

# RIGHTS OF PUBLICITY IN SPORTS-MEDIA

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## INTRODUCTION

In recent years, the sports-media industry has experienced an influx of litigation relating to the use of athletes' names, images, and likenesses (NILs).<sup>1</sup> The most prominent of such lawsuits have targeted major sports-media revenue resources, such as game broadcasts and videogames.<sup>2</sup> These cases have typically involved current or former National Collegiate Athletic Association (NCAA) student-athletes or retired players from major professional sports leagues, as plaintiffs, asserting antitrust and/or right of publicity claims against major sports organizational bodies, sporting event broadcasters, and videogame distributors, as defendants. Outcomes in such cases often turn on the delicate balance between an individual's state-based right of publicity and a publisher's rights under federal constitutional (i.e., First Amendment) and statutory law (i.e., Copyright Act).<sup>3</sup>

As the Supreme Court has only once addressed the right of publicity,<sup>4</sup> lower state and federal courts in the United States have developed several different tests and standards to determine whether a plaintiff can sustain a right of publicity claim.<sup>5</sup> Often times, statutory language will drive the analysis, particularly in the sports-media context, where numerous state statutes expressly exempt sports broadcasts from

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1. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1052 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016); Davis v. Elec. Arts, Inc., 775 F.3d 1171, 1175 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1448 (2016); ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 918–19 (6th Cir. 2003).

2. *See* Davis, 775 F.3d at 1175; Hart v. Elec. Arts, Inc., 717 F.3d 141, 145 (3d Cir. 2013).

3. Zacchini v. Scripps-Howard Broad. Co. (*Zacchini II*), 433 U.S. 562, 573–75 (1977).

4. *See generally id.* (holding the First and Fourteenth Amendments do not require a state to “privilege the press” when determining whether defendant improperly broadcast plaintiff's “stunt” without compensation).

5. Davis, 775 F.3d at 1177 (quoting *In re* NCAA Student-Athlete Name & Likeness Licensing Litig. (*Keller*), 724 F.3d 1268, 1273 (9th Cir. 2013)); Hart, 717 F.3d at 148–49 (citing *Zacchini II*, 433 U.S. at 574–75).

right of publicity liability. Generally, all relevant tests share a common end goal: to balance the right of publicity against recurring defenses rooted in free speech principles.<sup>6</sup> Because such defenses implicate First Amendment concerns, many practitioners and commentators opine the Supreme Court ought to impose a uniform standard to apply when right of publicity claims are met with First Amendment defenses, and have cited recent sports-media cases as an ideal opportunity for Supreme Court intervention.<sup>7</sup>

However, recent sports-media right of publicity cases, involving similarly situated parties and similar allegations, have yielded consistent outcomes, notwithstanding the application of different legal tests. Most courts, for example, have determined that a sporting event participant cannot sustain a right of publicity claim directed to defendant's use of his or her NIL in game broadcast footage, because (1) the applicable state's publicity statute expressly exempts sports broadcasts,<sup>8</sup> (2) such broadcasts represent protectable non-commercial speech (i.e., qualify as newsworthy or public interest publications),<sup>9</sup> and/or (3) the broadcaster's valid copyright in the relevant game footage preempts a state-based publicity claim under the Copyright Act.<sup>10</sup> In contrast, most courts have held that a right of publicity claim may lie against the unauthorized use

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6. *ETW Corp.*, 332 F.3d at 931 (“There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment.”).

7. See, e.g., Bill Donahue, *In Not Tackling Madden, High Court Punts on Publicity Rights*, LAW360 (Mar. 22, 2016, 10:45 PM), <https://www.law360.com/articles/774746/in-not-tackling-madden-high-court-punts-on-publicity-rights>.

8. See *Marshall v. ESPN (Marshall II)*, No. 15-5753, 2016 U.S. App. LEXIS 15292, at \*5 (6th Cir. Aug. 17, 2016) (“The plaintiffs claim that, under Tennessee statutory and common law, college players have a ‘right of publicity’ in their names and images as they might appear in television broadcasts of football or basketball games in which the plaintiffs participate. But that argument is a legal fantasy. Specifically, the plaintiffs’ statutory claim under the Tennessee Personal Rights Protection Act is meritless because that Act expressly permits the use of any player’s name or likeness in connection with any ‘sports broadcast.’” (citing TENN. CODE ANN. § 47-25-1107(a) (2013))).

9. See *Dryer v. Nat’l Football League (Dryer II)*, 55 F. Supp. 3d 1181, 1198 (D. Minn. 2014) (“Because the [NFL Films] productions are reporting on a matter of substantial public interest, California’s newsworthiness defense bars [plaintiffs’] California publicity-rights claims.”), *aff’d*, 814 F.3d 938 (8th Cir. 2016).

10. See *Dryer v. Nat’l Football League (Dryer III)*, 814 F.3d 938, 943 (8th Cir. 2016) (“When a right-of-publicity suit challenges the expressive, non-commercial use of a copyrighted work, however, that suit seeks to subordinate the copyright holder’s right to exploit the value of that work to the plaintiff’s interest in controlling the work’s dissemination. . . . Such a suit asserts rights equivalent to exclusive rights within the general scope of copyright and is preempted by copyright law.”; see also *Facenda v. NFL Films, Inc.*, 542 F.3d 1007, 1029 (3d Cir. 2008); 2 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 11:55 (2d ed. 2016).

of an athlete's likeness as a sports videogame avatar.<sup>11</sup> Thus, absent a divisive circuit split or disparate outcomes in analogous factual scenarios, the case for Supreme Court intervention arguably remains weak.<sup>12</sup>

Moreover, because recent decisions have shaped the landscape for right of publicity claims relating to game broadcasts and videogames, future litigants may seek to target other murkier, albeit less lucrative, areas left relatively undefined by courts to date, such as the use of player NILs in promoting game broadcasts or in emerging social media platforms. Such cases could be more likely to yield inconsistent results when applying fact-intensive right of publicity analyses, and provide more compelling bases for potential Supreme Court review.

### I. THE GENESIS OF PUBLICITY RIGHTS

Rights of publicity are derived from the long recognized right to privacy.<sup>13</sup> Over time, states began to recognize a distinct right of publicity flowing from the tort of "invasion of privacy by appropriation."<sup>14</sup> As one leading commentator describes it, "appropriation . . . of the plaintiff's name or likeness" for commercial purposes is but one of four distinct privacy rights recognized by courts, and applicable where the defendant "pirate[s] the plaintiff's identity for some advantage of his own."<sup>15</sup>

Early courts acknowledging the "so-called right of privacy" recognized a protectable property interest in "publicly known persons from the misappropriation of their identities."<sup>16</sup> Put differently, "[t]he right of publicity is an intellectual property right of recent origin which

11. *Davis v. Elec. Arts, Inc.*, 775 F.3d 1171, 1181 (9th Cir. 2015) ("[Defendant Electronic Arts] has not shown that its unauthorized use of former players' likenesses in the *Madden NFL* video game series qualifies for First Amendment protection under the transformative use defense, the public interest defense, the *Rogers* test or the incidental use defense."), *cert. denied*, 136 S. Ct. 1448 (2016); *Keller*, 724 F.3d 1268, 1276 (9th Cir. 2013) ("[Electronic Arts' use of the plaintiff's likeness] does not contain significant transformative elements such that EA is entitled to the [First Amendment] defense as a matter of law."); *Hart*, 717 F.3d at 170 ("[Electronic Arts'] *NCAA Football 2004, 2005* and *2006* games . . . do not sufficiently transform [the plaintiff's] identity to escape the right of publicity claim and . . . that the District Court erred in granted summary judgment in favor of [the defendant].").

12. See Donahue, *supra* note 7.

13. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928–29 (6th Cir. 2003) ("The right of publicity is, somewhat paradoxically, an outgrowth of the right of privacy." (citing 1 MCCARTHY, *supra* note 10, § 1:4)).

14. *Hart*, 717 F.3d at 150 (first citing 1 MCCARTHY, *supra* note 10, § 1:23; and then citing *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 394 (N.J. Ch. 1907)) (discussing development of "right of publicity" cause of action under New Jersey law).

15. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389, 401, 403 (1960).

