promotional: "Before considering whether either prong of the *Rogers* test applies, however, we must decide whether the television production is a 'work[] of artistic expression . . . as understood in the context of construing the [plaintiff's persona rights] narrowly to avoid a conflict with the First Amendment . . . . The Estate contends that the [new] program is commercial speech, and we agree. Our Court has 'three factors to consider in deciding whether speech is commercial: (1) is the speech an advertisement; (2) does the speech refer to

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114. Just as *Laws* had done, Facenda had expressly preserved his publicity rights, notwithstanding his assignment of any copyrights in the original programs. "Facenda signed a 'standard release' contract stating that NFL Films enjoys 'the unequivocal rights to use the audio and visual film sequences recorded of me, or any part of them . . . in perpetuity and by whatever media or manner NFL Films . . . sees fit, provided, however, such use does not constitute an endorsement of any product or service.'" *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1012 (3rd Cir. 2008).

a specific product or service; and (3) does the speaker have an economic motivation for the speech.”<sup>115</sup>

In short, the court did not presume that because Facenda’s voice was reproduced in an expressive work, defendant’s use of Facenda’s voice was *also* expressive. Instead, upon finding the NFL’s subsequent use to be more promotional than expressive in nature, the court distinguished the facts from those in *Rogers* (which involved a parody-like use of the plaintiff’s persona) and instead applied the traditional trademark likelihood of confusion analysis (as tailored to false-endorsement claims).<sup>116</sup> Finding it likely that consumers would believe that Facenda had endorsed *Madden NFL 06*, the court held in favor of Facenda’s estate.<sup>117</sup>

With regard to plaintiff’s right of publicity claim, the court acknowledged that “[b]y using the sound clips of Facenda’s voice . . . the NFL was exercising its exclusive right to make derivative works of those sound clips under § 106(2). In effect, it was ‘sampling’ itself, making a collage, taking a small piece of an old work and using it in a new work--as when

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115. *Id.* at 1016-17. Thus although the work at issue was a narrative video program (which is closer to a traditional literary work than a video game) unlike the court in *Brown*, the court here did not presume full literary work status and instead mad an express threshold determination of expressive status.

116. The court weighed the following factors: the level of recognition that the plaintiff has among the segment of the society for whom the defendant’s product is intended; the relatedness of the fame or success of the plaintiff to the defendant’s product; the similarity of the likeness used by the defendant to the actual plaintiff; evidence of actual confusion; marketing channels used; likely degree of purchaser care; defendant’s intent in selecting the plaintiff; and likelihood of expansion of the product lines. *Facenda*, 542 F.3d at 1019.

117. While the unauthorized work in *Facenda* was at best, an “expressive advertisement”, concededly, the subject work in *Laws* was almost entirely expressive, *unless*, as discussed above, the sampling of plaintiff’s voice was undertaken for promotional (urban marketing) and not artistic purposes. While not an easy hair to split, unlike the *Facenda* court, the *Laws* court did not even consider this possibility.

a hip-hop group samples the drum part from James Brown's 'Funky Drummer.' . . . . Nonetheless, if the right of publicity is qualitatively different from the derivative work right, it is not preempted. 'In other words, for a state-law claim to be preempted by copyright law, it must protect (1) an exclusive right in (2) a work within copyright's subject matter.'"<sup>118</sup>

In direct contrast to the findings in *Laws*, the *Facenda* court concluded that "[t]he requirement under the statute that Facenda's voice have 'commercial value,' provides an additional element beyond what a copyright-infringement claim requires . . . [In addition] . . . does Facenda's voice fall under the subject matter of copyright? The Court of Appeals for the Ninth Circuit has stated, in the context of vocal imitations, that '[a] voice is not copyrightable . . . .' We hold that Facenda's voice is outside the subject matter of copyright."<sup>119</sup>

Finally, having distinguished Facenda's publicity rights from the NFL's copyright claims, the court directly addressed the apparent conflict between the competing rights. "[I]n some situations . . . the right of publicity clashes with the exploitation of a defendant's copyright. Unlike the plaintiffs in cases involving vocal imitation, Facenda collaborated with the NFL to create the copyrighted sound recordings at issue . . . this gives the NFL a stronger preemption defense than the vocal-imitation defendants. Where a defendant in a right-of-publicity claim obtained a copyright in a work featuring the plaintiff, courts must separate legitimate exploitations of what Congress intended to be a copyright holder's exclusive rights from particular uses that infringe the right of publicity."<sup>120</sup>

Thus, even where the right of publicity is qualitatively different from a copyright exclusive right (and therefore not automatically preempted) enforcement of the publicity right may interfere with the copyright holder's exploitation and use

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118. *Facenda*, 542 F.3d at 1026.

119. *Id.* at 1027-28.

120. *Id.* at 1028.

of one or more of her exclusive rights. In such a case, the right of publicity *might* be preempted on that basis. In order to determine whether Facenda's publicity rights conflicted with the NFL's exclusive copyrights in the original program, the court set forth an analytical road map:

First, we look to how the copyrighted work featuring the plaintiff's identity is used. Surveying the case law, Nimmer finds that when defendants use the work 'for the purposes of trade,' such as in an advertisement, plaintiffs' right of publicity claims have not been held to be preempted . . . . The second part of Nimmer's framework addresses the way that contracts affect the preemption analysis. Nimmer proposes that courts should examine the purpose of the use to which the plaintiff initially consented when signing over the copyright in a contract. He argues that the proper question in cases involving advertising and a contract between the plaintiff and the defendant--such as our case--is whether the plaintiff 'collaborated in the creation of a copyrighted advertising product.' 1 *Nimmer on Copyright* § 1.01[B][3][b][iv][II], at 1-88.2(20). If the plaintiff did collaborate in that fashion, then the party holding the copyright is in a very strong position to contend that allowing the plaintiff to assert a right of publicity against use of its likeness in advertising would interfere with the rights it acquired. If, on the other hand, the plaintiff did not collaborate specifically in the creation of advertising content, then the plaintiff is in a strong position to assert continuing control over the use of his image. *Facenda*, 542 F.3d at 1028-29, 1030.

Just as was the case in *Laws*, (i) Facenda had not collaborated in the creation of the subsequent program, and (ii) he expressly reserved his publicity rights when he agreed to narrate the original NFL programs. Moreover, the court had already determined in connection with the disposition of Facenda's false endorsement claim that the NFL's later use was more promotional than expressive in nature. Accordingly the court concluded that the NFL did not have a legitimate copyright expectation that it would be able to use Facenda's voice work in the original program for subsequent promotional purposes unrelated to the original program.<sup>121</sup> Consequently the court held that Facenda's right of publicity was not preempted by the NFL's copyrights in the original programs. *Accord*, *Alberghetti v. Corbis Corp.*, 713 F. Supp. 2d 971 (C.D. Cal. 2010).<sup>122</sup>

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121. Under the Nimmer analysis, the NFL would probably be able to use Facenda's voice work to promote the *original program itself*, as an anticipated use of the NFL's exclusive rights to reproduce, distribute, and display the program.

122. Interestingly the *Facenda* court nonetheless expressed agreement with the ultimate decision in *Laws*, despite the fact that it differed in its disposition of virtually every substantive issue. *Compare* *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1143 (9th Cir. 2006) (dismissing plaintiff's intellectual property claims and holding that "[t]o the extent that *Laws* has enforceable, contractual rights regarding the use of Elektra's copyright, her remedy may lie in a breach of contract claim against Elektra for licensing 'Very Special' without her authorization.") *with* *Facenda*, 542 F.3d at 1031-32 ("The NFL argues that Facenda's only remedy should lie in contract. While we agree that Facenda could state a claim for breach of contract, we believe that he also retained his tort-derived remedy for violation of Pennsylvania's right-of-publicity statute. Parties may waive tort remedies via contract. It follows that they may also preserve them.") Indeed, the proffered basis for the court's approval of *Laws* presents a factual mismatch. "[W]e believe that *Laws* was rightly decided--Debra Laws sought to enforce a right that she had contracted away. We do not intend to express any disagreement with the Ninth Circuit Court of Appeals by distinguishing the facts of our case from those of *Laws*. Our case simply presents a different scenario than *Laws*. Just as Facenda did not, in the standard release contract, waive the right to bring a false-endorsement

IV. PROMOTING SOCIAL JUSTICE THROUGH THE  
RIGHT OF PUBLICITY: A FRAMEWORK FOR  
ENFORCING THE RIGHT AND BALANCING  
COUNTERVAILING SOCIAL UTILITIES

Although the court in *Facenda* does not expressly rest its decision on a social justice interpretation and application of right of publicity law, its reasoning is certainly consistent with intellectual property social justice mandates and illustrates the benefits of a socially balanced approach to right of publicity disputes. Unlike the courts in *Laws* and *Brown*, the *Facenda* court did not presume that the social utility interests that appeared to conflict with the plaintiff's publicity rights were superior to the social utility objectives which undergird the right of publicity, or for that matter, that these competing interests were even socially significant. Instead the court endeavored to assess the *social utility authenticity* of the purported copyright social utilities at issue (e.g., was the unauthorized use genuinely expressive or primarily promotional?) as well as their comparative importance in protecting the parties' conflicting rights (e.g., balancing the weight of defendant's copyright derivative work interests and expectations against that of plaintiff's publicity interests and incentives). This nuanced assessment and balancing of the various intellectual property social utilities at issue elevates the

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claim...he did not grant the NFL the right to use his voice in a promotional television program. This contrasts with the situation in *Laws*. Debra Laws's voice was not used in an endorsement, but in a work of artistic expression. [Moreover] having one's voice used as a sample in someone else's song may implicate a musician's identity. But listeners are probably less likely to assume that the sampled musician vouches for or approves of a new creative work that samples her work than consumers are likely to assume that an individual's presence in an advertisement reflects an active choice to endorse a product." *Facenda*, 542 F.3d at 1032. While the court initially appears to compare the respective contracts in the different cases, it ultimately distinguishes *Laws* on an entirely different basis.

right of publicity to its proper place in the intellectual property pantheon.

[A] defendant's ownership of copyright or a license of copyright in a particular photograph, motion picture or phonorecord of plaintiff should not be a defense to assertion of infringement of plaintiff's right of publicity. A copyright, no more than any other property right, cannot be a license to trample on other people's rights. A copyrighted book or motion picture is certainly capable of defaming people, yet no one seriously argues that because the book or film is copyrighted, its contents are free from claims of libel under state law. All of these sorts of liability for violation of state law in one way or another 'interfere' with the federal 'rights' of a copyright owner. That an owner of property is not completely free to do as he or she wishes with the property should be no news to the owner of any property right.<sup>123</sup>

By carefully considering whether a concrete and significant societal social utility interest was actually in conflict with the plaintiff's publicity interests, the *Facenda* court ultimately revealed the true tension between the intellectual property rights at issue: the desire on the defendant's part to commercially exploit aspects of the plaintiff's persona (as opposed to some contrived "benefit" to the public interest) versus a competing desire on the part of the plaintiff to obtain commercial compensation in connection with said exploitation. Once the facade of "copyright social superiority" was lifted from the NFL's defense, a more equitable balancing of the

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123. J. Thomas Mccarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 143-44 (1995).

parties' interests could be achieved – and the right of publicity's social justice objectives more properly served.

Equity favors that plaintiffs benefit from the commercial exploitation of their personas. '[T]he right of publicity is not restricted to superstar, nationally known athletes and entertainers. It applies to everyone. For example, it applies to the long distance runner who won an Olympic medal twenty years ago, is now selling insurance in Iowa and whose name and accomplishments are printed today on a box of breakfast cereal to help sell the cereal. Who is more entitled to that commercial value? The former Olympian or the breakfast cereal conglomerate? . . . Look at the recent cases involving well-known celebrities. How would you decide which party is most deserving and whether the award of damages distributed wealth "upwards"? Would you pick Samsung Electronics, a Korean electronics firm with \$10 billion in annual sales as more deserving than letter turner Vanna White? Would you pick Frito-Lay, with \$4.4 billion a year in sales and which is owned by Pepsi Cola, with \$25 billion of sales a year, as more deserving of the marketing value of Tom Waits' voice than Tom Waits himself? I would not.<sup>124</sup>

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124. *Id.* at 141. The choice is especially poignant where members of marginalized groups have developed highly valuable publicity personas. See, e.g., Jacoby & Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, *supra* note 66, at 1330-31 ("Tiger Woods is primarily a professional golfer and clearly is well-compensated for his performance on the golf course. But he reportedly earned an additional fifty to sixty million dollars in 2000 alone by licensing out the use of his face and his name to companies that want to use them to

A. *A Right of Publicity Social Justice Framework*

A social justice-sensitive interpretation of the right of publicity not only promotes the general social objectives of inclusion and empowerment, it also invigorates the doctrinal foundations of the right such that it stands on par with the other rights that comprise the American intellectual property regime. As illustrated by *Facenda*, appreciation for publicity right social utility/social justice interdependence graduates the right from the “IP kiddie table” to a seat with its IP forbears. Current right of publicity jurisprudence tends to suffer, however, from a “social justice deficiency” and would benefit from the development of an analytical framework through which the social utilities which undergird the right can be better achieved. Constructing a right of publicity social justice framework for interpretation and application of the right thus yields both doctrinal as well as social justice benefits.

Through the foregoing cases, a right of publicity social justice analytical spectrum can be perceived. First and foremost, it should be clear that right of publicity advocates must assist courts in becoming more cognizant of the social utility functions of the right of publicity and its concomitant social justice potential. The court in *Rosa Parks v. LaFace Records* did not have to look far to find an important right of publicity social utility/social justice interest in the case before it: she was sitting in the plaintiff’s chair. However, not all right of publicity plaintiffs have the status of a Civil Rights Icon, and

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promote products. He has a contract with Nike, for example, to license sports gear and merchandise, like posters of Woods, to his fans and admirers. Woods, in fact, has set up a corporation, ETW, for the sole purpose of managing his publicity rights. Michael Jordan, before his last ‘retirement’ from professional basketball, was reported to have earned forty million dollars in a single year by allowing his name to be used in connection with sneakers, underwear, and telephone service.’) The corporations who utilize the personas of these athletes earn billions through these marketing mechanisms and it difficult to see why the athletes themselves should not share in this wealth.

there is a need for greater social insight, intuition, and common sense in the adjudication of right of publicity disputes.<sup>125</sup> Disregard for right of publicity social justice increases the likelihood of miscarriages of justice, both as matter of intellectual property rights enforcement as well as a matter of general fairness, justice, and equality before the law; proper appreciation for the social functions of publicity rights will better enable courts to avoid patently unjust outcomes such as that in *Brooks* and similar cases. Moreover, it will also enhance judicial capability to fulfill the overarching policy objectives which support the inclusion of publicity rights in the intellectual property positive law regime.<sup>126</sup>

As a corollary to observing the social utility/justice functions of the right of publicity, courts should affirmatively

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125. See Danielle Conway-Jones, *Implicit Racial (and Gender) Bias in Right of Publicity Cases and Intellectual Property Law Generally*, (forthcoming 2011) (arguing that due to implicit racial biases, many courts devalue the right of publicity interests of minorities and women, when compared with the interests of majority defendants in commercially exploited such interests without permission); Hiemes, *supra* note 60, at 155 (“Some economically-based objections [to unauthorized use of publicity rights] can be remedied through monetary payment and perhaps injunctive relief. But morally based objections arise when the plaintiff’s image or persona is used in a context or manner that conflicts with the plaintiff’s own values and interests.”).

126. Of course consideration of social justice imperatives will sometimes militate in favor of sustaining an authorized use of publicity rights. See Hiemes, *supra* note 60, at 162 (“By putting image and language control in the hands of celebrities, their estates or assignees...critics of expanded publicity rights worry that the rest of society will be deprived of ‘our collective cultural heritage and the ability to reflect upon the historical significance of the celebrity aura.’ The valid social justice concerns identified here relate to the ability of members of American society, at least, to exercise rights in speech and expression that are embedded in our rich culture and expressly protected in our Constitution. To allow individual private property interests in words, designs, and names—especially ones that have acquired universal recognition and thus have inherent expressive meaning—to chill creativity disserves social and cultural enhancement in the aggregate.”).

assess the nature and extent of the publicity interests present in right of publicity disputes prior to evaluating any countervailing social utilities and objectives. While this may seem an obvious sequential step, many courts seem to overlook it, particularly when a publicity defendant raises the First Amendment banner. Rather than carefully exploring the nature of the plaintiff's publicity interests, courts often seem to presume that the only important question is whether the First Amendment or similar competing interest can be demonstrated, and once it is, many courts simply take for granted that any contrary publicity interests are comparatively inferior. This is one reason why the right of publicity fares so poorly when courts undertake to "balance" the competing social interests in these disputes; given the at best perfunctory review of the publicity social utilities as compared with the typically in-depth, almost pious exploration of even nominal First Amendment concerns, it's no surprise that the publicity interest generally weighs in as a bantam class amateur facing off against a heavy-weight champion- the fight is over before the first bell rings.

By first undertaking a thorough threshold assessment of the right of publicity interests before it, a court will attain a better vantage point from which to identify and assess any competing social utilities at issue. Indeed, the court should determine the nature and extent of such competing interests, be they First Amendment, copyright, trademark, or otherwise, wholly independent of its assessment of the publicity interests, and thereby avoid any "publicity rights skepticism" impacting (e.g., inflating) the countervailing considerations. Moreover, rather than reacting viscerally to invocations of free speech or "superior" intellectual property rights and policies, courts should instead strive to uncover the social utilities actually implicated by the specific facts and equities before it. Further, courts must become more vigilant toward disguised IP Imperialist maneuvers to annex individual publicity interests and related intellectual property rights into their IP empires.

Such nuanced assessments of the social utility authenticity of a publicity defendant's claims is particularly critical when the defendant is a major purveyor of IP commodities and the plaintiff is a member of a marginalized group for whom right of publicity incentives and benefits can provide a vital avenue for economic empowerment and social advancement.<sup>127</sup>

Having assiduously identified the competing social utilities at issue in a right of publicity dispute, the court can then afford each side its appropriate weight in balancing the respective interests- and it is vital that the relevant equities be included on the scales. Particularly where a weighing of the competing social utilities presents a close determination, a consideration of the relevant equities should tip the scales toward the side of (social) justice. Recognition of the relevant equities can thus ameliorate the outcomes in right of publicity litigation as it does in the resolution of other kinds of legal controversies. As illustrated by the statute of limitations problem in the *Brooks* case for example, where the competing social utilities weigh somewhat equally, the consideration of equitable factors can be dispositive. Had it been considered, plaintiff's undeniably unclean hands in its willful violation of

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127. See *Hiemes supra* note 60, at 1 ("In 2010, Kevin Antoine Dodson, a resident of a housing project in Hunstville, Alabama, agreed to be interviewed by the local television news after an intruder entered the home he shared with his sister and her children. The news broadcasted quickly and went viral online, as Mr. Dodson's look, style, and unique manner of speaking attracted the attention of millions of people worldwide. Shortly thereafter, musicians and humorists calling themselves The Gregory Brothers created a song known as the "Bed Intruder Song" with an accompanying music video using clips from the television broadcast. The song was one of the most viewed videos on YouTube, quickly became a top iTunes download, and even rose to the *Billboard* magazine's top 100 list. According to The Gregory Brothers, they agreed to share some of the proceeds from their song's commercial success with Mr. Dodson. Mr. Dodson obviously acquired instant fame and notoriety. He set up his own website to receive donations and garner additional publicity, and as a result has purportedly raised enough money to move his family to a better house in a safer neighborhood.").

Brooks' publicity rights and subsequent acts to conceal its misconduct would have supported a tolling of the limitations period to allow the plaintiff to proceed with an indisputably valid claim.

Indeed, the question of equitable tolling of limitations periods presents a prime example of the need to view publicity disputes through an equitable lens. Where the publicity interests of non-celebrities or members of marginalized groups are at stake, acts of misappropriation can be difficult to uncover. While the wealthy and influential celebrity may be well poised to police the exploitation of her persona, the law should not be fashioned or interpreted with only these kinds of publicity plaintiffs in mind. Many celebrities from marginalized groups, persons of historical significance, and the heirs and descendants of same simply lack the resources to monitor the media and commercial market place to protect their publicity interests- assuming that they are even fully aware that such interests exist. With respect to right of publicity limitations periods, the failure to consider the relevant equities can prove tantamount to a de facto license to misappropriate- steal now and pay later, *but only if you get caught in time*.<sup>128</sup>

Finally, a weighing of the equities approach not only promotes IP social justice by restraining IP Imperialist overreaching and supporting socially valuable encroachments upon publicity rights, it is also consistent the Supreme Court's

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128. To achieve uniformity in the law it would be helpful if courts considered consistent factors in deciding whether to toll a right of publicity limitations period. A list of pertinent factors would include (i) the ability of the plaintiff to police her publicity rights and/or uncover the specific misappropriation at issue; (ii) the extent of the defendant's efforts to obtain authorization for the unauthorized use or the basis for her belief that authorization was unnecessary; (iii) the open and notoriousness of the unauthorized use; and (iv) the amount time that has passed since the unauthorized use was undertaken, as weighed against evidence that the use was calculated to be undiscovered or that defendant took affirmative steps to prevent plaintiff's discovery of the unauthorized use.

directive in *eBay vs. MercExchange, L.L.C.*<sup>129</sup> that infringement upon intellectual property rights does not automatically mandate injunctive relief.<sup>130</sup> This approach not only preserves individual publicity plaintiffs' interests but also serves to protect society's social interests as a whole, in that unless the weighing of the equities mandates injunctive relief, the fact that the overall equities in a particular case favor the right of publicity plaintiff will not preclude the unauthorized use of her persona altogether. Instead, consistent with the Supreme Court's decision, it will merely assure her a portion of the revenues generated by the unauthorized use.<sup>131</sup>

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129. *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006).

130. *See, e.g.*, Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REGULATION, at 42 (2007), available at <http://www.cato.org/pubs/regulation/regv30n3/v30n3-6.pdf> (“[E]ven the Supreme Court’s most stalwart property rights defenders resisted the effort to pull intellectual property into the traditional property tent. In a unanimous decision . . . the Court ruled that injunctions should not be presumed in patent cases; rather courts should exercise equitable discretion in determining relief.”); *see also* Paul M. Janicke, *Implementing the “Adequate Remedy at Law” for Ongoing Patent Infringement After eBay v. MercExchange*, 51 IDEA 163 (2011).

131. *See* Kwall, *supra* note 65, at 65, arguing for a monetary damages-only remedy for certain right of publicity infringements. (“In light of the substantial support for the imposition of a liability rule approach in other areas of the law, it is surprising that this approach has never been invoked in the context of adjudicating conflicts between the right of publicity and the First Amendment. Indeed, resolution of this conflict is particularly suited to the imposition of a liability rule system since many situations will arise in which the defendant’s use is in the public interest, but the plaintiff and defendant will be unable to negotiate privately an agreement permitting such use. The failure of these negotiations may be attributable to factors such as the plaintiff’s adamant refusal to sell her persona, or the ability of the plaintiff to extract economic rents from the buyer due to the relative uniqueness of the desired commodity. In such instances, the adoption of a liability rule approach yields the most economically efficient result.”).

