Protecting Athletes' Right of Publicity in Video Games

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I. INTRODUCTION

Competitive sports have served as source material for video game developers since the dawn of the video game industry in the late 1960s and early 1970s. In fact, one of the earliest and most popular video games ever created was also a sports game. "Pong," invented by Atari founder Nolan Bushnell and his programmer Al Alcorn, was a simple two-player game based on the sport of tennis. The graphics were rudimentary (two vertical lines on opposite sides of the screen, hitting a square dot back and forth), but its appeal to the public was immediate and immense. Both children and adults were able to enjoy a friendly game of tennis with one another without ever breaking a sweat (or a racquet).

Since that time, video games have advanced to a point far beyond anything possible in the 1970s. Rather than moving simple boxy shapes up and down, today's video game players are able to control lifelike human avatars, which in some cases are nearly indistinguishable from the images of a live television broadcast. For example, purchasers of EA Sports' game "Grand Slam Tennis" can choose to control the movements of tennis greats like Chris Evert, John McEnroe, and Venus Williams.

While such developments in appearance and game play capability are highly enjoyable for the gamer, they have also ushered in an entire host of potential legal issues for video game producers and the athletes depicted in the games. One of the most obvious legal issues implicated is the extent of an athletes' right of publicity. Chris Evert probably wouldn't have had much of a case against Atari for "appropriating her identity"

when Pong was released in 1972. But she probably would have a very strong case today against the creators of Grand Slam Tennis if they included her name and image in their game without her permission.

This paper will discuss the value of a professional athlete's identity, the inadequacy of the extant system designed to protect that value, and the revisions necessary for an improved "Right of Publicity" statute.

II. THE VALUE OF AN ATHLETE'S IDENTITY

A professional athlete's identity (image, name, voice, signature, etc.) is often times one of his most valuable assets. Some athletes actually earn more by endorsing products or causes than they ever do from their team salary or tournament winnings. In 2009, for example, golf legend Tiger Woods earned $70 million for endorsements as compared to only $20.5 million in tournament money.[1] In the same year, NBA phenom LeBron James earned a $15.8 million salary from the Cleveland Cavaliers, but raked in $30 million in endorsements.[2] In light of examples like these, it is undeniable that a professional athlete's identity can be an extremely profitable resource.

Such value does not come easily. Although some athletes are rewarded with fame and wealth far beyond anything ever attainable by the majority of Americans, many of those very athletes also work harder and spend more agonizing hours than the average citizen at practicing and honing their valuable talents.[3] Professional football players, for

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[1] Jonah Freedman, *The 50 highest-earning American athletes*, SI.COM, http://sportsillustrated.cnn.com/specials/fortunate50-2010/?eref=sihp. Woods has leased his identity to a number of companies including Buick, Accenture, AT&T, Nike, and Gatorade.

[2] *Id.*

[3] *See Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 835 (Cal. 1979) (dis. opn. of Bird, C. J.) ("Often considerable money, time and energy are needed to develop one's prominence in a particular field. Years of

example, expose their bodies to such physical torture every week that the average career of an NFL player lasts no longer than 3.3 years.[4]

III. THE INADEQUACY OF THE CURRENT SYSTEM

The extant legal framework designed to protect athletes' (and other celebrities') right of publicity in California is a combination of statutory and common law prohibitions against the unauthorized exploitation of another's identity. California Civil Code § 3344 states that "[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent…shall be liable for any damages sustained by the person or persons injured as a result thereof."[5]

However, one of the vexatious aspects of California's right of publicity statute is that it seems to be at odds with video game producers' purported First Amendment right of free speech. From the athlete's perspective, their image, name, signature, or endorsement is a valuable commodity that should not be appropriated without authorization or compensation. From the game producer's perspective, however, a video game and its contents are protected speech which should not be subject to censorship. As with movies, they argue, it would be a nightmarish world if producers were required to

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labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. [Citations.] For some, the investment may eventually create considerable commercial value in one's identity.")

[4] This statistic is according to data collected by the NFL Players Association. Jeff Legwold, *NFL careers burn bright and short*, DENVER POST, September 9, 2010, at F10.

[5] CAL. CIV. CODE § 3344(a) (Deering 2011).

compensate or obtain permission from each and every person, business, sports team, etc. that is depicted or evoked in their games.

