

PERSONALITY BEYOND BORDERS: THE CASE FOR A FEDERAL RIGHT OF PUBLICITY

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INTRODUCTION

Imagine you are the star quarterback of a major college football program. You have led your team to a Top-25 national ranking and a prestigious bowl game. Between your best-yet junior year and your highly anticipated senior season, a local sports outfitter company, UltraSport, contacts you regarding an endorsement deal. Unfortunately, as an NCAA athlete, you may not accept any endorsement offers due to the NCAA's amateurism rules. Later that year, as you are driving from home to the practice field you see your face, larger than life, on a billboard advertisement for UltraSport. After asking around about your face appearing in the advertisement, you learn that UltraSport contacted your coach and that he agreed to the endorsement featuring your face, twenty five feet tall, sitting high on a billboard above the boulevard. What can you do?

Currently, there is no federal right of publicity. The ability to control public use of one's likeness is referred to by some as an inalienable right;¹ however, in reality this right only arises under state common law or statute and, in some cases, not at all.² Further, there is broad diversity among states in their recognition of this right: some offer robust protections, while others offer very little or no protection at all.³ For instance, Indiana laws offer one

¹ Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185 (2012).

² See Jonathan Faber, *Statutes, RIGHT OF PUBLICITY*, <http://rightofpublicity.com/statutes> (last visited March 17, 2014). The Mississippi legislature formally rejected a proposed protection of one's right of publicity. Nineteen states currently have statutory protection for the right of publicity, while another twenty-eight have common law protection.

³ IND. CODE ANN. §§ 32-36-1 (West 2012). Indiana's right of publicity laws protect any event that happens within its borders as well as protecting individuals for one hundred years after death. See also N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2014) (not recognizing a descendible right of publicity); *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405, 411 (N.C. 1984) (recognizing the right to privacy, which allows one to bring suit for appropriation of likeness in an advertisement); H.B. 327, Gen. Assemb. of N.C., 2009 Sess. available at <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?BillID=H327&Session=2009>. In *House Bill 327*, a specific right of publicity statute was filed but never reached a vote in the North Carolina House of Representatives. Many other states have similarly

hundred years of protection after death, while New York prohibits postmortem rights altogether.⁴

One may use the Lanham Act, originally enacted in 1946 to protect a federally registered mark against unauthorized use⁵, to claim misappropriation for likelihood of confusion, however, there is no federal remedy for misappropriating a person's likeness.⁶ In an increasingly global world, one's *personality* (a term sometimes used to describe more accurately what exactly the right of publicity may protect) is no longer limited to one's state of domicile. Expanding markets and the Internet, particularly social media, have made one's personality, identity, and sometimes-private facts available to nearly anyone, ranging from those in local communities to people across the world. Because states no longer solely control one's right of publicity, there is an increasing need for Congress to enact legislation recognizing a federal right of publicity—a Millennial Right of Publicity. A federally created right of publicity would simplify ongoing litigation, set limitations on the alienability of one's right of publicity, and possibly stipulate what waivers may or may not be valid concerning the right's assignability.

Nowhere is the need for a federal right of publicity more evident than with respect to current and former NCAA athletes. Plaintiffs Ed O'Bannon, Sam Keller, and Ryan Hart, along with

limited common law that does not account for issues such as assignability, waiver, term, and descendability in the way that a more complete law would. *See* TEX. PROP. CODE ANN. §§ 26.001-.015 (West 1987).

⁴ N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2014); IND. CODE ANN. § 32-36-1-8 (West 2014).

⁵ *Lanham Act*, LEGAL INFORMATION INSTITUTE http://www.law.cornell.edu/wex/lanham_act (last visited April 16, 2014).

⁶ *See* 15 U.S.C. § 1125(a) (West 2012). Lanham Act § 43(a) is typically used for trademark issues, however, it has also been used as a cause of action in cases related to the right of publicity regarding an appropriation of one's personality or likeness. In relevant part, § 43(a) provides a cause of action against "[a]ny person who, on or in connection with any goods or service . . . 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"

many current and former student-athletes, are presently involved in litigation seeking to rectify issues relating to the use of player likenesses in video games without permission or compensation.⁷ These past and present student-athletes contend that the NCAA and Electronic Arts⁸ misappropriated their likeness in violation of state right to publicity laws and NCAA rules. NCAA Bylaw 12.5.2.2 requires a student-athlete to take immediate steps to prevent or cease use of their name or likeness used to promote or in conjunction with any commercial items.⁹

Using intercollegiate athletics as its lens, this article advocates for the adoption of a federal right of publicity. Specifically, the article advocates for the adoption of a new federal statute recognizing a publicity right and remedying the confusion, inconsistency, and unfairness that arises from leaving right of publicity determinations to the states. Part I frames the argument by describing the development of the right to publicity. Part II highlights the current landscape by demonstrating the problems that arisen from various jurisdictions instituting a number of competing statutory and common law standards. Part III advances the central proposal of the article: advocating for a statute that would grant a federal right of publicity. Finally, part IV makes the case for why adoption of such a statute would drastically improve the status quo by examining its potential impact on intercollegiate athletics.

⁷ In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013).

⁸ EA SPORTS, <http://www.easports.com/> (last visited Mar. 26, 2014). An Electronic Arts subsidiary, EA Sports, is known for, among other things, its NCAA football and basketball video games. Amidst recent O'Bannon litigation developments, EA Sports has announced that they will no longer develop NCAA-branded games. See Darren Rovel, *EA Sports settles with ex-players*, ESPN (Sep. 26, 2013), http://espn.go.com/college-football/story/_/id/9728042/ea-sports-stop-producing-college-football-game.

⁹ *Use of a Student-Athlete's Name or Picture Without Knowledge or Permission*, 2013-14 NCAA DIVISION I MANUAL art. 12.5.2.2 (2013), available at <http://www.ncaapublications.com/productdownloads/D114.pdf>.

I. PROPERTY RIGHTS – PRIVACY, PUBLICITY, AND THE FIRST AMENDMENT

[B]ut since the latest advances in photographic art have rendered it possible to take pictures surreptitiously . . . the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.¹⁰

Samuel D. Warren and Louis D. Brandeis, 1890

Before exploring what a federal right of publicity might guarantee, it is instructive to detail what the right of publicity entails. While the term itself did not appear until 1953, the idea itself is much older.¹¹ In 1890, legal scholars Samuel Warren and Louis Brandeis published their now infamous article, *The Right to Privacy*, which described one's property right to privacy and personality and introduced the idea of possessing a property right in an individual's privacy and personality.¹² With the advent of photography, newspapers, and an appetite for gossip during the time of the writing, the authors felt regular citizens, in addition to those typically in the spotlight (i.e. politicians, celebrities, royalty, et. al.), deserve the protection of the courts with respect to the inherent value of their privacy or personality as a recognized property right.¹³ Warren and Brandeis argued that as society evolves, the law must similarly keep up.¹⁴

¹⁰ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 211 (1890).

¹¹ See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). Wherein a rival chewing gum company induced a baseball player into giving them rights to his image to sell gum while he was already under contract with the plaintiff. The court ruled that the ballplayer's right of publicity was, in fact, a property right which the player had exclusive use of unless contracted away, such as in this case.

¹² *Id.*

¹³ See Warren & Brandeis, *supra* note 10, at 202-07.

¹⁴ *Id.* at 194. As society has evolved, new causes of action have developed out of necessity. As cultural and technological interests have advanced, various rights have become recognized in the courts. With new innovations and businesses come new laws

In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the Second Circuit defined the “right of publicity” as a property right granted either *in gross* or with due consideration.¹⁵ The ideas expressed in *The Right to Privacy* and later codified by courts and legislatures seek both to protect an individual’s “use of his or her own name, picture, or likeness, and to prevent another from using it for commercial benefit without one’s consent.”¹⁶ By this definition, it would seem that any individual is able to control the use, and manner of such use, of any image, likeness, personality, or any other expression of one’s likeness.¹⁷ As discussed below, many states already explicitly provide for such a cause of action.¹⁸

The ability to protect the use of one’s image is not a novel idea and was not so, even at the time of Warren and Brandeis’ seminal publication. Indeed, within their article, the authors explored a number of cases dealing with the subject. For instance, *Pollard v. Photographic Company* dealt with a woman sitting for a photograph in a professional studio.¹⁹ When the photographer tried to publicly exhibit the resulting photograph, the court held that an individual sitting for a photograph has a certain property right over the contracted image.²⁰

Protecting individual publicity rights has even more value today, particularly with the ease of sharing media, the pervasiveness of social networking websites, and a relaxed understanding of intellectual property rights.²¹ At almost any

written to protect individuals. “From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind” *Id.* Personal property rights concerning both the body and mind exist, as well as the right “to be let alone.” *Id.* at 195 (quoting Cooley on Torts, 2d ed., p. 29).

¹⁵ *Haelan Labs*, 202 F.2d at 868.

¹⁶ Right of Publicity, BLACK’S LAW DICTIONARY 625 (3d pocket ed. 2006).

¹⁷ See Warren & Brandeis, *supra* note 10, at 199-200.