16. *Hart*, 717 F.3d at 150 (citing *Edison*, 67 A. at 394); see also *Edison*, 67 A. at 394 (enjoining a company from using the name or likeness of Thomas Edison to promote its products).

has been defined as the inherent right of every human being to control the commercial use of his or her identity.”<sup>17</sup> As public figures, athletes historically have played an integral role in the development of right of publicity jurisprudence.<sup>18</sup> The earliest federal appellate right of publicity decision, for example, concerned the unauthorized use of professional baseball players’ images within defendant’s gum packages.<sup>19</sup> In that case, the Second Circuit expressly recognized the players’ right of publicity, stating that “in addition to and independent of that right of privacy . . . , a man has a right *in the publicity value* of his photograph. . . . This right might be called a ‘right of publicity.’”<sup>20</sup> State and federal courts subsequently ruling on famous athletes’ right of publicity claims have similarly reasoned that

the basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference.

It is unfair that one should be permitted to commercialize or exploit or capitalize upon another’s name, reputation or accomplishments merely because the owner’s accomplishments have been highly publicized.<sup>21</sup>

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17. *ETW Corp.*, 332 F.3d at 928 (citing 1 MCCARTHY, *supra* note 10, § 1:3).

18. *See generally Marshall II*, No. 15-5753, 2016 U.S. App. LEXIS 15292, at \*5 (6th Cir. Aug. 17, 2016) (affirming dismissal of college basketball and football players’ right of publicity claims, Sherman Act claims, and Lanham Act claims against collegiate athletic conferences and television networks); *Dryer III*, 814 F.3d 938 (8th Cir. 2016) (affirming the NFL’s motion for summary judgment against former player’s claims that NFL’s use of video footage of players violated their publicity rights and the Lanham Act); *Keller*, 724 F.3d 1268 (9th Cir. 2013) (finding former college players’ class action suit against video game developer EA for violating publicity rights was not barred by California’s statute regarding anti-strategic lawsuit against public participation); *Hart*, 717 F.3d at 145, 170 (reversing summary judgment motion for the defendant, a video games developer, on the grounds that the use of a college football quarterback’s likeness in several video games did not sufficiently transform the player to escape the player’s right of publicity claim); *ETW Corp.*, 332 F.3d at 915 (affirming summary judgment motion for a defendant artist against professional golf player’s infringement, dilution of trademark, and right of publicity claims).

19. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867–68 (2d Cir. 1953) (per curiam).

20. *Id.* at 868 (emphasis added).

21. *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Ch. 1967) (citation omitted) (involving publicity right claims brought by well-known professional golfers—Arnold Palmer, Gary Player, Jack Nicklaus, and Doug Sanders—relating to the unauthorized use of their names in the defendants’ golf game). *See*, for example, *Abdul-Jabbar v. General Motors Corp.*, which held that former professional basketball player Karim Abdul-Jabbar “alleged sufficient facts to state a claim under both California common law and section 3344 [of California’s Civil Code]” for publicity right violations in connection with the unauthorized use his former name, Lew Alcindor, in an automobile television commercial. 85 F.3d 407, 415 (9th Cir. 1996) (“California’s common law right of publicity protects celebrities from appropriations of their *identity* not strictly definable as ‘name or picture.’” (quoting *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974)) (citing

In its 1977 *Zacchini* decision, the Supreme Court recognized a state's interest in permitting a right of publicity, expressing that it "is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors."<sup>22</sup> *Zacchini* is the only Supreme Court decision to offer guidance on the right of publicity analysis.<sup>23</sup> *Zacchini* "involved the videotaping and subsequent rebroadcast on a television news program of [the] plaintiff's human cannonball act."<sup>24</sup> At the state court level, "the Ohio Supreme Court held that *Zacchini's* right of publicity was trumped by the First Amendment."<sup>25</sup> Specifically, the Ohio Supreme Court determined that

the challenged invasion was privileged, saying that the press "must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the 'breathing room' in reporting which freedom of the press requires." Under this view, respondent was thus constitutionally free to film and display petitioner's entire act.<sup>26</sup>

On appeal, the Supreme Court reversed, holding that the First Amendment did not insulate defendant from right of publicity liability in connection with the publication of the plaintiff's entire act or performance.<sup>27</sup> The Court reasoned that "[t]he broadcast of a film of [*Zacchini's*] entire act poses a substantial threat to the economic value of that performance."<sup>28</sup> It further emphasized that

this act [was] the product of [*Zacchini's*] own talents and energy, the end result of much time, effort, and expense. Much of its economic value lie[d] in the "right of exclusive control over the publicity given to his performance"; if the public [could] see the act free on television, it [would] be less willing to pay to see it at the fair.<sup>29</sup>

The Court thus explained that

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Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988)).

22. *Zacchini II*, 433 U.S. 562, 573 (1977).

23. *Id.* at 565.

24. *See* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 929 (6th Cir. 2003); *see also Zacchini II*, 433 U.S. at 562.

25. *Zacchini II*, 433 U.S. at 562; *see also Zacchini v. Scripps-Howard Broad. Co. (Zacchini I)*, 351 N.E.2d 454, 462 (Ohio 1976).

26. *Zacchini II*, 433 U.S. at 570 (internal citation omitted) (quoting *Zacchini I*, 351 N.E.2d at 461).

27. *Id.* at 578–79.

28. *Id.* at 575.

29. *Id.* (quoting *Zacchini I*, 351 N.E.2d at 460).

[t]he effect of a public broadcast of the performance [was] similar to preventing [Zacchini] from charging an admission fee. “The rationale for (protecting the right of publicity) [was] the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose [was] 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>30</sup>

Drawing from language in *Zacchini*, one federal district court, in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation (In re NCAA)*, reasoned that the First Amendment does not, as a matter of law, preclude sporting event participants from asserting right of publicity claims in connection with live game broadcasts or re-broadcast footage.<sup>31</sup> In *In re NCAA*, the district court declined to dismiss collegiate athletes’ antitrust claims directed to the NCAA’s allegedly unlawful licensing of player NILs in connection with game broadcasts, among other things.<sup>32</sup> According to the California district court, “[t]he Court’s reasoning in *Zacchini* strongly suggests that the First Amendment does not guarantee media organizations an unfettered right to broadcast entire sporting events without regard for the participating athletes’ rights of publicity.”<sup>33</sup> However, subsequent federal court decisions have taken the opposite view,<sup>34</sup> characterized the court’s view *In re NCAA* as an outlier,<sup>35</sup> and dismissed the above-cited language as dicta.<sup>36</sup>

## II. RECOGNIZED DEFENSES AND LIMITATIONS TO PUBLICITY RIGHTS ACTIONS

Various defenses and exceptions, summarized below, have developed to limit the scope of plaintiffs’ right of publicity claims. Sports-media defendants regularly invoke such doctrines when faced with right of publicity actions asserted by athletes.

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30. *Id.* at 575–76 (quoting Harry Kalven Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 331 (1966)).

31. 37 F. Supp. 3d 1126, 1145 (N.D. Cal. 2014).

32. *Id.*

33. *Id.* at 1140.

34. See *Marshall v. ESPN, Inc. (Marshall I)*, 111 F. Supp. 3d 815, 827 (M.D. Tenn. 2015) (citing *Dryer v. Nat’l Football League (Dryer I)*, 689 F. Supp. 2d 1113, 1195–1200 (D. Minn. 2010)), *aff’d*, No. 15-5753, 2016 U.S. App. LEXIS 15292 at \*5 (6th Cir. Aug. 17, 2016).

35. *Id.* at 826 (citing *In re NCAA*, 37 F. Supp. 3d at 1140, 1145).