CONCLUSION

It is high time that the bench and bar revisit the social mandate of the Constitution that the intellectual property law promote the progress of the arts and sciences and thereby serve the greater societal good. “Intellectual property rights are not merely technical matters. They increasingly involve crucial questions not only of economic interest, competitiveness, and market power, but also of environmental sustainability, human development, ethics and international human rights. We need to start using intellectual property to reduce and eliminate hunger and poverty, to safeguard the environment, to halt the loss of biodiversity, to empower women, and to ensure food and social security.”<sup>132</sup>

Courts adjudicating right of publicity disputes should carefully consider the social utility goals which underlie these rights, as they can serve important social goals and promote social justice as an element of the intellectual property regime. Judicial recognition of the functional interdependence of right of publicity social utility and social justice not only restrains socially unproductive IP Imperialism, but promotes inclusion and participation in the IP regime, enhancing the ultimate benefits for society as a whole. The pursuit of such socially balanced applications of the intellectual property law will only enhance the social benefits to be obtained through the development of new intellectual properties and their exploitation in the digital information age.

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132. Rosemary Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 284 (2001).



## RESPECTING THE LIMITS OF JUDICIAL DISCRETION?

Lon Johnson

Lateef Mtima's *What's Mine is Mine but What's Yours is Ours: IP Imperialism, the Right of Publicity, and Intellectual Property Social Justice in the Digital Information Age* ("What's Mine is Mine") puts forth a compelling argument that judges should expand publicity rights to better conform with the Constitution's social mandate to promote the progress of the arts and sciences through intellectual property protection. Mtima is particularly interested in the use of the right of publicity as a tool for general social improvement, and his historical analysis of intellectual property law provides an excellent backdrop for his policy arguments because the origins of intellectual property law are so clearly grounded in public policy considerations.

However, when Mtima begins to apply old policy concerns to new problems, his argument begins to look somewhat more like social science than legal analysis. Most troublingly, Mtima's argument rests on the presumption that judges have full discretion to apply principles of social justice to every dispute involving the right of publicity. Mtima contends that courts charged with adjudicating rights of publicity should carefully consider the social utility goals which underlie the rights themselves, such as the protection of individual privacy and personal dignity. These goals certainly underlie our intellectual property regime, but by pursuing them beyond ways provided by law, a judge likely does more harm than good. Essentially, Mtima's view ignores the role of lawmakers in defining policy and calls for a questionable interpretation of the role of the judiciary in resolving disputes.

Mtima criticizes the decision in *Brooks v. The Topps Company, Inc.* because the judge gave only a “cursory” consideration of equitable principles in siding with a corporation over a wronged individual. The case involved the discovery - by the daughter of deceased baseball hall of famer James Bell - that the Topps Trading Company had engaged in various unauthorized uses of Bell's image. Although there was no dispute about the unauthorized conduct, Topps successfully moved for summary judgment on the grounds that the statute of limitations had run. It may well be that the ultimate result in this case was that a corporation unjustly benefited from Bell's persona in precisely the way that the right of publicity doctrine is designed to prevent. However, the statute of limitations has important social purposes as well. One might reasonably ask, for example, whether the strong interest in avoiding frivolous litigation and the adjudication of “stale” cases might outweigh the occasional denial of recourse to a wronged party. But even before such an inquiry even need be made, a judge should pause at the suggestion that he or she should interpret the law in line with any one theory of social justice. Judges are merely charged with interpreting the law as it is. If current law fails to perform some aspect of its purpose, lawmakers are free to improve it.

Although he does not approach this point directly, Mtima suggests that an imperialistic approach to intellectual property rights unfairly tilts the scales against litigants like Bell's daughter. This may be true, but the phenomenon of large corporations taking advantage of individuals is not new, and it is far from clear that the judiciary could or should take the role of protecting the publicity rights of individuals in ways that lawmakers did not intend. The Achilles' heel of Mtima's argument is fully illuminated by his suggestion that practitioners in the courts have “yet to mine the full social potential of the right of publicity.” He further explains that problems of negative racial, ethnic, and gender stereotypes can be combated by a more firm application of publicity rights,

such as by applying the right of publicity to depictions that are not negative per se but which may be culturally offensive. This argument ignores the all-important and ultimately very fine line between First Amendment rights and intellectual property rights. Although Mtima does weigh First Amendment considerations against social justice considerations in a compelling way, he does little to support the argument that judges themselves should be doing the weighing.

Mtima's *What's Mine is Mine* provides excellent insight into the intellectual property regime in the United States. Further, it offers numerous well-founded and plausible policy suggestions involving the right of publicity that would likely ameliorate long-standing social justice issues. However, Mtima's insistence that the judiciary take the helm is misguided and potentially dangerous. Lobbying lawmakers for change in the intellectual property statutory structure would be a more effective way to promote social justice while at the same time preserving the distinction between our branches of government.



# TWO MINUTES FOR SLASHING MY RELIGION: RELIGIOUS DISCRIMINATION IN THE PROFESSIONAL SPORTS INDUSTRY

Matthew J. Hamilton\*

## I. INTRODUCTION

Only one out of every 16,000 high school athletes will attain a career as a professional athlete.<sup>1</sup> The percentages of high school baseball players, basketball players, football players, and hockey players that continue on to play professionally in Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL) are .60%, .03%, .08%, and .10%, respectively.<sup>2</sup> While it is not as improbable as winning the Powerball, the odds of becoming a professional athlete are unfavorable.<sup>3</sup> To reach the professional

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1. *From High-School to Pro - How Many Will Go*, Georgia Career Information Center, Georgia State University, available at <http://freedom.mysdhc.org/guidance/information/From%20High%20School%20to%20Pro%20Statistics.pdf?plugin=RWD&Templates=RWD&printversion=2>.

2. Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Recruiting/Probability+of+Going+Pro> (last visited Jan. 12, 2012).

3. The odds of winning the Powerball Grand Prize are 1 in 195,249,054. Powerball - Prizes and Odds, POWERBALL.COM, [http://www.powerball.com/powerball/pb\\_prizes.asp](http://www.powerball.com/powerball/pb_prizes.asp) (last visited Jan. 12, 2012).

level, an athlete must possess some ideal combination of confidence, determination, focus, raw talent, and perhaps above all, luck.<sup>4</sup>

Many individuals grow up with aspirations of one day becoming a professional athlete - perhaps you are one of them. If so, imagine being one of the select few who eventually reach the professional level. You've dedicated a considerable portion of your adolescent life towards mastering a sport, and you've fortuitously fulfilled your childhood dream of becoming a professional athlete.

Here is the caveat: imagine, after all of your hard work, and after defying the unfortunate odds, your career as a professional athlete became troubled by your coaches' prejudice against your religious faith. Keeping in mind just how uncommon it is to reach the professional level, would you quietly endure the prejudice and hope to persevere, or would you fight back against the coaches' prejudice, potentially ending your career as a consequence?

This was the difficult situation recently encountered by a professional hockey player named Jason Bailey, and consistent with the pedigree of hockey players,<sup>5</sup> Bailey chose to fight back. On January 25, 2011, Bailey, a former minor-league hockey player, filed a civil lawsuit against the Anaheim Ducks, a professional hockey team in the NHL, alleging that the coaching staff of the Ducks' minor-league affiliate team, the Bakersfield Condors, repeatedly subjected him to

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4. Jack Perconte, *How to Become a Professional Athlete*, EZINE ARTICLES, <http://ezinearticles.com/?How-to-Become-a-Professional-Athlete&id=5366123>; GAYLE BRIAN, PROFESSIONAL ATHLETE 32 (Infobase Publishing 2009).

5. Travis Hughes, *Why Do Hockey Players Fight?*, SB NATION (Oct. 14, 2011), <http://www.sbnation.com/nhl/2011/10/14/2489931/hockey-fight-arron-asham-jay-beagle>.

religiously discriminative behavior on account of his Jewish faith.<sup>6</sup>

Bailey's lawsuit presents a unique occurrence of religious discrimination in the workplace. Specifically, as the alleged discrimination occurred within a professional sports-related employment relationship, it provides a rare opportunity to examine the legal doctrine of religious discrimination in the workplace as applied to the industry of professional sports.

Part I of this Article provides a broad overview of how religious discrimination in the workplace is governed. Next, beginning to focus on the professional sports industry, Part II explores religion's presence in professional sports. Part III speculates as to what potential barriers could be preventing professional athletes from pursuing claims of religious discrimination. Part IV examines a past religious discrimination lawsuit brought by an athlete in circumstances similar to Bailey, and Part V uses Bailey's lawsuit as a case study, concluding with a guide as to how professional athletes and their representatives should approach religious discrimination in the future.

## II. RELIGIOUS DISCRIMINATION IN THE WORKPLACE

Before examining religious discrimination specifically within the professional sports industry, it is necessary to provide an overview of how religious discrimination in the workplace is governed. The legal doctrine of religious discrimination in the workplace primarily consists of federal law, most importantly Title VII of the Civil Rights Act of 1964, and individual state laws, such as the California Fair

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6. Chris Stevenson, *Minor Leaguer Sues NHL's Ducks*, TORONTO SUN (Jan. 26, 2011), <http://www.torontosun.com/sports/hockey/2011/01/26/17048431.html>.

Employment and Housing Act.<sup>7</sup> Most commonly, an employee who has been subjected to religious discrimination will need to file a claim of religious discrimination under these laws with the appropriate government agency. However, certain unionized types of employment may require an employee's union to follow a specific type of procedure, as set forth in a collective bargaining agreement, in order to bring a claim of religious discrimination on the employee's behalf.

*A. Federal Law - Title VII of the Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964 (Title VII) provides the core prohibition against religion discrimination in the workplace. Title VII provides nationwide protection to millions of employees by shielding them from any workplace discrimination on the basis of their religion.<sup>8</sup>

Applying to employers nationwide with 15 or more employees,<sup>9</sup> Title VII defines the following to be unlawful employment practices:

“(1) treating applicants or employees differently based on their religious beliefs or practices . . . in any aspect of employment, including recruitment, hiring, assignments, discipline, promotion, and benefits; (2) subjecting employees to harassment because of their religious beliefs or practices . . . ; (3) denying a requested reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or practices. . . .”<sup>10</sup>

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7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq* (2000); The California Fair Employment and Housing Act, Cal Gov't Code § 12940(a) *et seq* (2011).

8. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000).

9. Does not include the United States, any corporation wholly owned by the Government of the United States, or Indian tribes. 42 U.S.C. § 2000e(b) (2000).

10. EEOC Compliance Manual, Section 12: Religious Discrimination, EQUAL EMP. OPPORTUNITY COMM'N, [http://www.eeoc.gov/policy/docs/religion.html#\\_Toc203359484](http://www.eeoc.gov/policy/docs/religion.html#_Toc203359484) (last visited Jan. 15, 2012).

These prohibitions apply to all aspects of religious belief, observance, and practice.<sup>11</sup> For example, under Title VII, an employer with the requisite amount of employees could not deny promotion to a qualified non-Jewish employee in order to give preference based on religion to a fellow Jewish employee, harass a Muslim employee for his or her religious dietary restrictions and/or need to pray during the workday, or refuse to accommodate a Native American's reasonable request to maintain his or her long hair pursuant to their sincerely held religious beliefs.<sup>12</sup>

Importantly, Title VII provides a defense to the employer's requirement to provide reasonable accommodations. Specifically, an employer will not be held liable for failing to reasonably accommodate an employee's or prospective employee's religious observances or practices if the employer can demonstrate that accommodating such observances or practices would cause an undue hardship on the conduct of the employer's business.<sup>13</sup> An undue hardship occurs when an accommodation requires "more than a de minimis cost" from the employer.<sup>14</sup> The effect an accommodation will have on an employer's business is calculated with regard to the accommodation's cost relative to the size and operating cost of the employer, as well as the amount of individuals who would similarly need that specific accommodation.<sup>15</sup>

The Equal Employment Opportunity Commission (EEOC) is the federal agency tasked with enforcing the prohibitions of Title VII. An employee may not file a religious

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11. 42 U.S.C. § 2000e(j) (2000).

12. *Id.*

13. *Id.*

14. 29 C.F.R. § 1605.2.

15. *Id.*

discrimination lawsuit against their employer under Title VII without first filing a claim with the EEOC.<sup>16</sup>

*B. State Laws - The California Fair Employment and Housing Act*

State-specific statutory laws often expand employees' protections against religious discrimination in the workplace. While each state law varies in substance, if a state does have its own law prohibiting religious discrimination in the workplace, it likely means that the law offers more expansive protections than those provided by Title VII. This section focuses solely upon California law, as it is the setting of Bailey's lawsuit and it is the state with the greatest amount of professional sports teams.<sup>17</sup>

California's religious discrimination at work protection is found in the California Fair Employment and Housing Act.<sup>18</sup> Under the California Fair Employment and Housing Act, it is an unlawful employment practice for any Californian employer who regularly employs five or more employees to,<sup>19</sup> based on the religious creed of a person,<sup>20</sup> "refuse to hire or employ the

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16. Filing a Discrimination Complaint in California, CAL. LAB. AND EMP. LAW, <http://www.calaborlaw.com/2010/01/19/filing-a-discrimination-complaint-in-california/> (last visited Jan. 15, 2012).

17. California has over 20 professional sports teams, including the Anaheim Ducks, CD Chivas USA, Golden State Warriors, Los Angeles Angels, Los Angeles Clippers, Los Angeles Dodgers, Los Angeles Galaxy, Los Angeles Kings, Los Angeles Lakers, Los Angeles Sparks, Oakland Raiders, Oakland Athletics, Sacramento Kings, Sacramento Monarchs, San Diego Chargers, San Diego Padres, San Francisco 49ers, San Francisco Giants, San Jose Earthquakes, and San Jose Sharks. California Sports Teams, 50STATES.COM, <http://www.50states.com/sports/calif.htm> (last visited Jan. 15, 2012).

18. The California Fair Employment and Housing Act, Cal Gov't Code § 12900 *et seq* (2011).

19. Cal Gov't Code § 12926(d) (West).

20. "Religious creed" includes all aspects of religious belief, observance, and practice. Cal Gov't Code § 12940(p) (West).

person . . . , refuse to select the person for a training program leading to employment, . . . to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.”<sup>21</sup> The law also forbids religious harassment,<sup>22</sup> and parallel to Title VII, it requires Californian employers to explore “reasonable alternative means of accommodating . . . religious belief[s] or observance[s]” so long as accommodating such beliefs or observances can be done “without undue hardship on the conduct of the business of the employer.”<sup>23</sup> Under the Act, an undue hardship occurs when accommodating a religious belief or observance would require a significant difficulty or expense, a determination which is made after considering the accommodation’s nature and cost, the financial resources of the employer, the number of persons employed by the employer, and the type of operations of the employer, among a couple of other factors.<sup>24</sup>

The California Department of Fair Employment and Housing (DFEH) investigates claims of religious discrimination in the workplace made pursuant to the California Fair Employment and Housing Act.<sup>25</sup> Californian employees who wish to file a religious discrimination lawsuit under the Act may not do so without first filing a claim with the DFEH.<sup>26</sup>

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21. Cal Gov’t Code § 12940(a) (West).

22. Cal Gov’t Code § 12940(j)(1) (West).

23. Cal Gov’t Code § 12940(l) (West).

24. Cal Gov’t Code § 12926(s) (West).

25. The California Department of Fair Employment and Housing, <http://www.dfeh.ca.gov/Default.htm> (last visited Jan. 15, 2012).

26. Filing a Discrimination Complaint in California, *supra* note 16.

## i. Work Share Agreements

The DFEH and the EEOC have an agreement in place where certain types of claims filed with one agency will be dual filed with the other.<sup>27</sup> This type of agreement, referred to as a “work share agreement,” is common between the EEOC and the individual state agencies that enforce state workplace discrimination laws.<sup>28</sup> The purpose of these agreements is to ensure that employees’ rights are protected under both federal and state law.<sup>29</sup> If an employee’s religious discrimination claim under state law is also covered by Title VII, the state agency will dual file the claim with the EEOC, while retaining the handling of the claim.<sup>30</sup> Likewise, if an employee’s religious discrimination claim under Title VII is also covered by state law, the EEOC will dual file the claim with the appropriate state agency, while also ordinarily retaining the handling of the claim.<sup>31</sup>

C. *Collective Bargaining Agreements*

Instead of filing a claim of religious discrimination with the appropriate government agency, unionized employees are often required to follow a different procedure in pursuit of a remedy for religious discrimination in the workplace. Traditionally, when a unionized employee has a dispute with his or her employer, the employee relies upon his or her union to assist in the resolution of the dispute.<sup>32</sup> Specifically, when a

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27. *Id.*

28. Federal Laws Prohibiting Job Discrimination Questions and Answers, EQUAL EMP. OPPORTUNITY COMM’N, <http://www.eeoc.gov/facts/qanda.html> (last visited Jan. 15, 2012).

29. *Id.*

30. *Id.*

31. *Id.*

32. Laura W. Stein, Preserving Unionized Employees’ Individual Employment Rights: An Argument Against Section 301 Preemption, 17 BERKELEY J. EMP. & LAB. L. 1, 2-3 (1996).

collective bargaining agreement is in place, the employee depends upon his or her union to follow the required grievance procedure, as outlined in the union's collective bargaining agreement, in order to efficiently resolve the employee's grievance.<sup>33</sup> The grievance procedures included in collective bargaining agreements typically involve some form of arbitration.<sup>34</sup>

A provision in a collective bargaining agreement requiring arbitration of claims of religious discrimination is enforceable as a matter of federal law as long as the provision clearly and unmistakably requires union members to arbitrate such claims.<sup>35</sup> General provisions requiring arbitration of all disputes are not sufficient enough to deprive union members of their right to pursue a claim of religious discrimination in a judicial forum.<sup>36</sup>

### III. RELIGION'S PRESENCE IN PROFESSIONAL SPORTS

Religion has a considerable presence in the professional sports industry. As Landon Hall of *The Orange County Examiner* explains, "Whether or not it makes [anyone] uncomfortable, religion is an inseparable part of sports; they don't call it a Hail Mary for nothing."<sup>37</sup>

Religion has particularly become such an inseparable part of the professional sports industry through the often-strong individual religious convictions of many of the most distinguished professional athletes. The more successful a professional athlete is, the more media attention they receive. Consequently, it is common for a prominent professional

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33. *Id.*

34. *Id.*

35. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 249 (2009).

36. Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 80 (1998).

37. Landon Hall, *Tim Tebow Spotlights Religion in Sports*, O.C. REGISTER (Oct. 24, 2011), <http://www.ocregister.com/sports/tebow-323472-denver-fans.html>.

athlete to use the national spotlight to promote their religious faith.<sup>38</sup> For example, after winning the Super Bowl, the most-watched event in all of professional sports, among NFL Quarterback Drew Brees' first words to the national audience were, "God is great."<sup>39</sup> Faith-related proclamations such as this have "become commonplace on American television, where athletes routinely thank God in postgame prayers and interviews."<sup>40</sup> Whether they like to openly admit it, as former NFL Quarterback Kurt Warner once did, or not, some professional athletes consciously use their fame as a platform for their religious message.<sup>41</sup>

The individual religious convictions of professional athletes are also put under the national spotlight when an athlete chooses a course of action that puts their religious beliefs above achieving success in their respective sport. For example, much to the dismay of the Los Angeles Dodgers' fans, legendary baseball pitcher Sandy Koufax, a devoted member of the Jewish faith, chose to sit out the first game of the 1965 World Series because it was scheduled on the same day as Yom Kippur, the holiest day of the Jewish year.<sup>42</sup> Only a few years later, boxing legend Muhammad Ali, after becoming a member of the Nation of Islam, was convicted for

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38. *Should Professional Athletes Be Glorifying the Lord on Their Public Platforms?*, BIBLEKNOWLEDGE.COM, <http://www.bible-knowledge.com/athletes-glorifying-god/> (last visited Jan. 16, 2012).

39. Johnathan Zimmerman, *When Athletes Praise God at the Super Bowl and Other Sports*, CHRISTIAN SCI. MONITOR (Feb. 9, 2010), <http://www.csmonitor.com/Commentary/Opinion/2010/0209/When-athletes-praise-God-at-the-Super-Bowl-and-other-sports>.

40. *Id.*

41. *Was Kurt Warner's Religion a Factor in His Benching? Whose Side is God on?*, ESPN, <http://sports.espn.go.com/espn/page2/story?page=bloc/040210> (last updated Feb. 10, 2004).

42. Rabbi Shais Taub, *Why Sandy Koufax Sat Out the World Series on Yom Kippur*, HUFFINGTON POST (Oct. 6, 2011), [http://www.huffingtonpost.com/rabbi-shais-taub/sand-koufax-yom-kippur\\_b\\_996111.html](http://www.huffingtonpost.com/rabbi-shais-taub/sand-koufax-yom-kippur_b_996111.html).

draft evasion after refusing to report for war because of his belief that only Allah could command him to go to war.<sup>43</sup> More recently, Mahmoud Abdul-Rauf, a Muslim professional basketball player, stirred up public outrage and received a one-game suspension for failing to stand for the national anthem; Abdul-Rauf considered standing for the anthem to be a form of nationalistic worship forbidden by his religion.<sup>44</sup>

Aside from the public actions and proclamations of individual professional athletes, religion's presence in professional sports is also manifested by the activities of entire professional sports teams. Although not televised, professional sports teams, especially NFL teams, often engage in a team prayer both before and after each game.<sup>45</sup> Often times competing teams even join together in a prayer circle at center field following the conclusion of a game.<sup>46</sup> Moreover, a majority of professional sports teams have their own in-house chaplains, who are hired to offer spiritual guidance to the professional athletes through a variety of means (e.g., holding chapel, one-on-one consultations, study groups).<sup>47</sup>

Today, religion's presence in professional sports has become a hot topic because of NFL Quarterback Tim Tebow. Tebow's public displays of faith, including in-game prayers and Biblical scripture face markings, have sparked a lively

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43. Denis Cummings, *On This Day: Muhammad Ali Convicted of Draft Evasion*, FINDING DULCINEA (June 20, 2011), <http://www.findingdulcinea.com/news/on-this-day/May-June-08/On-this-Day--Muhammad-Ali-Convicted-of-Draft-Evasion.html>.

44. Rick Reilly, *Patriot Games*, SPORTS ILLUSTRATED (Mar. 25, 1996), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1007881/index.htm>.

45. Douglas Howe, *Football Players & the NFL's Absent Cameras*, BELIEFNET (Nov. 13, 2006), <http://blog.beliefnet.com/idolchatter/2006/11/football-prayers-nfls-absent-cameras.html>.

46. *NFL Gets Religion (Maybe Not)*, GET RELIGION (Sept. 1, 2007), <http://www.getreligion.org/2007/09/the-nfl-gets-religion-maybe-not/>.

47. Anthony Johnson, *6 Things You Should Know About Being a Team Chaplain*, ESPN, <http://sports.espn.go.com/espnmag/story?section=magazine&id=3659969> (last visited Jan. 16, 2012).

debate as to whether religion should have a presence in professional sports at all.<sup>48</sup>

#### IV. POTENTIAL BARRIERS FACING PROFESSIONAL ATHLETES

The professional sports industry presents an employment context that is really unlike any other. The average annual salary in 2011 for a professional athlete in the MLB, NBA, NFL, and NHL was \$3.31 million, \$5.15 million, \$1.9 million, and \$2.4 million, respectively,<sup>49</sup> while the average worth in 2008 of a professional sports team in the MLB, NBA, NFL, and NHL was \$475 million, \$375 million, \$960 million, and \$200 million, respectively.<sup>50</sup> It would be an understatement to say that the industry's stakes are high.