¹⁸ See CAL. CIV. CODE § 3344.1 (West 2012); IND. CODE ANN. § 32-36-1 (West 2012); N.Y. CIV. RIGHTS LAW § 50-51 (McKinney 2014); OHIO REV. CODE ANN. § 2741.02 (West 2009); TEX. PROP. CODE ANN. §§ 26.001-.015 (West 2013). States like California, Indiana, New York, Ohio, and Texas specifically enumerate causes of action for misappropriation of one’s personality and likeness. See *infra* discussion in Part II.

¹⁹ 40 Ch. Div. 345 (1888).

²⁰ *Id.* at 349.

²¹ See *Coton v. Televised Visual X-Ography*, 740 F. Supp. 2d 1299 (M.D. Fla. 2010). In *Coton*, an adult media company used Coton’s photograph for a DVD cover without

time, anyone could be the subject of an amateur photographer equipped with nothing more than a cheap cellular phone or a telephoto lens.²² The issue here is not the photograph itself but, rather, its use.

The core question is where the photographer's First Amendment rights enter the publicity analysis. Weighing the photographer's copyright rights against the subject's right to control use of his or her "publicity" gives rise to a number of interesting issues. The photographer's intention or ultimate use of the photograph will determine the limitations of any potential cause of action. Where a photographer seeks a subject for an exhibition, his or her First Amendment rights will prevail.²³ If, alternatively, a photographer seeks a candid subject for ultimate use in commerce, he or she may be liable if the subject did not grant permission.

Perhaps the most significant case regarding the intersection of personal property rights of publicity and the rights of the press is *Zacchini v. Scripps-Howard Broadcasting Company*; commonly referred to as the Human Cannonball Case.²⁴ Here, a reporter filmed the entire fifteen-second performance of entertainer, Hugo Zacchini's human cannonball performance without his permission.²⁵ By filming and subsequently airing the entirety of the performance, the court reasoned the public would have less reason to actually pay to see later see the performance.²⁶ The Court explained that while the press does have certain First Amendment rights, an individual's right of publicity prevails in these scenarios.²⁷ The Court chose to protect one's commercially

permission. The company found the photo posted on the popular art and artist community deviantART. After years of litigation, a Florida court award Coton \$130,000 in damages.

²² See *Nussenzweig v. DiCorcia*, 878 N.E.2d 589 (N.Y. 2007). DiCorcia, a photographer, snapped a candid photo of Nussenzweig while walking through Times Square. While the court found that the First Amendment permitted the use of the photograph as artwork, it brought the issue of being an unwanted subject to the forefront in New York.

²³ *Id.*

²⁴ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

²⁵ *Id.*

²⁶ *Id.* at 562-63.

²⁷ *Id.* at 563.

valuable intellectual property rights, which includes one's rights to personality or performance.²⁸ The rationale of the decision is in "protecting the proprietary interest of the individual in his act" and "the fight of the individual to reap the reward of his endeavors."²⁹ Courts have held that "public interest in dissemination of news and information consistent with the democratic processes under the constitutional guarantees of freedom of speech and the press" must remain in balance with the right of publicity.³⁰

Courts have recently explored the First Amendment as it relates to video games through ongoing litigation.³¹ In 2011, the Supreme Court analyzed video game content for First Amendment protection in *Brown v. Entertainment Merchants Association*. The Court held that games, like other creative works, merit First Amendment protection. In his opinion, Justice Scalia wrote "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)."³²

More recently, the Ninth Circuit held that the First Amendment did not protect Electronic Arts' use of former Arizona State and University of Nebraska quarterback Sam Keller's appearance in their video game.³³ The court analyzed and applied a transformative use test in its decision and determined that a fair and accurate representation of an individual within a video game is not necessarily a creative endeavor that merits First Amendment protection over one's right to publicity.³⁴

²⁸ *Id.* at 576.

²⁹ *Id.* at 573.

³⁰ *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (2001); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1182-83 (C.D. Cal. 2002).

³¹ *Brown v. Entm't Merchs. Ass'n*, 131 S.Ct. 2729 (2011).

³² *Id.* at 2733.

³³ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

³⁴ *Id.*

The Third Circuit held similarly in a related case, but through a different analysis.³⁵ In *Hart v. Electronic Arts Inc.*, there was an issue of avatar enhancement and modification through in-game interactivity.³⁶ The court used the transformative use test to determine that modifications of the plaintiff's in-game likeness do not sufficiently transform the character, “[i]ndeed, the ability to modify the avatar counts for little where the appeal of the game lies in users’ ability to play ‘as, or alongside’ their preferred players or team.”³⁷ Further, when alterations to an avatar are so drastic, as that they may sufficiently transform the character, the plaintiff's likeness ceases.³⁸

Copyright and publicity cases frequently adopt the transformative use test used in *Hart*.³⁹ In copyright litigation, the test examines use to determine “whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.”⁴⁰ For publicity cases, a party may use transformative use as an affirmative defense.⁴¹ The transformative use test asks whether the work has significant transformative elements or if “the value of the work does not derive primarily from the celebrity’s fame”⁴² In this iteration,

³⁵ *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013).

³⁶ *Id.* at 168. In the game in question, NCAA Football, users were able to change the appearance and abilities of available in-game players.

³⁷ *Id.*

³⁸ *Id.* at 169.

³⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2002); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (2001).

⁴⁰ *Kelly*, 336 F.3d at 818 (discussing copyright issues).

⁴¹ *Hilton v. Hallmark Cards*, 599 F.3d 894, 909 (9th Cir. 2009). It is important to point out that using transformative use test in publicity disputes stems from the California Supreme Court's adoption of such a test, based on the relationship between copyright law and the right of publicity, stemming from *Zacchini*. Other circuits have since recognized the transformative use test's significance in publicity disputes. *See ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003).

⁴² *Id.*

the test “is essentially a balancing test between the First Amendment and the right of publicity.”⁴³

Legal theorist William Prosser describes the right to privacy as an appropriation of one’s name or likeness for personal advantage.⁴⁴ In both the Restatement of Torts and his article, Prosser’s definition of appropriation assumes harm to personal and commercial interests by an unauthorized or unlicensed use of one’s identity.⁴⁵ Before the right of publicity materialized as separate from the right to privacy, one was not able to freely assign one’s right of publicity.⁴⁶ Some early decisions seemed to suggest that only celebrities may have a valid cause of action for misappropriation of one’s right of publicity because their personality, likeness, and name are of value.⁴⁷ A normal citizen, by comparison, may have very little in the way of value associated with likeness or name.⁴⁸ Prosser suggests that the proper question is not the value of the likeness to the rightful owner, but instead the value to the one not authorized to use it.⁴⁹

Subsequent cases have lent credence to this argument. A 1988, 9th Circuit case involving Bette Midler held in favor of the singer, even though the defendant never explicitly used her image or likeness.⁵⁰ In that case, the Ford Motor company, in an appeal to a new customer base, opted to use a sound-a-like when Ms.

⁴³ *Id.* (quoting *Winter v. DC Comics*, 69 P.3d 473, 475 (2003)).

⁴⁴ RESTATEMENT (SECOND) OF TORTS § 652C. *See also* William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). In *Privacy*, Prosser goes into significant detail on the relatively new tort of appropriation of one’s right of publicity, describing it as “when he makes use of the name to pirate the plaintiff’s identity for some advantage of his own, as by impersonation to obtain credit or secret information...that he becomes liable.” *Id.* at 403.

⁴⁵ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b. (1995).

⁴⁶ *Id.* at cmt. g.

⁴⁷ *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978) (“[T]his right of publicity is usually asserted only if the plaintiff has ‘achieved in some degree a celebrated status.’”); *Cox v. Hatch*, 761 P.2d 556, 564 (Utah 1988) (“[T]he complaint fails because it [does not claim] that the plaintiffs’ names or likenesses have some ‘intrinsic value’ [or] . . . fame or notoriety.”).

⁴⁸ *Vassiliades v. Garfinckel’s, Brooks Bros.*, 492 A.2d 580, 592 (D.C. 1985). There was no actionable appropriation associated with the “before and after” patient photos that the plastic surgeon used because there was no public interest or other value in the patient’s likeness.

⁴⁹ Prosser, *supra* note 44, at 403-5.

⁵⁰ *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

Midler declined to appear in the commercial.⁵¹ Instead, the court said, an imitator misappropriated her likeness such that it may confuse the general public as to her endorsement.⁵² Similarly, in *White v. Samsung Electronics America, Inc.*, Wheel of Fortune co-host, Vanna White, sued the Samsung Corporation for misappropriation of likeness after Samsung ran an ad featuring an instantly recognizable robot made to look like Ms. White.⁵³ The court found that the robot, obviously meant to be an animatronic version of Ms. White, was a misappropriation of her likeness, which she had a right to control⁵⁴. In this instance, the court was more concerned with the monetization of her likeness and likelihood of confusion and endorsement claims under the Lanham Act.⁵⁵

Both of these cases may serve to give us an idea of how the NCAA and Electronic Arts have appropriated student-athletes' likenesses. Even though a video-game rendition is not explicitly one's likeness, if recognizable in such an instance, it may be enough to rule for misappropriation. Similarly, when an avatar has the recognizable talents and style of a student-athlete, one would argue that the representation itself is a misappropriation and may not qualify for First Amendment transformative use protection.

