
THE RIGHT OF PUBLICITY AND THE STUDENT-ATHLETE

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Now that the 2015 National Collegiate Athletic Association (NCAA) basketball tournament is over, merchandisers will be scrambling to secure the endorsements and images of the best of the best to enhance pecuniary profits from their goods and services. In combination with merchandisers and the NCAA, the goal is to ensure that the picture of the players' jump shots are as pure and as soft as newly fallen snow. In order to address these student-athlete publicity rights, a discussion of the law of the right of publicity is necessary.

INTRODUCTION

The right of publicity is a protectable property interest in one's name, identity or persona. Every person, celebrity or non-celebrity has a right of publicity—that is the right to own, protect and commercially exploit one's identity. The genesis of the legal right of publicity is rooted in and intertwined with the right of privacy.¹

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¹ See, e.g., *Robertson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (rejecting the common law right of publicity, which led to the enactment of the New York privacy law in 1903, codified at N.Y. Civ. Rights Law sections 50 through 51); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905) (recognizing a personal privacy right

The right of privacy protects against intrusions upon one's seclusion or solitude to obtain private facts for public disclosure that would be highly offensive, false, or embarrassing to a reasonable person.² In short, this is a right to be left alone. However, privacy and publicity rights become entwined when an appropriation of another's name or likeness for one's own benefit occurs without permission.³ Notwithstanding, the right of privacy is distinguishable because it is a personal right that is non-assignable and terminates at death.⁴

To further illustrate the difference and similarity between privacy and publicity rights, a photograph in an advertisement that causes injury to the plaintiff's feelings and dignity, resulting in mental or physical damages, implicates the right of privacy.⁵ Failing the elements of mental or physical injury invokes the right of publicity.⁶ The right of publicity is the legal right to exploit for commercial purposes one's own name, character traits, likeness⁷ or other indicia of identity. Depending on state law, a caricature,⁸ popular phrase ("Here's Johnny"),⁹ sound-alike voice,¹⁰ name in a car commercial,¹¹ animatronic like-

against unauthorized commercial exploitation); *Pallas v. Crowley, Milner & Co.*, 33 N.W.2d 911 (Mich. 1948) (recognizing a right of publicity where invasion of privacy was pleaded in preventing the nonconsensual use of a the photograph of a model, though not a known celebrity, in a local department store advertisement); *see also* *Janda v. Riley-Meggs Indus., Inc.*, 764 F. Supp. 1223 (E.D. Mich. 1991) (recognizing publicity rights through a derivative privacy right at common law). The seminal case that coined the term right of publicity is *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953).

² *Wolf v. Regardie*, 553 A.2d 1213, 1217 (D.C. 1989).

³ *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031 (N.D. Ga. 1986) (demonstrating the labyrinth of intellectual property rights at play in publicity issues, including copyright infringement and trademark dilution).

⁴ J. Alexander Johnson, *Identity Crisis*, 77 *Tex. B.J.* 30, 31 (2014).

⁵ *Id.*

⁶ *Id.*

⁷ *Newcombe v. Adolph Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998) (holding that Don Newcombe's stance and windup as displayed in a drawn beer advertisement featured in *Sports Illustrated* created a triable issue of fact as to whether Newcombe was readily identifiable as the pitcher in the advertisement).

⁸ *See Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85 (2d Cir. 1989).

⁹ *See Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

¹⁰ *See Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1986); *Waits v. Frito Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992). In March 2009, the estate of John Facenda, also known as the "Voice of God," settled with the NFL (NFL Films) for improperly using Facenda's voice without permission in a promotional film for a video game in violation of Pennsylvania's right of publicity statute. "*Voice of God*" *Heir, NFL Films Settle Lawsuit*, ESPN (Mar. 11, 2009), <http://sports.espn.go.com/nfl/news/story?id=3970565>.

¹¹ *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996).

ness,¹² and statistics of professional baseball players,¹³ without consent, have all been held to come within the ambit of publicity rights constituting infringement.

The purpose of this article is to provide guidance and an advance starting point for general practitioners, intellectual property lawyers, and entertainment attorneys, all of whom have an interest in the application of the right of privacy to student-athletes. An additional purpose is to push the edge of the intellectual property jurisprudential envelope forward and to inspire scholarship.