A key distinction between the professional sports industry and many other employment contexts is the industry's noticeable absence of any public claims of religious discrimination in the workplace. To those outside the industry, Bailey's recent lawsuit against the Anaheim Ducks seems very rare for the industry. The general lack of public claims of religious discrimination in the workplace may be a product of internal procedures created by the industry's various collective

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48. Dave Feschuck, *Sports and Religion Can Be Uneasy Bedfellows*, THE STAR (Oct. 26, 2011), <http://www.thestar.com/article/1076639--feschuck-sports-and-religion-can-be-uneasy-bedfellows>; Alex Groberman, *Religion in Sports: Tim Tebow Told to Shut Up After Prayer Request*, OPPOSING VIEWS (Mar. 26, 2010), <http://www.thestar.com/article/1076639--feschuck-sports-and-religion-can-be-uneasy-bedfellows>; Jeff Musall, *Fan Debate: Tim Tebow and the Infusion of Religion into Sports*, YAHOO! SPORTS (Sept. 20, 2011), <http://sports.yahoo.com/nfl/news?slug=yen-9148767>.

49. Joe Dorish, *Average Salaries in the NBA, NFL, MLB, and NHL*, YAHOO! SPORTS (Nov. 12, 2011), <http://sports.yahoo.com/nba/news?slug=yen-10423863>.

50. Ryan Spoon, *The NFL is Worth More Than NBA + MLB - Average Franchise Worth \$960 Million*, RYANSPOON.COM (July 13, 2008), <http://ryanspoon.com/blog/2008/07/13/the-nfl-is-worth-more-than-nba-mlb-average-franchise-worth-960-million/>.

bargaining agreements, a possibility discussed below, or it could be a result of certain barriers facing professional athletes, possibly discouraging them from pursuing any claims of discrimination. This section speculates as to what exactly those barriers could be.

First of all, the professional sports industry is a relatively small community. There are only four major professional sports leagues, the MLB, NBA, NFL, and NHL, all of which have only between 30 and 32 teams.<sup>51</sup> Accordingly, as mentioned previously, only so many athletes can attain a career at the professional level of their respective sport, and doing so requires an athlete to overcome the seemingly insurmountable odds.<sup>52</sup>

When an athlete does reach the professional level, it is reasonable to believe that he or she would be careful to avoid undertaking any courses of action that could jeopardize his or her success (although, as some recent professional athlete behavior has proven, this is not always the case).<sup>53</sup> Consequently, filing a public claim of religious discrimination against a professional sports team could be considered by professional athletes to be conduct that could threaten an athlete's career. Just as employees in other employment contexts may have fears of being demoted, terminated, or retaliated against in some other way for reporting religious

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51. Major League Baseball, [www.mlb.com](http://www.mlb.com) (last visited Jan. 16, 2012); National Basketball League, [www.nba.com](http://www.nba.com) (last visited Jan. 16, 2012); National Football League, [www.nfl.com](http://www.nfl.com) (last visited Jan. 16, 2012); National Hockey League, [www.nhl.com](http://www.nhl.com) (last visited Jan. 16, 2012).

52. William J. Price, *What Are the Odds of Becoming a Professional Athlete?*, SPORTS DIGEST, <http://www.thesportdigest.com/archive/article/what-are-odds-becoming-professional-athlete> (last visited Jan. 16, 2012).

53. Jeff Fishbein, *Sports Fans Are Behind Unruly Behavior of Professional Athletes*, LEWISTOWN SENTINEL (Sept. 24, 2010), <http://lewistownsentinel.com/page/content.detail/id/525779/Sports-fans-are-behind-unruly-behavior-of-professional-athletes.html?nav=5020>.

discrimination,<sup>54</sup> professional athletes may fear that publically reporting religious discrimination could lead to undesirable repercussions.

The potential negative repercussions of reporting religious discrimination could be devastating to a professional athlete's career. Most notably, the resentment of a team's coaching staff or management could lead to less playing and practice time, therefore impeding the athlete's career development. Moreover, even if a professional athlete were to be traded to a different team following a public claim of religious discrimination, the claim could still have possible lasting effects, as other teams might consider the athlete to be a potential legal liability. As Keith Fink, Bailey's initial attorney, explains, "What upside does [Bailey's lawsuit] have? He plays in a fish bowl . . . [T]here's no incentive for him to come forward . . . It takes a strong, confident person [to do so]."<sup>55</sup>

Another barrier potentially preventing public claims of discrimination by professional athletes is their public reputation. Professional athletes live their lives under an enormous microscope, as sports media providers are continuously searching for any story to fill up today's 24/7 news-cycle.<sup>56</sup> Moreover, fans are hardly sympathetic to the tribulations of professional athletes. This was made especially evident by the recently-settled NBA labor dispute, where although NBA players undoubtedly lost many millions of dollars while negotiating for a new collective bargaining

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54. Howard Deutsch, *Avoiding Employee Abuse and Discrimination Litigation with Employee Surveys*, EZINE ARTICLES, <http://ezinearticles.com/?Avoiding-Employee-Abuse-and-Discrimination-Litigation-With-Employee-Surveys&id=5551753> (last visited Jan. 16, 2012).

55. A.J. Perez, *Jason Bailey Alleges Anti-Semitism in Lawsuit Against Anaheim Ducks*, AOL NEWS (Jan. 26, 2011), <http://www.aolnews.com/2011/01/26/jason-bailey-alleges-anti-semitism-in-lawsuit-against-anaheim-du/>.

56. Christina H., *7 B.S. Sports Stories for When The Media Has Nothing to Say*, CRACKED.COM (Nov. 1, 2011), <http://www.cracked.com/blog/7-b.s.-sports-stories-when-media-has-nothing-to-say/>.

agreement, the American public had very “little sympathy for [those] millionaire athletes, particularly as the . . . public [itself] suffer[ed] through a struggling economy.”<sup>57</sup>

Unless religious discrimination against a professional athlete is particularly egregious, the general public is unlikely to express any amount of sympathy for the athlete. The public’s overwhelming stance is that professional athletes should be forever grateful to be playing a “children’s game” for a living,<sup>58</sup> and consequently, with that mind set, the public would likely expect a professional athlete to grin and bear any marginal amount of discrimination as a condition of having such ideal employment. As William C. Rhoden of *The New York Times* explains, “In these fragile economic times when only the wealthy - and that includes some athletes - appear to be prospering, soliciting sympathy from the public is a hard sell for professional athletes.”<sup>59</sup> For example, this sampling of comments left in response to a *Wall Street Journal* article regarding Bailey’s lawsuit confirms a general lack of sympathy for Bailey: “Does everyone have to resort to lawsuits? Come on,” “If you’re fortunate enough to get paid for what’s essentially a child’s game then be thankful and don’t go out of your way to find something to complain about;” “Ironically, Bailey’s publicized lawsuit only plays into their stereotype: Jews only care about money and who’s who.”<sup>60</sup>

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57. Scott Keyes, *Why We Can’t Dismiss the NBA Labor Dispute as Millionaires vs. Billionaires*, THINK PROGRESS (Oct. 11, 2011), <http://thinkprogress.org/alyssa/2011/10/11/328152/nba-lockout-millionaires-billionaires/>.

58. William C. Rhoden, *In Trying Times, Sympathy is a Tough Sell*, N.Y. TIMES (Dec. 9, 2010), <http://www.nytimes.com/2010/12/10/sports/10rhoden.html>.

59. *Id.*

60. Comments to Nathan Koppel, *The Frozen One? Jewish Hockey Player Files Discrimination Suit*, WALL ST. J. (Jan. 26, 2011), <http://blogs.wsj.com/law/2011/01/26/the-frozen-one-jewish-hockey-player-files-discrimination-suit/>.

Perhaps fearing the complete loss of their career as a professional athlete, or maybe concerned of damage to their public reputation, these may be reasons why it is rare to see a public claim of religious discrimination made by a professional athlete. As Abraham Foxman, the national director of the Anti-Defamation League, remarks, "Players are reluctant to complain, because once they do, they destroy their chances of being picked up or playing."<sup>61</sup>

#### V. PAST RELIGIOUS DISCRIMINATION CLAIMS BROUGHT BY ATHLETES

The most newsworthy past conflicts involving a professional athlete's religious beliefs rarely involved litigation. Instead, those conflicts were typically resolved without any third party assistance, often resulting favorably for the athletes. Sandy Koufax was given permission to skip the first game of the 1965 World Series, and he eventually returned to pitch three of the remaining six games, winning the World Series MVP honor.<sup>62</sup> Muhammad Ali's conviction for draft evasion was later reversed, and he would soon after reclaim the coveted heavyweight title.<sup>63</sup> And Mahmoud Abdul-Rauf successfully continued to play in the NBA for a few more seasons after agreeing to stand and quietly recite Muslim prayers during the national anthem.<sup>64</sup> Each of these athletes, who had reached the highest professional level of their respective sports, did not have their careers altered in any manner as a consequence of the conflict created by their religious beliefs.

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61. *Jewish Hockey Player Sues Anaheim Ducks Over Alleged Anti-Semitic Slurs*, HAARETZ.COM (Jan. 27, 2011), <http://www.haaretz.com/jewish-world/jewish-hockey-player-sues-anaheim-ducks-over-alleged-anti-semitic-slurs-1.339494>.

62. Rabbi Shais Taub, *supra* note 42.

63. Cummings, *supra* note 43.

64. Reilly, *supra* note 44.

Bailey's circumstances are different. Bailey's career as a professional athlete was only in its early development when he filed his claim of religious discrimination. His circumstances more closely resemble those of J. Edward Johnson, a former offensive lineman for the University of Miami who brought a lawsuit against the NFL in 1999.<sup>65</sup>

Johnson sued the NFL and other NFL-related organizations after no NFL team drafted him in the 1998 NFL Draft.<sup>66</sup> Prior to the draft, Johnson had been listed among potential draft selections for the offensive-lineman position, and he had received a moderate amount of attention from NFL teams, including a tryout invitation from his home team, the Miami Dolphins.<sup>67</sup> Despite this attention, however, Johnson unfortunately went undrafted, and even after continued post-draft discussions with multiple NFL teams, Johnson was never able to find a place in the NFL.<sup>68</sup>

Firmly believing that his failure to reach the NFL was a result of his Muslim religious beliefs, Johnson filed a charge of discrimination against the NFL and NFL-related organizations with the EEOC.<sup>69</sup> The EEOC never addressed Johnson's charge on the merits, but instead provided him with the right to file a civil lawsuit.<sup>70</sup>

Johnson's lawsuit alleged that his religious activities as a student at the University of Miami led to him being "blackballed" in the NFL.<sup>71</sup> Specifically, Johnson claimed that he was treated unfairly due to a public controversy that arose when he wrote two articles about race and religion that were published in the university's newspaper.<sup>72</sup> Johnson cited two

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65. Johnson v. Nat'l Football League, 1999 WL 892938 (S.D.N.Y. 1999).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

examples of instances where NFL teams had contacted him with an interest in signing him but later withdrew due to “what happened in Miami.”<sup>73</sup>

The NFL moved for summary judgment dismissal of Johnson’s lawsuit, however, the United States District Court, Southern District of New York, allowed the case to proceed against the NFL and all of the NFL-related organizations.<sup>74</sup> The court considered Johnson’s claim to have sufficiently alleged a claim of discrimination, as it properly alleged that Johnson had been denied employment opportunities on account of his Muslim religious beliefs.<sup>75</sup> Unfortunately for the purpose of this Article, Johnson’s case did not lead to a precedential decision. Instead, Johnson later filed a motion to voluntarily dismiss his cause of action under Rule 41(a) of *The Federal Rules of Civil Procedure*.<sup>76</sup> Although unconfirmed, the parties likely reached a confidential settlement.

## VI. V. JASON BAILEY: A CASE STUDY

Similar to Johnson’s lawsuit against the NFL, Jason Bailey’s recent lawsuit against the Anaheim Ducks did not result in any judicial decision, and therefore it unfortunately did not provide any useful legal precedent to assist the professional sports industry in its manner of conduct. However, Bailey’s case does provide a very fact-specific opportunity to conduct a case study of religious discrimination in the professional sports industry. The following discussion provides the relevant background of Bailey’s case, evaluates Bailey’s most prominent legal claims, and uses Bailey’s story as a guide for how professional athletes and their representatives should approach religious discrimination in the future.

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73. *Id.*

74. *Id.*

75. *Id.*

76. Case Docket, *Johnson v. Nat’l Football League*, 1999 WL 892938 (S.D.N.Y. 1999).

*A. Background*

Born on June 4, 1987, in Ottawa, Canada, like many Canadian kids, Bailey grew up playing hockey, eventually being drafted by the NHL's Anaheim Ducks in the third round of the 2005 NHL Entry Draft as the 63rd overall pick.<sup>77</sup> After being drafted by the Ducks, Bailey continued his development as an amateur hockey player, playing college hockey at the University of Michigan and junior hockey with the Ottawa 67's, before officially entering the professional level of hockey in 2008.<sup>78</sup>

Bailey's professional hockey career began with the Bakersfield Condors of the East Coast Hockey League (ECHL), which at that time was the minor-league affiliate team of the Ducks.<sup>79</sup> Bailey played 35 games for the Bakersfield Condors throughout the 2008-09 season, registering two assists and 44 penalty minutes.<sup>80</sup> On September 4, 2009, the Ducks traded Bailey to the NHL's Ottawa Senators, who would later assign him to their own minor-league affiliate team based in the American Hockey League, the Binghamton Senators.<sup>81</sup> Bailey played for the Binghamton Senators for parts of two seasons (105 games in all), before retiring in September 2011 at the age of 24-years old.<sup>82</sup>

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77. Jason Bailey, Hockeydb.com, <http://www.hockeydb.com/ihdb/stats/pdisplay.php?pid=87860> (last visited Jan. 16, 2012).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Bailey Retires*, PRESSCONNECTS.COM (Sept. 9, 2011), <http://www.pressconnects.com/apps/pbcs.dll/section?category=PluckPersona&U=551340dd39644ae695cca9fe0180e879&plckController=PersonaBlog&plckScript=personaScript&plckElementId=personaDest&plckPersonaPage=BlogViewPost&plckPostId=Blog:551340dd39644ae695cca9fe0180e879Post:488e14c1-a2dc-432c-9435-f568a962b492&sid=sitelife.pressconnects.com>.

82. *Id.*

Bailey's achievements as a professional hockey player are hardly remarkable. His legacy as a professional athlete, however, could have been considerable depending upon the result of his lawsuit. On January 21, 2011, Bailey filed his religious discrimination lawsuit in the Orange County Superior Court of California against the Anaheim Ducks, the Bakersfield Condors, Martin Raymond, the head coach of the Condors, and Mark Peterson, the former assistant coach of the Condors (collectively, "Defendants").<sup>83</sup>

Bailey's lawsuit alleged that during his tenure with the Bakersfield Condors, Bailey was "subject to severe and/or pervasive harassment on the basis of religion by being forced to endure a barrage of anti-Semitic, offensive and degrading verbal attacks regarding his Jewish faith" by Coaches Raymond and Peterson.<sup>84</sup> For example, Bailey's complaint alleges that Raymond had said the following to Bailey: that Raymond's ex-wife was Jewish and that she was a "bitch" for taking all of his money; that Jews "only care about money and who's who;" and that Raymond never wanted his son to be raised Jewish or to ever wear a Yarmulke.<sup>85</sup> Moreover, Bailey's complaint alleges that Peterson had once stated to Bailey that he had received a friend request on Facebook from a "dirty Jew" and that he had once exclaimed to everyone at a team meeting that he didn't "know if [the team] [could] trust [Bailey] with money, [because] he was Jewish."<sup>86</sup>

Bailey's complaint additionally alleged that Raymond and Peterson's harassment of Bailey included depriving him of the resources that he needed to develop as a hockey player.<sup>87</sup> Bailey specifically asserted that, on account of his Jewish faith, he was improperly told to stay behind and train before the

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83. Complaint, *Bailey v. Anaheim Ducks Hockey Club, LLC*, No. S-1500-CV-274133 (Kern County Superior Court 2011).

84. *Id.* at 3.

85. *Id.*

86. *Id.* at 4.

87. *Id.* at 5.

Condors' first road trip, he was not provided with the proper practice drills, hardly given any ice time, and was frequently forced to sit out of games.<sup>88</sup> Ultimately, due to an "anti-Semitic hostile work environment," Bailey declared that he became emotionally drained and unable to focus on the advancement of his hockey career.<sup>89</sup>

After making two complaints, one directly to the owner of the Bakersfield Condors, Raymond and Peterson were suspended for one week and two weeks, respectively, and they were each instructed to write a letter of apology to Bailey.<sup>90</sup> Raymond's apology letter predominantly focused on his own experience with prejudice, he wrote, "As a French-Canadian, I too have come face-to-face with bigotry and understand how such remarks can negatively affect lives."<sup>91</sup> Peterson's brief letter included the following passage, "I guess I never stopped to think about the impact my statement would have on you or how it would make you feel. It was not intended to insult or hurt you in any way, but it did, and for that I am truly sorry."<sup>92</sup>

Considering the apologies to be insincere and foreseeing continued discrimination, Bailey demanded a trade to another team, thereafter being traded by the Ducks to the Ottawa Senators.<sup>93</sup> Bailey would later file a claim of discrimination against the Defendants with the DFEH, and after receiving a right to sue letter from the DFEH, he filed suit in the Orange County Superior Court of California on January 21, 2011.<sup>94</sup> The case was transferred to the Kern County Superior Court of California in July of 2011, where Bailey

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88. *Id.*

89. *Id.*

90. *Id.*

91. Complaint at Exhibit A, *Bailey v. Anaheim Ducks Hockey Club, LLC*, No. S-1500-CV-274133 (Kern County Superior Court 2011).

92. Complaint at Exhibit B, *Bailey v. Anaheim Ducks Hockey Club, LLC*, No. S-1500-CV-274133 (Kern County Superior Court 2011).

93. Complaint, *supra* note 83, at 5-6.

94. *Id.* at 6.

would eventually dismiss it without prejudice on November 3, 2011.<sup>95</sup>

### *B. Evaluating Bailey's Claims*

Bailey's lawsuit alleged seven causes of action, including religious discrimination and harassment based on religion, under the California Fair Employment and Housing Act.<sup>96</sup> Based on the publicly available information, this section analyzes Bailey's religious discrimination and harassment based on religion claims.

#### *i. Religious Discrimination*

Bailey's religious discrimination claim contended that the Defendants violated California Government Code § 12940(a) by "depriv[ing] him of substantial employment benefits" and "treat[ing] him differently than similarly situated employees."<sup>97</sup> As mentioned above in Part II, California Government Code § 12940(a) prohibits discrimination on the basis of religious creed against any employee in the terms, conditions, or privileges of employment.<sup>98</sup>

A three-stage burden-shifting test is used to try claims of religious discrimination.<sup>99</sup> Had Bailey's case gone to trial, he would have had the initial burden of establishing a prima facie case of religious discrimination.<sup>100</sup> A prima facie case of discrimination exists when a plaintiff can provide evidence which demonstrates that (1) he or she was a member of a protected class; (2) he or she was qualified for the position he

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95. Case Docket, *Bailey v. Anaheim Ducks Hockey Club, LLC*, No. S-1500-CV-274133 (Kern County Superior Court 2011).

96. Complaint, *supra* note 83, at 6-11.

97. *Id.* at 6.

98. Cal Gov't Code § 12940(a) (West).

99. *Slatkin v. Univ. of Redlands*, 88 Cal. App. 4th 1147, 1156 (2001).

100. *Id.*

or she sought or was performing competently in the position he or she held; (3) he or she suffered an adverse employment action, such as termination, demotion, or denial of an available job; and (4) some other circumstance suggests discriminatory motive.”<sup>101</sup>

Proving the first two elements of a *prima facie* case would have been relatively simple for Bailey; he was a lifelong member of the Jewish faith, and he was qualified to be a minor-league professional hockey player. The latter two elements would have been much more difficult to prove. Bailey would have had to identify some adverse employment action, such as being given less playing time, then he would have had to prove that the adverse employment action was a direct consequence of a discriminatory motive by the Defendants. Given the great difficulty of making this connection, Bailey’s claim of religious discrimination likely would have failed here, if at any stage.

Assuming Bailey could have established a *prima facie* case of discrimination, the burden of proof would have then shifted to the Defendants to offer a “legitimate nondiscriminatory reason” for their adverse employment decisions.<sup>102</sup> The Defendants’ legitimate nondiscriminatory reason for not inviting Bailey on the first road trip, sitting him out of games, and for any other adverse employment decisions would have almost certainly been the following: Bailey was just not as skillful a hockey player as his teammates were. To prove this point, Defendants would have likely relied on game and practice video footage, Bailey’s statistics, and the testimony of coaches, players, and scouts.

If the aforementioned two stages of burdens were to have been satisfied, the burden of proof would have then shifted back to Bailey to prove that the Defendants’ proposed legitimate nondiscriminatory reason was pretextual.<sup>103</sup> In other

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101. *Id.* at 1158.

102. *Id.*

103. *Id.*

words, Bailey would have had to prove by a preponderance of the evidence that the adverse hockey-related decisions involving him were a primary consequence of religious discrimination and not a result of his capacity as a hockey player. Satisfying this final burden of the three-stage test requires “evidence supporting a rational inference that intentional discrimination . . . was the true cause of the [Defendants’] actions.”<sup>104</sup>

In 2011, the California Court of Appeals decided *Slatkin v. University of Redlands*, a case that may offer an indication of how good Bailey’s chances were of proving that any nondiscriminatory reason given by the Defendants was pretextual. In *Slatkin*, the Court of Appeals found a professor’s argument challenging a university’s reason for denying her tenure to not satisfy the professor’s burden.<sup>105</sup> The university contended that the professor had been denied tenure because of perceived deficiencies in her teaching,<sup>106</sup> an argument closely comparable to that of a hockey team denying a hockey player playing time on account of deficiencies in the player’s hockey skill. The professor instead argued that anti-Semitism played a role in the denial of her tenure.<sup>107</sup>

The court found the professor’s argument to be unsubstantiated by any admissible evidence, instead determining that the evidence actually indicated that the individuals involved in the tenure decision were in fact academically prejudiced against her, which was not an illegal reason to deny her tenure.<sup>108</sup> Therefore, the court ultimately affirmed the trial court’s grant of summary judgment in favor of the university.<sup>109</sup> However, relevant to Bailey’s claim of religious discrimination, the court explained that the evidence

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104. *Id.* at 1157.