36. *Id.*

*A. First Amendment Protection*

As noted above, courts are typically tasked with balancing First Amendment rights of free expression against an individual's state-based right of publicity. In this context, First Amendment analyses generally turn on whether the defendants' publication qualifies as commercial or non-commercial speech.<sup>37</sup> While "[c]ommercial speech was initially viewed as being outside the ambit of the First Amendment altogether," precedent has held "that commercial speech is constitutionally protected but governmental burdens on this category of speech are scrutinized more leniently than burdens on fully protected noncommercial speech."<sup>38</sup> As a general matter, noncommercial speech can provide a complete defense to a right of publicity action.<sup>39</sup> In contrast, liability for right of publicity violations can attach to commercial speech.<sup>40</sup> Moreover, "[t]o determine whether speech falls on the commercial or noncommercial side of the constitutional line, the [Supreme] Court has provided this basic definition: Commercial speech is 'speech that proposes a commercial transaction.'"<sup>41</sup>

There is not always a bright-line distinction between commercial and noncommercial speech for First Amendment purposes.<sup>42</sup> Indeed, courts have cautioned against strict application of a test that merely asks whether defendant's publication "proposes a commercial transaction."<sup>43</sup> The *Jordan v. Jewel Food Stores* case illustrates this point.<sup>44</sup> In *Jordan*, the defendant grocery store chain, Jewel, authored a one-page publication featured in a commemorative issue of *Sports Illustrated* that celebrated

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37. See generally *Jordan v. Jewel Food Stores, Inc. (Jordan II)*, 743 F.3d 509, 515–16 (7th Cir. 2014) (first citing *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942); and then citing *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989)) (outlining the commercial-speech doctrine).

38. *Id.* at 515 (first citing *Fox*, 492 U.S. at 477; and then citing *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985)).

39. *Id.*

40. *Id.* (*Zauderer*, 471 U.S. at 637).

41. *Id.* at 516 (citing *Fox*, 492 U.S. at 482).

42. DAVID L. HUDSON JR., *THE FIRST AMENDMENT: FREEDOM OF SPEECH* § 6.1 (2012).

43. *Jordan II*, 743 F.3d at 516–17 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983)) ("Although commercial-speech cases generally rely on the distinction between speech that proposes a commercial transaction and other varieties of speech, it's a mistake to assume that the boundaries of the commercial-speech category are marked exclusively by this 'core' definition. To the contrary, there is a 'common-sense distinction' between commercial speech and other varieties of speech, and we are to give effect to that distinction." (first quoting *Zauderer*, 471 U.S. at 637 n.7; and then quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978))).

44. See generally *id.* (describing the Court's approach to commercial and non-commercial speech).

Michael Jordan's 2009 induction into the Naismith Memorial Basketball Hall of Fame.<sup>45</sup> Jewel's published design included a pair of high-top basketball shoes bearing Jordan's iconic number twenty-three, and was accompanied by text that incorporated Jordan's name and number, along with part of Jewel's slogan: "Good things are just around the corner."<sup>46</sup> Jordan sued Jewel in connection with this publication, for the alleged unauthorized commercial use of elements of his identity.<sup>47</sup>

Jewel moved for summary judgment, seeking dismissal of Jordan's Illinois statutory right of publicity claim as a matter of law.<sup>48</sup> Jewel argued that its *Sports Illustrated* page was "noncommercial" speech, and thus deserved complete insulation from right of publicity liability under the First Amendment.<sup>49</sup> In 2012, the Illinois district court granted Jewel's summary judgment motion, and dismissed Jordan's Illinois right of publicity claim.<sup>50</sup> It reasoned that "[i]t is difficult to see how Jewel's page could be viewed, even with the benefit of multiple layers of green eyeshades, as proposing a commercial transaction."<sup>51</sup>

On appeal, however, the Seventh Circuit reversed.<sup>52</sup> The appeals court determined that Jewel's ad was "commercial speech" within the meaning of the First Amendment, and thus did not provide a complete defense to Jordan's right of publicity claim.<sup>53</sup> It specifically reasoned, "Jewel's ad has an unmistakable commercial function: enhancing the [Jewel] brand in the minds of consumers."<sup>54</sup> Accordingly, the appeals court remanded the case for further consideration of Jordan's statutory right of publicity claim.<sup>55</sup>

Thus, in cases like *Jordan*, where elements of an athlete's identity are used in connection with quasi-commercial, so-called "brand advertising" (i.e., does not directly promote a particularized commercial transaction), the intersection between First Amendment and publicity rights may be especially difficult to navigate.

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45. *Id.* at 512.

46. *Id.*

47. *Id.* at 513.

48. *Jordan II*, 743 F.3d at 513.

49. *Id.*

50. *Jordan v. Jewel Food Stores, Inc. (Jordan I)*, 851 F. Supp. 2d 1102, 1112 (N.D. Ill. 2012), *rev'd*, 743 F.3d 509 (7th Cir. 2014).

51. *Id.* at 1106.

52. *Jordan II*, 743 F.3d at 522.

53. *See id.* at 518.

54. *Id.*

55. *Id.* at 512.

*B. The Newsworthiness or Public Interest Exception*

Nearly all states that recognize the right of publicity also recognize some form of a newsworthiness or public interest exception, either by common law or statute, to varying degrees.<sup>56</sup> Essentially, “[t]he newsworthiness defense is akin to a First Amendment privilege and arises from the same roots as that privilege.”<sup>57</sup> Under California common law, for example, there can be no misappropriation of a person’s right of publicity for “publication of matters in the public interest.”<sup>58</sup> Texas common law “similarly exempts from its publicity-rights claim any use for a ‘newsworthy purpose.’”<sup>59</sup>

Generally, the newsworthiness/public interest defense is “broad” and extends “to all matters of the kind customarily regarded as ‘news’ and all matters giving information to the public for purposes of . . . amusement.”<sup>60</sup> Under New York’s statutory cause of action, for instance, “the use of a person’s name or picture in the context of an event within the ‘orbit of public interest and scrutiny,’ . . . a category into which most of the events involving a public figure . . . fall, can rarely form the basis for an actionable claim under [section 51 of New York Civil Rights Law].”<sup>61</sup>

In the sports-media context, courts have held that “[t]he recitation and discussion of factual data concerning the athletic performance of [professional athlete] plaintiffs commands a substantial public interest.”<sup>62</sup> Moreover, courts have recognized that, “both professional baseball and professional football . . . are closely followed by a large segment of the public.”<sup>63</sup> Accordingly, several courts have determined that broadcasts of professional sporting events and related reports are newsworthy events and/or in the public interest, and therefore cannot be subject to right of

56. See generally CAL. CIV. CODE § 3344 (West 2016) (demonstrating that the right of publicity in California has exceptions to the general rule).

57. *Dryer II*, 55 F. Supp. 3d 1181, 1199 (D. Minn. 2014), *aff’d*, 814 F.3d 938 (8th Cir. 2016).

58. *Id.* at 1197 (quoting *Keller*, 724 F.3d 1268, 1282 (9th Cir. 2013)) (citing *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 640–41 (Cal. Ct. App. 1995)).

59. *Id.* at 1198 (quoting *Brown v. Ames*, 201 F.3d 654, 657 (5th Cir. 2000)).

60. *Id.* (quoting *Anonsen v. Donahue*, 857 S.W.2d 700, 703 (Tex. Ct. App. 1993)).

61. *Ann-Margret v. High Soc’y Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) (quoting *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977)); see also N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009).

62. *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 315 (Cal. Ct. App. 2001) (citing *Carlisle v. Fawcett Publ’ns, Inc.*, 20 Cal. Rptr. 405, 414–15 (Cal. Ct. App. 1962)).

63. *CBS Interactive v. Nat’l Football League Players Ass’n*, 259 F.R.D. 398, 419 (D. Minn. 2009).

publicity liability.<sup>64</sup>

### C. Copyright Act Preemption

Section 301 of the Copyright Act provides another limitation to individuals' publicity rights. Section 301 preempts the assertion of state rights, and thus can trump right of publicity claims, when two conditions are met: first, the work must be fixed in a tangible medium and come within the subject matter of copyright as specified in section 102;<sup>65</sup> second, the right must be equivalent to any of the rights specified in section 106.<sup>66</sup> Under the Copyright Act, "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent and stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>67</sup> The audiovisual recording of a game telecast, for example, is considered "fixed in a tangible medium," and therefore the proper subject matter of copyright.<sup>68</sup>

For an asserted state law publicity right to be "equivalent" to one of the rights set forth in section 106, and thus subject to copyright preemption, the plaintiff's claim must relate to the reproduction, distribution, public performance, or display of a copyrighted work.<sup>69</sup> "When a right-of-publicity suit challenges the expressive, non-commercial use of a copyrighted work, . . . that suit seeks to subordinate the copyright holder's right to exploit the value of that work to the

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64. See, e.g., *Dryer II*, 55 F. Supp. 3d 1181, 1198 (D. Minn. 2014) (finding that the use of plaintiff's identity in the challenged NFL Films productions was a matter of public interest and was for the purpose of giving information to the public), *aff'd*, 814 F.3d 938 (8th Cir. 2016). In *National Football League v. Alley, Inc.*, the district court discussed how the Florida right of publicity statute "exempts from its prohibition unconsented use of names or likenesses as part of a 'presentation having a current or legitimate public interest,'" and held that "Defendants' use of [NFL game] intercepted telecast falls within this statutory exemption." 624 F. Supp. 6, 10 (S.D. Fla. 1983) (citing FLA. STAT. § 540.08 (2013)).