PROPRIETARY INTEREST

An individual has the right to control, direct, and commercially use his or her name, voice, signature, likeness, or photograph. Publicity rights may include the right to assign, transfer, license, devise, and enforce the same, against third parties.¹⁴ Today, nineteen states have publicity statutes,¹⁵ which differ widely, and at least twenty-five more

¹² See *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992); *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993).

¹³ See *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

¹⁴ See *Comedy III Prods, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

¹⁵ CAL. CIV. CODE § 3344 (West, Westlaw through Ch. 2 2015 Reg. Sess.); FLA. STAT. § 540.08 (West, Westlaw through 2015 1st Reg. Sess.); 765 ILL. COMP. STAT. 1075/30 (West, Westlaw through P.A. 99-2 of 2015 Reg. Sess.); IND. CODE § 32-36-1-1 (West, Westlaw through P.L. 1-2015 through P.L. 60-2015 of 2015 1st Reg. Sess.); KY. REV. STAT. ANN. § 391.170 (West, Westlaw through 2015 Reg. Sess.); MASS. GEN. LAWS ANN., ch. 214, § 3A (West, Westlaw through Ch. 16 of 1st Ann. Sess.); NEB. REV. STAT. §§ 20-201–20-211, 25-840.01 (West, Westlaw through 2014 Reg. Sess.); NEV. REV. STAT. §§ 597.770–597.810 (West, Westlaw through 28th Spec. Sess. 2014); N.Y. CIV. RIGHTS LAW §§ 50–51 (West, Westlaw through L.2015, ch. 1–13, 50–54, 61), N.Y. GEN. BUS. LAW § 397 (West, Westlaw through L.2015, ch. 1–13, 50–54, 61); OHIO REV. CODE ANN. § 2741.04 (West, Westlaw through 2015 Files 1, 3–4 of the 131st GA); OKLA. STAT. tit. 21 §§ 839.1–839.3, OKLA. STAT. tit. 12 §§ 1448–1449 (West, Westlaw through Ch. 27 of 1st Reg. Sess. 2015); 42 PA. CONS. STAT. § 8316 (West, Westlaw through 2014 Reg. Sess.); R.I. GEN. LAWS § 9-1-28 (West, Westlaw through Ch. 555, Jan. 2014 Sess.); TENN. CODE ANN. §§ 47-25-1101–47-25-1108 (West, Westlaw through 2015 1st Reg. Sess.); UTAH CODE ANN. § 45-3-1 (West, Westlaw through 2014 Gen. Sess.); VA. CODE ANN. §§ 8.01-40, 18.2-216 (West, Westlaw through 2014 Reg. Sess.); WASH. REV. CODE §§ 63.60.030–63.60.037 (West, Westlaw through Ch. 4 of 2015 Reg. Sess.); WIS. STAT. § 995.50 (West, Westlaw through 2015 Act 14). In Texas, the tort of misappropriation protects a person's persona and the unauthorized use of one's name, image, or likeness. See *Brown v. Ames*, 201 F.3d 654, 657 (5th Cir. 2000); see also TEX. PROP. CODE §§ 26.001–26.015 (West, Westlaw through 2013 3d Called Sess. of 83rd Legis.) (codifying Texas's post-mortem right of publicity).

have common law publicity rights.¹⁶ Thirteen states do not recognize the right of publicity.¹⁷ It is the commercial value, coupled with the commercial exploitation without prior consent, that triggers a cause of action.¹⁸ The unauthorized use, in a commercial context, may give rise to money damages, equitable relief by way of an injunction, or both.¹⁹ Moreover, as to a celebrity, subject to exemptions, the post-mortem right of publicity extends seventy years after death in California²⁰ and one hundred years in Oklahoma.²¹ New York, having one of the most developed jurisprudences in this area, excludes protection for the persona of deceased celebrities.²²

SUPPLEMENTAL JURISDICTION

Unlike other fields of intellectual property law, “[t]here is no federal statute or [federal] common law governing rights of publicity.”²³ Nevertheless, federal claims of unfair competition and false advertisement or false endorsement under the Lanham Act,²⁴ together with a state claim of publicity, can be asserted in federal court under supplemental jurisdiction. In appropriate circumstances, a prevailing party can collect treble damages, costs, and attorney fees on Lanham Act claims by establishing unfair competition, dilution, or the likelihood of public confusion.²⁵

Monetary relief in establishing liability for infringement of one’s right of publicity is measured by the commercial value of the person’s name, likeness, or persona.²⁶ In the absence of actual loss of money as a result of the defendant’s unauthorized use, the “going rate” or compensatory damages is the appropriate measure of damages.²⁷ Where

¹⁶ Jonathan L. Faber, *Indiana: A Celebrity-Friendly Jurisdiction*, RESGESTAE, Mar. 2000, at 24, 27.