105. *Id.* at 1147-50.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

required to prove religious discrimination must go to the ultimate issue of “whether the employer acted with a motive to discriminate illegally.”<sup>110</sup> Given the anti-Semitic remarks alleged to have been made by Raymond and Peterson, Bailey would have had a reasonable chance of proving an illegal motive, and therefore he would have had a much better chance than the professor in *Slatkin* did of satisfying the final burden of the religious discrimination three-stage burden-shifting test. Ultimately, of course, Bailey’s chance of prevailing on a claim of religious discrimination would have been up to the mercy of the trier of fact.

ii. Harassment Based on Religion

Bailey’s harassment based on religion cause of action asserted that the acts, conduct, and statements of the Defendants constituted harassment and created a hostile work environment. California Government Code § 12940(j)(1) forbids harassment by an employer on the basis of religious creed.<sup>111</sup>

To have prevailed on this claim, Bailey would have had to establish by a preponderance of the evidence that his “workplace was permeated with discriminatory intimidation, ridicule, and insult that [was so] *severe* or *pervasive* [that it] alter[ed] the conditions of [his] employment and create[d] an abusive working environment.”<sup>112</sup> Accordingly, California’s courts consider all circumstances in determining whether a defendant’s conduct was sufficiently severe or pervasive enough to constitute harassment, including “the frequency of the discriminatory conduct; its severity; whether it [was] physically threatening or humiliating, or a mere offensive

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110. *Id.* at 1157.

111. Complaint, *supra* note 83, at 8; Cal Gov’t Code § 12940(j)(1) (West).

112. *Erdmann v. Tranquility, Inc.*, 155 F. Supp. 2d 1152, 1158 (N.D. Cal. 2001) (emphasis added).

utterance; and whether it unreasonably interfere[d] with the employee's work performance."<sup>113</sup>

Bailey would have likely encountered difficulty in proving that the Defendants' conduct was sufficiently severe or pervasive. A broad examination of the applicable case law reveals that Californian courts have historically more often than not sided with the employer in cases involving various types of harassment claims made under the California Fair Employment and Housing Act, frequently determining that certain conduct does not rise to the level of being severe or pervasive.

For example, in *Etter v. Veiflo Corp.*, the California Court of Appeals affirmed a jury's decision to deny Robert Etter's claim of harassment based on race.<sup>114</sup> Etter's complaint offered evidence that was parallel to much of the evidence provided by Bailey in his complaint. Specifically, Etter, an African American, testified that one of his coworkers had repeatedly subjected him to offensive racial comments throughout a period of six weeks, including calling him "boy," "Buckwheat," "Jemima," and "Stymie."<sup>115</sup> Moreover, Etter further testified that the coworker had once also ridiculed the pronunciation of other Black workers, told a joke about two black girls, and declared her dislike of going to Oakland because of the prevalence of violence by blacks.<sup>116</sup> The trial court instructed the jury to consider in their verdict deliberation that "standard, trivial or occasional, sporadic, or isolated incidents of verbal abuse are not actionable."<sup>117</sup> Consequently, the jury returned a favor in the employer's favor.<sup>118</sup> The California Court of Appeals later affirmed the trial court's jury

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113. *Id.* at 1159-60.

114. *Etter v. Veriflo Corp.*, 67 Cal. App. 4th 457 (Ct. App. 1998).

115. *Id.* at 460-61.

116. *Id.*

117. *Id.* at 464.

118. *Id.* at 467.

instructions and the jury's verdict, determining that the conduct did not constitute harassment.<sup>119</sup>

More recently, the Supreme Court of California denied a significant claim of sexual harassment in *Lyle v. Warner Bros. Television Productions*.<sup>120</sup> Amaani Lyle, a comedy writers' assistant who worked on the popular television show *Friends*, filed a lawsuit against the show's producers and writers alleging, among other claims, sexual harassment under the California Fair Employment and Housing Act.<sup>121</sup> To demonstrate harassment, Lyle presented a record of evidence including: instances of the show's writers saying demeaning remarks about one of the actresses on the show, including referring to her infertility as having "dried twigs"; frequent changes made to the show's public calendar such as changing "happiness" to "penis" and "persistence" to "pert tits"; and a number of sex-based offensive discussions occurring both inside and outside the writers' room related to topics such as womens' bra sizes and men's sexual preferences.<sup>122</sup> Using the objective standard of "the perspective of a reasonable person" in Lyle's position, the Supreme Court of California concluded that no reasonable trier of fact could conclude that the defendants' comments were "severe enough or sufficiently pervasive to create a work environment that was hostile or abusive to [Lyle]," and therefore the court affirmed the prior summary judgment order in the defendants' favor.<sup>123</sup>

The court's decision in *Lyle* rested greatly upon the fact that the defendants' actions and remarks were not directly aimed at Lyle or any other female employee.<sup>124</sup> Conversely, the majority of the evidence presented in Bailey's complaint

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119. *Id.*

120. *Lyle v. Warner Bros. Television Productions*, 132 P.3d 211 (Cal. 2006).

121. *Id.* at 211.

122. *Id.* at 217-18.

123. *Id.* at 215, 223-25.

124. *Id.* at 215.

alleged that the Defendants' often made derogatory marks directly at Bailey. Therefore, the recent *Lyle* decision likely wouldn't have threatened the success of Bailey's harassment based on religion claim. However, Bailey would have still had the significant burden of proving that the Defendants' conduct was sufficiently severe or pervasive, which as the *Etter* decision demonstrated, is far from an easy task. Ultimately, again, the success of Bailey's harassment based on religion claim would have been dependent upon the jury's discretion.

*C. Learning from Bailey: How Professional Athletes Should Approach Religious Discrimination*

Perhaps the most significant take away from Bailey's lawsuit against the Anaheim Ducks is a guide as to how professional athletes and their representatives should approach religious discrimination in the future. While Bailey's story presents an excellent path for any employee to follow, and it is not entirely particular to the professional sports industry, it is a beneficial exercise to examine Bailey's path to identify what specific steps professional athletes should take to address instances of religious discrimination in the future. Agents, attorneys, and other representatives of professional athletes should advise their clients to follow these steps.

i. Step One - Approach the Source of the Discrimination

The first step that any professional athlete should take if subjected to religious discrimination is to directly approach the source of the discrimination. According to Bailey's complaint, around January 23, 2009, Bailey approached both of his coaches, Raymond and Peterson, and he openly expressed his concern about what he perceived to be an anti-Semitic work environment.<sup>125</sup> Directly approaching the source of the

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125. Complaint, *supra* note 83, at 4.

religious discrimination, whether it be a coach, assistant coach, owner, or whoever else, is the most prudent action that a professional athlete can take, as a sincere conversation regarding how the discrimination has adversely impacted the professional athlete's performance may quickly resolve the issue before it evolves into something more severe. Even more, the professional athlete's proactive approach may benefit teammates, both presently and in the future, who share the athlete's religious beliefs.

ii. Step Two - Take the Issue Higher

If the conversation with the source of the religious discrimination proves to be unfruitful, the professional athlete should then take the issue to someone higher up in the administration of the team, moving higher up the ladder of command until eventually reaching the very top. For example, after his unsuccessful communication with Raymond and Peterson, Bailey then brought the issue to the attention of David McNab, the assistant general manager of the Anaheim Ducks, and later to Jonathan Fleisig, the owner of the Bakersfield Condors.<sup>126</sup> While likely frustrated with the lack of response that he had received thus far, Bailey should have taken his concerns even one step further, contacting Henry Samueli, the owner of the Anaheim Ducks.<sup>127</sup> Samueli, the son of two Holocaust survivors, would have unquestionably taken Bailey's concerns to heart.<sup>128</sup>

iii. Step Three - Consider Requesting a Trade

When approaching a team's administration, the professional athlete should seriously evaluate whether the issue

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126. *Id.*

127. *Bio: Henry Samueli*, THE ORANGE COUNTY REGISTER (Apr. 30, 2008), <http://www.ocregister.com/articles/samueli-55222-million-ucla.html>.

128. *Id.*

is one which may not be able to be resolved promptly. If so, requesting a trade to a different team may be the most advantageous resolution. By being traded to another team, the professional athlete eliminates the possibility that the religious discrimination will ruin their professional development, which is especially important if the athlete is in the early stages of their career, as Bailey was when he played for the Bakersfield Condors. Bailey did not request a trade until many months after approaching McNab and Fleisig with his concerns of his coaches' behaviors, and his career ultimately concluded after playing only two seasons with the Ottawa Senators organization.<sup>129</sup> Perhaps he could have enjoyed more success in Ottawa had he requested a trade sooner.

iv. Step Four - Check the Collective Bargaining Agreement

If a team's administration fails to appropriately respond to the professional athlete's concerns of religious discrimination, and if a trade is refused or undesired, the professional athlete, or more likely their representative, should then consult the current collective bargaining agreement ("CBA") of the athlete's sport. The CBA might require that a certain grievance procedure be followed in order for a professional athlete to bring a claim of religious discrimination against their team. If the CBA does call for a specific grievance procedure, the professional athlete can typically elect to have their players' association argue the claim on their behalf.

The four major professional sports leagues' CBAs may be the reason for the noticeable absence of public claims of religious discrimination brought by professional athletes. However, not every one of the four major professional sports leagues' CBAs explicitly requires a procedure for bringing a claim of religious discrimination. For example, the NHL's current CBA only prohibits religious discrimination in the

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129. *Id.* at 6.

interpretation and application of the agreement itself, but nowhere does it explicitly prohibit religious discrimination.<sup>130</sup> This lack of a general religious discrimination prohibition allowed Bailey to initially file his claim of religious discrimination outside of the professional hockey community.

An example of an explicit prohibition of religious discrimination can be found in the recent CBA entered into between the NFL and the National Football League Players' Association (NFLPA). That agreement provides the following, "There will be no discrimination in any form against any player by . . . any [team] . . . because of . . . religion . . ." <sup>131</sup> The NFL-NFLPA CBA requires NFL players to initiate a grievance, either unilaterally or through the NFLPA, for any claim of religious discrimination.<sup>132</sup>

#### v. Step Five - File an Administrative Claim

If the professional athlete's CBA does not require a specific grievance procedure, or if the CBA provides a discretionary procedure, the professional athlete should then consider filing an administrative claim of religious discrimination. When deciding which administrative agency to file a claim with, it is very important for the professional athlete, through the counsel of their representatives, to understand the scope of protections afforded by both the

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130. "Neither the NHLPA, the NHL, nor any Club shall discriminate in the interpretation or application of this Agreement against or in favor of any Player because of religion, race, disability, color, national origin, sex, sexual orientation, age, marital status, or membership or non-membership in or support of or non-support of any labor organization." NHL-NHLPA Collective Bargaining Agreement, Art. VII, § 7.2. (2005), *available at* <http://www.nhlfa.com/CBA/2005-CBA.pdf>.

131. NFL-NFLPA Collective Bargaining Agreement, Art. VII, § 1, at 18 (2011), *available at* <http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf>.

132. NFL-NFLPA Collective Bargaining Agreement, Art. IX, at 23-27.

religious discrimination law of the professional athlete's home state and Title VII. A claim covered by both the state law and Title VII will generally be forwarded by the applicable state agency to the EEOC, and vice versa, under the EEOC's work share agreements.<sup>133</sup>

Because the NHL's CBA does not require an internal grievance procedure for claims of religious discrimination, Bailey filed a claim with the DFEH under the California Fair Employment and Housing Act on January 19, 2010.<sup>134</sup> Although Bailey's claim was covered by both the California Fair Employment and Housing Act and Title VII, his counsel likely chose to file with the DFEH because of the agency's generous 365-day timeframe to file a claim, as opposed to the EEOC's deadline of 180 days.<sup>135</sup>

#### vi. Step Six - File a Civil Lawsuit

The last resort for the professional athlete should be the filing of a civil lawsuit against their team. Bailey filed a religious discrimination lawsuit against the Anaheim Ducks and the Bakersfield Condors on January 21, 2011, almost exactly one year after filing his complaint with the DFEH.<sup>136</sup> A civil lawsuit cannot be brought by a professional athlete without first exhausting their administrative remedies (filing a claim with one of the agencies and later receiving a right-to-sue letter). The professional athlete, with the advice of their representatives, should seriously contemplate the decision to pursue a lawsuit, as the process can be incredibly costly and

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133. Federal Laws Prohibiting Job Discrimination Questions and Answers, *supra* note 28.

134. Scott Burnside, *Details Emerge of Jason Bailey's Suit*, ESPN.COM (Jan. 27, 2011), <http://sports.espn.go.com/los-angeles/nhl/news/story?id=6065644>.

135. San Francisco District Office - Timeliness, EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/field/sanfrancisco/timeliness.cfm> (last visited Feb. 11, 2012).

136. Complaint, *supra* note 83.

lengthy; and although professional athletes are typically in a better position than the general public to absorb the many burdens of litigation, particularly the financial burdens, a lawsuit may slowly drain the professional athlete's available financial resources, and far worse, their concentration.<sup>137</sup> It may be a more prudent solution for the professional athlete to first bring their intention to file a lawsuit to the team's attention in an attempt to initiate some form of alternative dispute resolution.<sup>138</sup>

## VII. CONCLUSION

Given the rarity of cases like Bailey's, it would have been fascinating to see exactly how his lawsuit would have been decided at the Kern County Superior Court. Unfortunately, like *Johnson v. Nat'l Football League* before it,<sup>139</sup> Bailey's likely settled lawsuit leaves the topic of religious discrimination in the professional sports industry without notable legal precedent. However, Bailey's recent story does provide something valuable to today's professional sports industry, a contemporary guide as to how professional athletes (and their representatives) should approach religious discrimination in the future. Religion has had, and will continue to have, a considerable presence in the professional sports industry. While Bailey's lawsuit could have perhaps eliminated any potential barriers preventing professional athletes from pursuing claims of religious discrimination, it may only be a matter of time before another penalty is sought for the slashing of a professional athlete's religion.

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137. Sports Psychology, BRIAN MAC - SPORTS COACH, <http://www.brianmac.co.uk/psych.htm> (last visited Feb. 12, 2012).

138. "The sports industry has a long history of utilizing alternative dispute resolution (ADR) to resolve a wide range of sports-related disputes." Sports ADR, AM. ARB. ASSOC., <http://www.adr.org/sp.asp?id=38981> (last visited Feb. 12, 2012).

139. *Johnson v. Nat'l Football League*, 1999 WL 892938 (S.D.N.Y. 1999).



# UNITED SPORTS OF AMERICA: MAKING REASONABLE ACCOMMODATIONS FOR RELIGIOUS PRACTICES AND PREFERENCES OF SPORTS PARTICIPANTS

Stephen Vincent

When Israeli national women's basketball team member Naama Shafir wanted to wear a t-shirt underneath her jersey in accordance to her religious beliefs, FIBA Europe refused to let her play in its basketball tournament.<sup>1</sup> The organization had a rule that all uniforms had to be, well, uniform—*rigidly* uniform.<sup>2</sup> For FIBA Europe, a t-shirt worn underneath the basketball jersey was a deviation too far. Dress like your teammates or do not take court, FIBA Europe said. In essence, FIBA was saying, “You can choose to abide by the tenets of your religion or our tenets—you cannot do both.” An appeal to FIBA failed on procedural grounds.<sup>3</sup> Finally, the story made international news, Shafir and FIBA Europe reached a compromise: The t-shirt she would wear underneath her jersey would be skin-colored.<sup>4</sup> Though the solution was simple, the underlying problem remains troubling. Whether it is the harassment Jason Bailey allegedly received or the unbending enforcement of rules that nearly resulted in excluding Naama Shafir, religious discrimination betrays what sports are purported to be: the great global unifier.

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1. *Faith, Rules at Odds for Israeli Player*, ESPN (June 9, 2011). <http://sports.espn.go.com/oly/olybb/news/story?id=6643921>.

2. *Id.*

3. *Id.*

4. *Compromise Found for Religious Player*, Y NET NEWS (June 19, 2011). <http://www.ynetnews.com/articles/0,7340,L-4083810,00.html>.

Our games show us how similar we really are. Global strife and international politics may divide, but every four years, when the world gathers for a World Cup or an Olympics, we remember how similar all of humanity really is. No sports figure has ever better exemplified this than Jackie Robinson. Whose poise amid turmoil not only broke baseball's color barrier, he also broke into the hearts of a segregated nation. Baseball integration helped spur the Civil Rights Movement.<sup>5</sup> However, all has not been rosy in the sports world. The old adage that "Sports don't build character, they reveal it" remains true. As united as our sports may make us feel, our sports also reveal that discrimination still exists. Such was the case with Bailey and Shafir—and such was the case for a basketball team of Seventh-Day Adventists.

Portland Adventist Academy, a Seventh-Day Adventist high school in Oregon, found itself the target of Oregon School Activities Association's rather pointed rule that a team who may intend to forfeit a tournament game would not be allowed to participate in the state basketball tournament.<sup>6</sup> This conflicted with the Adventists' Sabbath observance, which starts at dusk on Friday and lasts until sundown Saturday.<sup>7</sup> The rule resulted from complaints that OSAA received from the 1996 tournament in which it had agreed to allow the school to forfeit Saturday afternoon consolation games, should the team reach that stage of the tournament.<sup>8</sup> The Oregon Supreme Court held that the OSAA needed something more than a *de minimis* burden in tournament scheduling to justify the disparate rule.<sup>9</sup>

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5. Kenneth L. Shropshire, *Where Have You Gone, Jackie Robinson: Integration in America in the 21st Century*, 38 S. TEX. L. REV. 1043, 1043 (1997).

6. *Nakashima v. Oregon State Bd. of Educ.*, 185 P.3d 429, 432 (Ore. 2008).

7. *Id.*

8. *Id.*

9. *Id.* at 441.

To require something more than a *de minimis* burden may be a vague standard, but it is the correct one in this area. Where an accommodation can be made without a significant change to the structure of the tournament or the fairness of the game, that change should be permitted. There will be times when no accommodation can reasonably be made. For instance, when Eli Herring opted to not play in the NFL because it fell on the Sabbath,<sup>10</sup> it would not have been reasonable for him to ask the NFL shift away from its Sunday scheduling. At times, an athlete's decision to place religion first may adversely affect the squad.<sup>11</sup> But where both religious and team obligations can be met with a minor tweak of the rules, such accommodations should be made so that sports can truly be something that brings us *all* together.

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10. Steve Springer, *Eli's Not Coming: Former BYU Lineman Herring Has the Ability to Play in the NFL, but It's Never on Sunday for This Mormon*, L.A. TIMES (Sept. 15, 1995), [http://articles.latimes.com/1995-09-15/sports/sp-46184\\_1\\_eli-herring](http://articles.latimes.com/1995-09-15/sports/sp-46184_1_eli-herring).

11. Lindsay Knight, *Michael Jones*, ALL-BLACKS PLAYER PROFILE, <http://stats.allblacks.com/asp/Profile.asp?ABID=443> (last visited May 2, 2012) (describing the saga of rugby Hall-of-Famer Michael Jones, a devout Christian who vowed to his dying father that he would never play on Sunday. He kept that promise even though it meant he missed three games for New Zealand at the 1991 Rugby World Cup and was passed over for the 1995 World Cup because of his no-Sunday play observance).



# **FALSE ADVERTISING CLAIMS: ANALYSIS OF POTENTIAL ATHLETE ENDORSER LIABILITY**

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## Abstract

For decades, endorsements provided athletes with the opportunity to lend their personas to companies in order to promote and ultimately sell products to consumers. Both literature and case law support the concept that manufacturers and retailers are liable to consumers for false advertising claims. Little information is available, however, about potential athlete endorser liability for these claims. This Article fills that void by focusing on both federal and common law liability concerning the need for athlete endorsers to exercise due diligence in researching the companies and products that they endorse.

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## I. INTRODUCTION

Endorsements are a great opportunity for athletes to leverage their names and personas as brands and to utilize their status as celebrities to sell products. Endorsement deals, in fact, can be extremely profitable for athletes. Cam Newton, the first selection in the 2011 National Football League Draft, signed an endorsement deal with Under Armour that was reported to be the most lucrative deal ever awarded to an incoming NFL player.<sup>1</sup> Newton's endorsement deal was signed before he even proved his ability on football's biggest stage by playing in a NFL game. For some athletes, multi-million dollar endorsements are worth more than their salaries from actually playing their sport. For example, soccer player David Beckham's endorsement income rose 30 percent in 2010, earning him \$24 million,<sup>2</sup> while his salary with the Los Angeles Galaxy was \$6.5 million for that same year.<sup>3</sup> Arguably, the most notable endorsement deal is that between Nike and former NBA player (turned NBA team owner) Michael Jordan. Jordan's deal with Nike established not just an association, like most endorsement deals, but a partnership creating Brand Jordan, a division of Nike. In 2009, the brand grossed more than \$1 billion dollars in revenue and comprised roughly 5 percent of Nike's total revenue.<sup>4</sup>

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1. *Cam Newton Lands Under Armour Deal*, ESPN (Feb. 15, 2011, 2:26 AM), <http://sports.espn.go.com/nfl/news/story?id=6123536>.

2. *David Beckham Racked Up \$24.5M from Endorsement Deals*, CBS L.A. (Oct. 6, 2011 11:46 AM) <http://losangeles.cbslocal.com/2011/10/06/david-beckhams-endorsement-deals-rose-30/>.

3. Player Salary Information: 2010 Salaries, Major League Soccer Players Union, [http://www.mlsplayers.org/files/august\\_12\\_2010\\_salary\\_information\\_\\_alphabetical.pdf](http://www.mlsplayers.org/files/august_12_2010_salary_information__alphabetical.pdf) (last visited Apr. 12, 2012).

4. Darren Rovell, *Michael Jordan First Athlete to \$1 Billion*, SPORTS BUSINESS REPORT (Sept. 11, 2009 10:53 AM), [http://www.cnbc.com/id/32798277/Michael\\_Jordan\\_First\\_Athlete\\_To\\_1\\_Billion](http://www.cnbc.com/id/32798277/Michael_Jordan_First_Athlete_To_1_Billion).

Research indicates that companies increase the chances of communicating product messages to consumers when celebrities are featured in advertising campaigns.<sup>5</sup> Research also suggests that an endorsement by the “right” athlete or celebrity can help sell a product by providing brand recognition, advertisement credibility, and an increased likelihood of a purchase.<sup>6</sup> As a result, companies with products to sell continue to spend billions of dollars to procure endorsers for their products. Between two to three billion dollars were spent on celebrity advertising in 2006 in the United States alone.<sup>7</sup> This number has drastically increased over the past five years with the sports industry becoming extremely competitive to associate an athlete with a company brand. Nike alone spent more than \$4 billion in 2009 on athlete endorsements,<sup>8</sup> and Adidas is signing players to lifetime endorsement agreements. Soccer player David Beckham signed a \$160.8 million dollar “lifetime” agreement in 2003 with Adidas, and basketball player Derrick Rose is, at the time of this writing, in negotiations to do the same with reports that his deal with Adidas could reach up to \$250 million.<sup>9</sup>

Even with millions, if not hundreds of millions, on the line, the athlete-endorsee relationship can be peculiar because

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5. Sejung Marina Choi & Nora J. Rifon, Who Is the Celebrity in Advertising? Understanding Dimensions of Celebrity Images, 40 J. POPULAR CULTURE 304 (2007).

6. Christian Ryssel & Eric Stamminger, *Sponsoring World-Class Tennis Players*, 16 EUR. RES. 110 (1988).

7. Darin W. White, Lucretia Goddard & Nick Wilbur, *The Effects of Negative Information Transference in the Celebrity Endorsement Relationship*, 37 INT'L J. RETAIL & DISTRIBUTION MGMT. 322, 322 (2009).

8. Daniel Kaplan, *Nike Endorsement Tab Swooshes Down*, SPORTS BUS. DAILY (Aug. 2, 2010), <http://www.sportsbusinessdaily.com/Journal/Issues/2010/08/20100802/This-Weeks-News/Nike-Endorsement-Tab-Swooshes-Down.aspx>.