65. 17 U.S.C. § 102(a) (2012). The subject matters expressly encompassed by section 102 are "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." *Id.* § 102(a)(1)–(8). However, this list is considered illustrative, not exhaustive. *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 99–100 (2d Cir. 2014).

66. 17 U.S.C. § 301(a) (2012).

67. 17 U.S.C. § 101 (2012).

68. *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n (Balt. Orioles II)*, 805 F.2d 663, 668 (7th Cir. 1986) (citing *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 731–32 (8th Cir. 1986)).

69. See 17 U.S.C. § 106 (2012).

plaintiff's interest in controlling the work's dissemination."<sup>70</sup> Under this standard, courts have held that athletes' right of publicity claims directed to the broadcast of a sporting event are preempted by the Copyright Act, because the players' state law publicity rights are subordinate to the copyright holder's (i.e., broadcaster's) federal, exclusive, distribution rights.<sup>71</sup>

#### *D. State Law Variance and Sports Broadcast Statutory Exceptions*

As state-based common law or statutory rights (or both), publicity rights vary from jurisdiction to jurisdiction.<sup>72</sup> Some states, like Florida, for example, strictly require commercial use of the plaintiff's NIL to advertise a particular good or service to constitute a right of publicity violation.<sup>73</sup> In contrast, other states, like California, recognize a broader common law right of publicity, which requires "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of [the] plaintiff's name or likeness to [the] defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."<sup>74</sup>

In addition to the common law right, however, section 3344 of California's Civil Code provides a narrower statutory right of publicity action, which requires the plaintiff to prove all elements of the common law claim, plus "a knowing use by the defendant" and "a direct connection between the alleged use and the commercial purpose."<sup>75</sup> Moreover, the California statute, like numerous other state statutes, expressly exempts certain public interest events and publications from right of publicity liability, such as news and sports broadcasts.<sup>76</sup>

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70. *Dryer III*, 814 F.3d 938, 943 (8th Cir. 2016).

71. *Id.* at 944 ("The Copyright Act . . . preempts the [NFL retired players'] attempt to control dissemination of the [National Football League] films and thereby exercise a right equivalent to 'exclusive rights' granted by copyright."); *Balt. Orioles II*, 805 F.2d at 674.

72. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928 n.13 (6th Cir. 2003) ("The right of publicity is a creature of state law. . . . Approximately half of the states have adopted some form of the right of publicity either at common law or by statute.").

73. In *National Football League v. Alley, Inc.*, the district court dismissed the Miami Dolphins' players' right of publicity claims against local bar and restaurant owners, where the defendants' use of the plaintiffs' "names and likenesses by public showings of intercepted telecasts, while it conferred commercial advantages, was not a trade or advertising use that directly promoted defendants' bar/restaurant services or any product." 624 F. Supp. 6, 9–10 (S.D. Fla. 1983) ("Section 540.08 of the Florida Statutes prohibit unconsented use of an individual's name and likeness only when such directly promotes a commercial product or service." (citing *Loft v. Fuller*, 408 So. 2d 619 (Fla. Dist. Ct. App. 1981))).

74. *Keller*, 724 F.3d 1268, 1273 n.4 (9th Cir. 2013) (emphasis added) (quoting *Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98, 111 (Cal. Ct. App. 2010)).

75. *Id.* (quoting *Stewart*, 105 Cal. Rptr. 3d at 111).

76. CAL. CIV. CODE § 3344(d) (West 2016) ("For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs,

## III. THE VARIOUS APPLICABLE TESTS

A. *The Transformative Use Test*

The “transformative use” test, first formulated by the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, is “a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”<sup>77</sup> The rationale for this test is that “when a work contains significant transformative elements, it is . . . especially worthy of First Amendment protection . . . [and] less likely to interfere with the economic interest protected by the right of publicity.”<sup>78</sup> The *Comedy III* Court identified the following five factors to determine whether defendant’s use is “sufficiently transformative” to deserve First Amendment protection, subsequently adopted by the Ninth Circuit<sup>79</sup>:

First, if “the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized,” it is more likely to be transformative than if the “depiction or imitation of the celebrity is the very sum and substance of the work in question.” Second, the work is protected if it is “primarily the defendant’s own expression”—as long as that expression is “something other than the likeness of the celebrity.” This factor requires an examination of whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist. Third, to avoid making judgments concerning “the quality of the artistic contribution,” a court should conduct an inquiry “more quantitative than qualitative” and ask “whether the literal and imitative or the creative elements predominate in the work.” Fourth, . . . “a subsidiary inquiry” would be useful in close cases: whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.” [Fifth], . . . “when an artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame,” the work is not

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or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required.”); *see also, e.g.*, OHIO REV. CODE ANN. § 2741.02(D)(1) (West 2006) (“A use of an aspect of an individual’s persona in connection with any news, public affairs, sports broadcast, or account does not constitute a use for which consent is required.”); TENN. CODE ANN. § 47-25-1107(a) (2013) (“It is deemed a fair use and no violation of an individual’s rights shall be found, for purposes of this part, if the use of a name, photograph, or likeness is in connection with any news, public affairs, or sports broadcast or account.”).

77. 21 P.3d 797, 799 (Cal. 2001); *see also Keller*, 724 F.3d at 1274.

78. *Comedy III Productions, Inc.*, 21 P.3d at 808.

79. *Keller*, 724 F.3d at 1274; *see also Comedy III Productions, Inc.*, 21 P.3d at 799.

transformative.<sup>80</sup>

### B. *The Rogers Test*

The so-called *Rogers* test originates from the Second Circuit's *Rogers v. Grimaldi* decision.<sup>81</sup> In *Rogers*, well-known actress, singer, and dancer Ginger Rogers asserted section 43(a) of the Lanham Act,<sup>82</sup> false designation of origin claims against the producers, and distributors of a film entitled *Ginger and Fred*, alleging that the title infringed on her distinctive identity and was likely to cause consumer confusion.<sup>83</sup>

Under the *Rogers* test, Lanham Act false endorsement claims cannot attach to expressive works “unless the title has no artistic relevance to the underlying work whatsoever, or . . . the title explicitly misleads as to the source or the content of the work.”<sup>84</sup> The *Rogers* test ultimately looks at “the relationship between the celebrity image and the work as a whole.”<sup>85</sup> In applying the *Rogers* test, courts ask (1) whether the plaintiff's likeness is “wholly unrelated” to the content of the overall work, and (2) whether inclusion of the plaintiff's likeness is a “disguised commercial advertisement.”<sup>86</sup>

The Sixth Circuit Court of Appeals has extended the *Rogers* framework beyond Lanham Act claims to state-law right of publicity claims.<sup>87</sup> The Third and Ninth Circuits, in contrast, have refused to apply *Rogers* in the right of publicity context.<sup>88</sup> In doing so, these courts have

80. *Id.* (internal citations omitted) (quoting *Comedy III Productions, Inc.*, 21 P.3d at 809–10) (citing 2 MCCARTHY, *supra* note 10, § 8:72).

81. 875 F.2d 994 (2d Cir. 1989).

82. 15 U.S.C. § 1125(a)(1) (2012). Section 43(a) of the Lanham Act provides for a civil cause of action against

[a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.

*Id.*

83. *Rogers*, 875 F.2d at 996.

84. *Id.* at 999.

85. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 154 (3d Cir. 2013).