¹⁷ Alaska, Arizona, Connecticut, Idaho, Louisiana, Mississippi, New Hampshire, New Mexico, North Dakota, Oregon, South Carolina, Vermont and Wyoming.

¹⁸ See, e.g., *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 413–14 (9th Cir. 1996).

¹⁹ See, e.g., WIS. STAT. § 995.50 (West, Westlaw through 2015 Act 14).

²⁰ CAL. CIV. CODE § 3344.1(g) (West, Westlaw through Ch. 2 2015 Reg. Sess.).

²¹ OKLA. STAT. tit. 12 § 1448(G) (West, Westlaw through Ch. 27 of 1st Reg. Sess. 2015).

²² See *Stephano v. News Grp. Publ’ns*, 474 N.E.2d 580, 583 (N.Y. 1984).

²³ EDWARD A. PISACRETA ET AL., *INTELLECTUAL PROPERTY: FORMS AND ANALYSIS* § 7.02(1)(a) (8th ed. 2006).

²⁴ 15 U.S.C. § 1125(a) (2012).

²⁵ *Id.* § 1117(a)–(b) (2012).

²⁶ JULIAN S. MILLSTEIN ET AL., *DOING BUSINESS ON THE INTERNET: FORMS AND ANALYSIS* § 11.05(3) (7th ed. 2003).

²⁷ *Town & Country Props., Inc. v. Riggins*, 457 S.E.2d 356, 365 (Va. 1995).

the defendant's activities exhibit a willful disregard of the plaintiff's rights, punitive damages are warranted.²⁸

CONSTITUTIONAL PROTECTION

The reporting of newsworthy events, with nonconsensual use of a name or photo in a magazine, is afforded First Amendment guarantees of freedom of speech and the press.²⁹ In this circumstance, there is no violation of publicity rights. The newsworthiness of an article provides constitutional protection even for a newspaper selling promotional posters of NFL quarterback Joe Montana's four Super Bowl Championships.³⁰ The posters were reproductions of the actual newspaper pages.³¹ The California Court of Appeals opined that the posters depicted newsworthy events and the newspaper had a right to promote itself with them.³²

In another case, the plaintiff, Tony Twist,³³ a former professional "enforcer" hockey player, sued the creator of a comic series who used the name Anthony "Tony Twist" Twistelli, as a fictional Mafia character.³⁴ Twist claimed the association of his name with the comic book thug damaged his name's endorsement value.³⁵ In deciding the case, the Missouri Supreme Court adopted a predominant purpose test³⁶ and held that the use and identity of Twist's name was predominantly a

²⁸ *Frazier v. S. Fla. Cruises, Inc.*, 19 U.S.P.Q.2d (BNA) 1470, 1472 (E.D. Pa.), *vacated in part*, 945 F.2d 395 (1991) (denying defendant's post-trial motions regarding a jury verdict in plaintiff's favor where defendant had placed a full page unauthorized advertisement in *Ring Magazine* inviting the public to cruise with former world heavyweight champion Smokin' Joe Frazier).

²⁹ *Neff v. Time, Inc.*, 406 F. Supp. 858, 861 (W.D. Pa. 1976); *see Joe Dickerson & Assocs., L.L.C. v. Dittmar*, 34 P.3d 995, 1003 (Colo. 2001) (recognizing the tort of invasion of privacy by appropriation of name or likeness subject to First Amendment privilege where the use involves publication of matters that are newsworthy or of legitimate public concern).

³⁰ *Montana v. San Jose Mercury News Inc.*, 40 Cal. Rptr. 2d 639 (Ct. App. 1995); *see, e.g., Hogan v. Hearst Corp.*, 945 S.W.2d 246, 250-51 (Tex. App. 1997) (exemplifying the breadth of the newsworthy exception in negating a claim of invasion of privacy based on disclosure of highly embarrassing facts obtained from a public record); *Peckham v. Bos. Herald, Inc.*, 719 N.E.2d 888 (Mass. App. Ct. 1999) (granting summary judgment on a statutory private facts claim on the basis of newsworthiness).