9. Ariel Sandler, *Derrick Rose Is Close To Signing A 'Lifetime' Endorsement Deal With Adidas Worth A Rumored \$250 Million*, BUS. INSIDER (Dec. 30, 2011), [http://articles.businessinsider.com/2011-12-30/sports/30572007\\_1\\_endorsement-deal-derrick-rose-adidas](http://articles.businessinsider.com/2011-12-30/sports/30572007_1_endorsement-deal-derrick-rose-adidas).

of the various motivations that may be in play. Specifically, the motivations for forming these associations often extend beyond pecuniary interests to include desires to change consumer perception of the company or the athlete. For example, in the early 1980s, Firestone hired actor Jimmy Stewart to promote its radial tires to change the public opinion that Firestone was “an uncaring manufacturer of an unsafe tire.”<sup>10</sup> The relationship proved to be successful for Firestone and served as an example of how endorsers and endorsees can use the relationship to help their public image. Typically, these negotiated deals can range from explicit endorsement (I recommend this product), to implicit endorsement (I use this product), or co-present endorsement (I merely appear with this product).<sup>11</sup> No matter the form the endorsement takes, it is important to remember that “the value of player endorsements is based in large part on the public’s perception of that athlete as a person”<sup>12</sup> and that these mega-million dollar opportunities are not without negative consequences for the athlete.

On January 21, 2011, consumer Brian Casserly filed a class action lawsuit in the United States District Court of the Central District of California against Power Balance, LLC, its principals, and athlete endorsers Shaquille O’Neal and Lamar Odom. The complaint alleged that the Power Balance bracelets and products manufactured and marketed by the defendants to provide consumers with enhanced “strength, balance, and flexibility” were biologically incapable of doing so.<sup>13</sup> In short, the plaintiffs alleged that the defendants engaged in false advertising, unfair competition, and actions that resulted in

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10. Michael E. Jones, *Celebrity Endorsements: A Case for Alarm and Concern for the Future*, 15 *NEW ENG. L. REV.* 521, 524 (1980).

11. Grant McCracken, *Who is the Celebrity Endorser? Cultural Foundations of the Endorsement Process*, 16 *J. CONSUMER RES.* 310, 310 (1989).

12. Casey Shilts, Kate Jett & Nick Desiato, *Making the Pitch - Player Endorsements in Professional Sports*, 25 *ENT. & SPORTS L.* 6 (2008).

13. *Casserly v. PowerBalance, LLC*, No. CV11-00670 (C.D. Cal. filed Jan. 21, 2011).

unjust enrichment. The list of defendants named in the lawsuit not only included the company that made the product and produced the advertisements, it also included its athlete endorsers. The existence of this legal controversy demonstrates that endorsers are now potential targets for lawsuits involving the products they endorse. The athlete endorsers, however, may not fully understand the extent of their exposure to potential legal liability through the endorsement of products. Accordingly, there exists a need for research that analyzes the legal issues associated with the endorsement of products.

A review of the relevant literature identified articles that addressed athlete credibility and attractiveness, the effectiveness of celebrity endorsements in advertising, consumer responses to celebrity endorsements, as well as consumer attitudes towards a brand in light of athlete misconduct.<sup>14</sup> In contrast, there is a dearth of research concerning the potential for legal liability imposed on athletes for the endorsement of products that harm consumers. Furthermore, a review of existing statutory and case law revealed that most of the case law and statutory regulations controlling false advertising involved only instances where product manufacturers were alleged to have engaged in false or misleading advertising and were held liable for consumer injury caused by deceptive advertising. Therefore, it is difficult to identify the situations in which an endorser is legally liable for making false statements about a product. The literature supports an analysis of why endorsers should be liable, but there are very few examples of endorsers being found liable

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14. See Brian D. Till & Michael Busler, *Matching Products With Endorsers: Attractiveness Versus Expertise*, 5 J. CONSUMER MARKETING 576 (1998); Joshua Stuart, *Heroes in Sport: Assessing Celebrity Endorser Effectiveness*, 8 INT'L J. SPORTS MARKETING & SPONSORSHIP 126 (2007); Therese Louie & Carl Obermiller, *Consumer Response to a Firm's Endorser (Dis)association Decisions*, 31 J. ADVERTISING 41 (2002); Brian D. Till & Terence A. Shimp, *Endorsers in Advertising: The Case of the Negative Celebrity Information*, 27 J. ADVERTISING 67 (1998).

and even fewer research studies explaining how liability can be imposed. This Article will fill the void in existing literature by analyzing how liability can be imposed on an athlete endorser for making claims about a product that are inaccurate. In doing so, the Article (a) analyzes the Federal Trade Commission's (FTC) role in enforcing violations against endorsers, (b) identifies common law causes of action through which consumers may seek relief against endorsers, and (c) provides considerations for athletes seeking endorsements.

## II. THE FTC AND ENFORCEMENT OF ENDORSEMENTS

The FTC is the federal agency that focuses on consumer protection and deceptive business practices in the marketplace. The FTC was created in 1914 under the Federal Trade Commission Act (FTCA) to prevent false advertising and unfair competition.<sup>15</sup> The primary sections of the FTCA are § 5 and § 12. Section 5 prohibits persons, companies, or organizations from engaging in unfair or deceptive acts in interstate commerce;<sup>16</sup> section 12 prohibits false advertisements that are likely to induce the purchase of consumer goods.<sup>17</sup> In 1938, Congress passed the Wheeler-Lea Act to expand the scope of the FTC to protect consumers as well as competitors.<sup>18</sup> Unfortunately, the language of the Act limited the FTC's jurisdiction to intrastate activities.<sup>19</sup> The jurisdiction of the FTC was later broadened under the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, which provided the FTC with jurisdiction

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15. Act of Sept. 26, 1914, ch. 111, § 5, 38 Stat. 717 (1914) (current version at 15 U.S.C. § 41 (2011)).

16. 15 U.S.C. § 45(a) (2006).

17. 15 U.S.C. § 52(a)(2) (1994).

18. 52 Stat. 111 (1938) (amending Fed. Trade Comm'n Act, ch. 311, 38 Stat. 717 (1914)).

18. Fed. Trade Comm'n v. Bunte Bros., 312 U.S. 349 (1941).

19. *Id.* at 352.

over violations in and affecting commerce, not just interstate commerce.<sup>20</sup>

Under the FTCA, if a person, company, or organization is found to have committed a violation, each broadcast may be treated as a separate violation.<sup>21</sup> Remedies may include consent orders (no admission of guilt), restitution, and administrative hearings, which may provide penalties such as cease and desist orders and fines up to \$10,000 per violation.<sup>22</sup> Other methods may include injunctions or corrective advertising.<sup>23</sup> In proving its case for a violation, the FTC need not show that there was actual deception, only that the advertisement is likely to deceive.<sup>24</sup> The standard for this determination is whether a message would influence a reasonable consumer into making a purchase decision.<sup>25</sup>

The FTC's first guidelines regarding endorsements and testimonials were established in 1975 and finalized on January 18, 1980. Commonly referred to as "Guides" by the FTC,<sup>26</sup> the goal for the Guides was to assist companies with determining what would be considered proper advertising etiquette when utilizing endorsements. Endorsements were defined as:

[A]ny advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions,

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20. 15 U.S.C. § 2301-2312 (2006).

21. 15 U.S.C. § 45(l) (1988).

22. 15 U.S.C. § 45(m) (2006).

23. *Id.*

24. Letter from James C. Miller III, Chairman, FTC, to The Honorable John D. Dingell, Chairman of the Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

25. *Id.*

26. 16 C.F.R § 255.0 (2011).

beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.<sup>27</sup>

Even after the FTC issued a formal definition, it was unclear whether the endorser had a material connection to the product or manufacturer, and whether the endorser could be held liable for false advertising.

One of the earliest cases of enforcement involved actor/singer Pat Boone, Karr Preventative Medical Products, Inc. (Karr), and the product Acne-Statin in 1978. Boone appeared in a television advertisement claiming that Acne-Statin helped all four of his daughters with blemishes and acne.<sup>28</sup> The FTC filed a complaint stating that the product did not work, ordered Boone to stop appearing in the ads, and to pay out of pocket approximately 2.5 percent of any money that the FTC may order Karr to refund consumers.<sup>29</sup> Although the order was not binding, it put endorsers on notice that they indeed had some potential liability to consumers for the products they endorse.

One year later the FTC sought action against former astronaut Gordon Cooper, who appeared in a series of television and newspaper advertisements to promote a product that “increases engine performance, reduces smog emission, and clears your engine.”<sup>30</sup> The issues presented were whether Cooper was, in fact, an endorser of the product and whether he had the “knowledge” to make such claims regarding the product. The FTC found, based on Gordon’s claims regarding

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27. 16 C.F.R. § 255.0(b) (2011).

28. *Show Business: Let The Stellar Seller Beware*, TIME MAGAZINE (May 22, 1978), <http://www.time.com/time/magazine/article/0,9171,919667,00.html>.

29. *Id.*

30. Leroy Gordon Cooper, Jr., 94 F.T.C 674, 675 (1979).

the product, that he was an endorser of the product.<sup>31</sup> The FTC also found that Gordon did not possess the requisite knowledge or education to qualify as an expert in the field of automobile engineering and, because he was not an expert, he should have consulted an expert's opinion regarding the product.<sup>32</sup> As a result, Cooper's statements were considered false representations that had the capacity to mislead members of the public.<sup>33</sup> Cooper was ordered to cease and desist all endorsement activities unless he relied on competent scientific evidence to substantiate any representation made in the endorsement.<sup>34</sup>

The Cooper case was a landmark decision because it was the first to place the burden of substantiation of product claims on the endorser as well as the advertiser. Even if information is obtained from the advertiser, two reliable independent sources must be used. Under 16 C.F.R. §255.2(a):

An advertisement employing endorsements . . . about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, i.e., without using endorsements.<sup>35</sup>

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31. *Id.* at 675.

32. *Id.* at 676.

33. *Id.* at 677.

34. *Id.* at 695.

35. 16 C.F.R. § 255.2(a) (2011).

Accordingly, endorsers must do their own research regarding a product to support their claims. If endorsers fail to substantiate the claims they make in advertisements, they may find themselves vulnerable to FTC sanction, like Cooper. So, why did the *Boone* and *Cooper* cases result in very different outcomes? Boone was ordered to pay restitution because he had personal control over the actions of the advertiser. Conversely, Cooper lacked personal control over the advertiser, and this allowed him to avoid sanction by the FTC. Both decisions, however, were consistent with the FTC's policy of disclosing any connection "which might materially affect the weight or credibility of the endorsement."<sup>36</sup>

The most recent case of the FTC enforcing the Guides against an endorser occurred in 2000, when it filed a complaint against Enforma Natural Products, Inc. for the "Fat Trapper" and "Exercise in a Bottle" dietary supplements. After the parent company entered into a consent judgment with the FTC for \$10 million dollars,<sup>37</sup> former Los Angeles Dodger Steve Garvey was named in a separate action.<sup>38</sup> Garvey appeared in several infomercials and made personal appearances touting the benefits of the weight-loss system. The California Federal District Court concluded that Garvey could not be held liable for the claims made regarding the product.<sup>39</sup> The court found that Garvey was acting in the capacity as a spokesperson and not an endorser.<sup>40</sup> The case against Garvey turned on the fact that both he and his wife had used the product and lost weight, and the company specifically wrote and directed Garvey's

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36. 16 C.F.R. § 255.5 (2011).

37. Linda Goldstein, *Garvey Walks on Celebrity Pitch*, RESPONSE, Oct. 1, 2004, at 56.

38. Fed. Trade Comm'n v. Garvey, 2002 WL 31744639, at \*4 (C.D. Cal. Nov. 25, 2002).

39. *Id.*

40. *Id.*

statements.<sup>41</sup> Garvey made no independent claims regarding the product.<sup>42</sup>

The court stated that in order to hold Garvey liable, the FTC must have shown: (1) that he had actual knowledge of the material misrepresentations, (2) was recklessly indifferent to the truth or falsity of the misrepresentation, or (3) had an awareness of a high probability of fraud along with an intentional avoidance of the truth.<sup>43</sup> The court found that the FTC was not able to establish any of the three showings.<sup>44</sup> The FTC appealed the decision to the Ninth Circuit, which affirmed the district court's findings and added the requirement that endorsements must reflect the honest opinion or beliefs of the endorser.<sup>45</sup> Garvey did not provide an endorsement. Instead, Garvey simply repeated what he was told to say, and the court found that most reasonable consumers would interpret those statements to be those of Enforma rather than Garvey.<sup>46</sup>

The Ninth Circuit's decision in *Garvey* was contrary to the FTC's definition of an endorsement. Based on *Garvey*, for the FTC to prevail, the reasonable consumer had to believe that the statements made were those of Garvey rather than Enforma.<sup>47</sup> Another saving grace in *Garvey*'s case was the fact that he had conducted adequate independent research to substantiate his belief that the product actually worked.<sup>48</sup> Independent research and substantiation of claims were also emphasized in the *Cooper* case.<sup>49</sup>

The FTC continues to argue that the *Garvey* decision was an error, which is problematic for endorsers. As a result, endorsers should view both cases as warnings that independent

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41. *Id.*

42. *Id.*

43. *Id.*; see also Linda Goldstein, *supra* noted 37, at 56.

44. *Garvey*, 2002 WL 31744639, at \*4.

45. Fed. Trade Comm'n v. *Garvey*, 383 F.3d 891, 903 (9th Cir. 2004).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Supra* note 30 at 697.

investigation is always necessary when endorsing a product, and endorsers should be careful of the claims made regarding a product even if the words are not theirs but those of the endorsee company. In those situations where the endorser relies on information from the company to substantiate advertising claims, “if the study is on its face defective . . . such reliance cannot be considered reasonable.”<sup>50</sup>

For example, most weight loss advertisements depict individuals with extraordinary results, which is a concern because those who are unfamiliar with these types of advertisements may be misled to believe that if they use the product, they will obtain similar results. The fact that the results depicted in the advertisements are not typical is deceptive, and although the ads contain information in fine print acknowledging atypical results, endorsers may be led to believe that their statements are only offered as support for the product and that there is no duty to consumers regarding their statements. Endorsers, as a matter of fact, need to understand that the FTC considers the endorsement or testimonial to be another claim and not merely support for the product.<sup>51</sup> A material claim regarding a product must be based upon competent and reliable scientific evidence, otherwise the advertising may be deemed deceptive or misleading.<sup>52</sup> This standard was re-emphasized in 2004 when the FTC went after six companies that were making false weight-loss claims in national advertisements. The initiative was titled “Operation Big Fat Lie” and was created to “stop deceptive advertising and provide refunds to consumers harmed by unscrupulous weight-loss advertisers; encourage media outlets not to carry advertisements containing bogus weight-loss claims; and educate consumers to be on their guard against companies

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50. Am. Home Products Corp. 98 F.T.C. 136 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982).

51. Susan D. Brienza, *Your Results May Vary: Disclaimers and Disclosures*. 27 NATURAL FOODS MERCHANDISER 20, 22 (2006).

52. Prolong Super Lubricants, Inc., 128 F.T.C. 549, 599 (1999).

promising miraculous weight loss without diet or exercise.”<sup>53</sup> As an endorser, a connection to one of these companies could increase potential liability for false claims, and even if the endorsee company tells the endorser what to say, the FTC may not be lenient on an endorser who fails to substantiate the claims he or she makes in an advertisement.

### III. FTC STANDARDS FOR ATHLETE ENDORSERS

Substantiation is not the only FTC requirement for an endorser. It is also both the company’s and the athlete’s responsibility to make sure that the endorsement reflects the athlete’s honest opinions, findings, beliefs, or experiences about the product, and that the athlete is a bona fide user of the product at the time the endorsement was given.<sup>54</sup> The company is also obligated to check with the athlete at reasonable intervals to determine whether the athlete still “endorses” the product.<sup>55</sup> An advertiser may only use an endorsement so long as it has reason to believe that the endorser’s opinions about the product still coincide with the views expressed in the endorsement.<sup>56</sup> “Reasonableness [regarding the athlete’s opinions about the product] will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration of the product, changes in the performance of competitor’s products, and the advertiser’s contract commitments.”<sup>57</sup>

In addition to making sure the athlete adheres to the aforementioned requirements of being an endorser, the athlete must also disclose to consumers any financial relationship with

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53. Press Release, Fed. Trade Comm’n, FTC Launches “Big Fat Lie” Initiative Targeting Bogus Weight-loss Claims (Nov. 9, 2004), *available at* <http://www.ftc.gov/opa/2004/11/bigfatliesweep.shtml>.

54. 16 C.F.R. § 255.1(a) & (c) (2011).

55. 16 C.F.R. § 255.1(b) (2011).

56. *Id.*

57. *Id.*

a product's manufacturer.<sup>58</sup> According to the 2009 FTC Guidelines: "[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed."<sup>59</sup> This portion of the Guides has also been the subject of interest for endorsements on Facebook and Twitter. If an athlete mentions a product or company through any method of social media, the athlete must disclose the paid endorsement relationship with the product or company to Facebook friends or Twitter followers. At the time of this writing, the FTC has not sought to enforce these new rules against an endorser. Although the FTC lost in *Garvey*, perhaps that case would have turned out differently under the new Guides. Unfortunately, the Guides cannot cover every possible example of violation and, ultimately, "whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue."<sup>60</sup> To date, there have been few cases where a product endorser has been held liable to consumers for damages resulting from false advertisements. But there are several legal theories that could propel athletes into the spotlight as targets for such actions. These theories are explored in the following section.

#### IV. REVIEW OF COMMON LAW CAUSES OF ACTION AGAINST ATHLETE ENDORSERS

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58. Celebrities in Ads: FTC Proposes New Rules, CONSUMER REPORTS, Sept. 2009, at 9.

59. 16 C.F.R. § 255.5 (2011); *see also* Press Release, Fed. Trade Comm'n, FTC Publishes Final Guides Governing Endorsements, Testimonials (Oct. 5, 2009), *available at* <http://www.ftc.gov/opa/2009/10/endortest.shtm>.

60. 16 C.F.R. § 255.0(a) (2011).

All of the cases discussed so far involve claims in which the FTC was acting on behalf of the consumer. The FTCA does not allow consumers to seek redress from endorsers or companies for false advertising claims.<sup>61</sup> If a consumer files a claim against an endorser or company, damages must be sought under state regulations or common law. Most states have adopted unfair and deceptive acts and practices statutes, and consumers can seek relief through the issuance of injunctive relief or the award of compensatory damages and attorney's fees. Most states even allow for punitive damages.<sup>62</sup> All states, except Iowa, "allow consumers to seek at least the dollar amount of their losses."<sup>63</sup> Case filings against companies and/or endorsers have included claims brought under state consumer protection laws, negligence, the intentional tort of deceit, and under the Racketeer Influenced and Corrupt Organizations Act.<sup>64</sup> Many of these types of consumer claims are difficult to prove, however, especially those theories that require some showing of intent to deceive.

The concept of consumer reliance is "one of the most important bases for the endorser's legal liability . . . for false or

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61. *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973).

62. Sample unfair and deceptive acts and practices statutes are California Business & Professional Code §§ 17200 through 17594, N.Y. General Business Law §§ 349(a) and (b) and §§ 350-a(1), and Texas Business & Commerce Code §§ 17.45(5), 17.50(a)(3), and 17.47(a) through (d). *See also* Carolyn L. Carter, *Consumer Protection in the States Appendix B: State-by-State Summaries of State UDAP Statutes*, NAT'L CONSUMER LAW CENTER INC. (Jan. 10, 2009), <http://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf>.

63. Carolyn L. Carter, *Consumer Protection in the States*, NAT'L CONSUMER LAW CENTER INC., (Feb. 2009), [http://www.nclc.org/images/pdf/car\\_sales/UDAP\\_Report\\_Feb09.pdf](http://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf).

64. *See Christie Christensen v. Jillian Michaels*, No. 2:2010cv01857 (C.D. Cal. Mar. 15, 2010);

*Lavie v. Proctor & Gamble, Co.*, 129 Cal. Rptr.2d 486 (Dist. Ct. App. 2003), *aff'd*, 105 Cal.App.4th 496 (Ct. App. 2003); *Bauder v. Ralston Purina Co.*, RICO Bus. Disputes Guide (CCH) ¶ 7600 (E.D. Pa. Nov. 22, 1989).

deceptive product claims.”<sup>65</sup> The goal of every endorser is to convince consumers that the product will not only work for its particular purpose, but that the consumer who uses the product will obtain the same results as the endorser. If an athlete endorses a product, consumers often believe that product will also enhance their own athletic performance.<sup>66</sup> This belief is essential to influencing the consumer’s purchase decision, and if a consumer is misled by a product claim, endorsers may incorrectly believe that no liability exists where the behavior was unintentional. Actual intent or knowledge of the falsity of the claim, however, is not a requirement for all theories against endorsers in false advertisement actions. Rather, in an unintentional misrepresentation claim, “scienter or guilty knowledge can be established by proving that a reasonable inquiry would have established the truth or falsity of a particular statement.”<sup>67</sup>

This section will discuss several potential consumer claims for false advertising and the merit of those claims. Specifically, this section will discuss possible claims for negligent misrepresentation, breach of express and implied warranties under the Uniform Commercial Code (U.C.C.), breach of express warranties (products liability), and strict liability as each apply to claims alleging false advertisement. These theories were selected for discussion because they provide consumer plaintiffs with the best means for holding endorsers liable.

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65. Consuelo Lauda Kertz & Roobina Ohanian, *Source Credibility, Legal Liability, and the Law of Endorsements*, 11 J. PUB. POL’Y & MARKETING 12, 12 (1992).

66. Christian Ryssel & Eric Stamminger, *Sponsoring World-Class Tennis Players*, 16 EUR. RES. 110 (1988).

67. Consuelo Lauda Kertz & Roobina Ohanian, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, 19 HOFSTRA L. REV. 603, 634 (1991).

A. *Negligent Misrepresentation*

In *Hanberry v. Hearst Corp.*, the plaintiff filed a claim for negligent misrepresentation against Good Housekeeping Magazine for injuries sustained by wearing a pair of shoes that the magazine assigned “the Good Housekeeping seal.”<sup>68</sup> The plaintiff alleged that the shoes were purchased based on this seal of approval.<sup>69</sup> The court held that such a seal implies careful examination of a product and found the magazine liable under § 311 of *The Restatement (Second) of Torts*.<sup>70</sup> Citing *Merrill v. Buck*, the court also stated that “privity [of a contract] is not necessary to establish the existence of a duty” to recover for the negligent misrepresentation by the defendant when the plaintiff relies on the endorsement in purchasing a product.<sup>71</sup>

For a consumer plaintiff to sustain an action for negligent misrepresentation, the plaintiff must show: (1) that the defendant supplied false information, (2) that the defendant failed “to exercise reasonable care or competence in obtaining or communicating the information,” (3) that the defendant intends for the information to influence the plaintiff and for the plaintiff to rely upon the misrepresentation, and (4) that the plaintiff was damaged as a result of his or her “justifiable reliance on the information.”<sup>72</sup> The requirements for negligent misrepresentation are difficult to meet, but there are cases in which plaintiffs have sustained claims against endorsers under this theory.

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68. *Hanberry v. Hearst Corp.*, 276 Cal.App.2d 680, 682 (Dist. Ct. App. 1969).