II. STATE RIGHTS AND THE "MONROE PROBLEM"

The current state of the right of publicity varies widely from state to state.⁵⁶ While the Lanham Act does identify specific

⁵¹ *Id.*

⁵² *Id.* In this case, the Ford Motor Company attempted to reach a new "yuppie" customer base and wished to use Ms. Midler in a commercial. When she declined to appear in or lend her voice to the advertisement, Ford hired a long time Midler backup singer and great Midler imitator to record vocals very much in Midler's unique style. Even though Midler did not appear in the commercial, she successfully prevailed in showing Ford misappropriated her likeness for profit. When the distinctive voice of a professional singer is widely known and deliberately imitated to sell a product, the sellers have misappropriated an asset.

⁵³ 971 F.2d 1395 (9th Cir. 1992).

⁵⁴ *Id.* at 1399.

⁵⁵ *Id.* at 1399-1401.

⁵⁶ Jonathan Faber, *Welcome*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/> (last visited Mar. 28, 2014).

causes of action associated with appropriation of one's personality, it does not explicitly cover the right of publicity.⁵⁷ The Lanham Act "was enacted primarily to protect consumers from misrepresentations or deceptions and to protect trademark owners that they are associated with or endorse a product."⁵⁸ Indeed, Lanham Act § 43(a) does not provide a federal vehicle for the assertion of infringement of the state law right of publicity for the simple reason that § 43(a) is limited to some form of falsity, while infringement of the right of publicity involves no element of falsity.⁵⁹

Without central legislation that regulates the way each state handles the right of publicity, protection of one's personality or likeness exists only to the extent state statutes or common law provide.⁶⁰ Entities that exist in many jurisdictions face differing laws that may restrict their operations.⁶¹ Perhaps no better example of the inherent conflicts among state laws is an exploration of the consequences of the estate of Marilyn Monroe.

The continuing economic value of Marilyn Monroe's estate is undeniable.⁶² It seems that her estate's control over her right of publicity is much more difficult to manage given her state of domicile. The Monroe estate claimed New York domicile in order

⁵⁷ Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity*, 94 TRADEMARK REP. 1202, 1206 (2004).

⁵⁸ *Id.* (citing *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003)).

⁵⁹ J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6:136 (Clark Boardman Callaghan, 2nd ed. 2014). § 43(a) of the Lanham Act of 1946, provides specific causes of action associated with appropriation of one's personality where there is a likelihood of confusion, as demonstrated in *Parks v. LaFace Records*, when Rosa Parks sued OutKast under the Lanham Act for false advertising and likelihood of confusion for her association with the musical group. See *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003).

⁶⁰ *Board Resolutions U.S. Federal Right of Publicity*, INTERNATIONAL TRADEMARK ASSOCIATION (March 3, 1998), <http://www.inta.org/Advocacy/Pages/USFederalRightofPublicity.aspx>.

⁶¹ *Id.*

⁶² Jeff Glor, *Marilyn Monroe still lucrative 50 years after her death*, CBS NEWS (Aug. 3, 2012, 10:04 AM), http://www.cbsnews.com/8301-505270_162-57486027/marilyn-monroe-still-lucrative-50-years-after-her-death/. As of 2008, Marilyn Monroe still ranked among the top-ten of top-earning deceased celebrities.

to take advantage of a beneficial estate tax law.⁶³ Because of New York's right of publicity laws, however, her estate attempted to claim, simultaneously, California as her state of domicile to take advantage of its lucrative publicity legislation, which would allow Ms. Monroe's right of publicity to extend past her death.⁶⁴ The court in *Milton Green Archives, Inc. v. Marilyn Monroe LLC* held that the prior claim of New York domicile estopped the California domicile claim.⁶⁵ As a result, Ms. Monroe's estate lost the right of publicity after death.⁶⁶ New York is one of several (but a minority of states) that does not allow the right of publicity to survive death.⁶⁷

Right of publicity laws vary wildly within the United States, creating an unfavorable environment for individuals who may possess a publicity right with inherent value. Depending on one's state of domicile or even location during a particular event, the right to publicity may be unavailable.

There are nineteen states with right of publicity statutes and twenty-eight more with some degree of common law protection.⁶⁸ Each state offers a varying level of protection in a variety of categories. Most states recognize the right of publicity for all citizens, regardless of the commercial value of their likeness, personality of persona.⁶⁹ A minority of states differentiates between the status of "celebrity" and "non-celebrity" of an individual.⁷⁰ The rationale being that the right should only attach to those who have actively sought monetary gain "from the exploitation of the publicity value of their names and likenesses."⁷¹ That is, only individuals who could successfully

⁶³ *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012); *Frosch v. Grosset & Dunlap, Inc.* 427 N.Y.S. 2d 828, 829 (1980).

⁶⁴ *Id.*

⁶⁵ *Milton H. Greene Archives, Inc.*, 692 F.3d at 999.

⁶⁶ *Id.* at 1000.

⁶⁷ *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 586 (2d Cir. 1990) (stating that there is no common law right of publicity and the right of publicity does not survive death).

⁶⁸ *Statutes*, RIGHT OF PUBLICITY, <http://www.rightofpublicity.com/statutes/> (last visited Mar. 28, 2014).

⁶⁹ MCCARTHY, *supra* note 59, at § 4:16.

⁷⁰ *Id.* at § 4:19.

⁷¹ Stephen J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 111, 112 (1980).

demonstrate economic value to their personality were able to claim a right of publicity.⁷² The problem with this limited view on the right of publicity is that as soon as a defendant misappropriates one's personality, he or she has proven its commercial value. Indiana defines "personality" as one whose specific characteristics enumerated in the right of publicity definition "ha[ve] commercial value, whether or not the person uses or authorizes the use of the person's right of publicity for a commercial purpose during the person's lifetime."⁷³

Beyond just value of one's personality and the viability of its commercial value, states differ in the protection of aspects of personality. The right of publicity is most often associated with one's name and likeness, as evidenced by the scope of protection offered by all nineteen states with statutory protection.⁷⁴ At a minimum, these states protect one's name and likeness. Many states extend protection to include a photograph and voice, as well.⁷⁵ Indiana takes its level of protection a step further. The statute defines the right of publicity as "[A] personality's property interest in the personality's: (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gestures; or (9)mannerisms."⁷⁶

Considering the Monroe Problem, states treat the descendibility of the right of publicity differently. Nineteen states recognize a right of publicity after death, through either common law or statute.⁷⁷ States with common law protection include Connecticut, Georgia, Michigan, New Jersey, and Utah.⁷⁸ State statutes grant postmortem rights in California, Florida, Illinois, Indiana, Kentucky, Nevada, Ohio, Oklahoma, Pennsylvania,

⁷² Pepter Felcher & Edward Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1591, n. 78 (1979).

⁷³ IND. CODE ANN. § 32-36-1-6 (West 2012).

⁷⁴ MCCARTHY, *supra* note 59, at § 6:8.

⁷⁵ *Id.*

⁷⁶ IND. CODE ANN. § 32-36-1-7 (West 2012).

⁷⁷ THOMAS D. SELTZ ET AL., ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES §13:6 (3d ed. 2013).

⁷⁸ MCCARTHY, *supra* note 59, at § 9:18.

Tennessee, Texas, and Washington.⁷⁹ In addition, nearly every state provides a different duration of protection after death.⁸⁰

Both California⁸¹ and Indiana⁸² have enacted statutes that retroactively protected individuals. Oklahoma, borrowing its legislation from California,⁸³ grants protection for individuals that died within fifty years of the January 1, 1986 statute and for one hundred years afterwards.⁸⁴ Illinois and Ohio, on the other hand, has specifically limited publicity rights to those who were alive at the time of enactment.⁸⁵

In its Rights of Publicity statutes, Indiana protects a personality's right of publicity for one hundred years after death.⁸⁶ Recent Indiana litigation, however, has interpreted the statute more narrowly than its language seems to provide.⁸⁷ Even though the statute itself calls for one hundred years of protection, whether or not the individual was alive when the statute took effect,⁸⁸ a District Court in Indiana held that a post-mortem right of publicity did not apply for a personality who died before the statute's effective date.⁸⁹

⁷⁹ *Id.* at n.1.

⁸⁰ MCCARTHY, *supra* note 59, at § 6:8. Of those states that explicitly define a duration, the time varies between the and one hundred years of protection. Tennessee allows for ten years of protection, but the period may extend based on use. *See* TENN. CODE ANN. § 47-25-1104 (West 1998). Washington provides seventy five years of protection for personalities with commercial value and ten years for those without. *See* WASH. REV. CODE ANN. § 63.60.040 (West 2004).

⁸¹ CAL. CIV. CODE § 3344.1 (West 2012). California's 2007 Right of Publicity amendment 3344.1 sought to provide postmortem rights to those who died before January 1, 1985.

⁸² IND. CODE ANN. § 32-36-1-8 (West 2014).

⁸³ MCCARTHY, *supra* note 59, at § 9:33.

