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## “Groove is in the *Hart*”: A Workable Solution for Applying the Right of Publicity to Video Games

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# “Groove is in the *Hart*”: A Workable Solution for Applying the Right of Publicity to Video Games†

R. Garrett Rice\*

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### I. Introduction

The Arizona State quarterback wearing number “9” on Electronic Arts’ *NCAA Football 2005* video game is a 6’4”, 235-pound specimen of an athlete.<sup>1</sup> He wears a black wristband on his right throwing arm and a white quarterback wristband on his left.<sup>2</sup> His uniform includes the “Nike swoosh” on the left shoulder just to the side of the jersey’s gold collar.<sup>3</sup> The quarterback’s maroon helmet has a gold stripe down the center and features a facemask resembling a “Schutt OPO,” the design currently worn by National Football League (NFL) quarterbacks Tom Brady and Tony Romo.<sup>4</sup>

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1. See NCAA FOOTBALL 2005 (Electronic Arts, Inc. 2004) (showing this character as a toned, fit player).

2. *Id.*

3. *Id.*

4. See Greg Hanlon, *Nine of a Kind: Grills*, N.Y. TIMES (Jan. 13, 2012), <http://www.nytimes.com/interactive/2012/01/15/magazine/nine-of-a-kind-football-helmets.html> (last visited Jan. 27, 2015) (noting that quarterbacks favor

The Rutgers University quarterback wearing the number “13” jersey appears equally lifelike in this same game.<sup>5</sup> He is a bit smaller than his Arizona State counterpart, listed in the game at 6’2”, 197 pounds.<sup>6</sup> He wears two white wristbands and has a similar “Nike swoosh” on his left shoulder.<sup>7</sup> His facemask resembles the lightweight “Schutt OPO-SW” that is also popular among professional quarterbacks.<sup>8</sup> It is nearly impossible to miss his thick eye black.<sup>9</sup>

A college football fan who plays the game and is familiar with Sam Keller will certainly recognize Arizona State’s number “9” as representing Keller, and anyone not familiar with Keller can clearly see the similarity between his picture and the image used in *NCAA Football*. Ryan Hart, the Rutgers quarterback, is equally identifiable in the game, down to the remarkably similar skin tone. The characters in the game, while not identified as Keller and Hart by name, have the same biological statistics, home states, and playing styles as the real quarterbacks who both had moderately successful college football careers but who were by no means All-Americans.<sup>10</sup>

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this facemask because of its “large ‘view-box’”) (on file with the Washington and Lee Law Review).

5. NCAA FOOTBALL 2005, *supra* note 1.

6. *Id.*

7. *Id.*

8. See Hanlon, *supra* note 4 (noting that quarterbacks like Aaron Rodgers prefer this facemask because it is lightweight).

9. NCAA FOOTBALL 2005, *supra* note 1.

10. See *Sam Keller Stats*, SPORTS REFERENCE, <http://www.sports-reference.com/cfb/players/sam-keller-1.html> (last visited Jan. 27, 2015) (noting that Keller accumulated forty touchdown passes and almost 5,500 passing yards in three seasons at Arizona State and one at Nebraska, and that he is famous for starting his first game in the 2004 Sun Bowl where he led the Sun Devils to a comeback victory over Purdue) (on file with the Washington and Lee Law Review); *Ryan Hart Stats*, SPORTS REFERENCE, <http://www.sports-reference.com/cfb/players/ryan-hart-1.html> (last visited Jan. 27, 2015) (noting that Hart finished with fifty-two touchdown passes and nearly 8,500 passing yards in four years playing for the Scarlet Knights, leading the Big East in pass completions and completion percentage during his junior year in 2004) (on file with the Washington and Lee Law Review). Neither athlete played in the National Football League. See *Sam Keller*, NFL PLAYERS, <http://www.nfl.com/player/samkeller/770/profile> (last visited Jan. 27, 2015) (noting that Keller played zero NFL seasons and has no NFL statistics) (on file with the Washington and Lee Law Review); *Ryan Hart News, Rumors and Stats*, KFFL, <http://www.kffl.com/player/14562/nfl/ryan-hart> (last visited Jan. 27, 2015)