86. *Keller*, 724 F.3d 1268, 1281 (9th Cir. 2013) (quoting *Rogers*, 875 F.2d at 1004).

87. *See, e.g., id.* (discussing the Sixth Circuit's application of the *Rogers* test); *see also Parks v. LaFace Rec.*, 329 F.3d 437, 442 (6th Cir. 2003) (holding that summary judgment was improper for claims under the Lanham Act and common law rights of publicity but proper on a state law defamation claim).

88. *See, e.g., id.*, *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172, 1179 (9th Cir. 2016) (declining to apply the *Rogers* test to California state law); *see also Facenda v. NFL Films, Inc.*, 542 F.3d

reasoned, *inter alia*, that such expansive application of *Rogers* could “potentially immunize a broad swath of tortious activity,”<sup>89</sup> and that the Sixth Circuit is “the only circuit court to import the *Rogers* test into the publicity arena . . . [and] has done so inconsistently.”<sup>90</sup>

### C. The Incidental Use Test

As a general matter, use of an individual’s NIL in a manner that is merely incidental to an overall publication does not impinge that individual’s right of publicity. In another right of publicity case directed to virtual reality sports videogames, *Davis v. Electronic Arts, Inc.*, the Ninth Circuit Court of Appeals recently articulated the following multi-factor incidental use test:

(1) whether the use [of a person’s NIL] has a unique quality or value that would result in commercial profit to the defendant; (2) whether the use contributes something of significance; (3) the relationship between the reference to the plaintiff and the purpose and subject of the work; and (4) the duration, prominence or repetition of the name or likeness relative to the rest of the publication.<sup>91</sup>

### D. The Predominant Use Test

Finally, the so-called “predominant use” test focuses on the purpose of defendant’s publication, namely, whether it is predominantly commercial or expressive in nature:

If a product is being sold that *predominantly* exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some “expressive” content in it that might qualify as “speech” in other circumstances. If, on the other hand, the *predominant purpose* of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.<sup>92</sup>

Missouri courts adopted the predominant use test in *Doe v. TCI Cablevision*.<sup>93</sup> In that case, the plaintiff, former professional hockey player Anthony “Tony” Twist, asserted right of publicity claims relating to the introduction of a villainous character named Anthony “Tony

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1007, 1018 (3d Cir. 2008) (declining to apply the *Rogers* test to Pennsylvania state law).

89. *Hart*, 717 F.3d at 155.

90. *Keller*, 724 F.3d at 1281 (first citing *Parks*, 329 F.3d at 461; and then citing *ETW Corp v. Jireh Publ’g, Inc.*, 332 F.3d 915, 960 (6th Cir. 2003)).

91. *Davis*, 775 F.3d at 1180.

92. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc).

93. 110 S.W.3d 363.

Twist” Twistelli in the well-known *Spawn* comic series.<sup>94</sup> In seeking to balance the plaintiff’s personal interests in his NIL against the defendant comic publisher’s First Amendment interests in free expression, the *TCI Cablevision* Court rejected the transformative use and *Rogers* tests as giving “too little consideration to the fact that many uses of a person’s name and identity have both expressive and commercial components.”<sup>95</sup> According to the Missouri court, the predominant use analysis offers a “more balanced balancing test . . . [particularly for] cases where speech is both expressive and commercial.”<sup>96</sup>

Applying the above test, the *TCI Cablevision* Court ultimately sided with the plaintiff, holding that “the metaphorical reference to Twist . . . has very little literary value compared to its commercial value.”<sup>97</sup> Other courts, however, have criticized and declined to adopt the predominant use analysis, reasoning, for example, that it “is subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics. These two roles cannot coexist.”<sup>98</sup>

#### IV. APPLYING RIGHT OF PUBLICITY PRINCIPLES TO THE SPORTS-MEDIA CONTEXT

This Section focuses on recent applications of publicity rights claims to sports-media platforms, such as game broadcast footage and virtual reality sports videogames. With few exceptions, a consensus has developed among state and federal courts—to disfavor right of publicity claims directed to game broadcasts, and accept such claims directed to sports videogame avatars—regardless of which test or legal doctrine is applied.<sup>99</sup> Indeed, as explained in greater detail below, courts have reached similar outcomes upon analyzing similar right of publicity claims under various tests.

##### *A. Alleged Publicity Rights in Sporting Event Broadcasts*

Courts across jurisdictions have relied upon various sources and legal principles (e.g., express statutory exemptions, newsworthiness/public interest defenses, and copyright preemption) to hold that an athlete cannot sustain right of publicity actions directed to a

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94. *Id.* at 365.

95. *Id.* at 374.

96. *Id.*

97. *Id.*

98. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 154 (3d Cir. 2013).

99. *See supra* notes 77–98 and accompanying text.

defendant's use of that athlete's NIL in connection with game broadcasts.<sup>100</sup> Although one federal district court, relying on *Zacchini*, determined that no universally applicable principle precludes sporting event participants from asserting right of publicity claims against game broadcasters,<sup>101</sup> that case has proven to be an anomaly, decided in a unique procedural context (involving federal antitrust, rather than state law publicity right, claims).<sup>102</sup>

### *1. Applying Statutory Exemptions for Sports Broadcasts*

Numerous states adopting a statutory right of publicity carve out an exception for sports broadcasts, as an explicit example of non-actionable newsworthy or public interest events.<sup>103</sup> The Tennessee Personal Rights Protection Act (TPRPA), for example, provides that “[i]t is deemed a fair use and no violation of an individual’s rights shall be found . . . if the use of a name, photograph, or likeness is in connection with any news, public affairs, or *sports broadcast* or account.”<sup>104</sup> The Tennessee federal district court and the Sixth Circuit Court of Appeals, in *Marshall v. ESPN*, recently applied this provision to dismiss right of publicity claims asserted by a group of former collegiate athletes against major sports broadcasters for the alleged unauthorized use of the players’ NILs in game telecasts.<sup>105</sup>

In *Marshall*, the Sixth Circuit characterized as “a legal fantasy” the plaintiffs’ claim that “under Tennessee statutory and common law, college players [had] a ‘right of publicity’ in their [NILs] as they might appear in television broadcasts of football or basketball games in which the plaintiffs participat[ed].”<sup>106</sup> The court reasoned that the “plaintiffs’ statutory claim under [TPRPA] [was] meritless because that Act expressly permit[ed] the use of any player’s name or likeness in connection with any ‘sports broadcast.’”<sup>107</sup>

100. See *supra* notes 37–76 and accompanying text.

101. *In re NCAA*, 37 F. Supp. 3d 1126, 1140, 1145 (N.D. Cal. 2014).

102. See *Marshall I*, 111 F. Supp. 3d 815, 826 (M.D. Tenn. 2015) (“The court’s statements in [*In re NCAA*] about the right to publicity in sports broadcasts are clearly *dicta*.”), *aff’d*, No. 15-5753, 2016 U.S. App. LEXIS 15292, at \*6 (6th Cir. Aug. 17, 2016).

103. See *supra* Section III.D.

104. TENN. CODE ANN. § 47-25-1107(a) (2013) (emphasis added); see also, e.g., CAL. CIV. CODE § 3344(d) (West 2016); 76 ILL. COMP. STAT. 1075/35(b)(2) (2014); OHIO REV. CODE ANN. § 2741.02(D)(1) (West 2006).

105. *Marshall I*, 111 F. Supp. 3d at 826–27; *Marshall II*, No. 15-5753, 2016 U.S. App. LEXIS 15292, at \*5 (6th Cir. Aug. 17, 2016).

106. *Marshall II*, 2016 U.S. App. LEXIS 15292, at \*5 (quoting TENN. CODE ANN. § 47-25-1107(a)).

107. *Id.*

One issue potentially left open by *Marshall*, however, is the extent to which similar statutory “sports broadcast” exceptions apply to the use of athletes’ NILs in *promotions* relating to live sports broadcasts, as opposed to the telecasts themselves. At the district court level, the television network defendants argued that the statutory exception for sports broadcasts necessarily extended to advertisements of such broadcasts, considering the TPRPA applied only to advertisements in the first instance.<sup>108</sup> The district court agreed, stating that “the TPRPA clearly confer[red] no right of publicity in sports broadcast, or with respect to any advertisement if the advertisement [was] in connection with such a broadcast.”<sup>109</sup> The Sixth Circuit, however, did not expressly address this determination on appeal.