⁸⁴ OKLA. STAT. ANN. tit. 12, § 1448 (West 1986).

⁸⁵ 765 ILL. COMP. STAT. 1075/30 (West 1999); OHIO REV. CODE ANN. § 2741.03 (West 1999).

⁸⁶ IND. CODE ANN. § 32-36-1-8 (West 2014).

⁸⁷ *Dillinger, LLC v. Electronic Arts, Inc.*, 795 F.Supp. 2d 829, 834 (S.D. Ind. 2011). (“[G]iven the existence of a reasonable alternative reading of the statute, the Court must presume that the Indiana Supreme Court would . . . adopt the narrower reading.”).

⁸⁸ IND. CODE ANN. § 32-36-1-8(a)(1) (West 2014).

⁸⁹ *Dillinger*, 795 F.Supp. 2d at 834. *Dillinger, LLC*, purported owners of the publicity rights of John Dillinger, sued EA for misappropriation of Dillinger's name in two of its video games. The court held that, even though the statute did grant a one hundred year protection period, it does not apply to those who died before its inception.

California, on the other hand, has been progressive in its laws of publicity. With its large population of celebrities and other citizens that may benefit from a liberal right of publicity, it is probably in the state's best interest to enact laws that protect the right up to and even after death.⁹⁰ In 2007, California amended its right of publicity statute to include the existence of the right of publicity for any personality that died after January 1, 1938, as well as a provision defining the rights as property rights, freely transferrable by the individual in question before death or by any to whom the rights vested after death.⁹¹

Indiana has, within its statutes, an exception for literary works.⁹² Some jurisdictions have held that video games themselves fall under the category of literary works.⁹³ Regardless of this holding, Indiana's statute remains among the most protective.⁹⁴

Owing its ruling to policy concerns, the court stated that “[p]roviding causes of action for the heirs of the millions of people who died between 1894 and 1994—*i.e.* during the 100 year post-death period of protection—would greatly expand the potential liabilities that the statute creates.” *Id.*

⁹⁰ California's 1985 right of publicity legislation is itself known as the California Celebrities Rights Act. The legislation was passed following a 1979 California Supreme Court decision, which ruled that personality rights do not survive death as copyright would. *See* *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979). Deceased Hollywood legend, Bela Lugosi's family sued the studio for using his image in *Dracula* after death without permission. After lengthy litigation, it was determined that California does not recognize rights or privileges to one's likeness following death.

⁹¹ *Milton H. Green Archives, Inc. v. CMG Worldwide, Inc.* 568 F.Supp 2d. 1152, 1156 (C.D. Cal 2008) (quoting CAL. CIV. CODE § 3344.1 (West 2012)). The new legislation, which sought to correct this result, created a right to one's likeness for seventy years after death—the same term as copyright. Immediately prior to the 2007 expansion, a New York court ruled that Monroe's personality was not protected under the original California Celebrities Rights Act. As a result, her personality was in the public domain in California and any other state that does not recognize a descendible right of publicity (including New York). *See* *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.* 486 F. Supp. 2d 309 (S.D.N.Y. 2007). Following this decision, Governor Schwarzenegger signed into law an extension retroactively protecting anyone that has died since January 1, 1938. Seemingly, this would include Ms. Monroe.

⁹² IND. CODE ANN. § 32-36-1-1(C)(1) (West 2012).

⁹³ *Dillinger, LLC v. Electronic Arts, Inc.*, 795 F.Supp. 2d 829, 836 (S.D. Ind. 2011).

⁹⁴ *Brief History of RoP*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited Mar. 28, 2014).

One argument for appropriation of one's likeness in a creative setting is First Amendment protection.⁹⁵ California, like Indiana, has visited the issue of using one's likeness in a video game. In a 2011 case involving popular band No Doubt and video game maker Activision, the California Court of Appeals held that, based on common law and California statutory protection of the right of publicity, the First Amendment did not protect Activision's use of each band member's likeness because of the faithful representation of the band.⁹⁶ Ed O'Bannon, chief plaintiff in the case against the NCAA, may construct his case based on the *No Doubt v. Activision* litigation and the recent *Hart* decision regarding transformative use in video games.⁹⁷ The primary issue at stake in his case is whether the state recognizes the right of publicity as an assignable property right.⁹⁸

Finally, and perhaps most radical when compared against the outcome of the Marilyn Monroe litigation, Indiana's right of publicity statute "applies to an act . . . that occurs within Indiana, regardless of . . . domicile, residence, or citizenship."⁹⁹

Just as some states seek to offer protection not only to its citizens, but also to anyone who enters the state, others are far less concerned with the right of publicity.¹⁰⁰ In some states, the right of publicity almost defaults not to the individual in question but the one in control of the offending use. In Mississippi, common law restricts the right of publicity such that unless one explicitly limits the use of a photograph, one effectively waives the right of publicity.¹⁰¹ Consent without limitation is absolute consent.¹⁰²

⁹⁵ *Infra*, Section III D.

⁹⁶ *No Doubt v. Activision*, 192 Cal. App. 4th 1018 (Cal. App. 2d. 2011). This case set up the recent 2013 *Hart* decision regarding the transformative use doctrine.

⁹⁷ *Id.*; *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013).

⁹⁸ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th. Cir. 2013).

⁹⁹ IND. CODE ANN. § 32-36-1-1(a) (West 2012).

¹⁰⁰ *Id.* as compared to Mississippi, which failed to advance a right to publicity statute past committee. Senate Bill 2254, Mississippi Legislature 2011 Regular Session, Feb.1,2011, <http://billstatus.ls.state.ms.us/2011/pdf/history/SB/SB2254.xml>.

¹⁰¹ *Brasel v. The Hair Co.*, 976 So.2d 390 (Miss. Ct. App. 2008). In this case, a salon owner asked the plaintiff for permission to photograph his new haircut. The plaintiff consented and the salon owner then used the photograph for advertisement and display on both the salon's and others' websites. The Mississippi Court of Appeals ruled

Three years after a Mississippi case demonstrated the lack of control over one's image, a proposed Mississippi Right of Publicity Act died in committee.¹⁰³

One recent federal ruling demonstrated the dire need for a sufficient federal cause of action for the right of publicity because of the disparity between current federal and state protections. In *Brown v. Electronic Arts*, just one of many ongoing cases involving athletes in video games, the plaintiff sued the famous game maker for a Lanham Act violation.¹⁰⁴ The court held that, under the Lanham Act, there was not a sufficient claim to substantiate a false endorsement or likelihood of confusion claim.¹⁰⁵ The court specifically made mention that "this appeal relates only to Brown's Lanham Act claim. Were the [California Right of Publicity] causes of action before us, our analysis may be different and a different outcome may obtain [sic]."¹⁰⁶ A proper federal right of publicity would greatly reduce the confusion over causes of action to bring.

III. PROPOSED STATUTORY CONSTRUCTION

Stephen Hoffman laid out three primary policy considerations in his oft-cited article, *Limitations on the Right of Publicity*.¹⁰⁷ A federal statute defining a right of publicity should seek to address all three concerns, if possible. Hoffman's first matter is that "the right of publicity vindicates the economic interest of celebrities, enabling those whose achievements have imbued their identities with pecuniary value to profit from their fame."¹⁰⁸ Next, a federal right would encourage "production of

that Brasel's consent without limitation to how the photographs were used defeated his claim for misappropriation (citing the rule from *Harbin v. Jennings*, 734 So.2d 269, 272 (Miss. Ct. App. 1999): plaintiff must show that the defendant (1) appropriated his name or likeness, (2) without consent, (3) for use in a commercial enterprise).

¹⁰² *Id.* at 392.

¹⁰³ S. 2254, 2011 Leg., Reg. Sess. (Ms. 2011).

¹⁰⁴ 724 F.3d 1235 (9th Cir. 2013). Brown's claims were false endorsement and likelihood of confusion.

¹⁰⁵ *Id.* at 1239.

¹⁰⁶ *Id.* at 1240 n. 2.

¹⁰⁷ See Hoffman, *supra* note 71 at 111.

¹⁰⁸ *Id.* at 116.

intellectual and creative works by providing the financial incentive for individuals to expend the time and resources necessary to produce them.”¹⁰⁹ Finally, legislation will serve “both individual and societal interests by preventing what our legal tradition regards as wrongful conduct: unjust enrichment and deceptive trade practices.”¹¹⁰

In addition, a statute defining a right of publicity must seek to resolve many of the issues that exist between various state rights. California’s statute seeks to define publicity as a freely assignable property right. Within property law, one possesses a bundle of rights. Among the rights are the right to exclude,¹¹¹ the right to possess and use,¹¹² and the right to transfer.¹¹³ Publicity rights must incorporate the same rights as property.

For collegiate athletes, a voluntary waiver of publicity during their tenure as student-athletes is exclusive and all encompassing.¹¹⁴ Perhaps college athletes should not have to waive rights of publicity during their tenure with collegiate athletic programs. The federal right of publicity should incorporate elements of and behave like federal copyright rights. As the rights one might seek to protect (persona, personality, likeness, etc.) originally stem from trademark law, elements from this legal field should be included in the federal statute.¹¹⁵

Within copyright law, the owner of a work has the exclusive right to reproduce, prepare derivative works, distribute copies of, perform, and display the work.¹¹⁶ Each right may be divisible and

¹⁰⁹ *Id.* at 118.