Both Keller and Hart sued Electronic Arts for violating their rights of publicity.<sup>11</sup> The right of publicity is a common-law doctrine that some states have statutorily adopted.<sup>12</sup> Although defined differently by the states that recognize it, the right of publicity is broadly recognized as an individual's right to protect her name and persona from commercial exploitation.<sup>13</sup> The issue in Keller's and Hart's cases is whether the First Amendment right to free speech protects Electronic Arts' use of the plaintiffs' likenesses in the *NCAA Football* games or whether the former athletes' publicity rights outweigh Electronic Arts' constitutional interests.<sup>14</sup> The Third and Ninth Circuits recently held in *Hart v. Electronic Arts, Inc.*<sup>15</sup> and *In re NCAA Student-Athlete Name & Likeness Licensing Litigation (Keller)*,<sup>16</sup> respectively, that Electronic Arts violated Hart's and Keller's rights of publicity.<sup>17</sup>

The amount of attention devoted to video game cases in recent right of publicity scholarship reveals that the video game

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(noting that the New York Giants cut Hart after minicamp in 2006) (on file with the Washington and Lee Law Review).

11. *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 760 (D.N.J. 2011); *In re NCAA Student-Athlete Name & Likeness Litig. (Keller)*, No. C 09-1967 CW, 2010 WL 5644656, at \*1 (N.D. Cal. Dec. 17, 2010).

12. *See Parks v. LaFace Records*, 329 F.3d 437, 441 (6th Cir. 2003) (noting that the right of publicity is a state-based common law doctrine and is distinct from the federal Lanham Act, a federal trademark law); *infra* notes 83-84 (listing the states that have adopted the right of publicity either by statute or through common law).

13. *See, e.g., Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201, 1205 (11th Cir. 2009) (noting that the right of publicity under Georgia law is "[an individual's] right to the exclusive use of his or her name and likeness" (quoting *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 700 (Ga. 1982))).

14. *See Hart*, 808 F. Supp. 2d at 771 (framing the issue as "whether the First Amendment grants EA the right to impinge upon Plaintiff's New Jersey common law right of publicity"); *Keller*, 2010 WL 5644656, at \*1 (framing the issue as whether Electronic Arts, the NCAA, and the Collegiate Licensing Company "conspired to deprive [the plaintiffs] of their rights of publicity").

15. 717 F.3d 141 (3d Cir. 2013).

16. 724 F.3d 1268 (9th Cir. 2013).

17. *See Hart*, 717 F.3d at 170 (concluding that Electronic Arts' games did not "sufficiently transform" Hart's likeness and that Electronic Arts thus violated Hart's right of publicity); *Keller*, 724 F.3d at 1271 (affirming the district court's judgment that the plaintiffs' right of publicity claim trumped Electronic Arts' First Amendment interests).

context is a hot-button area in need of consistency.<sup>18</sup> As Rhonda Trotter notes, “With the rapid growth of the videogame industry in recent years, videogames have become fertile ground for right of publicity claims stemming from unauthorized use of a celebrity’s persona.”<sup>19</sup> Applying the right of publicity in the video game context is relatively new because the right of publicity predates video games.<sup>20</sup> *Hart* and *Keller*, however, are not the first of their kind.<sup>21</sup> In previous right of publicity cases in the video game context, courts have primarily considered and applied three tests: the *Rogers*<sup>22</sup> test, the transformative use test, and the predominant use test.<sup>23</sup>

Scholars and judges have criticized each test, and courts disagree on what test to use in the video game context.<sup>24</sup> As Jordan Blanke observes, “Even when courts apply the same test to the same facts, results are inconsistent.”<sup>25</sup> The opposite

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18. See 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 24:4 (2013) (describing the conflict between the right of publicity and the First Amendment and devoting significant attention to the video game context in discussing the cases and the three major tests).

19. Rhonda R. Trotter, *Issues in Music, Television, and Videogame Litigation in the Digital Age*, ASPATORE, Dec. 2013, at 5.

20. See Alan Wilcox, *Regulating Violence in Video Games: Virtually Everything*, 31 J. NAT’L ASS’N ADMIN. L. JUDICIARY 253, 256–57 (2011) (discussing the origin of video games, noting that scholars disagree on what the first video game actually was, and describing how early video games were unsophisticated).

21. See *infra* Part III.B (describing three other important video game right of publicity cases from 2006, 2008, and 2011).