In copyright and trademark disputes, those who wish to exploit something of value (*e.g.* a passage from a book, a photograph, a competitor's name, etc.) can rely on the established and statutorily defined concept of "fair use" to defend their actions.[6] A magazine writer, for example, who makes reference to a popular television program in her article, is probably safe so long as she doesn't appropriate too much of the television program, or mislead consumers to believe that her article is officially associated with the program in any way. Even offensive works of questionable value can be exempt from liability if they are intended as criticism or parody.[7]

Contrarily, Cal. Civ. Code §3344 does not explicitly mention a "fair use" exemption for those who wish to use an athlete's identity for purposes of commentary or criticism. The only express exemption, iterated in Cal. Civ. Code §3344(d), is for usages related to "news, public affairs,… sports broadcast or… political campaign."

In an attempt to balance the competing rights of valuable identity owners with those of would-be exploiters, courts in California and the Ninth Circuit have adopted two tests: the Transformative Use Test and the *Rogers* Test.

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[6] Fair use of copyright protected works is defined in 17 U.S.C. § 107. Fair use of trademarks is defined in 15 U.S.C. § 1115.

[7] *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994) (holding that 2 Live Crew's rap version of the Roy Orbison song "Oh, Pretty Woman" was fair use since it criticized or commented on the original).

For another example of parodic works of "questionable value," s*ee also* the 2010 movie *Vampires Suck*.

A. The Transformative Use Test

The Transformative Use Test was established by the Supreme Court of California in *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001). In *Comedy III*, the plaintiff corporation owned the rights to the identity of the former comedy act known as "The Three Stooges."[8] The defendant, Saderup, was an artist who specialized in charcoal drawings of celebrities.[9] When the plaintiff discovered that Saderup had been selling lithographs and t-shirts printed with images of the Three Stooges, it sued for violation of its right of publicity.[10]

The court recognized the competing interests between the right of the identity owners to restrict unauthorized exploitation of their valuable property and the right of the artist to freely express himself.[11] In an effort to balance these two important interests, the court formulated what has come to be known as the Transformative Use Test. As the court described the test, it is "essentially 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."[12]

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[8] *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 393 (2001). The right of publicity for deceased persons is governed in a manner similar to that for living persons. CAL. CIV. CODE § 3344.1 (Deering 2011).

[9] *Comedy III*, 25 Cal. 4th at 393.

[10] *Id.* at 391. A copy of the drawing is viewable at http://www.law.cornell.edu/copyright/cases/Image9.jpg.

[11] *Comedy III*, 25 Cal. 4th at 393.

[12] *Id.*

Applying this test to Saderup's lithographs and t-shirts, the court held that Saderup had in fact violated the plaintiff's right of publicity, and that his actions were not protected by the First Amendment.[13] It reasoned that Saderup's depiction of the Three Stooges characters contained "no significant transformative or creative contribution."[14] Rather, Saderup had faithfully recreated literal and conventional depictions of the Three Stooges so as to exploit their fame.[15] It further reasoned that the value of Saderup's drawings derived primarily from the fame and identity that the Three Stooges had cultivated throughout their lives—not from any artistic or transformative elements that Saderup added.[16]

While the *Saderup* Transformative Use Test does offer a measure of protection to athletes and other celebrities with valuable identities, the glaring problem with it is that the test seems entirely subjective. Another court hearing the exact same facts, applying the exact same rule as articulated by the *Saderup* court, could reasonably come to the exact opposite conclusion. It would not be ridiculous for a different court to find that Saderup's drawing *was* "transformative," because he chose to sketch only the heads of the Stooges, he arranged their floating heads in a particular manner side by side, he faded the edges of their costumes, and he transformed the images into wearable art.

The unpredictability and subjective nature of the Transformative Use Test becomes even more apparent when one observes how it has been applied in video game cases over the past decade. By way of example, in *Kierin Kirby v. Sega of America, Inc.*,

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13 *Id.* at 409.

14 *Id.*

15 *Id.*

16 *Id.*

144 Cal. App. 4th 47 (2006), the lead singer from Deee-Lite accused Sega of using her identity to create the lead character in a video game called "Space Channel 5."[17] The court applied the *Saderup* test and found that the use was transformative because the character in the game was taller than the plaintiff, more slender, had a different hairstyle, different dance moves, and was depicted in a setting far different from any place the plaintiff had ever been depicted.[18] More recently, however, in *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018 (2011), the same court applied the same test and came to the opposite conclusion. The members of the rock band No Doubt licensed their likenesses for use in the video game "Band Hero." Once the game was released, however, No Doubt was unhappy with the results. The band members sued the video game publisher for using their identities in an unauthorized manner.[19] Rather than address the contractual issues, the court felt the best path was to apply the Transformative Use Test.[20] Despite several arguably "transformative" and creative elements of the game—the band members could be separated to perform with members of other bands, they could be made to perform in outer space, they could be made to sing in voices not their own (including voices of musicians of the opposite sex)[21]—the court nonetheless held that the usage did not warrant First Amendment protection.[22] Ignoring the background elements of the game, the court reasoned that "nothing in the creative

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17 *Kierin Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 50-51 (2006).