### 2. Applying the First Amendment Defense to Sports Broadcasts

Where state law does not expressly exempt sports broadcasts from right of publicity liability, broadcasters may still succeed in raising free speech-based defenses. The Minnesota district court’s summary judgment ruling in *Dryer v. NFL* is illustrative, because the court analyzed several defenses—First Amendment protection, newsworthiness or public interest exceptions, and copyright preemption—to reach the same conclusion (i.e., athletes possess no cognizable right of publicity in game broadcast footage).<sup>110</sup>

*Dryer* involved right of publicity claims asserted by former NFL players under the laws of various jurisdictions.<sup>111</sup> In essence, the players alleged that the NFL’s use of their NILs from game footage republished in documentary-style NFL Films productions “violat[ed] their publicity rights.”<sup>112</sup> In evaluating the NFL’s First Amendment defense, the district court first analyzed whether the speech at issue was commercial, applying the following three part test: (1) “whether the speech is an advertisement,” (2) “whether the speech refers to a specific product,” and (3) “the speakers economic motivation for the speech.”<sup>113</sup> Under this test, the court determined that the NFL Films productions at issue were non-commercial, reasoning that

the productions [told] the story of a football game, or a football team,

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108. Reply Memorandum of Conference Defendants in Support of Rule 12(b)(6) Motion to Dismiss Plaintiffs’ Complaint at 2, *Marshall I*, 111 F. Supp. 3d 815 (No. 3:14-cv-01945).

109. *Marshall I*, 111 F. Supp. 3d at 827.

110. *Dryer II*, 55 F. Supp. 3d 1181, 1188–1203, 1204 (D. Minn. 2014) (discussing various defenses and concluding that there was no legally cognizable right).

111. *Id.* at 1186, 1195–96.

112. *Id.* at 1186.

113. *Id.* at 1189 (citation omitted).

or even of a particularly great football player. They [were] . . . a history lesson of NFL football. The only way for NFL Films to tell such stories [was] by showing footage of the game—the plays, the players, the coaches, the referees, and even the fans. The NFL [was] capitalizing not on the likenesses of individual players but on the drama of the game itself, something that the NFL [was] certainly entitled to do.<sup>114</sup>

Moreover, the court recognized that even though the NFL “certainly reaps monetary benefits” from marketing the NFL Films productions, the NFL’s use of player NILs in the films was non-actionable because the game could not be “described visually any other way.”<sup>115</sup>

With respect to the second factor—whether the speech refers to a specific product—the court explained, “[T]he productions do not promote a product separate from the productions themselves. The productions exist in their own right—they are the stories of the NFL.”<sup>116</sup> With respect to the final factor, it was undisputed that the NFL had an economic motivation to sell the accused NFL Films productions.<sup>117</sup> But, according to the district court, just because films or other expressive works are “published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the *First Amendment*.”<sup>118</sup> Accordingly, the court concluded that the NFL Films productions at issue did not constitute commercial speech and thus deserved First Amendment protection as a matter of law.<sup>119</sup>

### *3. Applying Newsworthiness or Public Interest Exceptions to Sports Broadcasts*

Under each state law at issue, the *Dryer* district court also analyzed whether recognized exceptions for newsworthy or public interest events applied to defendants’ documentary-style NFL Films productions.<sup>120</sup> The court determined that the productions qualified as newsworthy under relevant jurisprudence.<sup>121</sup> For example, it concluded that because the NFL Films productions were “reporting on a matter of substantial public interest, California’s newsworthiness defense bar[red] [the plaintiffs’] California publicity-rights claims.”<sup>122</sup> The court reached the same

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114. *Id.* at 1192.

115. *Dryer II*, 55 F. Supp. 3d at 1192.

116. *Id.* at 1193.

117. *Id.* (quoting *Dryer I*, 689 F. Supp. 2d 1113, 1119 (D. Minn. 2010)).

118. *Id.* (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)).

119. *Id.*

120. *Dryer II*, 55 F. Supp. 3d at 1197–99.

121. *Id.*

122. *Id.* at 1198.

conclusion under the public interest exceptions applicable in the other jurisdictions at issue.<sup>123</sup>

On a related note, courts have held that factual data and statistics underlying sporting events are newsworthy and immune from right of publicity actions. *C.B.C. Distribution & Marketing, Inc.* and *CBS Interactive, Inc.*, for example, involved the use of current professional athletes' names, images, and statistics for the purposes of online fantasy games.<sup>124</sup> Both cases held that free speech interests outweighed the plaintiffs' publicity rights, focusing on the factual nature of the information used and the public value of that information.<sup>125</sup>

Similarly, *Gionfriddo v. Major League Baseball* involved former players' names, images, and biographical information, as well as video clips of them playing baseball, on Major League Baseball's website.<sup>126</sup> The court determined that the information at issue was "factual data" about the history of baseball that was the subject of great public interest.<sup>127</sup> As a result, the court concluded that the defendant's publication was entitled to "substantial constitutional protection."<sup>128</sup>

#### 4. Applying Copyright Preemption to Sports Broadcasts

Courts have also held that athletes' state law right of publicity claims relating to game broadcasts are preempted by valid federal copyright rights existing in those broadcasts.<sup>129</sup> The copyright preemption defense is statutory in nature.<sup>130</sup> Specifically, as noted above, section 301 of the Copyright Act provides that

[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this [act]. Therefore, no person is entitled to any such right or equivalent right in any such work

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123. *Id.* at 1198–99 (citing *Keller*, 724 F.3d 1268, 1282 (9th Cir. 2013)).

124. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 820 (8th Cir. 2007); *CBS Interactive, Inc. v. Nat'l Football League Players Ass'n*, 259 F.R.D. 398, 403 (D. Minn. 2009).

125. *C.B.C. Distrib. & Mktg., Inc.*, 505 F.3d at 824; *CBS Interactive, Inc.*, 259 F.R.D. at 417–19.

126. 114 Cal. Rptr. 2d 307, 310 (Cal. Ct. App. 2001).

127. *Id.* at 314–15.

128. *Id.* at 315.

129. *See Student Athletes Lose Sixth Circuit Appeal in Marshall v. ESPN*, ROTHMAN'S ROADMAP TO RIGHT PUBLICITY (Aug. 18, 2016, 10:30 AM), <http://www.rightofpublicityroadmap.com/news-commentary/student-athletes-lose-sixth-circuit-appeal-marshall-v-ESPN>.

130. *Id.*; *see also* 17 U.S.C. § 301(a) (2012).

under the common law or statutes of any State.<sup>131</sup>

Section 301 thus “sets forth a two-part test to determine whether a state-law claim is preempted by the Copyright Act”<sup>132</sup>:

Such a claim is preempted (i) if it seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106—the general scope requirement; *and* (ii) if the work in question is of the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103—the subject matter requirement.<sup>133</sup>

Furthermore,

17 U.S.C. § 106, which states that the general scope of copyright . . . “affords a copyright owner the exclusive right to . . . (1) reproduce the copyrighted work; (2) prepare derivative works; (3) distribute copies of the work by sale or otherwise; and, with respect to certain artistic works, (4) perform the work publicly; and (5) display the work publicly.”<sup>134</sup>

Accordingly, the Copyright Act preempts state law rights that may be violated by activity which, in itself, would infringe one of section 106’s enumerated exclusive rights.<sup>135</sup>

The Seventh Circuit Court of Appeals addressed whether the Copyright Act preempts any potential publicity rights in game broadcasts in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*.<sup>136</sup> In *Baltimore Orioles*, MLB clubs sought a declaratory judgment

that the telecasts of Major League Baseball games constitute[ed] copyright[en] “works made for hire” in which [the MLB Players’ Association] and Major League Baseball players [had] no rights whatsoever. The district court found that the [MLB] Clubs, not the Players, owned a copyright in the telecasts as works made for hire and that the Clubs’ copyright in the telecasts preempted the Players’ rights of publicity in their performances.<sup>137</sup>

131. 17 U.S.C. § 301(a).

132. *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 892 (2d Cir. 2011) (citing 17 U.S.C. § 301(a)).