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

23. See *infra* Part III (describing the origins, specifics, and application of each test).

24. See Charles Bahlert, *College Football, Electronic Arts, and the Right of Publicity: Reality-Mimicking Run Amok*, 18 INTELL. PROP. L. BULL. 149, 158–66 (2014) (criticizing each of the existing tests); Jordan M. Blanke, *No Doubt About It—You’ve Got to Have Hart: Simulation Video Games May Redefine the Balance Between and Among the Right of Publicity, the First Amendment, and Copyright Law*, 19 B.U. J. SCI. & TECH. L. 26, 63 (2013) (noting that different courts apply different tests).

25. Blanke, *supra* note 24, at 63; see also Bahlert, *supra* note 24, at 155 (“First Amendment challenges to the right of publicity have led to a number of disparate tests and subsequent unpredictable results.”); Joseph Gutmann, Note, *It’s in the Game: Redefining the Transformative Use Test for the Video Game Arena*, 31 CARDOZO ARTS & ENT. L.J. 215, 222 (2012) (“Courts deciding on the same video game have come to different conclusions despite using the same test.”); Alex Wyman, *Defining the Modern Right of Publicity*, 15 TEX. REV. ENT.

outcomes at the district court level in *Hart* and *Keller* highlight this inconsistency and uncertainty.<sup>26</sup> The number of tests and inconsistent application of each test spawn many problems, including a decreased incentive for creating video games because companies cannot anticipate whether their products will violate an individual's right of publicity.<sup>27</sup> The result of these problems is, as Timothy Bucher observes, that "something must be done, and soon, to reroute the right of publicity and First Amendment jurisprudence" as it relates to cases like those discussed in this Note.<sup>28</sup> Although scholars have suggested different approaches to remedy the problems,<sup>29</sup> the recent *NCAA Football* decisions necessitate reevaluating the current tests and possible alternatives.

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& SPORTS L. 167, 167 (2014) ("[T]he framework for litigating this right has become impossibly muddled. . . . The consequences of this confusion are far-reaching and have become more troubling as the right of publicity has expanded."). Alex Wyman asserts that the variation among different states' right of publicity laws is a large contributor to the confusion. "Primarily, these problems result from varied approaches taken by both state and federal courts in addressing right of publicity claims. . . . [T]he right of publicity is inconsistently applied because its regulation has been delegated to the states." *Id.* at 168.

26. See Timothy J. Bucher, *Game On: Sports-Related Games and the Contentious Interplay Between the Right of Publicity and the First Amendment*, 14 TEX. REV. ENT. & SPORTS L. 1, 19 (2012) (arguing that the different district court outcomes in *Hart* and *Keller* "demonstrate the need for the Supreme Court to set forth a clear standard so that courts can consistently determine the appropriate interplay between the right of publicity and the First Amendment"); Gutmann, *supra* note 25, at 248 ("Even the most popular test is unequipped to deal with modern issues such as video games, leading to completely contradictory opinions like *Keller* and *Hart*.").

27. See Bahlert, *supra* note 24, at 151 ("Unpredictability creates a chilling effect at the clearance level and barricades otherwise protected speech behind a wall of uncertainty."). Susannah M. Rooney, Note, *Just Another Brown-Eyed Girl: Toward a Limited Federal Right of Publicity Under the Lanham Act in a Digital Age of Celebrity Dominance*, 86 S. CAL. L. REV. 921, 941 (2013) ("These tests are applied inconsistently, and consequently, creators cannot confidently determine whether their works will fall within the realm of the protected speech or will infringe on the right of publicity. This issue implicates free speech concerns because it serves to effectively chill some forms of creative speech.").

28. Bucher, *supra* note 26, at 22.

29. See *infra* Part IV (describing many alternative approaches including Joseph Gutmann's suggested "redefined transformative test" that classifies a game as either an altered reality or an imitation of life).