69. *Id.* at 683.

70. *Id.* at 685; *see also* RESTATEMENT (SECOND) OF TORTS §311 (1977).

71. *Id.* at 685; *see also* *Merrill v. Buck*, 58 Cal.2d 552, 561-62 (1962).

72. RESTATEMENT (SECOND) OF TORTS §552 (1977); *see also* *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 447 (4th Cir. 2001); *Maneely v. General Motors Corp.*, 108 F.3d 1176, 1181 (9th Cir. 1997); *Lloyd v. General Motors Corp.*, 916 A.2d 257, 273 (Md. 2007).

For example, in 1987, U.S. District Court Judge Milton Shadur denied actor Lloyd Bridges' motion to dismiss claims brought against him by investors who were defrauded by Diamond Mortgage Corp. and A.J. Obie Associates.<sup>73</sup> Bridges was featured in television advertisements where he claimed A.J. Obie Associates offered secured investments with high returns.<sup>74</sup> The two companies filed for bankruptcy after facing claims of more than \$40 million, and the company officers were later found guilty of fraud.<sup>75</sup> Similar lawsuits involving actor George Hamilton, who was also a paid endorser, and the advertising agency were settled after the bankruptcy court denied each party's motion for summary judgment.<sup>76</sup> Bridges refused to settle, claiming that he was merely a spokesperson and did not know the statements he made were false. A bankruptcy judge ruled that Bridges had a "duty to substantiate the truthfulness of the endorsements and obtain independent and reliable information regarding the financial stability of A.J. Obie Associates and Diamond Mortgage Corp."<sup>77</sup> The court found that had Bridges conducted a search about the company and its principals he would have discovered that the company had been involved in similar schemes in other states.<sup>78</sup> Bridges settled both cases for undisclosed amounts but never admitted any liability for his part in defrauding consumers.

Consumers who have brought claims for negligent misrepresentation have found the burden of proof to be a little easier than other claims for endorser liability. For negligent misrepresentation, knowledge of the falsity of statement is not

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73. *In re Diamond Mortg. Corp. of Ill.*, 118 B.R. 575, 576 (Bankr. N.D. Ill. 1989).

74. *Id.* at 577.

75. Paul Marcotte, *Endorser Liability: Actor Who Touted Now Bankrupt Firm Settles with Investors*. A.B.A. J., May 1990, at 24.

76. *In re Diamond Mortg. Corp. of Ill.*, 118 B.R. 583, 588 (Bankr. N.D. Ill. 1989).

77. *Id.* at 576.

78. *Id.*

required to expose the endorser to liability.<sup>79</sup> Endorsers must conform to a duty of reasonable care,<sup>80</sup> and some endorsers may incorrectly believe that they are protected even if they don't know about the falsity of a statement.<sup>81</sup> In *Clark v. Haggard*, the Supreme Court of Connecticut ruled that intentionally "not knowing" something is not a defense to the charge that statements were untrue.<sup>82</sup> The potential damage to their reputations provides endorsers with the motivation to not knowingly make false representations. Endorsers, however, may not understand that all that is required for negligent misrepresentation is a conscious disregard for whether the statements made in the endorsement are actually true. Thus, endorsers cannot protect themselves by hiding behind a veil of ignorance about the products they endorse.

It is also important to recognize that courts have distinguished expressly false claims from implied claims that mislead consumers. For express claims, "courts . . . rely on factual evidence to determine whether the advertised claim can be substantiated on the basis of scientific evaluation. Courts, however, fail to recognize that consumers often rely on what is implied in advertisements."<sup>83</sup> Consumers may have difficulty in distinguishing between what the athlete actually believes to be true about a product and what the company wants the athlete to say about the product.

Consumers must be justified in believing that the representation is true, and they must be justified in relying on the representation to make a decision.<sup>84</sup> But a consumer cannot

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79. DAVID G. OWEN, PRODUCTS LIABILITY LAW §3.3 at 132 (West Publishing Co., 2d ed. 2008).

80. Restatement (Second) of Torts §552(1) (1977).

81. *Clark v. Haggard*, 141 Conn. 668 (1954).

82. *Id.*

83. Manoj Hastak & Michael B. Mazis, *Deception by Implication: A Typology of Truthful but Misleading Advertising and Labeling Claims*, 30 J. PUB. POL. & MARKETING 157, 159 (2011).

84. W. KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS §108 at 753 (West Publishing Co., 5th ed. 1984).

rely on a statement of opinion as a representation of fact. At the heart of an endorsement is the endorser's opinion of the product, which makes it difficult for a consumer to establish the misrepresentation of fact absent a showing of factual assertion made by the endorser. If the endorser's comments are only opinions, then the consumer is not justified in relying on those opinions for the purpose of a negligent misrepresentation claim. There are, however, exceptions to this rule:

A person may rely on a statement of opinion when the statement carries with it the implied assertion that the speaker knows of nothing that would preclude the opinion, and that he or she knows facts that would justify it. This is implied when the speaker is understood to have special knowledge of the matter which is not available to the plaintiff.<sup>85</sup>

Therefore, a consumer is justified in relying on the statements of an athlete who claims to use a product and boasts of its benefits, especially if the product is one that the reasonable consumer believes the athlete would actually use to improve their performance as an athlete. If a consumer can prove that the athlete knew of the falsity of the statements and intentionally induced the consumer to rely upon the statements, negligent misrepresentation is a very viable theory for plaintiffs pursuing actions against athlete endorsers.

*B. Breach of Express and Implied Warranties  
Under the U.C.C.*

When a consumer buys a product that is not what they expected or fails to do what was promised by the endorser, warranty law will apply, specifically Article 2 of the U.C.C.,

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85. *Id.* §109 at 760-61.

which covers contracts for the transaction or sale of goods.<sup>86</sup> To establish a claim under warranty law, there first needs to be a contract between the endorser and the consumer. It could be argued that the endorser is a seller of a product, that the endorser's statements are an "offer" for a consumer to buy a product, and that such statements create a quasi or implied contract between the consumer and the endorser. But would such an argument succeed in court? The answer to that question resides in U.C.C. § 2-204(2), which states that "an agreement sufficient to constitute a contract for sale may be found even if the moment of its making is undetermined."<sup>87</sup> Implied contracts are inferred from the conduct of the parties,<sup>88</sup> and U.C.C. § 1-201(b)(12) states that contracts involve the total legal obligation resulting from the parties' agreement.<sup>89</sup> Such legal obligations include the consumer expectations regarding an endorsed product. By providing an endorsement, the endorser is assuring the consumer that specific facts about the product are true, and this is known as a warranty.<sup>90</sup> There are two types of warranties identified under the U.C.C.: express and implied. Express warranties may be verbal or written and are created through:

[A]ny affirmation of fact or promise made by the seller which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise, and [A]ny description of the goods which is made part of the basis of the bargain creates an

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86. U.C.C. § 2 (1977).

87. U.C.C. § 2-204(2) (2003).

88. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS §1.8(c) at 19 (West Publishing Co., 6th ed. 2009).

89. U.C.C. § 1-201(b)(12) (2011).

90. U.C.C. § 2-313(2) (2003).

express warranty that the goods shall conform to the description.<sup>91</sup>

Conversely, unless excluded or modified under the U.C.C., implied warranties are inherent in every transaction regardless of statements made by the seller.<sup>92</sup> Implied warranties are created if the seller knows the consumer's purpose for the product and that the consumer is relying on their skill or judgment to influence their purchase decision.<sup>93</sup> An implied warranty means that the product will, in fact, be fit for the consumer's purpose.<sup>94</sup> By enticing a consumer to buy a particular product with testimonials that a product will provide certain results, and ultimately causing a consumer to purchase the product based on those statements, endorsers are, in fact, making warranties about the product and what the consumer should expect from using it. Even if there is no express statement by the endorser about a product, an implied warranty of fitness may apply. Consumers need to be able to trust that if a product is made to do something in particular, it actually will serve that purpose.

Some companies have used disclaimers to protect themselves against express warranties and the implied warranty of fitness. For example, POMWonderful, a manufacturer of pomegranate-based products, utilized advertising campaigns that boasted the benefits of pomegranate antioxidants until the FTC filed a complaint that the company's claims that the product would treat heart disease were considered false advertising.<sup>95</sup> POMWonderful customers continued to believe in the product, but now the company webpage includes the

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91. U.C.C. § 2-313 (2003).

92. U.C.C. §2-314 (2003); U.C.C. §2-315 (2003).

93. U.C.C. §2-315 (2003).

94. *Id.*

95. Press Release, Fed. Trade Comm'n, FTC Complaint Charges Deceptive Advertising by POM Wonderful (Sept. 27, 2010), available at <http://www.ftc.gov/opa/2010/09/pom.shtm>.

following disclaimer: “Customer comments have not been tested or confirmed by POMWonderful LLC. You should not assume that any customer comments are typical of the results you will experience.”<sup>96</sup> This disclaimer was important to not only protect the company but also to protect the views, or warranties, posted by consumer endorsers.

In order to invalidate a warranty, a disclaimer must be “reasonable.”<sup>97</sup> It must also be in “writing and conspicuous.”<sup>98</sup> Under the U.C.C., a sufficient disclaimer would state “[t]here are no warranties that extend beyond the description on the face hereof.”<sup>99</sup> Furthermore, words such as “as is” or “with all faults” serve to inform the consumer that there are exclusions of warranties.<sup>100</sup> Moreover, if the consumer examines or even refuses to examine a product prior to purchase and there are “defects [in the product] that an examination in the circumstances should have revealed to [him],”<sup>101</sup> there is no implied warranty. In a circumstance where an endorser falsely claims that there are benefits to using a product, such claims may support an argument that there is a defect in the product that would invalidate the warranty.

Although the argument for the existence of warranties appears to have support from the U.C.C., three reasons exist why such a claim would be denied. First, basic common law requires that there be privity of contract between the buyer and seller.<sup>102</sup> The endorser is not privy, or party to, the transaction between the consumer or buyer and the retailer. As a result, why should the endorser be held liable for any product that the consumer purchases? Second, the U.C.C. defines a seller as

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96. POM WONDERFUL, <http://www.pomwonderful.com> (last visited Apr. 12, 2012).

97. U.C.C. § 2-316(1) (2003).

98. U.C.C. § 2-316(2) (2003).

99. *Id.*

100. U.C.C. § 2-316(3)(a) (2003).

101. U.C.C. § 2-316(3)(b) (2003).

102. OWEN, *supra* note 79, §4.5 at 188-89.

“person that sells or contracts to sell goods.”<sup>103</sup> An endorser is technically not contracting to sell a product. The endorser is merely providing a statement of opinion about the product, which leads into the third reason the claim would be denied. U.C.C. § 2-313(3) states that “an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.”<sup>104</sup> So, even if a consumer succeeded in convincing a court that the endorser is a seller, it would be difficult to label their statements as a warranty about a product under the U.C.C.

*C. Breach of Express Warranties and Strict Liability  
(Products Liability)*

Some theorists believe that consequential damages may also be available under tort claims through breach of an express warranty (products liability) or strict tort liability. With the first, an endorser would be liable to a consumer if a product does not “do” what it was designed to “do” (e.g., that the product does not fit its particular purpose). For example, in *Casserly v. PowerBalance*, Shaquille O’Neal was quoted as stating “I don’t really do a lot of testimonials, but this really works! I want to do everything to get the slightest advantage. I’m here to tell you it works!”<sup>105</sup> The PowerBalance bracelet was designed to increase balance, strength, and flexibility in its users, but while the company owners claimed that the product worked, there was no scientific evidence to substantiate their

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103. U.C.C. § 2-103 (2005).

104. U.C.C. § 2-313(3) (2003).

105. *Casserly v. PowerBalance, LLC*, No. CV11-00670 (C.D. Cal. filed Jan. 21, 2011). This quote originated from the PowerBalance website. At the time of this Article, Shaquille O’Neal’s athlete profile and testimonials were no longer available on the website.

claim.<sup>106</sup> If the product does not do what it was designed to do, there is a potential claim for breach of an express warranty. Under the second tort theory, “a seller who makes a misrepresentation as to a material fact concerning the character or quality of a product sold by him is strictly liable for physical harm to a consumer caused by justifiable reliance upon the misrepresentation.”<sup>107</sup> Although the plaintiffs in *Casserly* were not physically harmed by the PowerBalance bracelets, strict liability may be applied where there is consumer harm from a product.

It is important to note that the language in these claims closely mirrors the terminology in the U.C.C. claims. The advantage of pursuing a tort claim is that it allows the consumer to claim liability without fault and without privity, and liability exists regardless of intent and whether the consumer entered into a contractual relationship with the seller. The plaintiff does not have to prove that the endorser made a representation nor that the consumer relied upon it. Unfortunately, both of these actions may unfairly impose liability on the endorser without fault.<sup>108</sup> It is with this basic premise in mind that most lawsuits naming athlete endorsers as defendants in false advertisement claims have not been successful.

Companies and endorsers have also defended lawsuits by arguing that certain claims are permissible because they are merely puffery, rather than fact, and the ordinary consumer would understand the statements to be an exaggeration rather than the endorser’s honest belief or opinion.<sup>109</sup> Others have

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106. Garrett Downing, *Power Balance Bracelets Exposed as Fraud*, NEWSNET5.COM (Jan. 5, 2011), <http://www.newsnet5.com/dpp/news/national/power-balance-bracelets-exposed-as-fraud>.

107. RESTATEMENT (SECOND) OF TORTS §402B (1965).

108. Jay S. Kogan, *Celebrity Endorsement: Recognition of a Duty*, 21 J. MARSHALL L. REV. 47, 75 (1988).

109. *See Chic Promotion v. Middletown Sec. Sys.*, 688 N.E.2d. 278, 282 (Ohio Ct. App. 1996) (general assertions in a sales brochure were deemed puffing rather than a warranty).

argued the doctrine of caveat emptor,<sup>110</sup> which means “let the buyer beware.”<sup>111</sup> This doctrine puts the responsibility on the buyer to investigate whether a product is fit for its particular purpose prior to purchase.<sup>112</sup> Endorsers, however, should use *FTC v. Education Society* as a rule of thumb. “Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that the rule of caveat emptor should not be relied upon to reward fraud and deception.”<sup>113</sup> If an endorser is deceiving consumers, the behavior should not be ignored. Truth in the marketplace is essential to consumer protection, and endorsers would be remiss to believe there are no legal repercussions for their actions.

#### V. WORDS OF CAUTION TO ATHLETE ENDORSERS

Whether at the hands of the FTC or through consumer lawsuits, athletes need to take responsibility for limiting liability for false advertising claims through endorsements. Basic due diligence to substantiate product claims is essential and understanding what is said, and not said, will help in reducing potential liability. The aforementioned theories are only a glimpse of what could happen, and the lack of FTC claims and consumer lawsuits should not provide athlete endorsers with a false sense of security. In fact, the review of existing literature and case law revealed that athlete endorsers should be more cautious in selecting both the companies and products they choose to associate with. This is especially true given the continued growth of athlete endorsement deals. Companies will continue to distinguish products among a sea of marketing messages in order to influence the purchases of

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110. Fed. Trade Comm'n v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937).

111. OWEN, *supra* note 79, at 170 n.3.

112. Ollerman v. O'Rourke Co., Inc., 94 Wis.2d 17, 30 (1980).

113. *Id.*

potential customers. By associating its product with the athlete's persona, a company is "fusing the celebrity's identity with the product and thereby siphoning some of the publicity value . . . in the [athlete's] persona into the product."<sup>114</sup> The very nature of the endorsement culture is rooted in the fact that "endorsement advertisements are most effective when the consumer identifies with the endorser because of perceived similarities between himself and the endorser, or when the consumer believes what the endorser says either because the endorser is perceived to be personally credible or is perceived to be an expert,"<sup>115</sup> and athletes are an "easy and familiar way to manipulate consumer perception of a product."<sup>116</sup>

This ability to "manipulate consumer perception" has been hampered by athlete conduct that calls their credibility as endorsers into question. Controversies involving athlete endorsers have resulted in companies distancing themselves from the athletes based on the fear that the negative publicity associated with the controversy would transfer to the image of the company and its products. In 2003, McDonald's and Nutella terminated its contract with Kobe Bryant when he was on trial for rape.<sup>117</sup> Barry Bonds lost agreements with Mastercard, KFC, and Charles Schwab when he was linked to a steroid scandal.<sup>118</sup> Most notably, Tiger Woods lost agreements with Accenture and AT&T after acknowledging extra-marital affairs.<sup>119</sup> Advertisers began to "use the morals clause in an attempt to quickly disconnect the [endorser]/product

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114. *Lugosi v. Universal Pictures*, 25 Cal.3d 813, 834 (1979).

115. Kertz & Ohanian, *supra* note 67, at 603.

116. Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 240 (2006).

117. Leah Goldman & Dashiell Bennett, *12 Athlete Endorsements That Were Lost to Scandal*, BUS. INSIDER (Aug. 8, 2011 10:32 AM), <http://www.businessinsider.com/12-athlete-endorsements-that-were-lost-to-scandal-2011-8>.

118. *Id.*

119. *Id.*

association in the consumer's mind."<sup>120</sup> The industry recently saw a trend calling for insuring endorsements against athlete scandals. Companies were encouraged to change the morals clauses in endorsement contracts to cover more contingencies and to incorporate incentives based upon on-field performance.<sup>121</sup>

Similarly, athletes must also protect their names and personas against corporate scandals. As a precautionary measure, athletes should request a reverse morals clause in their agreements that would allow them to terminate endorsement deals based on endorsee misconduct. A reverse morals clause is "a reciprocal contractual warranty . . . intended to protect the reputation of talent from the negative, unethical, immoral, and/or criminal behavior of the endorsee-company or the purchaser of talent's endorsement."<sup>122</sup> These clauses are designed to give endorser's the right to terminate an endorsement agreement based upon defined negative conduct by the endorsee company. Such negative actions may include bankruptcy or the business' closing, such as National Car Rental, or bad business practices, such as Enron. When an athlete's reputation attaches to a product or company, such scandals may transfer to the athlete, and athletes must negotiate protection for their reputation in their endorsement agreements. Once a consumer associates the athlete with a company scandal, this may result in damage to the athlete's reputation, which may in turn affect the athlete's ability to secure future endorsement agreements. A review of state and federal cases fails to reveal the enforcement of such provisions in contracts,

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120. Kressler, *supra* note 116, at 241.

121. Ken Belson & Richard Sandomir, *Insuring Endorsements Against Athletes' Scandals*, N.Y. TIMES (Feb. 1, 2010), <http://www.nytimes.com/2010/02/01/sports/01insurance.html?pagewanted=print>.

122. Porcher L. Taylor, III, Fernando M. Pinguelo & Timothy D. Cedrone, *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. L.J. 65, 66-67 (2010).

and no endorsement contracts have publicly revealed such a clause,<sup>123</sup> but these clauses are definitely in the best interest of the athlete, especially in the event that a company becomes insolvent. Research shows that consumers are more likely to sue endorsers when the advertising company is insolvent.<sup>124</sup>

Most endorsement agreements contain indemnification provisions to protect athletes if they are included in legal claims based on product defects and product liability. Endorsers may also request to be beneficiaries of insurance policies to cover any additional financial loss. Athletes, however, should not believe they are safe from persecution from the FTC or from lawsuits in general. The Guides “provide the basis for voluntary compliance with the law by advertisers and endorsers.”<sup>125</sup> If an athlete’s endorsement messages are inconsistent with these Guides, regardless of being indemnified by the product manufacture or advertising company, under section 5, the FTC has authority to enforce the statute and seek legal penalties against the endorser.<sup>126</sup>

Porcher L. Taylor suggests implementing an endorsement checklist that is based on “simple, no-cost, quick, accurate due diligence” to determine whether a company could pose a risk to the athlete’s reputation.<sup>127</sup> The athlete should look for previous scandals involving the company or its principals; a study by Melissa Baucus and Janet P. Near indicated that if a company had prior violations or misdealings, it is more likely to be involved in them again.<sup>128</sup> If the company is publicly traded, reviewing the financial statements is also advisable. Additionally, athletes should look at company websites and conduct a general search on the Internet to see

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123. *Id.* at 71-72.

124. Kertz & Ohanian, *supra* note 67, at 604.

125. 16 C.F.R. § 255.0(a) (2011).

126. *Supra* notes 16 and 17.

127. Taylor, Piguero & Cedrone, *supra* note 122, at 91.

128. Melissa Baucus & Janet P. Near, *Can Illegal Corporate Behavior Be Predicted? An Event History Analysis*, 34 ACAD. MGMT. J. 9, 9 (1991).

what comes up. Information may also be found in blogs or other online communities and federal court filings. When choosing to associate with a company for an endorsement, athletes should “not be lured into a false sense of regulatory, financial, or reputation security.”<sup>129</sup>

Also, athletes should not rely on indemnification provisions to protect them from consumer lawsuits. While indemnification clauses are designed to protect athletes from future legal actions, claims of indemnity may be useless if the sponsor is insolvent. Whether endorsers want to acknowledge it or not, consumers have confidence in the information provided by the endorser. It could easily be argued that “but-for” the advertising message provided by the athlete, a consumer would not have purchased the product. “The law treats an [endorser’s] identity as property which he or she may use, lend, or sell to others for profit, the [endorser], like other property owners, should not be permitted to use his property with impunity or in a manner harmful to others.”<sup>130</sup> The research indicates that enforcement lawsuits have been minimal rather than non-existent, and endorsers should remember that the FTC standard of liability only requires the likelihood of being misled.

Under sections 5 and 12 of the FTCA, endorsers participating in false advertisements can also create liability.<sup>131</sup> In *Porter & Dietsch, Inc. v. Federal Trade Commission*, the court held that where a drug retailer only provided its name to be printed on advertisements for a diet product that was furnished by the manufacturer, it was not a defense that the retailer acted under the direction and control of the advertiser.<sup>132</sup> The fact that the retailer had no “critical” part in

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129. Taylor, Piguelo & Cedrone, *supra* note 122, at 85.

130. Jay S. Kogan, *Celebrity Endorsement: Recognition of a Duty*, 21 J. MARSHALL L. REV. 47, 53-54 (1988).

131. *Supra* notes 16 and 17.

132. *In re Porter & Dietsch, Inc.*, 90 F.T.C. 770, 864-65 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

the advertising campaign was only a factor in determining the proportion of liability as it related to its obligation for consumer remedy.<sup>133</sup> Even if an athlete endorser lends their name to a product, liability may arise, and although due diligence is expected, the athlete may be held responsible if testimonials are based on independent investigation. Fear of liability should not be a deterrent for independent investigation. It would be unreasonable and irresponsible for an athlete endorser to not inquire about the validity of claims made regarding products. The reality is that “sport celebrities cannot just accept a check and read a script prepared by an advertiser without taking steps to substantiate the truth of the product claims.”<sup>134</sup>

## VI. CONCLUSION

Ultimately, athletes have a responsibility to protect consumers as well as their own identities from false endorsements. If an athlete chooses to endorse a product, due diligence about the company and the product is necessary not only for the consumer but also for the athlete’s reputation. There may be legal liability as an endorser, and if sued, the cost of legal fees and possible consumer damages could be costly, both financially and to the image of the athlete. If an athlete is linked to a product or company that is defrauding consumers, the athlete may be seen as incredulous, thereby reducing the athlete’s potential for future endorsement opportunities. Often times, consumers may believe that the endorsement is more about the financial benefit to the athlete than the athlete’s actual confidence in the product that they endorse.<sup>135</sup> As a result, the perception from the consumer often includes a view

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133. *Id.*

134. Anita M. Moorman, *False Advertising and Celebrity Endorsements: Where's My Script?*, 15 *SPORT MKTG. Q.* 111, 113 (2006).