133. *Id.*

134. *Id.* at 893 (citation omitted) (quoting *Comput. Assocs. Int’l v. Altai*, 982 F.2d 693, 716 (2d Cir. 1992)); *see also* 17 U.S.C. § 106(1)–(5) (2012).

135. *Id.* (citing *Harper & Row, Publishers, Inc., v. Nation Enters.*, 723 F.2d 195, 200 (2d Cir. 1983)).

136. *Balt. Orioles II*, 805 F.2d 663, 665 (7th Cir. 1986).

137. *Id.* at 667; *see also* *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n (Balt. Orioles I)*, Nos. 82 C 3710, 82 C 6377, 1985 WL 1509, at \*2 (N.D. Ill. May 23, 1985), *aff’d in part, vacated in part*, 805 F.2d 663 (7th Cir. 1986).

The Seventh Circuit affirmed this determination on appeal.<sup>138</sup>

Under the “subject matter” prong of the copyright preemption test (i.e., whether the work in question is copyright protectable), the *Baltimore Orioles* Court determined that MLB game telecasts fall within the scope of copyright protection.<sup>139</sup> As a threshold matter, the Seventh Circuit confirmed that the relevant “work” for purposes of the analysis was the telecast of MLB games, rather than the players’ underlying “performances.”<sup>140</sup> The court noted that “once a performance [was] reduced to tangible form, there [was] no distinction between the performance and the recording of the performance for the purpose of preemption under [section] 301(a).”<sup>141</sup>

With respect to game telecasts, the Seventh Circuit reasoned that “[a]lthough there may have been some question at one time as to whether simultaneously recorded live broadcasts were copyrightable, this [was] no longer the case,” because “[s]ection 101 expressly provid[ed] that ‘[a] work consisting of sounds, images, or both, that are being transmitted, is “fixed” . . . if a fixation of the work is being made simultaneously with its transmission.’”<sup>142</sup> Therefore, “[s]ince the telecasts of the games [were] videotaped at the same time that they [were] broadcast, the telecasts [were] fixed in tangible form,” and thus satisfied the “fixation” requirement of section 101 of the Copyright Act.<sup>143</sup>

Moreover, the Seventh Circuit held that the telecasts possessed the requisite modicum of creativity to qualify for copyright protection.<sup>144</sup> The court reasoned that “[t]he many decisions that must be made during the broadcast of a baseball game concerning camera angles, types of shots, the use of instant replays and split screens, and shot selection similarly supply the creativity required for the copyrightability of the telecasts.”<sup>145</sup> Accordingly, the “subject matter” prong of the copyright preemption test was met.<sup>146</sup>

Under the “general scope” requirement (i.e., whether the players’ asserted publicity right is equivalent to any of the rights specified in

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138. *Balt. Orioles II*, 805 F.2d at 665.

139. *Id.* at 668.

140. *Id.* at 669 n.7.

141. *Id.* at 675.

142. *Id.* at 668 (third alteration in original) (omission in original) (quoting 17 U.S.C. § 101 (2012)).

143. *Balt. Orioles II*, 805 F.2d at 668 (citing *Nat’l Football League v. McBee & Bruno’s, Inc.*, 792 F.2d 726, 731–32 (8th Cir. 1986)).

144. *Id.* at 669 n.7.

145. *Id.* at 668.

146. *Id.* at 669.

section 106 of the Copyright Act), the Seventh Circuit recognized that “a right is equivalent to one of the rights comprised by a copyright if it is ‘infringed by the mere act of reproduction, performance, distribution or display.’”<sup>147</sup> The Seventh Circuit noted that “the Players consistently . . . maintained that their rights of publicity permit them to control telecasts of their performances, and that televised broadcasts of their performances made without their consent violat[ed] their rights of publicity in their performances.”<sup>148</sup> The court reasoned that because, according to the players, “the exercise of the [MLB] Clubs’ right to broadcast telecasts of the games infring[ed] the Players’ rights of publicity in their performances, the Players’ rights of publicity [were] equivalent to at least one of the rights encompassed by copyright, viz., the right to perform an audiovisual work.”<sup>149</sup> The court thus concluded that “[s]ince the works in which the Players claim[ed] rights [were] fixed in tangible form and [came] within the subject matter of copyright, the Players’ rights of publicity in their performances [were] preempted.”<sup>150</sup>

The Minnesota district court and Eighth Circuit Court of Appeals more recently reached the same conclusion in *Dryer v. National Football League*, with respect to the NFL game broadcast footage reproduced in the documentary-style NFL Films productions at issue.<sup>151</sup> Even though the *Dryer* district court dismissed the player-plaintiffs’ publicity right claims on numerous bases, the Eighth Circuit addressed only copyright preemption in affirming the district court’s judgment.<sup>152</sup> Like the players in *Baltimore Orioles*, the *Dryer* plaintiffs argued on appeal that their asserted NIL rights arose from the underlying “performances” in football games, and such performances, in themselves, were not “fixed” works eligible for copyright protection.<sup>153</sup> But, like the Seventh Circuit in *Baltimore Orioles*, the circuit court in *Dryer* rejected this argument.<sup>154</sup>

The Eighth Circuit reasoned that, even though athletes’ underlying performances of a game was an “athletic event” outside the subject matter of copyright, once that performance was fixed in a tangible medium of expression (i.e., in the form of a telecast), it becomes the subject matter

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147. *Id.* at 677 (quoting MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 1.01(B)(1) (2016)).

148. *Balt. Orioles II*, 805 F.2d at 677.

149. *Id.*

150. *Id.* at 677.

151. *Dryer II*, 55 F. Supp. 3d 1181, 1199 (D. Minn. 2014), *aff’d*, 814 F.3d 938 (8th Cir. 2016); *Dryer III*, 814 F.3d 938, 942 (8th Cir. 2016).

152. *Dryer II*, 55 F. Supp. 3d at 1188–1204; *Dryer III*, 814 F.3d at 944.

153. *Dryer III*, 814 F.3d at 942.

154. *Id.* at 944.

of copyright.<sup>155</sup> Moreover, when the performer in a copyrighted recording later objects to the reproduction or performance of that recording in an expressive, non-advertising use, then the claim is of copyright infringement, not of misappropriation of the right of publicity.<sup>156</sup> Accordingly, the Eighth Circuit held that the *Dryer* plaintiffs asserted rights equivalent to “exclusive rights within the general scope of copyright,” triggering preemption under section 301.<sup>157</sup>

The cases discussed above illustrate the apparent consensus among courts across jurisdictions that right of publicity claims will not lie in connection with game broadcast footage.

### *B. Alleged Publicity Rights in Video Games*

In recent years, some of the most high-profile sports-media litigation involves right of publicity claims brought by former collegiate and professional athletes relating to the use of their NILs in virtual reality sports video games.<sup>158</sup> Multiple federal circuit courts of appeals, and the Ninth and Third Circuits in particular, have held that First Amendment and other defenses rooted in free speech principles will not preclude such right of publicity claims as a matter of law.<sup>159</sup>

#### *1. Applying the Transformative Use Test to Video Games*

The Ninth Circuit, in *In re NCAA Student-Athlete Name (Keller)*, and the Third Circuit, in *Hart v. Electronic Arts, Inc.*, addressed substantially similar right of publicity claims asserted by former collegiate athletes in connection with EA’s *NCAA Football* branded video games.<sup>160</sup> The plaintiffs in both *Keller* and *Hart* alleged right of publicity violations in connection with the unauthorized use of their NILs, and other elements of their identities, in the defendant’s virtual reality-style interactive sports video games.<sup>161</sup> In both instances, defendant EA raised First Amendment and other free speech-related defenses.<sup>162</sup>

Initially, the *Keller* and *Hart* cases yielded disparate results. In

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155. *Id.*

156. 2 MCCARTHY, *supra* note 10, § 11:55.

157. *Dryer III*, 814 F.3d at 943.

158. *See, e.g., Keller*, 724 F.3d 1268, 1271 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 145 (3d Cir. 2013).

159. *See, e.g., Keller*, 724 F.3d at 1271; *Hart*, 717 F.3d at 145.

160. *Keller*, 724 F.3d at 1271; *Hart*, 717 F.3d at 145.