18 *Id.* at 59. The character in the game was depicted as a space-age reporter in the 25th Century, combating hordes of dancing alien invaders.

19 *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018, 1022 (2011).

20 *Id.* at 1035 n.7.

21 *Id.* at 1024.

22 *Id.* at 1041.

elements of Band Hero elevates the depictions of No Doubt to something more than 'conventional, more or less fungible, images' of its members that No Doubt should have the right to control and exploit."[23]

When applying the Transformative Use Test, courts rarely if ever attempt to objectively quantify the weight given to each factor; nor do they make much of an effort to justify their arbitrary determinations. Why was the futuristic outer space setting transformative in *Kirby*, but not in *No Doubt*? What made the different dance moves in *Kirby* more significant than the different voices used in *No Doubt*? Even looking at just these two recently decided cases, it seems clear that the defendants' case will either stand or fall based on the subjective inclinations of the court.

B. *The* Rogers *Test*

Another test used by some courts attempting to strike a balance between athletes' and video game producers' rights is the *Rogers* Test.[24] This test (named after the Second Circuit case in which it was originally iterated) looks at two factors when determining whether an unauthorized use of identity is protectable under the First Amendment.[25] First, the defendant's use of the plaintiff's identity must be relevant to the underlying work. ("The level of relevance must merely be above zero.")[26] Second, the defendant's

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[23] *Id.* at 1035.

[24] Although the *Rogers* or "artistic relevance" test has most often been applied to trademarks, it is also used in right of publicity cases. *See, e.g Rogers v. Grimaldi*, 875 F.2d 994, 1004-05 (2d Cir. 1989) (applying "artistic relevance" test to right of publicity claim); *Parks v. LaFace Records*, 329 F.3d 437, 460 (6th Cir. 2003) (same); *The Romantics v. Activision Publ'g, Inc.*, 574 F.Supp.2d 758 (E.D. Mich. 2008) (same).

[25] *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

[26] *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. Cal. 2008).

use must not explicitly mislead consumers as to the source or content of the work.[27] If both of these conditions are met, then the unauthorized expression is protectable free speech.

The problem with this test, as illustrated in the 2009 federal case of *James "Jim" Brown v. Electronic Arts*, Case No. 2:09-cv-01598-FMC-RZx, U.S. Dist. Court Central Dist. of California (2009), is that it provides athletes with scant protection for any value that they may have cultivated in their identity. In *Brown*, a video game company produced an extremely popular football game called "Madden NFL."[28] The game included avatars representing the identity of hundreds of current and retired NFL players.[29] One of those players, retired superstar running back Jim Brown, sued the video game company for failing to obtain his permission before exploiting his identity.[30] The only identifiable "transformation" to Brown's identity in the game was the changing of his jersey number from 32 to 47—the avatar's team, age, height, weight, appearance, skill level, and number of years in the league all correctly mirrored Jim Brown's actual characteristics.[31]

The district court held that the video game company's use of Brown's identity was an artistic expression protectable by the First Amendment.[32] The court ignored any

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27 *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002).

28 All facts are in *Brown v. Electronic Arts* are taken from Brown's opening appellant brief, 2010 WL 4622640.

29 *Id.* at 5.

30 *Id.* at 1.

31 *Id.* at 9-10.