¹¹⁰ *Id.*

¹¹¹ *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

¹¹² *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-378 (1945).

¹¹³ *Green v. Van Buskirk*, 74 U.S. 139 (1868).

¹¹⁴ *See Form 08-3a Academic Year 2008-09: Student Athlete Statement – Division 1*, available at http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf (last visited April 15, 2014) (illustrating that—while the language of Form 08-3a, Part IV is not explicitly exclusive—the NCAA’s working definition of amateurism, found in Part II, precludes a student-athlete from acting upon the commercialization of their personality or likeness in any way while participating intercollegiate athletics).

¹¹⁵ *Brief History of RoP*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited Mar. 28, 2014) (“Theoretically, the Right of Publicity is of the same genus as unfair competition and, more precisely, the doctrine of misappropriation—two hallmarks of trademark law . . .”).

¹¹⁶ 17 U.S.C.A. § 106 (West 2002).

assignable itself, allowing, for example, an article author to assign a nonexclusive and limited right of reproduction and distribution to an academic journal, while maintaining copyright ownership of the work itself.¹¹⁷ Just as many state statutes have assigned the right of publicity property right status, it will be important to stress the divisibility and assignability of each facet of one's personality.¹¹⁸

One may trademark a name for use in commerce and the right of publicity should give protection over one's name, as well as control over how one's name is used in a commercial setting.¹¹⁹ Even more importantly, one should be able to control the commercial use of one's likeness and developed persona. A federal statute should not, however, restrict use of one's likeness such that First Amendment rights are limited or that it provides a cause of action without injury.

California's right to publicity statute states that a cause of action exists when one's "name, voice, signature, photograph, or likeness [is used] in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling . . . without such person's prior consent . . ." ¹²⁰ New York statutes prohibit any person, firm, or corporation from using a living person's name, portrait, picture, or voice for advertising or purposes of trade without consent.¹²¹ A New York court has recognized some limitations of its statute that stem from tort law in *Bement v. N.Y.P. Holdings, Inc.*¹²² In that case, the court held that NY CRL

¹¹⁷ H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674. ("Each of the five enumerated rights may be subdivided indefinitely and . . . each subdivision . . . may be owned and enforced separately.")

¹¹⁸ ARIZ. REV. STAT. ANN. § 12-761 (West 2007) (applying only to soldiers and military personnel currently); CAL. CIV. CODE § 3344.1(3)(b) (West 2008); 765 ILL. COMP. STAT. ANN. 1075/15 (West 1999); IND. CODE ANN. § 32-36-1-16 (West 2002); KY. REV. STAT. ANN. § 391.170 (West 1984); OHIO REV. CODE ANN. § 2741.01 (West 2003); OKLA. STAT. ANN. tit. 12 § 1448 (West 1986); TENN. CODE ANN. § 47-25-1104 (West 1984); TEX. PROP. CODE ANN. § 26.002 (West 1987); VA. CODE ANN. §8.01-40 (West 1977).

¹¹⁹ 15 U.S.C.A. § 1127 (West 2006) ("The term 'trademark' includes any . . . name [used] . . . to identify and distinguish his or her goods, including a unique product . . .").

¹²⁰ CAL. CIV. CODE § 3344(a) (West 1984).

¹²¹ N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2009).

¹²² 760 N.Y.S.2d 133 (2003).

§§ 50-51 are generally inapplicable when “the use occurs in the context of a report of newsworthy events or matters of public interest,” citing a lack of advertising or trade in its legality.¹²³ Indiana structures its right of publicity statutes similar to New York.¹²⁴

One instance where the two states (California and New York) that would arguably have the most incentive for protecting its private celebrity citizens’ rights differ is the right of publicity after death. California law clearly states that the right of publicity descends after death,¹²⁵ whereas New York does not. California goes on to assign property right status on publicity rights:

The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument . . . The rights recognized under this section shall be deemed to have existed at the time of death of any deceased personality¹²⁶

There is not yet any California case law that addresses the policy concerns of granting post-mortem protection to those that died before the inception of the statute as discussed in Indiana’s *Dillinger, LLC v. Electronic Arts Inc.*¹²⁷ If drafted with one’s property rights, copyright, right to privacy, the First Amendment, and the changing national and international landscape in mind, a federal right of publicity should seek to wholly address the 1) definition, 2) divisible personality rights, 3) property’s bundle of rights, 4) limitations and the First Amendment, 5) jurisdiction, 6) term, and 7) assignability. In addition to these key elements,

¹²³ *Id.* at 136.

¹²⁴ IND. CODE ANN. § 32-36-1-1(c)(1) (West 2012) (stating that the Rights of Publicity chapter of the Code of Indiana does not apply to “(A) [l]iterary works, theatrical works, musical compositions, film, radio, or television programs,” or “(B) [m]aterial that has political or newsworthy value.”).

¹²⁵ CAL. CIV. CODE § 3344.1(a) (West 2009).

¹²⁶ *Id.* at § 3344.1(b).

¹²⁷ 795 F. Supp. 2d 829 (S.D. Ind. 2011).

Congress should seek to enact legislation that addresses the population of student athletes.

A. Definition

In seeking to properly define the right of publicity, one should visit statutes already in place. One Illinois statute protects one's "'identity,' mean[ing] any attribute . . . that serves to identify that individual to an ordinary, reasonable viewer or listener"¹²⁸ Washington differentiates between the individual and a personality in its personality rights statutes.¹²⁹ Technology is evolving in such a way that many individuals are creating and subsisting on income derived from personalities separate from what may be considered an individual in Washington state.¹³⁰ Blogs, Twitter accounts, and Tumblr pages have all been instrumental in the development of many commercially viable personalities. In the past few years, purveyors of media of all kinds have looked online for prospects with greater regularity. Prominent Twitter and Tumblr users are signing book and TV development deals.¹³¹ Prominent foodie and home chef blogger, Pioneer Woman, recently debuted her Food Network TV series

¹²⁸ 765 ILL. COMP. STAT. ANN. 1075/5 (West 1999).

¹²⁹ WASH. REV. CODE ANN. § 63.60.020 (West 2008). Washington, throughout its Personality Rights statutes, has separate clauses for individuals and personalities, which it later defines separately. "Individual" is a "natural person, living or dead," whereas a "personality" is any "individual whose name, voice, signature, photograph, or likeness has commercial value, whether or not that individual uses his or her name, voice, signature, photograph, or likeness on or in products, merchandise, or goods, or for purposes of advertising or selling, or solicitation of purchase or, products, merchandise, goods, or services."

¹³⁰ *Id.*

¹³¹ Eliza Kern, *Tumblr CEO David Karp Says at Least 70 Users Have Turned Blogging Into Book Deals*, GIGAOM (Apr. 17, 2013, 8:59 AM), <http://paidcontent.org/2013/04/17/tumblr-ceo-david-karp-says-at-least-70-users-have-turned-blogging-into-book-deals/>. MG Siegler, *Sometimes Twitter Accounts About Sh*t Your Dad Says Get You TV Deals*, TECHCRUNCH (Nov. 9, 2009), <http://techcrunch.com/2009/11/09/sometimes-twitter-accounts-about-sht-your-dad-says-get-you-tv-deals/> (explaining that Twitter user Justin Halpern, using the handle @shitmydadsays, has garnered over three million followers, a book deal, a short lived sitcom, and offers for more opportunities, including a second book on an unrelated subject).

based on her blog.¹³² Each blog, Tumblr, and Twitter account, regardless of popularity or commercial value, has developed with it a distinct personality, and one that deserves protection.

One common theme that appears in seemingly every state statute is that misappropriation of one's personality in commerce is dispositive of a violation of one's rights.¹³³ Commerce online continues to evolve with each passing year. What we consider to be of little value today may be a viable revenue stream tomorrow.

Keeping that in mind, control over any number of personal attributes associated with an individual or personality in commerce, for profit or not-for-profit, as recognizable by a "de minimis number of persons [who] reasonably identify plaintiff as the person in defendant's use" should define the right to publicity.¹³⁴ In essence, one's personality "encompasses any aspect of the individual from which the individual can be identified in the entire context of the defendant's use."¹³⁵

A federal statute must define all aspects of a right of publicity, beginning with what the protection offered. A proposed federal Right to Publicity statute may be structured like the following to include this amended language:

Right of publicity is an inalienable property right available to all who fall under the jurisdiction.

1. The right of publicity gives an individual protection and control of and a property interest in one's separate and distinct Personality Rights:
 - a. Name
 - b. Likeness
 - c. Image
 - d. Personality
 - e. Distinctive Appearance, including

¹³² Rene Lynch, *'The Pioneer Woman' Takes Her Vittles to TV*, L.A. TIMES (August 27, 2011), <http://articles.latimes.com/2011/aug/27/entertainment/la-et-pioneer-woman-20110827>.