161. *Keller*, 724 F.3d at 1272; *Hart*, 717 F.3d at 145.

162. *Keller*, 724 F.3d at 1272; *Hart*, 717 F.3d at 147 (citing *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 764, 766 (D.N.J. 2011)).

*Keller*, the California district court rejected EA's First Amendment defense, and denied EA's early motion to dismiss the players' publicity right claims on free speech grounds.<sup>163</sup> In contrast, the New Jersey district court dismissed the *Hart* plaintiffs' publicity right claims as a matter of law, reasoning that EA's virtual reality sports video games were expressive works deserving of First Amendment protection, and thus the First Amendment insulated EA's use of player NILs in that context from right of publicity liability as a matter of law.<sup>164</sup>

On appeal, however, both the Ninth and Third Circuit reached the same conclusion applying similar analyses.<sup>165</sup> Both the Ninth Circuit and Third Circuit applied the transformative use test to determine that EA's use of player NILs in the context of its *NCAA Football* branded video games was not sufficiently transformative to qualify for First Amendment protection as a matter of law.<sup>166</sup> In doing so, the *Keller* and *Hart* Courts relied upon the near identical similarities between the video game avatars and the players' uniquely identifiable individual characteristics (e.g., height, weight, position, skin tone, etc.), in connection with the very same athletic activities and endeavors for which those individuals became known.<sup>167</sup>

## 2. Applying the Incidental Use Test to Video Games

The Ninth Circuit, in *Davis v. Electronic Arts, Inc.*, recently addressed whether the unauthorized use of player NILs in virtual reality sports video games was merely incidental to EA's overall expressive work, and therefore immune from players' right of publicity claims.<sup>168</sup> The *Davis* case involved publicity right claims asserted by retired professional football players, directed to EA's use of player NILs as avatars in the *Madden NFL* video game series.<sup>169</sup> In *Davis*, EA raised the additional argument that its alleged conduct was protected as an "incidental use" under First Amendment principles.<sup>170</sup>

The Ninth Circuit in *Davis* reaffirmed its prior decision and

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163. *In re NCAA*, 37 F. Supp. 3d 1126, 1143, 1146 (N.D. Cal. 2014).

164. *Hart*, 717 F.3d at 145.

165. *Keller*, 724 F.3d at 1271; *Hart*, 717 F.3d at 165, 170.

166. *See supra* notes 158–162 and accompanying text; *see also Keller*, 724 F.3d at 1271; *Hart*, 717 F.3d at 165, 153.

167. *Keller*, 724 F.3d at 1276. The *Keller* Court also rejected EA's argument that the public interest exception shielded it from right of publicity liability, reasoning that the *NCAA Football* video games at issue do not publish or report factual data or newsworthy events. *Id.* at 1280; *see also Hart*, 717 F.3d at 165–66.

168. 775 F.3d 1172, 1175 (9th Cir. 2015).

169. *Id.*

170. *Id.*

reasoning in *Keller* with respect to EA's other free speech-based defenses, then proceeded to address EA's incidental use argument by applying the multi-factor test recited above.<sup>171</sup> The court determined that "[u]nder the first and second factors, the former players' likenesses [had] unique value and contribut[ed] to the commercial value of *Madden NFL*," and reasoned, in part, that current NFL players were compensated for such NIL usage by EA through the collective bargaining process.<sup>172</sup>

With respect to the final two factors, the Ninth Circuit rejected EA's argument that any one player's likeness has only de minimis commercial value to the game as a whole,<sup>173</sup> and found that "the former players' likenesses [were] featured prominently in a manner that is substantially related to the main purpose and subject of *Madden NFL*—to create an accurate virtual simulation of an NFL game."<sup>174</sup> Thus, the *Davis* Court determined that where "[a]ccurate depictions of the players on the field [were] central to the creation of an accurate virtual simulation of an NFL game," factors three and four of the test could not support an incidental use conclusion.<sup>175</sup> Accordingly, in *Davis* the Ninth Circuit rejected EA's proffered incidental use defense to the plaintiffs' right of publicity claims.<sup>176</sup>

In view of the *Keller*, *Hart*, and *Davis* decisions discussed above, there is an apparent consensus among courts across jurisdictions that athletes may sustain right of publicity claims asserted in connection with the unauthorized use of their NILs in virtual reality sports video games, notwithstanding the variety of First Amendment arguments available to gaming defendants.

#### V. THE PRESENT AND FUTURE OF SPORTS-MEDIA RIGHT OF PUBLICITY LITIGATION

In view of the historic and recent decisions discussed in this Article, the legal landscape is arguably fixed for athletes' right of publicity claims directed to game broadcasts and interactive virtual reality sports video games.<sup>177</sup> Whether analyzed pursuant to express statutory exemptions, First Amendment (non-commercial) speech principles, the newsworthiness/public interest exception, or the copyright preemption

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171. See *supra* Section IV.C.

172. *Davis*, 775 F.3d at 1181.

173. *Id.*

174. *Id.* (citing *Preston v. Martin Bregman Prods., Inc. v. MCA-Universal City Studios, Inc.*, 765 F. Supp. 116, 119 (S.D.N.Y. 1991)).

175. *Id.* (citing *Lohan v. Perez*, 924 F. Supp. 2d 446, 455–56 (E.D.N.Y. 2013)).

176. *Id.*

177. See *supra* notes 166–168 and accompanying text.

doctrine, courts have held, with minimal exception, that sporting event participants possess no cognizable rights of publicity in connection with the live telecast or rebroadcast of game footage.<sup>178</sup>

Moving forward, player-plaintiffs might assert right of publicity violations in connection with the use of their NILs in promotions, marketing, or advertising associated with game broadcasts. However, the pool of potential plaintiffs alleging such claims is relatively limited, to the most high-profile “superstar” athletes, and the monetary incentive for bringing such claims is relatively weak for plaintiffs and their counsel, considering the game broadcasts themselves represent the industry’s chief revenue source.<sup>179</sup> Moreover, as major sporting organizations and broadcasters continue to utilize emerging online, digital, and social media platforms in unprecedented ways,<sup>180</sup> future sports-media right of publicity claims may be targeted toward particular uncharted “gray area” usage of player NILs on such platforms, distinct from traditional game telecasts.

In contrast, whether analyzed under the transformative use or incidental use test, or general free speech and newsworthiness/public interest principles, it is arguably settled that the First Amendment does not insulate virtual reality video game makers from athletes’ right of publicity claims as a matter of law.<sup>181</sup> These legal determinations have had a real world market effect, as EA announced the discontinuance of its *NCAA Football* branded video game series in September, 2013,<sup>182</sup> and retired NFL player-plaintiffs are beginning to receive remuneration for the use of their NILs in connection with *Madden NFL*.<sup>183</sup>

Finally, in view of the multiple First Amendment-based tests and limitations to right of publicity cases arising in the sports-media context, legal practitioners and commentators have suggested that Supreme Court intervention is needed to establish a uniformly applicable First Amendment standard to balance against state law publicity claims.<sup>184</sup> However, because the recent cases discussed above have yielded

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178. See *supra* notes 166–168 and accompanying text.

179. See *Broadcasting & Media Rights in Sport*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/ip-sport/en/broadcasting.html> (last visited Feb. 2, 2017).

180. See, e.g., Ty Scheiner, *4 Winning Sports Social Media Marketing Campaigns You Can Learn From*, BRAFTON, <http://www.brafton.com/blog/four-winning-sports-social-media-marketing-campaigns-you-can-learn-from/> (last visited Feb. 2, 2017).

181. See *supra* note 168 and accompanying text.

182. See Jason Kirk, *EA Sports Halting College Football Video Game Series After All*, SB NATION (Sept. 26, 2013, 4:29 PM), <http://www.sbnation.com/college-football/2013/9/26/4774556/ea-sports-college-football-video-game-series>.

183. See *id.*

184. See Donahue, *supra* note 7.

relatively consistent outcomes in analogous cases,<sup>185</sup> the argument for Supreme Court review remains relatively weak. On the other hand, there may be a more compelling case for Supreme Court guidance should future right of publicity litigation directed to emerging or unprecedented sports-media platforms generate a circuit split concerning First Amendment application.

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185. See *supra* notes 166–168 and accompanying text.