32 *James "Jim" Brown v. Electronic Arts*, Case No. 2:09-cv-01598-FMC-RZx 9, Order Granting Defendant's Motion to Dismiss, U.S. Dist. Court Central Dist. of California (2009).

potential application of the Transformative Use Test, and instead applied the *Rogers* Test.[33] With regard to the first prong—the relevance of the use to the underlying work—the court found that the use of Jim Brown's identity was relevant. It reasoned that "[u]se of a legendary NFL football player's likeness in a game about NFL football is clearly relevant."[34] Turning to the second prong—whether the use explicitly misleads consumers as to the source or content of the work—it held that consumer confusion was unlikely.[35] In the court's mind: "[I]t would require a leap of logic to conclude that the anonymous, mis-numbered player's presence in the games equates to Brown's endorsement of the games."[36] Thus the video game company's exploitation of Jim Brown's identity passed both prongs of the *Rogers* Test—it was an artistic expression protectable by the First Amendment.[37]

Applying the *Rogers* Test to video game producers' exploitation of athletes' identities, it seems difficult to picture any situation where the athlete can prevail and protect his right of publicity. The first prong of the *Rogers* Test is incredibly low: the relevance of the use to the underlying work must be "greater than zero." But just about *any* time that a video game producer wishes to exploit the identity of a particular athlete, this prong will be satisfied. As a rule, the underlying work will almost invariably be a related sports game. Video game producers who wish to use Michael Jordan's identity

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[33] Part of the court's justification for doing so is that it focused solely on the plaintiff's federal trademark infringement claim, and not his California right of publicity claim. This federal court ultimately dismissed the trademark claim and refused to exercise pendent jurisdiction over the state law claim. *Id.* at 9. Had it considered the right of publicity claim too, perhaps it would have applied the Transformative Use test.

[34] *Id.* at 8.

[35] *Id.* at 9.

[36] *Id.*

[37] *Id.*

will want to use it for a game about basketball; they won't be interested in using it for an unrelated game about, say, World War II. Game makers who want to use Floyd Mayweather's identity are probably interested in creating a game about boxing; not a game set in a medieval fantasy world. Thus the first "hurdle" in the *Rogers* Test is practically insignificant—any time an athlete's identity is exploited in a video game, this prong will easily be satisfied.

Similarly, the second prong of the *Rogers* Test offers little protection to athletes. As this prong is applied in *Brown*, video game producers are free to exploit an athlete's identity without authorization or compensation, so long as consumers won't be misled to believe that the athlete endorsed the game. Perhaps the common and widespread perception among consumers today is that athletes like Brown must in fact endorse any product in which they are depicted. If that is the prevailing perception, then athletes do have a chance of winning on the second prong. But the public's perception is often shaped and influenced by highly publicized court decisions. The more often courts refuse to enforce the right of publicity in cases involving famous athletes, the less likely consumers will be in the future to believe that an athlete has endorsed a product in which his identity appears. Thus, the common perception is bound to change if more and more decisions like *Brown* are handed down and reported to the public.

In essence, then, this second prong creates a downward spiral of self-perpetuated reasoning and circular logic: It states that the court should only protect Jim Brown's rights if the public believes that the court regularly protects athletes' rights. Yet the public will believe that the court regularly protects athletes' rights only if the court does in fact protect Jim Brown and other athletes' rights. The conclusion to be drawn from

this confusing conundrum is that the second prong of the *Rogers* Test, much like the first, ultimately provides very little protection in the long run to athletes who have spent countless hours honing their skills and cultivating the value of their identity.

If such reasoning is permitted to stand, and if the application of the *Rogers* Test in right of publicity cases continues to gain widespread acceptance, athletes' will face a drastic drop in the value of their identities. If a video game producer is permitted to use Jim Brown's identity without compensating him, why should it bother to pay for the use of any NFL player? What would prohibit the producer from freely exploiting the identities of Evert, McEnroe, Williams, and every other tennis star who has ever played the game (so long as they are used in the context of a "relevant" game about tennis)? How could any athlete anywhere *ever* expect to be compensated for the use of their identity in a video game (or book, or movie, or painting, or app, etc.) about sports? If the decision in *Brown* is permitted to stand, something that was once worth millions of dollars in licensing fees[38] will become worthless to hundreds of athletes, and free for exploitation by anyone who can surmount the two miniscule "hurdles" of the *Rogers* Test.

IV. A Proposal For An Improved System

Given the inadequacies of the extant system for protecting athletes' right of publicity, this author would suggest significant revisions to Cal. Civ. Code § 3344. Proper revisions could potentially resolve conflict between various courts' inconsistent application of the Transformative Use Test. The new statute could better protect athletes' (and other celebrities') right of publicity, while at the same time guarding the First

[38] *See* Jonah Freedman, *supra* note 1.

Amendment rights of video game producers. While much of the current statutory language does serve a valuable purpose, the statute could be enhanced by adding three new key sections. First, the statute must explicitly recognize the value of an athlete's right of publicity. Second, it must better define the parameters of fair use. Finally, it must supersede all other law on the matter, including the common law right of publicity.