This Note reexamines the three major existing alternatives and concludes that none of them is an effective standard that courts can apply consistently.<sup>30</sup> It addresses this problem by proposing an alternative test that will be easier for courts to apply consistently, will protect video game producers’ reasonable expectations, and is designed specifically for balancing the right of publicity with the First Amendment in the video game context.<sup>31</sup>

Part II discusses the development of the right of publicity, the right’s origin, its policy justifications, and how it differs in various states.<sup>32</sup> Part III outlines the major right of publicity precedent, including both the foundational right of publicity cases and those in the video game context.<sup>33</sup> Part IV examines scholars’ suggestions for resolving the inconsistencies in right of publicity cases.<sup>34</sup> Part V establishes this Note’s suggested approach, the readily identifiable standard, and explains how a court applying this standard would evaluate the video game cases addressed in Part III.B.<sup>35</sup>

## *II. The Right of Publicity: Origin, History, and Development*

### *A. Source of the Right*

The Second Circuit coined the term “right of publicity” in its 1953 opinion *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>36</sup> The *Haelan* court considered two parties’ competing claims that they owned exclusive rights to use a baseball player’s photograph to help sell gum.<sup>37</sup> The defendant contended that the

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30. See *infra* Part V.A (explaining why none of the three currently considered tests solve the problem).

31. See *infra* Part V.B (introducing the readily identifiable standard and explaining how it accomplishes these goals).

32. *Infra* Part II.

33. *Infra* Part III.

34. *Infra* Part IV.

35. *Infra* Part V.

36. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (introducing the term).

37. See *id.* at 867 (noting that the baseball player had entered into two exclusive contracts with rival gum manufacturers of the same type and



baseball player had only a right of privacy interest in his picture.<sup>38</sup> The Second Circuit rejected this argument and found instead that “a man has a right in the publicity value of his photograph.”<sup>39</sup> The court distinguished the right of publicity from privacy rights, which are neither assignable nor economic in nature.<sup>40</sup> It reasoned that this new right was necessary to protect celebrities’ ability to profit from their own identities and claimed that New York precedent, including the famous *Wood v. Lucy, Lady Duff-Gordon*,<sup>41</sup> provided a basis for the right.<sup>42</sup>

Melville B. Nimmer unraveled what a right of publicity should look like a year later in his article *The Right of Publicity*. Nimmer examined the right of privacy, unfair competition, and other doctrines and concluded that these theories inadequately protected a celebrity’s right to profit from her image.<sup>43</sup> He noted that the judiciary had not yet recognized the right of publicity other than in *Haelan* but agreed with the *Haelan* court that existing precedent “indicated a judicial willingness to extend protection to publicity values which would not be protect[a]ble under the traditional legal theories.”<sup>44</sup> Nimmer thus advocated that future courts create a right of publicity that accounted for both “the economic reality of pecuniary values inherent in

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considering which company had the right to use the player’s image).

38. *See id.* at 868 (explaining the defendant’s argument that “a man has no legal interest in the publication of his picture other than his right of privacy”).

39. *See id.* (“This right might be called a ‘right of publicity.’”).

40. *See id.* (explaining that the right of publicity is “in addition to and independent of that right to privacy”).

41. 118 N.E. 214 (N.Y. 1917). Then-Judge Cardozo concluded in this brief opinion that an agreement between an employer and employee contained an implied promise that amounted to a contract because the writing was “instinct with an obligation, imperfectly expressed.” *Id.* at 214 (internal quotations omitted). The case has since become “one of the most enduring and influential cases in the contracts pantheon.” James J. Fishman, *The Enduring Legacy of Wood v. Lucy, Lady Duff-Gordon*, 28 PACE L. REV. 162, 162 (2008).

42. *See Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (noting the need to protect “prominent persons” like entertainers and athletes and arguing that multiple New York cases supported the court’s position).

43. *See* Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204–15 (1954) (insisting that each of these doctrines has flaws that prohibit them from fully protecting what a right of publicity will protect).

44. *Id.* at 218.

publicity” and “the inadequacy of traditional legal theories in protecting such publicity values.”<sup>45</sup>

*B. Defining the Right of Publicity*

As noted above, *Haelan* coined the right of publicity as a right distinct from that of privacy.<sup>46</sup> The main distinction between the rights of publicity and privacy is that the right of publicity protects an “individual’s persona” whereas the right of privacy safeguards “conventional work[s] of authorship” among other more general privacy interests.<sup>47</sup> Although the right of publicity protects both celebrities and noncelebrities,<sup>48</sup> it is invoked almost exclusively by celebrities because people who are not famous face a much lower risk of economic exploitation of their personas.<sup>49</sup> It thus makes sense that the right of publicity originated as Americans’ fascination with celebrities began to take off.<sup>50</sup> The right to privacy, conversely, is often used by both

45. *Id.* at 215.

46. *See Haelan*, 202 F.2d at 868 (explaining that the court was creating the right of publicity in addition to the existing right of privacy).

47. ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 34 (2010).

48. *See* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102 (9th Cir. 1992) (concluding that the right of publicity protects individuals “who fall short of superstardom”); *Cheatham v. Paisano Publ’ns, Inc.*, 891 F. Supp. 381, 386 (W.D. Ky. 1995) (noting that a plaintiff has a remedy only if her identity has a commercial value but arguing that “celebrity status should not be an absolute prerequisite”); Ann Margaret Eames, *Caught on Tape: Exposing the Unsettled and Unpredictable State of the Right of Publicity*, 3 J. HIGH TECH. L. 41, 51 (2004) (explaining that the right of publicity has evolved to a point that it now protects everyone, not just celebrities). *But see* Bahlert, *supra* note 24, at 154 (“Some jurisdictions only grant the right of publicity to famous people, while others permit its use by every individual.”); Wyman, *supra* note 25, at 170 (“Another issue exacerbated by the confusion among states and courts is exactly who may assert the right of publicity. Specifically, there is no consensus on whether the right of publicity is reserved for celebrities or whether all individuals have such a right.”).

49. *See* *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983) (noting that the right of publicity protects “commercial exploitation” of one’s identity and thus individuals with an identity capable of exploiting have more use for it). In addition to being invoked primarily by celebrities, the right of publicity developed specifically to protect them. *Id.* at 835.

50. *See* KWALL, *supra* note 47, at 111 (crediting the “fame phenomenon” for

celebrities and noncelebrities because it is broader and includes elements like the right to “seclusion or solitude” that celebrities and noncelebrities can equally enjoy.<sup>51</sup>

The Restatement (Third) of Unfair Competition (the Restatement) accurately summarizes what the right of publicity generally protects.<sup>52</sup> Section 46 provides that the right of publicity guards an individual’s right to profit from his own identity and thus prohibits people from exploiting another’s identity without consent.<sup>53</sup> Intent to violate another’s right of publicity is not normally an element of liability,<sup>54</sup> although some courts and scholars suggest that it should be.<sup>55</sup> Consumer confusion, which is often about “whether the celebrity endorsed the product,”<sup>56</sup> is also not necessary.<sup>57</sup> Because the right of

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necessitating the right of publicity).

51. *Carson*, 698 F.2d at 834. Roberta Kwall distinguishes the right of publicity from the right of privacy by arguing that the former is “the means of achieving compensation for the loss of financial gain associated with a defendant’s unauthorized appropriation” whereas the latter concerns “hurt feelings.” Kwall, *supra* note 47, at 119; *accord* *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 730 (8th Cir. 1995) (“The right to publicity protects pecuniary, not emotional, interests.”).

52. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49 (1995) (describing what the right of publicity protects, how the right is violated, and what the appropriate damages are).

53. See *id.* § 46 (“One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49.”); see also Marc Edelman, *Closing the “Free Speech” Loophole: The Case for Protecting College Athletes’ Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553, 560 (2013) (“In almost all states, a prima facie claim for violating one’s right of publicity requires the showing of four elements: (1) the use of one’s identity; (2) for purposes of a commercial advantage; (3) without consent; and (4) in a manner that causes monetary harm.”).

54. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (explaining that, under *Zacchini*, “actual malice” does not apply to the right of publicity); § 46 cmt. e (providing that a plaintiff does not have the burden of proving intent).

55. See *Zacchini v. Scripps–Howard Broad. Co.*, 433 U.S. 562, 565 (1977) (noting that the Ohio Supreme Court had considered intent); Gutmann, *supra* note 25, at 234–35 (maintaining that the right of publicity test in the video game context must account for a manufacturer’s intent).

56. David M. Schlachter, Note and Comment, *Adjudicating the Right of Publicity in Three Easy Steps*, 14 J.L. & POL’Y 471, 479 (2006).