135. Robin B. Evans, *Production and Creativity in Advertising* (Pitman Publishing 1988).

that the athlete endorser is a liar, and that they are not “genuine or real.”<sup>136</sup> If an athlete endorser is placed in this category, consumers may never trust the athlete again, and endorsee companies will have no reason to offer the athlete additional endorsement opportunities.

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136. John Temperley & Daniel Tangen, *The Pinocchio Factor in Consumer Attitudes towards Celebrity Endorsement: Celebrity Endorsement, The Reebok Brand, and an Examination of a Recent Campaign*, 2 SPECIAL EDITION ON CONSUMER SATISFACTION - GLOBAL PERSPECTIVE, INNOVATIVE MARKETING 97, 104 (2006).

# SPOKESPERSON OR ENDORSER? THE FTC GUIDES AND *F.T.C. v. GARVEY* IN DETAIL

Michael Pang

Professors Brison, Baker, and Byon, in their article *False Advertisement Claims: Analysis of Potential Athlete Endorser Liability*, discuss the Ninth Circuit Court of Appeals' decision in *F.T.C. v. Garvey*.<sup>1</sup> The authors of the article note that Steve Garvey, a former first baseman for the Los Angeles Dodgers, acted as a "spokesperson" and not an "endorser" when he appeared in infomercials for Enforma dietary supplements, thereby escaping endorser liability for false advertisement. What is the difference between a spokesperson and an endorser? Moreover, did the Ninth Circuit really decide that Garvey was not an endorser?

According to the Federal Trade Commission Guides Concerning Use of Endorsements and Testimonials in Advertising (the FTC "Guides") an endorsement is "any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser."<sup>2</sup> Naturally, a person delivering such an endorsement could be defined as an "endorser." The FTC Guides, however, do not provide a similar definition for a "spokesperson." The FTC Guides use the term "spokesperson" three times, but the term is only used in examples and never to differentiate a person from an endorser.<sup>3</sup> A spokesperson, then,

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1. Fed. Trade Comm'n. v. Garvey, 383 F.3d 891 (9th Cir. 2004).
  2. 16 C.F.R. § 255.0(b) (2009).
  3. 16 C.F.R. §§ 225.0, 255.2, and 255.5 (2009).

could simply be considered as a person who appears in an advertisement but does not endorse a product.

In *Garvey*, the Ninth Circuit deferred to the district court and its conclusion that Garvey did not make an endorsement.<sup>4</sup> Specifically, the Ninth Circuit reiterated the district court's finding that the FTC "failed to present . . . any facts establishing that consumers are likely to believe that Garvey's statements with respect to the Enforma System reflect the opinions, beliefs, findings and experience of a party other than Enforma Natural."<sup>5</sup> A finding that Garvey did not make an endorsement (and, therefore, was not an endorser) probably should have been enough to protect Garvey from endorser liability for false advertisement. The Ninth Circuit, however, continued its analysis by further considering the FTC Guides and their rules for endorsements.

First, the Ninth Circuit found that Garvey's appearance in the Enforma infomercials satisfied the FTC Guides' rule that "[e]ndorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser."<sup>6</sup> Because Garvey based his statements on his actual beliefs and experiences, his honesty was undisputed.<sup>7</sup> Second, the Ninth Circuit found that Garvey's appearance satisfied the FTC Guides' rule that endorsements "may not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser."<sup>8</sup> Because Garvey and his wife used the dietary supplements and lost weight, and because he only made statements regarding that weight loss, his statements were substantiated.<sup>9</sup>

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4. *Garvey*, 383 F.3d at 904.

5. *Id.*

6. 16 C.F.R. § 255.1(a) (2009).

7. *Garvey*, 383 F.3d at 905.

8. 16 C.F.R. § 255.1(a) (2009). This section was amended December 1, 2009, moving the rules for substantiation to §§ 255.2(a) and (b).

9. *Garvey*, 383 F.3d at 905.

On the one hand, the Ninth Circuit in *Garvey* affirms the district court's holding that Garvey was not an endorser. On the other hand, the Ninth Circuit's own analysis of the FTC Guides suggests that Garvey was an endorser, but was not liable for false advertisement under a theory of endorser liability. In any event, the Ninth Circuit never finds that Garvey was just a spokesperson. Whether "[t]he Ninth Circuit's decision in *Garvey* was contrary to the FTC's definition of an endorsement," as Professors Brison, Baker, and Byon contend, is somewhat unclear. In any case, the authors' advice for endorsers is good: endorsers should make sure their statements reflect their own honest beliefs, and they should always substantiate those statements. Following this advice might not turn an endorser into a spokesperson (whatever that term might mean), but it will help protect them from endorser liability for false advertisement.



# TEACHING AN OLD DOG NEW TRICKS: TITLE IX AND THE ESSENTIAL UPGRADE

Kellen W. Bradley\*

## I. INTRODUCTION

Laws are not perfect. And, perhaps unfortunately, the effectiveness of a law can be fairly judged exclusively through the prism of its results. As is most often the case with regard to discrimination law—we know it when we see it. The violation of Title IX is no exception. True gender equality in educational opportunities and, for purposes of this Article, athletic opportunities, can undoubtedly be reached. Nevertheless, several NCAA member institutions have consistently evaded the intent of Title IX, yet still been found in compliance with the statute. Many pundits see no problem with the status quo of devious roster management while others point to a lack of resources as justification for cutting roster spots and teams.

It would be one thing if every school had infinite funds – limited opportunity to compete in a sport would be a ludicrous thought. Since resources are limited, however, a school must allocate them to put the school in the best position possible while still complying with Title IX. Or do they? Frequently, under the antiquated statute, schools discriminate on the basis of sex under Prong 1 of Title IX, also known as the safe harbor provision. That is, of course, until they get caught.

This Article thus frames and explores one seemingly simple question: How does a law that requires schools to offer

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equal opportunities to both sexes simultaneously compel discrimination of both sexes? Accordingly, this Article looks at several instances of uncured discrimination at major American colleges and attempts to make the case for a wholesale re-examination of Title IX.

The statute has placed an unreasonable burden on schools in hard financial times and forced them to discriminate on the basis of sex. To meet the requirements of Title IX, schools are often forced to either (1) cut sports programs, (2) shuffle rosters and athletes, or (3) lie when reporting to the regulating agency. This activity is entirely inconsistent with Title IX. This Article explores the multifaceted risks associated with an NCAA member institution's compliance with Title IX (mostly under Prong 1) in the wake of the UC Davis case and provides recommendations to the institutions and enforcement agencies as a guide to prevent NCAA sanctions and civil litigation.

Part I discusses the history of Title IX and the struggles and challenges member institutions, legislators, and enforcement bodies have encountered in complying with and interpreting the statute. Part II outlines recent decisions (in particular, the UC Davis case) involving discrimination and the gender-conscious removal of athletes and teams. Part III discusses how member institutions have circumvented the challenge of compliance (often created by the presence of a football team) by implementing roster management techniques. Finally, Part IV calls for an OCR clarification that would implement a strict scrutiny standard and for the consideration of Title IX compliance notwithstanding football membership.

## II. TITLE IX GENERALLY

During the Nixon years, Congress addressed intense social concern and passed Title IX of the Education Amendments to the Civil Rights Act of 1964, which states in relevant part that, "No person in the United States shall, on the

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basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.<sup>1</sup> The Department of Education's Office of Civil Rights (OCR) enforces Title IX via the "Three-Prong Test" (Test) contained in the larger analytical framework of the 1979 Policy Interpretation, which currently determines compliance.<sup>2</sup>

### *A. OCR's Role*

OCR's regulation contains specific provisions governing athletic programs<sup>3</sup> and the awarding of athletic scholarships.<sup>4</sup> Specifically, the regulation provides that "[i]f an institution operates or sponsors an athletic program, it must provide equal athletic opportunities for members of both sexes."<sup>5</sup> In determining whether equal athletic opportunities are available, the regulation requires OCR to consider whether an institution is effectively accommodating the athletic interests and abilities of students of both sexes.<sup>6</sup> Under the larger umbrella of discrimination law, OCR essentially must monitor the halls of college athletics and make sure each student has the chance to play the sport he or she desires. It should be noted that the OCR is not perfect in its capacity as judge, which some equate to a "law student who marks his own examination papers."<sup>7</sup>

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1. Title IX of the Education Amendments Act, 20 U.S.C. § 1681 (1972).

2. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

3. 34 C.F.R. § 106.41 (1972).

4. 34 C.F.R. § 106.37(c) (1972).

5. 34 C.F.R. § 106.41(c) (1972).

6. 34 C.F.R. § 106.41(c)(1) (1972).

7. H.L. Mencken, Journalist, THE BALTIMORE SUN (1880-1956).

*B. The Three-Prong Test*

Under the Test, a school is presumed to provide nondiscriminatory participation opportunities to its student-athletes if it satisfies any one of the following: (1) the ratio of male to female athletes is substantially proportionate to the ratio of male to female students enrolled at the school; (2) the school has a history and continuing practice of expanding participation opportunities for the underrepresented sex (typically female); or (3) the school is fully and effectively accommodating the interests and abilities of the underrepresented sex.<sup>8</sup> This much has remained constant since 1979.

Fearing the interpretations courts might give the more subjective second and third prongs, schools have repeatedly selected Prong 1 as a means of compliance. As a result, and in practice, the Test has collapsed into just one prong, and “substantial proportionality” has thus ruled the day of Title IX.<sup>9</sup>

*C. Clarification?*

Describing Title IX interpretation and application over the course of its development as ‘burdensome’ would be a drastic understatement. Following several discrimination suits (discussed *infra*), OCR answered the call for clarity in its 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (the Clarification).<sup>10</sup> The uncertainty lingered

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8. 20 U.S.C. § 1681, *et seq.* (1972).

9. *See generally*, Scott Jaschik, *Changing the Rules*, INSIDE HIGHER ED (Mar. 22, 2005), <http://www.insidehighered.com/news/2005/03/22/titleix>.

10. Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, Office of Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, 2 (Jan. 16, 1996) (on file with United States Department of Education) (The Clarification confirms that institutions only need to comply with any one part of the three-part test to prove nondiscriminatory participation opportunities exist.).

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and OCR released the Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (Further Clarification) on July 11, 2003, which did little more than reiterate the Clarification and explain that the reduction or cutting of teams was both “not require[d]” and “disfavored.”<sup>11</sup> Under the Bush Administration, OCR issued the Additional Clarification of Intercollegiate Athletic Policy: Three-Part Test: Part Three (Additional Clarification),<sup>12</sup> which spelled out burden of proof distribution, offered a sample e-mail survey to collect data on interest satisfaction, and otherwise set the rules for compliance with Prong 3 of the Test.<sup>13</sup>

OCR’s clarification efforts ultimately failed when the Obama Administration repealed the Additional Clarification on April 20, 2010.<sup>14</sup> Before this time, schools were to comply with

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11. Letter from Gerald Reynolds, Assistant Secretary of Civil Rights, Office of Civil Rights, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003) (on file with United States Department of Education) (stating that: “(1) The Three-Part Test for assessing compliance with the participation portion of Title IX provides schools with flexibility and will continue to be the test used by the OCR to determine compliance; (2) Title IX did not require the cutting or reduction of teams and that such a practice is disfavored, and generally reinforced prior Title IX regulations.”).

12. Office for Civil Rights, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three (Mar. 17, 2005) (rescinded by “Dear Colleague” letter on Apr. 20, 2010).

13. U.S. Department of Education, Office for Civil Rights, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three (2005) (“The OCR will deem schools to be in compliance with Title IX if the school uses the OCR-provided e-mail survey and finds that there is no unmet interest and ability of the underrepresented sex.”) *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>.

14. *See* Letter from Russlynn Ali, Assistant Secretary of Civil Rights, Office for Civil Rights, Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three, (Apr. 20, 2010) (rescinding 2005 Additional Clarification and setting forth current Title IX compliance guidelines) (*available at* <http://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX-Docs>); *see also* NCAA Executive Committee Resolution Opposing the Clarification Signed by Chair Carol Cartwright to Secretary of

Title IX while OCR was not entirely sure how to interpret the statute. Certainly, there must have been some method to the madness. Or perhaps it is true that “[t]he United States is a nation of laws: badly written and randomly enforced.”<sup>15</sup> In any event, the 2010 Clarification rescission serves as an example of the OCR’s capability of both recognizing a shortcoming in Title IX enforcement and correcting it. The same approach should be utilized to increase protection for the student-athlete experience of males and females in nonrevenue sports today.

#### *D. Conventional Compliance*

The overwhelming majority of schools support a broad-based offering of varsity sports. In Division I (which requires a minimum of 16 varsity sports offered), the economic reality is that the expense of competing in athletics has increased rapidly. And short of private donations and profits from high-revenue teams (e.g., football and basketball) that can bankroll nonrevenue sports teams (e.g., swimming and wrestling), several schools have struggled to keep pace. Despite the struggle, compliance departments must still satisfy the main goal of Title IX: gender equality.

Equality is certainly a loaded word, and even further befuddling by a fundamental problem: all athletes are created equal, but (let’s face it) some sports are more equal than others (after all, they are created by man). That includes male and female sports. It is unquestioned that female participation in athletics has benefitted tremendously from Title IX. In just thirty-nine years, women now outnumber men in

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Education Margaret Spellings, NCAA, Gender Equity in Intercollegiate Athletics, p.189 (2008) stating that “NCAA members [we]re urged to decline use of the procedures set forth in the March 17, 2005 Additional Clarification and abide by the standards of the 1996 Clarification to evaluate women’s interest in sports under the third prong of the Three-Part Test.”

15. Frank Zappa, Producer, *The Mothers of Invention* (1940-1993).

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undergraduate and graduate enrollment, and where only 300,000 women played high school sports in 1971, the number of women participating in sports at the high school level is now close to 3 million.<sup>16</sup> Unfortunately, the fact remains that women's athletics have not reached the level of their male counterparts. This is not because of a lack of access or opportunity, but rather a product of fan interest. As Patrick Pexton, ombudsman of the Washington Post, declares, "[W]omen as well as men are more interested in men's . . . sports generally than they are in women's teams or women's sports, and by large margins."<sup>17</sup>

For all its success, Title IX still fails to acknowledge this reality. And at the end of the day, schools are still obligated to support teams that struggle to generate revenue and interest lest forfeit precious and substantial federal funding.<sup>18</sup> When a school does struggle financially, it is often precluded by Title IX from simply cutting the high-cost or nonrevenue teams and left with the task of creating a compliant athletics program. For those schools, Title IX presents a tremendous burden. So the question then becomes, how do NCAA member institutions comply without cutting athletic opportunities? Compliance departments seek roster management techniques to find a palatable solution.

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16. See generally, Athletics, TITLE X INFO, <http://www.titleix.info/10-Key-Areas-of-Title-IX/Athletics.aspx> (last visited Sept. 20, 2011).

17. Patrick B. Pexton, *Women's Sports Coverage Lacking*, WASH. POST (June 10, 2011), [http://www.washingtonpost.com/opinions/womens-sports-coverage-lacking/2011/06/10/AGk2kLPH\\_story.html](http://www.washingtonpost.com/opinions/womens-sports-coverage-lacking/2011/06/10/AGk2kLPH_story.html).

18. See Claire Gordon, *Title IX Complaint Against Yale Has a Case*, HUFFINGTON POST (Apr. 4, 2011), [http://www.huffingtonpost.com/claire-gordon/yale-sexual-harassment-title-ix\\_b\\_843273.html](http://www.huffingtonpost.com/claire-gordon/yale-sexual-harassment-title-ix_b_843273.html) (stating that Yale's potential Title IX violation could force the OCR to revoke \$510.4 million (2010's federal funding)).

## III. UC DAVIS AND OTHERS

Examples of lost athletic opportunities in the name of Title IX abound. And where discrimination is center court, the specific sport and the institution are paramount. Courts and OCR view contact sports and noncontact sports differently. Thus, in cases involving gender discrimination in athletics, the arguments employed vary depending on the sport. In addition to Title IX, the litigant often makes use of other theories (e.g., Equal Protection Clause (EPC)<sup>19</sup> and state Equal Rights Amendments in certain states).

Recently, UC Davis lost a long and hard-fought case against three former female students who claimed they were denied the opportunity to participate in varsity wrestling. That UC Davis conceded Prong 1 (substantial proportionality) noncompliance might have been the tipping point against the defendant. In *Mansourian v. Regents of University of California*, the Eastern District of California found for the plaintiffs on their claims for ineffective accommodation of female student-athletes under Title IX based upon UC Davis' failure to demonstrate a continuing practice of program expansion (Prong 2).<sup>20</sup>

Athletic Director Greg Warzecka (Warzecka), who stepped down after sixteen years on June 30, 2011, was aware that female athletic participation opportunities were not substantially proportionate to female undergraduate enrollment when he began implementing roster management techniques in the late 1990s to achieve gender parity.<sup>21</sup> He did so based on

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19. U.S. Const. amend. XIV, § 1 (stating that: "No State shall make or enforce any law, which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")<sup>62</sup>

20. *Mansourian v. Regents of University of California*, No. 2:03-cv-2591 (E.D. Cal. Aug. 3, 2011), available at [http://www.nacua.org/documents/Mansourian\\_v\\_UCal\\_Aug2011.pdf](http://www.nacua.org/documents/Mansourian_v_UCal_Aug2011.pdf).

21. *Mansourian*, *supra* note 20, at 81.

his understanding that “roster management was approved in the decision of *Neal v. California State University*[,] and would help address the participation ratio.”<sup>22</sup> At first glance, Warzecka’s reliance might seem naive; however, a closer look might expose a circuit court giving athletic departments *carte blanche* to make gender-conscious cuts in the name of Title IX.

In *Neal*, the Third Circuit denied appellants’ (male wrestlers) request to reverse a trial court holding that the California Board of Regents (California State University, Bakersfield was named) had not violated Title IX, essentially because the gender-conscious decision to cut men’s spots on the wrestling team was in pursuit of satisfying the ‘substantial proportionality’ test (Prong 1).<sup>23</sup> The crux of this case came in dicta where the court offered that, “If a university wishes to comply with Title IX by leveling down programs instead of ratcheting them up, as Appellant has done here, Title IX is not offended, and additional discovery into the interests of males and females in participating in intercollegiate athletics would not have been relevant.”<sup>24</sup> Warzecka was not alone in the frustration of Title IX compliance, and one wonders, in the wake of *Neal*, how they were unable to comply under Prong 1.

From 1994 to 2004, co-defendant Robert Franks (Franks) was the Associate Vice Chancellor for Student Affairs. Franks was also aware of the unequal opportunities for women and found Prong 1 compliance particularly challenging because women’s enrollment fluctuated from year to year.<sup>25</sup> Despite this, he never directed Warzecka to eliminate opportunities for males because he considered the campus compliant under Prong 2 (continuing practice of program expansion) at all relevant times. Although the roster management program (reducing athletic opportunities) ran

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22. *Id.*; see also *Neal v. Bd. of Trustees of Cal. State Universities*, 198 F.3d 763 (9th Cir. 1999) (*cert. denied*).

23. See *Neal*, 198 F.3d at 770.

24. *Id.*

25. *Mansourian*, *supra* note 20, at 85.

counter to UC Davis' philosophy, Franks approved it as necessary to reduce the size of a number of men's programs and comply under Prong 2 while dealing with resource constraints.<sup>26</sup> Four varsity sports ultimately were cut including men's wrestling, swimming, diving, indoor track and field, and women's rowing.<sup>27</sup> The momentous decision was reportedly not made on an impulse. Instead, it followed the consideration and review of twenty separate models for reaching fiscal solvency.

Despite conflicting testimony at trial, Franks never actually authorized wrestling coach Burch to exclude any women from his roster. Once he learned that women had been cut and not reinstated to the team, Franks' efforts to cure the situation failed, and the women were left to tryout against men as their only chance to join the team.<sup>28</sup> The girls protested and later sued. After conceding noncompliance under Prong 1, Judge Damrell found that UC Davis violated Title IX because it could not prove that it had a continuing history of expanding opportunities for women (Prong 2).<sup>29</sup> The administrators were immune to the claims, and the court was particularly swayed by evidence that, while plaintiffs were enrolled, UC Davis eliminated more than sixty actual participation opportunities for women, which it never fully regained over the next four years.<sup>30</sup>

It might not be entirely accurate to call the decision, as it stands, a victory for the plaintiffs. The decision reads more like an enunciation of Prong 2 compliance than an expansion or

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26. *Id.* at 87 (both parties conceded that UC Davis was in no way compliant with Prongs 1 or 3).

27. *UC Davis to Drop Four Teams Due to Financial Crisis*, News & Information University of California Davis, [http://news.ucdavis.edu/search/news\\_detail.lasso?id=9432](http://news.ucdavis.edu/search/news_detail.lasso?id=9432) (last visited Sept. 20, 2011).

28. Erin E. Buzuvis, *Sidelined: Title IX Retaliation Cases and Women's Leadership in College Athletics*, 17 DUKE J. GENDER L. & POL'Y 1, 29 (2010).

29. *Mansourian*, *supra* note 20, at 107.

30. *Id.*

reinforcement of women's athletic opportunities. This case serves as an example of a contact sport in which females sought participation, but that is not what makes this case unique. It is unique because it is one of the few times<sup>31</sup> where a school both violated Title IX (via Prong 2) and conceded noncompliance with Prong 1.

There is more at stake than female opportunities alone. Before the UC Davis case at the University of Illinois, former members of the swim team sued the university after four varsity sports, including men's swimming, were eliminated.<sup>32</sup> In *Kelly v. Board of Trustees Ill.*, the plaintiffs claimed that the decision to drop the men's program while retaining women's swimming violated Title IX.<sup>33</sup> The court held that the university was well within its rights because, even after eliminating the program, the men's participation levels in athletics continued to be more than substantially proportionate (Prong 1 was satisfied).<sup>34</sup> This is precisely the type of ruling that runs counter to the intent of Title IX. In conjunction with *Neal*, the court examined and permitted the gender-conscious removal of an athletic opportunity, ignored student interest, and simply looked at the overall ratio.

More important, by agreeing that the university eliminated the men's swimming program in an effort to cut its athletic budget and get rid of teams that were not competitive on a national level, the court refused to believe that any decision was made because of sex.<sup>35</sup> The court further stated, as it did again later in *Boulahanis v. Board of Regents*,<sup>36</sup> that

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31. See also *Bryant v. Colgate Univ.*, 996 F. Supp. 170 (N.D.N.Y. 1998) (ruling that Colgate University was not within the "substantially proportionate" safe harbor provided by the OCR policy interpretations and granted the plaintiffs summary judgment on this issue).

32. *Kelly v. Bd. of Trustees Ill.*, 35 F.3d 265 (7th Cir. 1994) *aff'd*, 115 S. Ct. 938 (1995).

33. *Id.*

34. *Id.* at 270.