A. The Revised Statute Must Explicitly Recognize the Value of Athletes' Right of Publicity

The first new section should explicitly recognize the value of athletes' and other celebrities' identities. As discussed above, a sports figure's identity can be cultivated into extremely valuable intellectual property, and a continuing source of income for those who are no longer able to physically perform at a professional level.[39] It makes sense then to approach athletes' right of publicity from the perspective of intellectual property law. Many of the characteristics that make works like books, songs, paintings, and movie characters valuable and protectable under copyright law are also recognizable in an athlete's identity. Like books, athletes' identities can be the product of conscious planning and concerted effort over a long period of time. Like songs and paintings, athletes' identities add flavor and entertainment to our lives. Like popular movie characters, athletes' identities can provide valuable source material for additional movies, television programs, books, posters, t-shirts, Halloween costumes, action figures, lunch boxes, video games, and other creative works or merchandise.

By explicitly recognizing an athlete's identity as valuable, commodifiable property within the statute, courts will be forced to look at right of publicity issues from

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[39] *See* Jonah Freedman, *supra* note 1.

more familiar perspectives of property and IP law. Courts are more likely to recognize and rectify instances of misappropriation and conversion when athletes' identities are defined as property. Presumably, the *Brown* court would not have tolerated a defendant taking Jim Brown's house, Heisman trophy, or motorcycle without his consent (even if the defendant's purported goal was some type of protectable artistic expression). Perhaps the court would have decided his case against the video game company differently, if it had similarly visualized Brown's identity as part of his personal property, rather than as the elusive and vague concept that most laypersons conceive when they hear the word "identity."

B. The Revised Statute Must Define the Parameters of Fair Use

The next new section of Cal. Civ. Code § 3344 should more clearly address the issue of "fair use." While athletes might complain that the concept of fair use or "transformativeness" is currently ambiguous and unpredictable with regard to right of publicity issues, video game producers also have a legitimate gripe when expressing concern about the curtailment of their First Amendment free speech rights.[40] Thus it would benefit both video game producers and athletes if the revised statute defined the parameters of fair use, and incorporated a list of fair use factors.

Consistent with the theory that an athlete's identity is a form of intellectual property, it makes sense to model the new fair use section of Cal. Civ. Code § 3344 on §

[40] *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 397 (2001) ("Because celebrities take on public meaning, the appropriation of their likenesses may have important uses in uninhibited debate on public issues, particularly debates about culture and values. And because celebrities take on personal meanings to many individuals in the society, the creative appropriation of celebrity images can be an important avenue of individual expression.").

107 of the Copyright Act.[41] This section explains that "fair use" of copyrighted material includes use for "purposes such as criticism, comment, news reporting, teaching…, scholarship, or research."[42] It goes on to provide a list of "fair use factors" that courts should consider when assessing whether a defendant's use of the material is fair. Those factors include:

> (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work….[43]

Similarly, the new section of Cal. Civ. Code § 3344 should explain that use of an athlete's identity (image, name, voice, etc.) for purposes of criticism, comment, teaching, scholarship, or research is an acceptable fair use.[44] This would ensure that video game producers' and other users' First Amendment free speech rights are protected, and that they are free to criticize or comment on athletes who have thrust themselves into the social consciousness.[45]

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41 17 U.S.C. § 107.

42 *Id.*

43 *Id.*

44 As mentioned in Section II above, CAL .CIV. CODE §3344(d) already provides an exemption for usages related to "news, public affairs,… sports broadcast or… political campaign."

45 Perhaps the definition should also be expanded to incorporate the common law trademark concept of "nominative fair use." This doctrine was explicated by Judge Kozinski in *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992): "[W]here the defendant uses a trademark to describe the plaintiff's product, rather than its own, we hold that a commercial user is entitled to a nominative fair use defense provided he meets the following three requirements: First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much

Further, the new section should provide a similar list of fair use factors for courts to weigh when determining whether a particular use of an identity is a fair use. Those factors should include:

(1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;

(2) the amount and substantiality of the identity used in relation to the defendant's work as a whole;

(3) the effect of the use upon the potential market for or value of the identity;

(4) the extent to which the defendant's use parodies or comments on the individual or their identity; and

(5) the extent to which the identity has been transformed by the defendant's use.