57. See *In re NCAA Student–Athlete Name & Likeness Licensing Litig.*

publicity is a common law right that varies significantly among the states that adopt it, there are many other elements, like descendibility, that differ by state.<sup>58</sup> Although differences among states remain,<sup>59</sup> celebrities generally have more right of publicity protection in the United States than abroad.<sup>60</sup>

### C. Justifying the Right of Publicity

As already noted, the broad rationale for the right of publicity is protecting celebrities’ rights to profit commercially from their own fame.<sup>61</sup> As the Supreme Court explained in *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>62</sup> “The rationale . . . is the straightforward one of preventing unjust enrichment by the theft of good will.”<sup>63</sup> Fairness is thus the

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(*Keller*), 724 F.3d 1268, 1281 (9th Cir. 2013) (“The right of publicity protects the *celebrity*, not the *consumer*.”); *Parks v. LaFace Records*, 329 F.3d 437, 460 (6th Cir. 2003) (noting that a right of publicity claim differs from a false advertising claim because a right of publicity claim does not require evidence of consumer confusion); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b–c (1995) (noting that “[p]roof of deception or consumer confusion is not required for the imposition of liability”).

58. See § 46 cmt. h (1995) (explaining that some states have not considered whether the right of publicity is descendible while others have made the right descendible only under certain conditions).

59. See *infra* Part II.D (examining these differences).

60. See KWALL, *supra* note 47, at 34 (noting that despite the similarities between publicity rights and moral rights, the United States “is a leader among nations in protecting publicity rights” while offering little protection of moral rights).

61. See *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (“The theory of the right is that a celebrity’s identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.”); Nimmer, *supra* note 43, at 216 (insisting that “every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations”).

62. 433 U.S. 562 (1977).

63. *Id.* at 576. Justice White wrote that “the [s]tate’s interest in permitting a ‘right of publicity’ . . . is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.” *Id.* at 573; accord § 46 cmt. c (explaining that the right of publicity is designed to prevent free-riding off of celebrities’ hard-earned reputations, especially exploitation that would diminish celebrities’ reputations).

doctrine's foundation.<sup>64</sup> Although the right of publicity's justification seems straightforward, Susannah Rooney suggests a more complex, multifaceted policy rationale.<sup>65</sup> Rooney's theory focuses on the right of publicity in general, but her reasoning is also applicable to the right of publicity's necessity in the video game context.<sup>66</sup>

First, Rooney proposes that the right of publicity protects moral rights similar to the way that copyright law operates abroad.<sup>67</sup> This first theory does not deal with incentivizing creativity but instead recognizes an inherent right to control one's reputation and identity.<sup>68</sup> The theory is that moral rights are a broad category and that the right of publicity deals solely with these rights in the context of an individual's likeness.<sup>69</sup> Sean Whaley suggests that this moral rights concept relates back to John Locke's theory of natural rights, which partially relies on the assumption that "every man has a right to own that which he has mixed his labor with."<sup>70</sup> In the video game context, this moral

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64. See *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967) ("It is *unfair* that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or accomplishments merely because the owner's accomplishments have been highly publicized." (emphasis added)).

65. See Rooney, *supra* note 27, at 927 (observing that "[t]hree major schools of thought have evolved regarding the policy reasons behind the right of publicity").

66. See *id.* at 941–44 (discussing *Hart* and *Keller* and arguing that they demonstrate the need for a federal right of publicity).

67. See *id.* at 927 (explaining the theory of moral rights and noting that American copyright law does not account for this theory).

68. See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003) (defining the right of publicity as "the inherent right of every human being to control the commercial use of his or her identity"); Rooney, *supra* note 27, at 927 (distinguishing this "inherent moral right" from a right arising from diligence and effort).

69. See Kwall, *supra* note 47, at 162 (suggesting that the right of publicity is only one of many ways in which laws protect moral rights).

70. Sean D. Whaley, *"I'm a Highway Star": An Outline for a Federal Right of Publicity*, 31 HASTINGS COMM. & ENT. L.J. 257, 263 (2009); see also A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 68–78 (1992) (discussing the basis for Locke's theory of natural rights and explaining how Locke viewed various rights). *But see* GILLIAN BLACK, *PUBLICITY RIGHTS AND IMAGE: EXPLOITATION AND LEGAL CONTROL* 97–99 (2011) (rejecting the theory that the right of publicity is needed as an "individual's desert or reward" for labor because a celebrity's fame is often the result of luck and good fortune rather than hard work).

rights theory means that a celebrity has the innate right to choose what games to appear in and not appear in.<sup>71</sup>

Second, Rooney finds economics to be a major rationale for the right of publicity.<sup>72</sup> Tragedy of the commons logic requires limiting the use of publicity to prevent dilution of the value of celebrities’ personas.<sup>73</sup> The more obvious economic rationale is the need to incentivize advances in creativity, just as in copyright law.<sup>74</sup> If celebrities’ images are exploitable at will, individuals will have less incentive to work toward fame and fortune.<sup>75</sup> Because many celebrities are famous for making major contributions that better society, there is a policy interest in encouraging and preserving such initiative.<sup>76</sup> The policy of incentivizing fame applies in the video game context, where there is also a strong need to incentivize video game companies’ creativity.