35. *Id.*

36. *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 637 (7th Cir. 1999).

decisions cannot be distinguished as sex-based or financially based because the decision of which athletic programs to offer necessarily entails budgetary considerations.<sup>37</sup> By that same logic, virtually any team could be cut without Title IX consequences simply under the defense of budgetary reasons. This ruling perpetuated the free rein engendered in *Neal* and empowered athletic departments to confiscate the opportunities of one sex without creating a single opportunity for the other.

In the same fashion, a Drake University decision to eliminate the wrestling program triggered a lawsuit by four members of the team.<sup>38</sup> The plaintiffs in *Gonyo v. Drake University* claimed the action violated Title IX and the EPC.<sup>39</sup> The court disagreed and held that because Drake fell within the safe harbor provision (Prong 1), the university was compliant under Title IX.<sup>40</sup> The court also rejected the constitutional challenge and concluded that while consideration of gender in the application of Title IX may work to the immediate disadvantage of males under the facts of this case, that fact alone did not support a challenge under the EPC.<sup>41</sup> The court chose to ignore that Title IX regulations, as enforced, threatened nonrevenue student-athletes' educational experiences across the country.<sup>42</sup> Yet again, the removal of one gender's athletic opportunities while creating none for the other is permitted.

It is important to realize that gender-conscious decisions in education are subject to intermediate scrutiny, but here the district court did not even conduct a complete EPC analysis. Alternatively, they chose to look only at precedent concerning the validity of gender classification and not the burden of proof for justifying or constitutionality of methods

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37. *Kelly*, 35 F.3d at 271.

38. *See Gonyo v. Drake Univ.*, 879 F. Supp. 1000 (S.D. Iowa 1995).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

implementing gender consideration.<sup>43</sup> Here again, opportunities were taken away with an obvious interest by a school safe under the immense umbrella of Prong 1. And even though the student-athletes affected by the decision lacked the resources necessary to appeal the decision, an important victory for student-athletes was on the horizon.

In 1996, women from the gymnastics and volleyball teams at Brown University were demoted from university-funded to donor-funded varsity status for budgetary reasons. In *Cohen v. Brown University*, the plaintiffs were successful in alleging Title IX (Prong 3—satisfying interest) violation due in large part to Brown’s defense, which was entirely based on the stereotype that men are more interested in sports participation than women.<sup>44</sup> After conceding to Prong 1 noncompliance (as happened later in the UC Davis case), the court appropriately held that Brown violated Title IX by taking away two sports with an obvious interest by the *under*-represented sex and required Brown to reinstate both teams.<sup>45</sup> The crux of this case (and key difference between *Gonyo* and *Cohen*) is ostensibly the concession of Prong 1 noncompliance.

Around the time UC Davis began considering roster management (discussed *infra*) to comply with Title IX, Illinois State University’s men’s wrestling and soccer programs were cut. Members of those teams later brought suit alleging that the action violated Title IX in *Harper v. Board of Regents, Illinois State University*<sup>46</sup> where the plaintiffs argued that the underlying decision was made solely on the basis of sex to meet Prong 1.<sup>47</sup> The court rejected the argument and cited *Cohen* in holding that elimination of the men’s programs was

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43. *Id.* at 1006.

44. *Id.*; *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996).

45. *See id.* at 194 (emphasis added).

46. *Id.*; *Harper v. Bd. of Regents, Ill. State Univ.*, 35 F. Supp. 2d 1118 (C.D. Ill. 1999).

47. *See id.*

an acceptable means of Title IX compliance,<sup>48</sup> and chalked up another win for schools implementing roster management schemes. Beyond the Prong 1 context, the court was unconvinced by an additional argument that the institution was required to use the least discriminatory method to achieve compliance because “nothing in Title IX requires the institution to choose the method . . . for achieving gender parity that has the least negative impact on the overrepresented gender.”<sup>49</sup> Courts from outside this jurisdiction have also leaned on this rationale in similar cases,<sup>50</sup> and in doing so, have continued the trend of granting tremendous deference to OCR and leniency to schools relying on the safe (more like impregnable) harbor of Prong 1.

Though not exhaustive, these cases represent a trend of schools cutting athletic opportunities in order to comply with Title IX, mostly male nonrevenue and female opportunities. Furthermore, as evidenced by *Neal* and *Cohen*, plaintiffs asserting claims against an institution defending its compliance under Prong 1 face a much harder road than those facing schools relying on Prongs 2 or 3. Wise institutions might completely disregard Prongs 2 and 3 and employ roster management to achieve substantial proportionality. The remedial nature of Title IX begs the question, how can schools continually cut athletic opportunities and still be compliant?

#### IV. HOW FOOTBALL MESSES EVERYTHING UP

Traditionally, schools have complied with Title IX by selecting an equal number of men’s and women’s teams under

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48. *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (cited with approval in *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) and *Kelley v. Bd. of Trustees*, 35 F.3d 265 (7th Cir. 1994)).

49. *Id.*

50. *See, e.g., GI Forum Image De Tejas v. Texas Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. Ala. 1993).

the presumption that every men's sport has a women's counterpart. Simple enough, right? Not quite. The big obstacle here (in terms of participation) is that men's football has no female counterpart, and football teams far surpass other sports in terms of members (upwards of 100). When added to the Title IX compliance equation, things get tricky because males appear to be participating much more than females.<sup>51</sup>

Many institutions with football teams have, at least ostensibly, the penchant for struggling under Prong 1 due to a lack of proportion of female athletes at the institution. To comply, some schools (as discussed above) have been forced to add non-revenue female teams and reduce or cut male non-revenue teams.<sup>52</sup> Other schools, dissatisfied by the choices, engage in meandering maneuvers that circumvent the intent of Title IX and amount to discrimination based on sex. Some schools have even tiered different sports (which can also amount to discrimination) to address this truth by financially supporting and treating said sports in significantly different fashions. And, as often happens in times of financial necessity and struggle, an alternative was born.

#### *A. Roster Management, a.k.a. Discrimination*

Back in 2000, *Athletic Business* journalist, Paul Steinbach, encouraged roster management as an alternative to slashing entire teams.<sup>53</sup> He was most likely not the originator, but the novel idea (authorized—in a way—by *Neal*) was that universities could achieve Prong 1 proportionality compliance by (1) cutting a few men's slots on each team and (2) expanding existing female rosters slightly. Although athletic directors from the University of Wisconsin and Dayton

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51. See Appendix A.

52. See Appendix B.

53. Paul Steinbach, *Roster Management Takes Pain Out of Title IX Compliance*, *ATHLETIC BUSINESS* (Oct. 1, 2000), <http://athleticbusiness.com/articles/article.aspx?articleid=55&zzoneid=3>.

University have defended the practice early on as the least restrictive method of compliance within the spirit of Title IX, they probably neglected to foresee coaches of teams hamstrung by marginalized rosters and, most importantly, the widespread loss of opportunities for both sexes.<sup>54</sup> Moreover, proponents fail to identify that the techniques are a blatant violation of Title IX and discrimination on the basis of sex.

The method is often difficult in practice. Women's coaches must recruit and field more girls than are actually interested in participating while men's coaches most often must trim rosters to the sport's absolute minimum. The merits of roster management in this fashion are at the very least questionable; nevertheless, OCR has repeatedly found the practice an honest attempt at compliance.<sup>55</sup> Since 2000, roster management has spread like the plague and evolved into a much more devious beast. Indeed, high officials at major universities have recently acknowledged the practice as commonplace among "[t]hose of us in the business" who have been "end-running Title IX for a long time[.]"<sup>56</sup> How long do they do it? "[U]ntil they get caught."<sup>57</sup>

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54. *See id.*

55. *See, e.g.,* Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930 (D.C. Cir. 2004) (holding that NWCA could not show that Title IX caused or required the elimination of men's athletics teams or that changing Title IX's enforcement scheme would lead to their reinstatement). After losing several programs across the country, the Court refused to hear, and thereby denied a case against the Department of Education seeking to invalidate OCR's Title IX enforcement framework. The case arose from decisions to discontinue men's wrestling at many universities. In reaching its decision, the Court stated that schools make independent decisions about which teams to field based on factors that may or may not include gender equity concerns and deferred completely to OCR guidance.

56. Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES, Apr. 25, 2011, at A1, available at <http://www.nytimes.com/2011/04/26/sports/26titleix.html?pagewanted=all>.

57. *Id.*

*B. Roster Management in Practice*

Fearing the consequences of Prong 1 noncompliance, several prestigious NCAA athletic and academic universities now count men as females.<sup>58</sup> At Cornell, nearly half of the thirty-four student-athletes on the fencing roster are male students who Cornell counted as female athletes.<sup>59</sup> At Duke, Texas A&M, and others, if a man is cut from the men's basketball team he can simply join the women's basketball team.<sup>60</sup> Also at these schools, women's rosters include several male practice players, who are counted as females when reported to OCR.<sup>61</sup> The absurdity of this routine is, in part, that a man could lose his spot and then take it right back from a female so long as he is willing to practice with women and be counted as a female. Is this what Title IX framers had in mind? It gets worse.

The University of South Florida has taken roster management to a new level. When three female long jumpers were recently asked about their cross-country season, they responded that they were not on the team.<sup>62</sup> In fact, only twenty-eight girls from South Florida ever competed in cross-country. It is true that the OCR does not require competition participation for athletes to be counted on a roster, but each of the seventy-one females on the cross-country, indoor and outdoor track rosters were counted three times for Title IX reporting. Not surprisingly, members of the men's track team at South Florida are not counted on the cross-country team roster unless they compete (otherwise they are on the women's roster).

Second year law student at the Sandra Day O'Connor College of Law at Arizona State University, Lexi White,

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

experienced similar antics during undergrad at the University of Southern California. The first week of her freshman year (Fall 2005), she joined the varsity crew team.<sup>63</sup> Accordingly, she first filled out and signed all of the paperwork (waivers, insurance, etc.) that goes with being a student athlete at an NCAA member institution. Before even making it to a practice on the water, however, Ms. White told the head coach and assistant coach directly she no longer wanted to be on the crew team. The head coach said that was completely fine, but asked if he could keep her name on the roster anyways. He specifically told Ms. White that such activity would guarantee her athlete prioritization in terms of class registration.<sup>64</sup> Ms. White is unsure of when she was taken off the crew roster; nevertheless, she received priority registration for the second semester of her freshman year (Spring 2006).

For all its folly, this type of behavior regularly satisfies Prong 1. As one judge recently ruled in *Biediger v. Quinnipiac University*, however, the tactics equate to unequal offering of participation opportunities.<sup>65</sup> This ruling should and can be reached more often, and is perhaps a step in the right direction to start looking at roster management with higher scrutiny for what it truly is: discrimination. If courts regularly applied EPC scrutiny, this activity would require defendants to show a substantial relation to the compelling objective of increasing female educational opportunities. Ostensibly, that showing seems entirely absent to all of the cases addressed here.

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63. Interview with Lexi White (Feb. 22, 2012).

64. *Id.* (Varsity athletes at USC get to register for classes first regardless of class year or standing—this is to allow them to schedule around their team practices.)

65. *See Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62 (D. Conn. 2010).

*C. Discussion*

The success of Title IX in promoting and protecting educational opportunities for women is well established. Despite this success, OCR's current enforcement policies need revamping. Specifically, by allowing athletic departments to continue cutting men's nonrevenue teams and shuffling athletes around, Prong 1 compliance via roster management entirely evades the intent of Title IX. When no additional funds are budgeted or opportunities are created for women's sports, this tactic takes opportunities on the basis of sex.<sup>66</sup> Overall, Title IX enforcement encourages (if not requires) economically focused athletic departments to allocate spending away from nonrevenue males but does not require that it be redirected to females. And since the majority of athletic department expenses are tied up in football and men's basketball,<sup>67</sup> schools resort to gender-conscious removal of educational opportunities when those teams struggle to create revenue. For schools in financial binds, Title IX compliance is a seemingly insurmountable burden, so schools implement roster management, and thus discriminate on the basis of sex. The very sad reality is that roster management will continue unless OCR does something about it.

*D. Removing Football from the Equation*

Removing football from the Title IX compliance equation could help. OCR needs to acknowledge the status of revenue producing student-athletes in a fan-based athletics

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66. See Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, Office of Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) (on file with United States Department of Education).

67. U.S. Department of Education, Office of Postsecondary Education, Equity in Athletics Data Analysis Cutting Tool Website, <http://ope.ed.gov/athletics/GetAggregatedData.aspx>.

model as an entirely different experience from the education-focused, nonrevenue student-athlete experience. At first glance, the sports are similar; a closer glance uncovers an uncontestable difference: certain sports (most often men's football and basketball) can bankroll others. The relationship is almost never the reverse. Furthermore, men's football creates huge problems for Prong 1 schools because of the massive roster sizes and lack of a female peer. Why not axe football from Title IX completely? That way, schools could compare rosters and student enrollment on a more equitable standard. Notwithstanding the cases<sup>68</sup> allowing female participation on all-male teams, the circuit split fosters further inquiry.

Football is already separating itself as unique, and the NCAA Division I Board of Directors has already approved a measure that allows conferences to vote on providing up to \$2,000 in spending money to scholarship offers, or what the NCAA calls the "full cost-of-attendance."<sup>69</sup> Even though the Board emphasized that the measure is not a "pay for play," this approval necessarily increases the likeness of more money issues and thereby Title IX issues in college athletics. For example, if the Pac-12 approved the measure, where would financially strapped Arizona State University come up with the additional \$2,000 for athletes? And there is little to no nexus, much less a substantial relationship, between the manipulation of rosters and the compelling objective of promoting educational opportunities for women. Yet, OCR has expressed little reluctance to forbid the phenomena, and as such, schools will continue to play roster games.

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68. See *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985), *Saint v. U. Nebraska School Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988). *But see Mercer v. Duke Univ.*, 190 F.3d 643 (4th Cir. 1999) (holding that Duke had the right to prevent a female from trying out for an all-male contact sport.)

69. *NCAA Panel Approves Major Changes*, ESPN (Oct. 27, 2011), [http://espn.go.com/college-sports/story/\\_/id/7156548/ncaa-panel-approves-major-scholarship-rules-changes](http://espn.go.com/college-sports/story/_/id/7156548/ncaa-panel-approves-major-scholarship-rules-changes).

V. PROPOSAL FOR OCR 2012 CLARIFICATION

A new OCR Clarification creating a strict scrutiny (EPC) standard for review of Title IX compliance methods should be published. Prong 1 of Title IX is being abused and should not protect schools unwilling to fund additional female participation opportunities. Moreover, protection of educational student-athlete experiences would be better served under a strict scrutiny review of compliance efforts. A “2012 Clarification” implementing this standard would hold financially capable schools responsible for meeting the viable athletics interests of all students rather than cut opportunities to divert funds for football and basketball.

The option of reaching Title IX compliance through reduction of men’s nonrevenue athletic programs should be used only as a last resort by athletic departments that truly cannot afford them. This must be shown and can be guaranteed if the OCR requires a strict scrutiny review of all compliance proposals. Then, if male student-athletes’ opportunities are cut they can file a Title IX grievance forcing the school to prove that the action furthers the compelling interest of increasing female opportunities and that no less restrictive means were possible.

VI. CONCLUSION

In just under 40 years, Title IX has done wonders for female educational opportunities. Schools have found it increasingly difficult, however, to comply with the statute. And in many cases, athletic departments have resorted to roster management. Plaintiffs have likewise experienced the frustration. Furthermore, to reconcile the remedial nature of Title IX with the case law is exasperating. And although this analysis is not exhaustive, the rulings expose and support a very reasonable hypothesis: unless a school cannot meet Prong

1, it is extremely difficult (if not impossible) to win in court against a school for violating Title IX.

Schools may not have to resort to roster management if men's football did not throw off the ratio to the degree that it does. And, if history is any indication, removing football or an additional clarification may not solve all of the problems universities face in their quest for compliance. By the same token, the proposed 2012 Clarification would by no means put an end to the discrimination. Laws aren't perfect, and Title IX is a great example of that truth. But what this Article proposes would bring the statute into the 21st century and give universities, athletic departments and, ultimately, students a better sense of Title IX's purpose (equal opportunity) and how to abide that order. Should this clarification amount to the *deus ex machina* some have yearned for, then hopefully the ripple effect could usurp cases like UC Davis from ever occurring. The point is to give universities across the country a tool more winsome to athletic programs. Hopefully strict scrutiny can provide that.

And conceivably the statute deserves a wholesale re-examination. This could likely be the end game for literal application. As Abraham Lincoln posited, "The best way to get a bad law repealed is to enforce it strictly."<sup>70</sup> In the meantime, compliance officers and coaching staffs lie awake, fatigued by the prospect of complying with the statute without upsetting students or forfeiting substantial funds. The economy and society have far outpaced the statute. Moreover, the NCAA has repeatedly shown its ability to address twenty-first century problems.<sup>71</sup> The discriminate-until-caught mentality needs to

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70. Abraham Lincoln, 16th U.S. President (1809-1865).

71. See Erin Buzuvis, *NCAA Adopts Policy for Including Transgender Athletes*, TITLE IX BLOG (Sept. 13, 2011), <http://title-ix.blogspot.com/2011/09/ncaa-adopts-policy-for-including.html>; see also Helen J. Carroll & Dr. Pat Griffin, *On the Team: Equal Opportunity for Transgender Student Athletes*, NAT'L CENTER FOR LESBIAN RIGHTS (Oct. 4, 2010) available at

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be done away with. The NCAA needs to implement the essential Title IX upgrade.

APPENDIX A<sup>72</sup>

Men's Sports	#S-As	Women's Sports	#S-As
Football	104	Volleyball	14
Basketball	15	Basketball	15
Baseball	33	Soccer	25
<b>Total</b>	<b>152</b>	<b>Total</b>	<b>54</b>
<b>Percentage</b>	<b>75%</b>	<b>Percentage</b>	<b>25%</b>

APPENDIX B<sup>73</sup>

Men's Sports	#S-As	Women's Sports	#S-As
Football	104	Volleyball	14
Basketball	15	Basketball	15
Baseball	33	Soccer	25
		Softball	19
		Rowing	62
<b>Total</b>	<b>152</b>	<b>Total</b>	<b>135</b>
<b>Percentage</b>	<b>53%</b>	<b>Percentage</b>	<b>47%</b>

72. Christine H.B. Grant, *A 'Tiering' Caution on Different Treatment of Male and Female Student Athletes*, SPORTS MGMT. RESOURCES (May 10, 2011), <http://www.sportsmanagementresources.com/node/245>.

73. *Id.*

# TITLE IX'S REAL PROBLEM IS ITS REMEDY

Christopher Thiele\*

Since Title IX's adoption in 1972, there has been a general convergence toward gender equality in college athletics.<sup>1</sup> Despite this substantial progress, the rate of speed of this convergence is slowing down.<sup>2</sup> In the 21st Century, the central problem facing Title IX is deliberate *under-compliance*, not accidental *non-compliance*.<sup>3</sup>

In seeking to comply with federal requirements, the bottom line for university administrators is cost.<sup>4</sup> Administrators balance the costs of *non-compliance* (e.g., legal liability) with the costs of *compliance* (e.g., funding additional opportunities for female participation).<sup>5</sup> The costs of compliance are certain and real. College athletics are not cheap, with each additional athlete costing the school money used to pay for sports equipment, uniforms, travel budgets, coaches, trainers, facilities, and other institutional costs. However, the costs of non-compliance are far less certain and

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1. See Arne Duncan, *The Importance of Title IX*, ED.GOV (Apr. 20, 2010), <https://www.ed.gov/news/speeches/importance-title-ix>.

2. See Christopher Thiele, *A Long Term Promise: Title IX Discrimination, Statistics, and College Sports*, SPORTS & ENTMT'L BLOG (Mar. 4, 2012), <http://www.sportsandentertainmentlawblog.com/2012/03/long-term-promise-title-ix-discrimination-statistics-college-sports>.

3. See Cynthia J. Harris, *The Reform of Women's Intercollegiate Athletics: Title IX, Equal Protection, and Supplemental Methods*, 20 CAP. U. L. REV. 691, 719-20 (1991).

4. See generally Robert Cooter & Thomas Ulen, *Law and Economics* (6th ed 2011).

5. *Id.*

tangible. Simply put, the cost of non-compliance is the probability of “getting caught” times the penalty. If the probability is low enough, even a relatively high penalty won't deter *under-compliance*. This happens precisely because Title IX limits the decision to *initiate* administrative review to two mechanisms: complaints and compliance reviews.

First, the Department will investigate “all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs.”<sup>6</sup> Under-compliance is likely because a lack of athletic opportunities doesn't perfectly motivate someone to file an administrative complaint.<sup>7</sup> That individual must also know, sufficiently value, and be willing to enforce those rights.<sup>8</sup> Thus, only a tiny fraction of those discriminated against actually report the discrimination.

Second, the Department will undertake compliance reviews in which they “[p]eriodically . . . select a number of recipients . . . and conduct investigations.”<sup>9</sup> Although the process is not very public, it is presumed to be quasi-random and based on data that colleges must collect and submit.<sup>10</sup> Thus, under-compliance is likely because the frequency of “periodically” is quite small, resulting in only a tiny percentage of the over 2000+ schools reporting actually being investigated.<sup>11</sup> With so little risk of review, administrators are

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6. See A Policy Interpretation: Title IX and Intercollegiate Athletic, OFFICE OF CIVIL RIGHTS, DEPT. OF HEALTH, EDUCATION, AND WELFARE, 45 C.F.R. pt. 26 (1979), available at <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

7. See Katherine B. Woliver, *Title IX and the “E-MAIL Survey” Exception: Missing the Goal*, 18 S. CAL. INTERDISC. L.J. 463, 466-67 (2009).

8. *Id.*

9. *Id.*

10. See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 242-43 (2011).

11. See Diane Heckman, *Title IX Marks Its 35th Anniversary By Opening the Doors to Single-Sex Public Elementary and Secondary Schools*, 237 ED. LAW REP. 1, 23-24 (2008).

free to manipulate the data disclosed to avoid being an outlier chosen for administrative review. This manipulation varies in degree, and includes anything from fudging the numbers, to double counting, to cutting male sports rather than adding female sports.<sup>12</sup>

Understanding Title IX's remedial scheme, neither a "strict scrutiny" nor an "eliminate football" proposal would completely eliminate this incentive to under-report (and thus under-comply).<sup>13</sup> A strict scrutiny approach would raise the probability of non-compliance, but only for those outliers selected for compliance reviews. The result is still under-compliance for everyone else *not* an outlier. Likewise, "eliminating football" from what counts as discrimination would make it easier for schools to comply by reducing costs for compliance, but does nothing to eliminate the fundamental incentive to under-comply because of the lack of enforcement for non-compliance. In short, the problem is

Ultimately, the problem of under-compliance will not be solved until Congress directly addresses this incentive to under-report violations. Congress could (1) raise the frequency of investigation, (2) make investigations truly random, (3) impose strict disclosure and verification requirements for any data submitted, (4) increase the penalty for findings of non-compliance, and/or (5) subsidize female participation with federal funds, rather than disingenuously threaten federal funds unless females participate. Indeed, we will likely need some permutation of these solutions to create the proper mix of incentives necessary to fulfill Congress's intent for gender equality in female athletics underlying Title IX.

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12. See Kellen Bradley, *An Old Dog New Tricks: Title IX and the Essential Upgrade*, ARIZ. ST. SPORTS & ENT. L.J. (May 2012).

13. *Id.*