This list takes into consideration the economic value of an athlete's identity, and helps to ensure that video game producers and others will not exploit or appropriate the valuable aspects of an athlete's identity without authorization. On the other hand, this list also recognizes that there are certain uses—uses which do not detract from the economic value of the identity, or uses which criticize or comment on the athlete—which should be permissible. It demotes the concept of "transformativeness" from being the sole determining issue to just one of a list of several factors; yet it still provides a measure of protection for extremely creative and transformative uses. This list, combined with the initial explanation of fair use, will provide courts with clearer guidelines, it will better protect athletes' rights, and it will hopefully lead to more consistent and predictable decision-making by California courts.

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of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder."

Similarly, it makes sense that if a defendant uses an athlete's identity simply to identify the athlete—not to exploit the identity or to imply endorsement—such use should be protected.

C. The Revised Statute Must Supersede the Common Law Right of Publicity

Finally, in order to resolve the current ambiguity and unpredictability of right of publicity matters, the revised Cal. Civ. Code § 3344 must make clear that it supersedes all other laws regarding the right of publicity.[46] Currently, § 3344(g) states that "[t]he remedies provided for in this section are cumulative and *shall be in addition to any others provided for by law*." (emphasis added). Thus, the existing and divergent principles of the common law still apply to right of publicity cases. Stated another way, Cal. Civ. Code § 3344 "complements" rather than "codifies" the common law principles.[47]

This dual system of parallel (but different) statutory and common law has led to a system where plaintiffs file two claims for the same cause, and where courts inconsistently adopt various tests like the Transformative Use Test and the *Rogers* Test. As explained above, these tests provide unpredictable results and inadequate protection for athletes' rights in their identities.

To eliminate these troubling issues, Cal. Civ. Code § 3344 should be expanded to include all situations involving misappropriation of an athlete's identity—not just commercial uses, or situations involving "advertising or selling, or soliciting purchases of, products, merchandise, goods or services…."[48] This can be accomplished simply by

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[46] To further ensure consistency and predictability between different states and circuits, the revised CAL. CIV. CODE § 3344 could also be proffered to other states as a model statute for their adoption.

[47] *See Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 416 including n6 (Cal. App. 2d Dist. 1983).

[48] CAL. CIV. CODE § 3344 (Deering 2011). Although the language of this statute forbids misuse of the athlete's identity "in any manner," courts have held that the plaintiff must show "a direct connection between the alleged use and [a] commercial purpose." *See, e.g., Butler v. Target Corp.* (2004, CD Cal) 323 F Supp 2d 1052.

Even the title of this section emphasizes its applicability to commercial uses: "Section 3344. Unauthorized commercial use of name, voice, signature, photograph or likeness" CAL. CIV. CODE § 3344 (Deering 2011).

striking the quoted language above. Furthermore, Cal. Civ. Code § 3344(g) should be revised to state: "This statute supersedes all prior law regarding the right of publicity."[49] Such language will confine courts to the contents of the statute, and keep them from adopting outdated, inadequate, and contradictory tests from other states or circuits. If the legislature wishes to preserve more common law principles from prior right of publicity cases, they can do so by making additional revisions to the statute.

V. CONCLUSION

An athlete's identity can be an extremely valuable commodity. Although video game producers and others have recognized that value for a number of years, in some ways the law has been slow to do so. The current system in place to protect that value from unauthorized exploitation is unpredictable, inconsistent, and inadequate. In order to better protect athletes' right of publicity, without unacceptably infringing the First Amendment rights of video game producers, revisions must be made to Cal. Civ. Code § 3344. The revised statute must explicitly recognize the potential value of an athlete's identity. It must better define the parameters of fair use. And it must establish itself as the sole authority with regard to matters of the right of publicity.

As video games about sports become more and more lifelike, and as impersonal games like Pong become historical artifacts, professional athletes' identities may become even more valuable than they are today. It is crucial that we have a system in place that

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[49] The Illinois Right of Publicity Act takes a similar approach: "The rights and remedies provided for in this Act are meant to supplant those available under the common law as of the effective date of this Act, but do not affect an individual's common law rights as they existed before the effective date of this Act. Except for the common law right of publicity, the rights and remedies provided under this Act are supplemental to any other rights and remedies provided by law including, but not limited to, the common law right of privacy." 765 ILL. COMP. STAT. ANN. 1075/60 (LexisNexis 2011).

sufficiently protects that value from unauthorized exploitation, while at the same time balancing the First Amendment rights of those who wish to fairly use those identities in their creative expression.