³¹ *San Jose Mercury News Inc.*, 40 Cal. Rptr. 2d at 640.

³² *Id.* at 643.

³³ *Doe v. TCI Cablevision*, 110 S.W.3d 363, 365 (Mo. 2003).

³⁴ *Id.*

³⁵ *Id.* at 368.

³⁶ *Id.* at 374.

ploy to sell comic books rather than an artistic or literary expression.³⁷ The court held that, under these circumstances, free speech must give way to the right of publicity.³⁸ However, because of improper jury instructions, the \$24.5 million verdict in the plaintiff's favor was set aside.³⁹ A second trial in 2004 resulted in a \$15 million jury verdict.⁴⁰ On June 20, 2006, in a 3-0 opinion, a three-judge panel of the Eastern District Appeals Court upheld the \$15 million jury verdict against the comic book creator Todd McFarlane, and his company, Todd McFarlane Productions, Inc.⁴¹

Similarly, a publisher of an artist's work depicting Tiger Woods' likeness entitled "The Masters of Augusta" was afforded First Amendment protection based on its classification as "fine art"⁴² despite the fact that 5,250 copies of the print have been sold.⁴³ The court found that the art print was not a mere poster or item of sports merchandise but rather an artistic creation seeking to express a message.⁴⁴ In a similar vein, courts have found the right of publicity does not extend to prohibit depictions of a person's life story in television miniseries,⁴⁵ books,⁴⁶ or films.⁴⁷

In *Gionfriddo v. Major League Baseball*, the First Amendment protected Major League Baseball's use of the names and statistics of four former players on the defendant's websites, media guides, and programs for All-Star and World Series games.⁴⁸ The California Court of

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Doe v. McFarlane*, 207 S.W.3d 52, 56 (Mo. Ct. App. 2006).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003); see *Comedy III Prods., Inc. v. Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (holding that a T-shirt artist's realistic drawing of the Three Stooges was not sufficiently transformative to defeat a claim of California's publicity rights statute); *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013) (holding that video games from the NFL Madden series featuring the likeness of NFL Legend Jim Brown were expressive works entitled to protection under the First Amendment).

⁴³ *ETW Corp.*, 332 F.3d at 919.

⁴⁴ *Id.* at 936.

⁴⁵ *Ruffin-Steinbeck v. Depasse*, 82 F. Supp. 2d 723 (E.D. Mich. 2000).

⁴⁶ *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (applying Texas law).

⁴⁷ *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (applying Pennsylvania law).

⁴⁸ *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307 (Ct. App. 2001). *But see Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. 1967) (holding that the defendant violated the plaintiff's privacy rights by selling a game with cards

Appeals held that those uses were of substantial public interest and not commercial speech.⁴⁹

New York's highest court extended such rights to a magazine that used a fourteen-year-old girl's picture, without her consent, to illustrate a magazine column about teenage sex and drinking.⁵⁰ The New York Court of Appeals ruled that publishers cannot be held liable so long as the photograph bears a genuine relationship to a newsworthy article and is not an advertisement in disguise.⁵¹ Despite the fact that the plaintiff's photo was used in a substantially fictionalized way, the court found that it could, by implication, make the plaintiff the subject of the article.⁵²

The ruling in the immediately preceding case begs the question: would the result have been different if a high-profile celebrity's picture was used without permission? And, should any and all purported newsworthiness provide a safe haven for authors and publishers? If section 50 of the Civil Rights Act provides a criminal misdemeanor penalty, and section 51, civil damages, then when do they really become actionable? Moreover, how is it that celebrities may prevent the use of their visual and audio images yet cannot stop authors from writing about them? The courts do not draw a clear path between commercial exploitation and protected expression. In this morass, questions abound and answers elude.

Consider the Ninth Circuit's reversal of \$1.5 million in compensatory damages and \$1.5 million in punitive damages in *Hoffman v. Capital Cities/ABC, Inc.*⁵³ The Ninth Circuit disagreed with the district court's conclusion that the magazine article with a digitally altered photograph of Dustin Hoffman together with a fashion spread was pure advertisement and commercial speech.⁵⁴ The court opined that the fashion article's purpose was not to propose a commercial transaction.⁵⁵ Since the defendant was fully protected by the First Amendment, the court went on to state that *Los Angeles Magazine* could not be

depicting the names and profiles of twenty-three famous professional golfers without consent).