¹³³ TENN. CODE ANN. § 47-25-1104(b) (West 1984); WASH. REV. CODE ANN. § 63.60.050 (West 1998); MASS. GEN. LAWS ANN. ch. 214, § 3A (West 1973).

¹³⁴ MCCARTHY, *supra* note 59, at § 3:7.

¹³⁵ Talor Bearman, *Interception Licensing Rights: Why College Athletes Need a Federal Right of Publicity*, 15 VAND. J. ENT. & TECH. L. 85, 111 (2012).

- f. Mannerisms
 - g. Gestures
 - h. Voice
 - i. Persona¹³⁶
2. The right of publicity also recognizes protection over performance values in:¹³⁷
 - a. Personality
 - b. Distinctive appearance, including
 - c. Mannerisms, and
 - d. Gestures
 - e. Voice, and
 - f. Persona¹³⁸
3. The right of publicity attaches regardless of preexisting commercial value.¹³⁹
4. The right of publicity guarantees a subset of rights:
 - a. Right to exclude use
 - b. Right to possess
 - c. Right to transfer
5. The right of publicity is freely assignable.
6. The right of publicity and its various subsets are divisible to multiple parties, where desired.¹⁴⁰
7. Infringement – to prove infringement of the right of publicity, no proof of falsity, confusion, or deception is

¹³⁶ See IND. CODE ANN. § 32-36-1-6 (West 2002).

¹³⁷ Richard Ausness, *The Right of Publicity: A "Haystack in a Hurricane,"* 55 Temple L.Q. 977, 989 (1982). ("The development of performing skills and the implementation of creative ideas often requires a substantial investment of time, energy, and money. The great the possibilities for personal profit, the more likely people are to pursue these creative, socially beneficial activities. For this reason the right to publicity can arguably be applied to protect the values that inhere in a particular performance.") It should be pointed out that Copyright affords protection of performance fixed in a tangible medium of expression.

¹³⁸ IND. CODE ANN. § 32-36-1-6 (West 2002).

¹³⁹ OHIO REV. CODE ANN. § 2741.01(a) (West 1999). Unlike states such as Ohio that provide protection only for those who have commercial value associated with their personality. Ohio defines "persona" as an individual's name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects have commercial value.

¹⁴⁰ See 17 U.S.C. § 106 (West 2002).

required.¹⁴¹ Use of one's property interest without consent in commerce alone suffices to prove infringement.¹⁴²

B. Divisible Personality Rights

As seen in Indiana's statutes, one's publicity rights may expand beyond historical provisions.¹⁴³ In addition to one's likeness, distinctive appearance, or image, personality has grown to include anything that may have commercial value.¹⁴⁴ As such, the right of publicity should not be limited to protect only an image or likeness, but also one's name, voice, image, distinctive appearance, and future personal attributes that may be instrumental in identifying an individual—up to and including one's social media interactions. The law should recognize each particular facet of one's personality as separate for purposes of not only commercialization but also protection.

The right of publicity, recognized as encompassing a number of facets, is divisible in its scope. Each protected aspect is separately assignable with equal protection.¹⁴⁵

C. Property's Bundle of Rights

Within the spectrum of protection afforded each divisible personality right should be property's so-called bundle of rights. Within the bundle are the rights to exclude,¹⁴⁶ possess and use,¹⁴⁷ and transfer.¹⁴⁸ Arguably, the first and last of the bundle are the most necessary. By recognizing one's personality as a property

¹⁴¹ *Parks v. Laface Records*, 329 F.3d 437, 460 (“[One’s] right of publicity claim does not require any evidence that a consumer is likely to be confused.”).

¹⁴² “This is because proof of falsity, deception or confusion is not required for infringement of the right of publicity.” MCCARTHY, *supra* note 59 at § 5:19 (“Proof of deception or consumer confusion is not required for the imposition of liability under this Section.”); RESTATEMENT (THIRD), UNFAIR COMPETITION § 47 (1995), cmt. a (“Proof that prospective purchasers are likely to believe that the identified person endorses or sponsors the user’s goods or services is not required for the imposition of liability.”).

¹⁴³ IND. CODE ANN. § 32-36-1-1 (West 2012).

¹⁴⁴ *Id.*

¹⁴⁵ 17 U.S.C. § 106 (West 2002).

¹⁴⁶ *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979).

¹⁴⁷ *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

¹⁴⁸ *Green v. Van Buskirk*, 74 U.S. 139 (1868).

right, one would have the power to limit its use by power of exclusion and transfer. By allowing you to transfer—exclusively or not, via license or assign—part of your personality, one maintains the right to possess and use your own personality for commercial gain. Similarly, with copyright a transfer or grant of personality right must be in writing.¹⁴⁹

D. First Amendment Limitations and Other Exemptions

Limitations to a right of publicity will go hand-in-hand with the First Amendment. There must be specific language in the statute that will make concessions for the freedom of the press and free expression. While the Supreme Court has held that individuals have protection against unauthorized disclosure by the press in *Zacchini*,¹⁵⁰ the freedom of the press is well established. The First Amendment acts as a subsidy to speech.¹⁵¹ Publication absent of malice immunizes the press from liability for reasons of the free enterprise of ideas.¹⁵²

Beyond the freedom of the press lies the freedom of expression, which also deserves stringent First Amendment protection.¹⁵³ The Supreme Court held “[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”¹⁵⁴ Beyond this list and falling into the same category as movies and books, video games also merit First Amendment protection.¹⁵⁵

Furthermore, many states’ statutes include that the right of publicity does not apply with regards to portrayal in a live performance, work of art or literature (which has been held to

¹⁴⁹ 17 U.S.C. § 204 (West 1976).

¹⁵⁰ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

¹⁵¹ MCCARTHY, *supra* note 59, at § 8:10.

¹⁵² *Id.* (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (White, J., concurring) (“The press must therefore be privileged to spread false information, even though that information has negative First Amendment value . . . in order to encourage the full flow of the truth.”)).

¹⁵³ MCCARTHY, *supra* note 59, at § 8:15.

¹⁵⁴ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

¹⁵⁵ *Brown v. Entm’t Merchants Ass’n*, 131 S.Ct. 2729 (2011).

include video games),¹⁵⁶ film, television, etc., assuming that the work itself is not and does not constitute advertisement.¹⁵⁷

A federal right to publicity, in its statutory language, should specifically name certain limitations to its protection. An example of this could include:

The provisions of the right of publicity shall not apply to use of one's Personality Right for:

1. Works:
 - a. The publication, printing, display, or use in any bona fide newsworthy or political material having current and legitimate public interest,¹⁵⁸
 - b. Literary works, theatrical works, musical compositions, film, radio, or television programs, or¹⁵⁹
 - c. Original works of fine art

Which are not directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for purposes of advertising or in commerce.¹⁶⁰

2. One whose Personality Rights have commercial value solely because of notoriety through formal charges or conviction of a crime.¹⁶¹

E. Jurisdiction

In order for a federal right of publicity to be effective, its reach must encapsulate not only the whole country, but also any individual or entity over whom it has jurisdiction. Publicity rights should originate in, but not be limited to, one's state of domicile. In order to secure total protection for individuals, the right of

¹⁵⁶ *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1234 (3rd Cir. 1986); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (holding that "literary works" in the statute do not encompass videogames would set the right-of-publicity statute up for a constitutional challenge because videogames have just as much protection under the First Amendment as does "highbrow literature.").

¹⁵⁷ 765 ILL. COMP. STAT. 1075/35 (West 1999).

¹⁵⁸ See FLA. STAT. § 540.08 (3)(a) (West 2007).

¹⁵⁹ See IND. CODE ANN. § 32-36-1-1(c) (West 2012).

¹⁶⁰ See TENN. CODE ANN. § 47-25-1107(b) (West 1984).

¹⁶¹ See IND. CODE ANN. § 32-36-1-1(c)(4) (West 2012).

publicity must not be limited to one's state of domicile, but instead to the jurisdiction in which the event occurred.¹⁶²

A national model of protection could replace the old model of a single jurisdiction's protection. Thus:

The jurisdictional reach of the federal right of publicity extends to any event or act that occurs within the jurisdiction of the Federal Act, regardless of:

1. Domicile,
2. Citizenship, or
3. Residence.¹⁶³

F. Term

The overall term of a federal right of publicity is an issue that would be hotly debated leading up to enactment of a statute. There is a growing voice against the overall length and scope of both copyright and, especially, patent protection.¹⁶⁴ Currently, federal copyright laws offer life plus seventy years of protection.¹⁶⁵ Some states have followed suit, offering another two generations' worth of protection in the right of publicity after an individual's death, while others have limited it to only ten years or for the life

¹⁶² *Id.* at § 32-36-1-1(a) ("this chapter applies to an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship.").

¹⁶³ *Id.* at § 32-36-1-1.