⁴⁹ *Gionfriddo*, 114 Cal. Rptr. 2d at 319.

⁵⁰ *Messenger v. Gruner + Jahr Printing & Publ'g*, 727 N.E.2d 549, 551 (N.Y. 2000).

⁵¹ *Id.* at 553.

⁵² *Id.* at 551.

⁵³ *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1185–86

subjected to liability unless, under *New York Times v. Sullivan*,⁵⁶ the magazine intended to mislead its readers.⁵⁷ This raised the burden of proof to clear and convincing evidence that the magazine acted with “actual malice.” The foregoing seems to suggest that it is now time for a uniform federal statute governing the rights of publicity.

POST-MORTEM RIGHTS

There are two central issues in any right of publicity statute. First, to whom does the right of publicity extend, i.e., to any person or just celebrities,⁵⁸ and what elements of personality are protected, e.g., name, signature, and voice?⁵⁹ And second, is a post-mortem property right provided?⁶⁰ Not only do the publicity statutes in nineteen states vary widely, but so too does the post-mortem protection. For example, post-mortem rights last fifty years in Kentucky,⁶¹ sixty years in Ohio;⁶² and ten years in Tennessee with a potential perpetual right, so long as there is no nonuse for two consecutive years.⁶³ New York does not recognize a post-mortem right of publicity.⁶⁴

In *Cobb v. Time, Inc.*, Randall “Tex” Cobb, a former professional boxer, sued Sports Illustrated over an article describing his alleged drug use and participation in a fixed boxing match.⁶⁵ The Sixth Circuit reversed the district court’s order and judgment based on the actual malice standard because Cobb was a public figure.⁶⁶

O’BANNON V. NCAA

Former UCLA basketball star Ed O’Bannon, the principal plaintiff in *O’Bannon v. NCAA*, filed a lawsuit in 2009 against the NCAA and the Collegiate Licensing Company for their failure to compensate him during and after his collegiate athletic career for the use of his name, image, and likeness on trading cards, video games, and other materi-

⁵⁶ N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

⁵⁷ *Id.* at 287–88.

⁵⁸ *See, e.g.*, Hart v. Elec. Arts Inc., 717 F.3d 141 (3d Cir. 2013).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ KY. REV. STAT. § 391.170 (West, Westlaw through 2015 Reg. Sess.).

⁶² OHIO REV. CODE ANN. § 2741.02 (West, Westlaw through 2015 Files 1, 3–4 of the 131st GA).

⁶³ TENN. CODE ANN. § 47-25-1104 (West, Westlaw through 2015 1st Reg. Sess.).

⁶⁴ N.Y. CIV. RIGHTS LAW § 50 (West, Westlaw through L.2015, ch. 1–13, 50–54, 61).

⁶⁵ 278 F.3d 629, 631–32 (6th Cir. 2002).

⁶⁶ *Id.* at 640.

als.⁶⁷ Subsequently, *O'Bannon* was consolidated with one brought by former University of Nebraska quarterback Sam Keller to form *In re NCAA Student-Athlete Name and Likeness Litigation*.⁶⁸ On November 8, 2013, U.S. District Judge Claudia Wilken partially certified class-action status in *O'Bannon v. NCAA* for current and future athletes but not former ones.⁶⁹ Additional plaintiffs include Hall of Fame legends Bill Russell and Oscar Robertson.⁷⁰ The *O'Bannon* antitrust lawsuit against the NCAA challenged the right of the NCAA, the Collegiate Licensing Company, and EA Sports to use student-athletes' likenesses commercially without paying them.⁷¹ In the consolidated lawsuit, the plaintiffs alleged that the NCAA and its business partners made agreements that unreasonably restrained trade in violation of the Sherman Act and that the NCAA deprived former student-athletes of their right of publicity.⁷² *O'Bannon* and Keller contended that, through these agreements, the NCAA prevents student-athletes from entering the licensing market and negotiating a price in exchange for their right of publicity.⁷³ Additionally, the plaintiffs contend that the NCAA's profits from these agreements constitute unjust enrichment.⁷⁴

At the center of the plaintiffs' unjust enrichment claim is the required signing of Form 08-3A by every student-athlete at the beginning of each year.⁷⁵ This form authorizes the NCAA to use the athlete's name or picture to promote NCAA Championships and other NCAA events and programs.⁷⁶ A student-athlete cannot participate in intercollegiate athletics until he or she has signed this form.⁷⁷ The plaintiffs dispute that the signing of Form 08-3a by each student-athlete gives the NCAA a right of publicity for commercial purposes.⁷⁸

⁶⁷ *O'Bannon v. Nat'l Collegiate Athletics Ass'n*, No. C 09-3329 CW, 2009 WL 4899217, at *1 (N.D. Cal. Dec. 11, 2009).

⁶⁸ *In re NCAA Student-Athlete Name & Likeness Litig.*, No. C 09-1967 CW, 2010 WL 5644656, at *1 (N.D. Cal. Dec. 17, 2010).

⁶⁹ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5979327, at *10 (N.D. Cal. Nov. 8, 2013).

⁷⁰ Third Consolidated Amended Class Action Complaint ¶¶ 41-67, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 3810438 (No. C 09-01967 CW).

⁷¹ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, C 09-1967 CW, 2010 WL 445190, at *2 (N.D. Cal. Feb. 8, 2010).

⁷² *In re NCAA Student-Athlete Name & Likeness Litig.*, 2010 WL 5644656, at *1-2.

⁷³ *O'Bannon*, 2010 WL 445190, at *2.

⁷⁴ *Id.* at *7.

⁷⁵ See *id.* at *1-2.

⁷⁶ *Id.* at *1.

⁷⁷ *Id.*

⁷⁸ *Id.*

In order for the plaintiffs to prevail on their section I antitrust claim, they must show that (1) there was an agreement; (2) the agreement unreasonably restrains trade under a rule of reason analysis; and (3) the restraint affects interstate commerce.⁷⁹ It appears that antitrust law applies to sports in general⁸⁰ and to higher education.⁸¹

PAYING STUDENT-ATHLETES

Athletes are of great publicity value to colleges and universities and generate millions of dollars for their schools. Division I institutions in particular are making big money off of student-athletes. High-profile football and basketball coaches earn in excess of one million dollars annually.⁸² Students and sports enthusiasts ask why players worth so much to their schools are not able to earn revenue based on their persona.⁸³ This article argues that it is irresponsible to pay student-athletes out of the funds generated from their sports, to permit them to sign autographs for money, or to receive endorsement money from merchandisers. This is simply because they are first and foremost students and not celebrities. Moreover, how would the institutions or NCAA apportion the revenue to the players? The potential would be to have some student-athletes receiving paychecks every month for thousands of dollars. This would create all kinds of temptations and problems. Additionally, paying college players has huge risks. The student-athlete's mindset and purpose could become distorted. The players could become more interested in making money than learning skills and information that will assist them after their playing days are over. Also, wealthier schools could buy up talent and disrupt the competitive balance.

This article's viewpoint is consistent with that of Jim Boheim, the head basketball coach at Syracuse University, who called the idea of paying college athletes "the most idiotic suggestion of all time."⁸⁴ Keep

⁷⁹ 15 U.S.C. § 1 (2004).

⁸⁰ See *Int'l Boxing Club of N.Y. v. United States*, 358 U.S. 242, 258-59 (1959).

⁸¹ *United States v Brown Univ.*, 5 F.3d 658 (3d Cir. 1993); see also *Mass. Sch. of Law v. Am. Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997).

⁸² See Martin Greenberg & Thom Park, *CEOs in Headphones*, SPORTS J. (Feb. 12, 2014), <http://thesportjournal.org/article/ceos-in-headphones/>.

⁸³ See Zach Gorwitz, *Money Madness: Why and How NCAA Athletes Should Be Paid*, DUKE POL. REV. (Oct. 1, 2013), <http://dukepoliticalreview.org/money-madness-why-and-how-ncaa-athletes-should-be-paid/>.