¹⁶⁴ Patent protection, it is argued, frequently extends beyond the active duration for an invention—especially a technological one. In fact, the length of time it takes for the United States Patent and Trademark Office to issue a patent is frequently beyond the scope of viability for new tech patents. The exclusive protection that patents offer is directly in contract with the speed at which technology evolves. See Julie Samuels, *Why the Patent System Doesn't Play Well with Software: If Eolas Went the Other Way*, ELECTRONIC FRONTIER FOUNDATION (February 15, 2012), <https://www.eff.org/deeplinks/2012/02/why-patent-system-doesnt-play>. In earlier iterations of the US Copyright statute, only those who published and issued a copyright notice with their expression qualified for federal protection. *Contra* 17 U.S.C. § 401 (West 1988). The current Copyright laws no longer require notice or publication to guarantee seventy years of protection. As social media companies continue to claim ownership over material posted on their services and the internet creates an illusion of the victimless crime of copyright infringement, it becomes harder to effectively prosecute all infringers. *Id.*

¹⁶⁵ See 17 USC § 302 (West 1998).

of the personality.¹⁶⁶ The majority of states with statutory rights limit the postmortem duration to fewer than fifty years.¹⁶⁷

The current intellectual property environment would make it realistic to offer life, plus seventy years of protection. This will allow those who are in possession of publicity rights sufficient opportunity to profit from and control them. It would also give long-term control to those who did not create the personality protected by postmortem rights—a frequent criticism of copyright’s length of protection.¹⁶⁸ In a paper released immediately following the 2012 Presidential election, the Republican Study Committee called for copyright reform citing, among other reasons, the need for limited terms to cultivate innovation rather than stifle it.¹⁶⁹ Addressing the policy concern, a California district court advised that, “enforcing intellectual property rights is the balance that must be struck between protecting an individual’s right to reap the benefits of his creative endeavors and the public’s freedom of expression.”¹⁷⁰

The limitations put in place for uses like news reporting, commentary, and literary works, mean this lengthy term would not be an absolute bar against using an individual’s personality in the media.

There are current policy arguments both for and against postmortem publicity rights. A New York court decision presented early dissent to a postmortem right in *Schumann v. Loew’s Inc.*¹⁷¹ In this case, the court held that descendants of the long-deceased composer had no cause of action to prevent production of a movie made about his life, citing both length of time passed and policy concerns of unlimited protection of deceased celebrities.¹⁷²

¹⁶⁶ See *infra* Part II.

¹⁶⁷ *Hebrew Univ. of Jerusalem v. General Motors, LLC*, 903 F. Supp. 2d. 932, 939 (C.D. Cal. 2012) (finding, after surveying state statutes, that most states limit postmortem rights to fifty years or less).

¹⁶⁸ See Mike Mansick, *House Republicans: Copyright Law Destroys Markets; It’s Time for Real Reform*, TECHDIRT (Nov. 16, 2012, 7:39 PM), <http://www.techdirt.com/articles/20121116/16481921080/house-republicans-copyright-law-destroys-markets-its-time-real-reform.shtml>.

¹⁶⁹ *Id.*

¹⁷⁰ *Hebrew Univ. of Jerusalem*, 903 F. Supp. 2d. at 940.

¹⁷¹ 144 N.Y.S. 2d 27 (N.Y. Sup. Ct. 1955).

¹⁷² *Id.* at 30.

Similarly, Stephen Hoffman has argued that postmortem rights would not create significant incentive for creative endeavors, causing a rift between First Amendment and copyright laws.¹⁷³ A postmortem right, he argued, would not serve economic and creative interests.¹⁷⁴

An influential Tennessee case made policy arguments in favor of a postmortem right. In *State ex. rel. Elvis Presley International Memorial Foundation v. Crowell*, the court reasoned, 1) the right of publicity is intangible personal property and should be subject to testamentary distribution, 2) the unauthorized postmortem user is unjustly enriched and reaps where he has not sown, 3) the law should recognize a celebrity's expectation that he or she is creating a valuable capital asset for the benefit of heirs after death in the same way that others invest in real estate or stocks, 4) the law should recognize the value of contract rights of licensed users, and 5) a postmortem right of publicity will discourage false claims of endorsement by the deceased person.¹⁷⁵

Whereas copyright protection is limited, trademark protection (with which the right of publicity is commonly associated) may offer perpetual protection.¹⁷⁶ The Lanham Act provides for continued use for as long as the trademark is in use in commerce, with sufficient extensions.¹⁷⁷

The problem with using trademark's perpetual use rule is that it sets up the possibility for a family or company who inherits or has been assigned publicity rights to use them perpetually, almost as a brand. In this way, it is reminiscent of copyright's policy concerns.

Finally, with regard to postmortem rights, there are policy debates in both support and opposition of the necessity of "lifetime

¹⁷³ Hoffman, *supra* note 71, at 139.

¹⁷⁴ *Id.*

¹⁷⁵ 733 S.W.2d 89 (Tenn. Ct. App. 1987).

¹⁷⁶ See *Alan Wood Steel Co. v. Watson*, 150 F. Supp. 861, 862 (D. Wash. D.C. 1957) ("The potential consequences to the public might be very serious, because . . . a trademark becomes the permanent property of its owner and secures for him a monopoly in perpetuity.").

¹⁷⁷ 15 U.S.C. 1058 (West 2010).

exploitation.”¹⁷⁸ Lifetime exploitation refers to an individual’s use in commerce of his or her personality rights before death.¹⁷⁹ While no jurisdictions specifically hold that lifetime exploitation is required for the right of publicity to survive death, it has been posited in a number of scholarly journals.¹⁸⁰ The concept of a lifetime exploitation requirement is the idea that, without prior exploitation, there could be no economic loss in postmortem exploitation.¹⁸¹ In copyright law, copyright passes on to one’s descendants or assignees regardless of whether it was exploited or not.¹⁸² In trademark law, trademark rights continue as long as they are used.¹⁸³ Alternatively the statute could be amended to state:

A federal right of publicity should have limited postmortem rights:

The federal right of publicity shall survive death, regardless of lifetime exploitation.¹⁸⁴

1. The right descends by assignment, designation, or will. If no clear heir, assignee, or designee exists, the statutory right extinguishes.¹⁸⁵
2. From death, the right of publicity shall continue for a period of fifty years, regardless of continued use.

G. Assignability

One of the biggest issues in the O’Bannon case is the use of one’s likeness by third parties. As an NCAA student-athlete, O’Bannon, and thousands more like him, was required to sign

¹⁷⁸ MCCARTHY, *supra* note 59, at § 9:12.

¹⁷⁹ *Id.*

¹⁸⁰ MCCARTHY, *supra* note 59, at § 9:13-15; Felcher & Rubin, *supra* note 72, at n.78.

¹⁸¹ Felcher & Rubin, *supra* note 72, at 1613-1614.

¹⁸² 17 U.S.C. § 201(d)(1) (West 1978).

¹⁸³ See J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 17:9 (Clark Boardman Callaghan, 4th ed. 2013).

¹⁸⁴ See *Martin Luther King, Jr., Center for Social Change, Inc. v. Am. Heritage Products, Inc.*, 296 S.E.2d 697, 699 (Ga. 1982) (answering in the negative to the question “must an owner [of the right to publicity] have commercially exploited the right before it can survive his death?”).

¹⁸⁵ See FLA. STAT. ANN. § 540.08(1)(c) (West 2007).

Form 08-3a as an affirmation of eligibility as well as an understanding that the NCAA or designated third parties may use his name or likeness.¹⁸⁶ While the required Form 08-3a does specifically use the term “third parties,” it does not specifically name parties and does not include language that would mandate specific grant by an individual for assignment of this constructive license.¹⁸⁷

To counteract this issue and issues in other instances, the federal right of publicity should not be freely assignable without specific contract provisions. That is, the NCAA should seek permission from student-athletes for licensure to Electronic Arts, apparel companies, and other third parties.

H. Student-athlete provision

While some have specifically called for a student-athlete right of publicity that would seek to protect the rights of student-athletes, the NCAA and colleges tend to ignore that favor of athletic participation.¹⁸⁸ Indeed, in 1906 the NCAA began “to protect young people from the dangerous and exploitative athletics practices of the time.”¹⁸⁹ Now the same young student-athletes that the NCAA is supposed to protect seek a law that would protect them from dangerous and exploitative business practices. A student-athlete provision would simplify the debate between the NCAA and student-athletes around the country. Given the current state of NCAA amateurism, a federal right of publicity may directly interfere with an athlete’s status as an amateur while simultaneously giving that athlete an unalienable ability to earn from his or her personality and likeness.¹⁹⁰

¹⁸⁶ See *Form 08-3a Academic Year 2008-09: Student Athlete Statement – Division 1*, available at http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf (last visited April 15, 2014).

¹⁸⁷ *Id.*

¹⁸⁸ Bearman, *supra* note 135.

¹⁸⁹ *Health and Safety*, NCAA, <http://www.ncaa.org/about/what-we-do/health-and-safety> (last visited Mar. 24, 2014).

¹⁹⁰ *Amateurism: General Principles*, 2013-14 NCAA DIVISION I MANUAL art. 12.01 (2013), available at <http://www.ncaapublications.com/productdownloads/D114.pdf>.

Student-athletes must meet NCAA amateurism rules to remain eligible for intercollegiate athletic play.¹⁹¹ This includes refraining from using athletic skill for pay, promise of pay, committing to a professional athletics contract, or endorsement.¹⁹²

A student-athlete provision should recognize a student-athlete's ability to profit from use of likeness in commerce and leave room for an ability to earn when and if the NCAA changes its amateurism rules.

Perhaps, most importantly, a student-athlete provision must include a most favored nation clause, the inclusion of which should create a favorable atmosphere for NCAA rule changes.¹⁹³ This clause should not regulate open market competition, but future compensation from universities, athletics departments, or educational institutions.

Finally, by recognizing the right of publicity as an unalienable property right, the student-athlete provision should open the door to compensation through publicity rights outside of athletic competition. Courts have sided with the NCAA regarding administration of its rules in the past.¹⁹⁴ In *Bloom v. NCAA*, the Colorado Court of Appeals held that, while athletes have standing to challenge NCAA eligibility determinations, courts defer to the NCAA unless it has acted arbitrarily, unreasonably, or unfairly.¹⁹⁵

IV. O'BANNON, THE NCAA, AND AN OPEN MARKET

A federal right of publicity would change the landscape of collegiate sports. Currently, when a student-athlete signs a Form 08-3a at the beginning of the academic year, they are affirming with the NCAA that, among other things: 1) they are eligible (meaning they meet NCAA standards as amateurs); and 2) they

¹⁹¹ *Id.* at art. 2.12, 12.01, 12.1.2, and 14.1.

¹⁹² *Amateur Status*, 2013-14 NCAA DIVISION I MANUAL art. 12.1.2 (2013), available at <http://www.ncaapublications.com/productdownloads/D114.pdf>.

¹⁹³ Discussion on the NCAA's current amateurism rules and paying players has put a premium on dissecting how to pay players fairly. By giving the NCAA a federally mandated statute that guarantees equal treatment for student-athletes, regardless of ability or commercial viability, Title IX and issues of favoritism may be kept to a minimum regarding payment to players by universities.

¹⁹⁴ See generally *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004).

¹⁹⁵ *Id.*

will allow the NCAA or a third party of the NCAA's behalf "to use [their] name or picture [in commerce] to generally promote NCAA championships or other NCAA events, activities, or programs."¹⁹⁶ The unnamed third parties could include the university with which the student-athlete is associated, a video game company such as Electronic Arts, or any sports outfitter. As long as the student receives no compensation or remuneration for his or her athletic skill, he may remain eligible under NCAA guidelines.¹⁹⁷

In some states, such as Mississippi, this waiver for publicity may be absolute and perpetual relating to the time period in which the student-athlete participates in athletics.¹⁹⁸ In any case, Part IV of the NCAA's Form 08-3a is a contract for temporarily giving license to one's property right of publicity seemingly without compensation. All student-athletes are required to sign Form 08-3a, regardless of scholarship or financial aid assistance.

A federal right of publicity may guarantee property rights for all individuals, but the NCAA's form 08-3a still restricts a student-athlete's ability to exploit their property rights.¹⁹⁹ In order to protect student-athletes from exploitative business practices while complying with guaranteed property rights, the NCAA would be best suited to adopt a new model of amateurism.²⁰⁰ The NCAA's definition of amateurism centers on the "play for pay" model—citing farcical concerns over commercializing collegiate sports. If we believe that the NCAA truly has concerns over not making collegiate athletics a commercial enterprise that would compromise the integrity of its student-athletes' amateur status, then we must concede to the

¹⁹⁶ See *Form 08-3a Academic Year 2008-09: Student Athlete Statement – Division 1*, available at http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf (last visited April 15, 2014).

¹⁹⁷ *Amateur Status*, 2013-14 NCAA DIVISION I MANUAL art. 12.1.2 (2013), available at <http://www.ncaapublications.com/productdownloads/D114.pdf>.

¹⁹⁸ *Brasel v. The Hair Co.*, 976 So. 2d 390 (Miss. Ct. App. 2008).

¹⁹⁹ See *Form 08-3a Academic Year 2008-09: Student Athlete Statement – Division 1*, available at http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf (last visited April 15, 2014).

²⁰⁰ Danny Roach, *A Solution to the NCAA's Compensation Problem*, SDSU SPORTS MBA BLOG (Aug. 30, 2013), <http://www.sportsmbablog.com/a-solution-to-the-ncaas-compensation-problem/>.

NCAA's rules banning pay for play.²⁰¹ To comply with the proposed federal right of publicity guaranteeing property rights in one's publicity, the NCAA should relax its rules regarding compensation outside of performance on the field—allowing student-athletes to use their image and likeness on the open market for profit.²⁰² This proposed change is adapted from the oft-proposed Olympic Model in which amateur athletes are able to utilize their popularity garnered through athletic skill for profit, frequently through endorsements, appearances, memorabilia, and other business opportunities.²⁰³

This small change, resulting from a recognized right of publicity, would make drastic changes to current litigation by giving student-athletes the opportunity to profit from their notoriety. The most pressing issue remains with the source of monetization. NCAA's rules strictly prohibit compensation for participation in athletic competition.²⁰⁴ It is conceivable that compensation in exchange for endorsements, appearances, or other business opportunities would be considered as directly resulting from athletic skill—an indirect pay for play as opposed to pay *from* play.

A federal right of publicity statute would not change the waiver of publicity to collegiate sports. A statute in place may not greatly affect the O'Bannon case, except for the fact that the defendants used O'Bannon's image well after his tenure in collegiate athletics was finished. The language on the form does not mandate, however, granting the NCAA exclusive license for publicity.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Dan Wetzel, *NCAA probe of Johnny Manziel Raises Questions About Amateurism Rules*, YAHOO! SPORTS (Aug. 4, 2013, 7:04 PM), <http://sports.yahoo.com/news/ncaaf-ncaa-probe-of-johnny-manziel-raises-questions-about-amateurism-rules-230350855.html>.

²⁰⁴ *Amateur Status*, 2013-14 NCAA DIVISION I MANUAL art. 12.1.2 (2013), available at <http://www.ncaapublications.com/productdownloads/D114.pdf>. Specifically, art. 12.1.2.2 states that “[p]articipation for pay in competition that involves the use of overall athletics skill constitutes a violation of the Association's amateur-status regulations”

CONCLUSION

The biggest issue currently affecting the sports world is paying college student-athletes. The value of an education measured against the gross revenue generated by athletics, particularly football, athletes argue, pales in comparison. Assuming, *arguendo*, that student athletes do, in fact, receive a quality education during their time in college, what is the true value received?²⁰⁵ If an education was truly a valid exchange for the revenue generating performances of many student athletes, then we should see a huge influx of student-athlete applications to the best, most expensive schools. From a purely economic standpoint, it would make the soundest fiscal sense for an athlete to apply and seek acceptance to a school with a more expensive education value in exchange for his or her talents on the field. The current state of college athletics, however, tells us a different story.²⁰⁶ Athletes and fans alike are more concerned with strong traditions of sports teams than education.

²⁰⁵ It has become evident recently that “athlete-students” may be a more appropriate term for student-athletes. These individuals frequently attend college not to get an education but to participate on an upper-level field in their sport of choice. Christopher Saffici & Robert Pellegrino, *Intercollegiate Athletics vs. Academics: The Student-Athlete or the Athlete Student*, THE SPORT JOURNAL (Nov. 19, 2012), http://thesportjournal.org/article/tag/service_quality/page/14/. Many student-athletes find their choices in majors limited to what fits into the athletic season and practice schedule. Clustering, as it is called, results in a significant percentage of student athletes enrolling in “general studies” and other such non-specific programs—sometimes up to fifty percent of the team. Shaun Hittle, *Athletes’ Tendencies to ‘Cluster’ in Certain Academic Fields Problematic, Some Say*, LAWRENCE JOURNAL-WORLD (June 15, 2012), <http://www2.ljworld.com/news/2012/jun/15/athletes-tendencies-cluster-certain-academic-field/>.

²⁰⁶ In its own surveys, the NCAA has found the many student athletes spend twice the number of hours on athletic practice and training as allowed by NCAA. Even though the NCAA has specific rules limiting the time spent on athletics weekly to twenty hours, many athletes report an average near forty hours spent on athletics training. *Division I Results from the NCAA GOALS Study on the Student-Athlete Experience*, NCAA RESEARCH, slide 17 (Nov. 2011), available at http://www.ncaa.org/sites/default/files/DI_GOALS_FARA_final_1.pdf. See also *Time Limits for Athletically Related Activities*, 2013-14 NCAA DIVISION I MANUAL art. 17.1.6 (2013), available at <http://www.ncaapublications.com/productdownloads/D114.pdf> (limiting participation in athletic activities to twenty hours per week in-season and eight out-of-season). Further, the NCAA found that graduation rates among the traditional revenue generating sports were between sixteen and twenty-five percent, lower than typical students. Gary Gutting, *The Myth of the ‘Student-Athlete,’* N.Y. TIMES (March

Since the value of education rarely is a deciding factor for student athletes, college athletics may soon see a shift in enrollment towards schools that can best afford to pay its athletes. Based on one possible outcome of the NCAA/O'Bannon case, I would predict we see, included with the contract stipulating terms of athletic eligibility, a waiver, or assignment of one's right of publicity in exchange for the going rate of athletic payment.