⁸⁴ *Syracuse's Jim Boheim: Paying NCAA Athletes "Idiotic"*, USA TODAY (Oct. 2, 2013, 7:35 PM), <http://www.usatoday.com/story/sports/ncaab/acc/2013/10/02/syracuse-or-ange-jim-boheim-college-players-student-athletes-pay/2912327/>.

in mind that Jim Boheim, now in his thirty-ninth coaching season, is a former player at Syracuse and was the backcourt partner of NBA Hall of Famer Dave Bing of the Detroit Pistons.⁸⁵

PARTIAL SOLUTIONS

Bob Bowsby, Commissioner of the Big 12 Athletic Conference, supports new benefits short of payment to student-athletes.⁸⁶ Bowsby is suggesting that major college programs consider new ideas for helping players, such as a departure fund.⁸⁷ A trust fund of this nature, on its face, appears to be a good idea, since less than one percent of college students make it to the professional ranks. Such a fund could be used to help athletes make the transition from college to life thereafter.

Brad Wolverton, staff editor of *The Chronicle of Higher Education*, has written about alternative benefits and a new openness to increasing player benefits.⁸⁸ “The idea for a trust fund—which is endorsed by the National College Players Association . . . is one of several gaining momentum as commissioners met last week in Chicago to discuss ideas for a revamped Division I.”⁸⁹

College sports is a multi-billion dollar industry, and in 2010, the NCAA signed a \$10.8 billion, fourteen-year television contract.⁹⁰ To keep the players’ jump shots and other indicia of identity “pure,” and to avoid a violation of the right of publicity, the individual’s consent should be secured by a release or license. The appropriate instrument should transfer, in whole or in part, specific rights setting forth, at a minimum, the scope, term, representations, and fees. A formula should be devised to apportion a percentage or dollar amount to each student-athlete to be held in trust and be distributed at a future time.

⁸⁵ #35 *Jim Boheim*, ORANGE HOOPS <http://www.orangehoops.org/jboheim.htm> (last visited Apr. 28, 2015).

⁸⁶ Brad Wolverton, *Big 12 Commissioner Backs New Benefits Short of Payments for Athletes*, CHRON. HIGHER EDUC. (Oct. 8, 2013), <http://chronicle.com/article/Big-12-Commissioner-Backs-New/142205/>.

⁸⁷ *Id.*

⁸⁸ Brad Wolverton, *In College Sports, a New Openness to Increasing Player Benefits for Athletes*, CHRON. HIGHER EDUC. (Sept. 25, 2013), <http://chronicle.com/article/In-College-Sports-a-New/141857/>.

⁸⁹ *Id.*

⁹⁰ *CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, NCAA (Jan. 12, 2011, 9:24 AM), <http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement>.

On the other hand, the proposed amount could be used as a stipend to each player over and above what the basic scholarship covers.

CONCLUSION

The First Amendment requires that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information.⁹¹ This is congruent with the democratic processes under the constitutional guarantees of freedom of speech and the press. Fame is valued, and the right of publicity protects the student-athlete's proprietary interest in the commercial value of his or her identity from exploitation by others.⁹² Advertising is the quintessential commercial speech, and a violation of the right of publicity is a tort that quintessentially consists of advertising. The crux of the right of publicity is the commercial value of human identity. In order to lawfully and properly exploit this legitimate proprietary interest, just like the game itself, one must know the rules.

After a lengthy trial commencing on June 9, 2014 and ending August 8, 2014, Chief Judge Claudia Wilken of the Northern District of California ruled in favor of the plaintiffs in *O'Bannon*, holding that NCAA rules violate antitrust laws.⁹³ In her ninety-nine-page opinion, she issued an injunction that prevents the NCAA from enforcing any rules or bylaws that would prohibit member schools and conferences from offering a limited share of revenue generated from the use of players' names, images, and likenesses over and above a full grant-in-aid.⁹⁴ In her ruling, Judge Wilken also rejected the plaintiff's proposal to allow athletes to receive money for endorsements, saying that such a move would undermine the efforts of member schools and the NCAA to protect student athletes from commercial exploitation.⁹⁵ Judge Wilken's ruling establishes that players have group rights in products that exploit their names and likeness. The NCAA can have a cap of \$5,000

⁹¹ Scott R. Chandler, *Whose Right Is It Anyway?: How Recent Cases and Controversy Have Blurred the Lines Between First Amendment Protection and an Athlete's Right of Publicity*, 21 MARQ. SPORTS L. REV. 315, 316 (2010).

⁹² *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941) (opening the door to the professional athlete's right of publicity pursuant to a legal challenge brought by Davey O'Brien, famed Texas Christian University Heisman Quarterback and Philadelphia Eagle).

⁹³ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014), *appeal argued*, Nos. 14-16601 & 14-17068 (9th Cir. Mar. 17, 2015).

⁹⁴ *Id.* at 963.

⁹⁵ *Id.* at 984.

per year, in 2014 dollars, above the value of a full college scholarship and will be allowed to have rules that prevent the athletes from using the money, which will be held in trust while in school.⁹⁶ As an interesting aside, the National Labor Relations Board is reviewing an appeal by Northwestern University, supported by the NCAA, of a regional director's decision that football players are employees and have the right to unionize.⁹⁷

Keep in mind that Judge Wilken's ruling is about removing restrictions on the money college students receive for the use of their names, images, and likenesses. She determined those restrictions violated antitrust law.⁹⁸ Now each school may pay the full costs for an athlete to attend its school if it so desires.⁹⁹ *O'Bannon* is now on appeal in the Ninth Circuit Court of Appeals.¹⁰⁰ In its appeal, the NCAA contends that Judge Wilken improperly took the role of superintendent of collegiate sports and, thus, her injunction is unlawful.¹⁰¹ In addition, the NCAA contends that the First Amendment does not recognize athletes' right of publicity.¹⁰² A case of this importance will likely receive expedited review. In the latest development, on March 9, 2015, lawyers for the plaintiffs reduced their request for attorneys' fees and other costs.¹⁰³ Michael Hausfeld, lead attorney for plaintiffs, initially asked for \$50.9 million but lowered that figure to under \$50 million.¹⁰⁴ It will likely be some time before all the issues and reasonable solutions are sorted out. Moreover, regardless of what the Ninth Circuit Court

⁹⁶ *Id.* at 1008.

⁹⁷ *Nw. Univ.*, No. 13-RC-121359, 2014-15 NLRB Dec. (CCH) ¶ 15,781, 2014 WL 1653118 (Mar. 26, 2014), *review granted*, 2014 WL 1653118 (N.L.R.B. Apr. 24, 2014).

⁹⁸ *O'Bannon*, F. Supp. 3d at 1009.

⁹⁹ Jon Solomon, *Q&A: What the O'Bannon Ruling Means for NCAA, Schools and Athletes*, CBS SPORTS (Aug. 9, 2014, 6:30 PM) <http://www.cbssports.com/collegefootball/writer/jon-solomon/24654805/qa-what-the-obannon-ruling-means-for-the-ncaa-schools-and-athletes>.

¹⁰⁰ Ben Strauss, *N.C.A.A. Appeal of Ruling in O'Bannon Case Is Heard*, N.Y. TIMES (Mar. 18, 2015), http://www.nytimes.com/2015/03/18/sports/ncaa-appeal-of-ruling-in-obannon-case-is-heard.html?_r=0.

¹⁰¹ Brief for Defendant-Appellant at 44, *O'Bannon v. NCAA*, Nos. 14-16601 & 14-17068 (9th Cir. Jan. 21, 2015), *available at* <http://cdn.ca9.uscourts.gov/datastore/general/2014/11/17/14-16601%20Opening%20Brief%2011-14-14.pdf>.

¹⁰² *Id.* at 38.

¹⁰³ Steve Berkowitz, *O'Bannon Lawyers Fight Huge Fee Reduction Sought by NCAA*, USA TODAY (Mar. 10, 2015, 2:55 AM), <http://www.usatoday.com/story/sports/college/2015/03/09/ed-o-bannon-class-action-lawsuit-ncaa-attorney-fees/24681847/>.

¹⁰⁴ *Id.*

of Appeals rules, this case will likely be appealed to the U.S. Supreme Court. In other words, stay tuned.

In the interim, it is time to get back to the basics and the fundamentals of sport. Participation in sports engenders qualities that can prepare student-athletes for productive lives as adults. Leadership, discipline, sportsmanship, how to win, and more importantly, how to lose are some of the enduring values that can be gleaned from participation in athletics. Grantland Rice, Dean of Sports Journalists, summed it up best: "When the One Great Scorer comes to mark against your name, he will not write if you won or lost but how you played the game."¹⁰⁵

¹⁰⁵ *Henry Grantland Rice*, VAND. U., <http://www.vanderbilt.edu/colleghalls/colleges/moore/rice/henry-grantland-rice.php> (last visited Apr. 8, 2015).