Lastly, Rooney argues that the right of publicity is necessary to prevent consumer confusion.<sup>77</sup> Similar to the rationale behind trademark law, “there must not be an unauthorized link to a brand or, in the case of publicity, a person.”<sup>78</sup> As noted above, a

71. See *infra* notes 269–270 (explaining that the right of publicity is a moral right because a celebrity’s right to choose not to appear in a video game might be based on a moral objection).

72. See Rooney, *supra* note 27, at 927–28 (identifying and describing two economic theories that justify the right of publicity).

73. See *id.* at 928 (noting that overuse can dilute and even destroy publicity and thus recognizing the need to control the use of publicity).

74. See BLACK, *supra* note 70, at 94–95 (analogizing the right of publicity to copyright law based on the policy goal of encouraging creativity and advancement); Rooney, *supra* note 27, at 928 (noting that this rationale “mirrors the justifications for copyright and patent” law).

75. See BLACK, *supra* note 70, at 126 (explaining the correlation between the protection of publicity rights and the incentive to invest in one’s persona); Rooney, *supra* note 27, at 928 (arguing that the right of publicity incentivizes celebrities by design). *But see* Recent Case, *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013), 127 HARV. L. REV. 1212, 1217 (2014) [hereinafter Recent Case] (“[T]here are already ample incentives to pursue fame. . . . Thus, the marginal incentive provided by the right of publicity is likely to be negligible.”).

76. See Rooney, *supra* note 27, at 928 (providing that identities need protection if they “can be viewed as valuable to society and as useful tools of business”).

77. See *id.* (explaining how the right of publicity helps to prevent consumer confusion).

78. *Id.*

right of publicity claim does not require proof of consumer confusion.<sup>79</sup> This justification nevertheless applies in the video game context because consumers playing a video game may, and often do, rationally believe that a celebrity featured in that game endorsed the game and consented to her inclusion.<sup>80</sup>

Several justifications for the right of publicity exist, all of which are relevant in the video game context. Part V.A argues that courts and legislatures must tailor the test for whether a video game infringes an individual's right of publicity toward these justifications.<sup>81</sup>

#### *D. How Various States Apply the Right of Publicity*

While the above subpart spells out the justifications behind the right of publicity, many states do not recognize the right.<sup>82</sup> Nineteen states have statutorily adopted the right of publicity.<sup>83</sup>

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79. See *supra* note 57 and accompanying text (explaining that courts and legislatures did not design the right of publicity to protect consumers).

80. See *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 61–62 (Cal. Ct. App. 2006) (noting the issue of consumers mistakenly believing that Kirby endorsed the video game); Brandon Johansson, Note, *Pause the Game: Are Video Game Manufacturers Punting Away the Publicity Rights of Retired Athletes?*, 10 NEV. L.J. 784, 810 (2010) (arguing that sports video games present “a high likelihood of consumer confusion regarding the athlete’s endorsement of the game”). *But see* BLACK, *supra* note 70, at 100 (insisting that consumer confusion is not a legitimate justification for the right of publicity because “[m]embers of the public are no longer, if they ever were, likely to believe wholeheartedly that a celebrity uses or believes in the product she advertises”).

81. See *infra* Part V.A. (arguing that a workable test needs to be consistent to account for consumers’, celebrities’, and video game companies’ reasonable expectations).

82. See Brittany A. Adkins, Comment, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499, 500–01 (2010) (observing that the right is not uniformly applied even within the states that recognize it).

83. *Id.* These nineteen states are California, CAL. CIV. CODE §§ 3344, 3344.1 (West, Westlaw through 2013 Sess.); Florida, FLA. STAT. § 540.08 (Westlaw through 2013 Sess.); Illinois, 765 ILL. COMP. STAT. §§ 1075/10 to /60 (Westlaw through 2013 Sess.); Indiana, IND. CODE §§ 32-36-1-1 to -20 (Westlaw through 2013 First Regular Sess.); Kentucky, KY. REV. STAT. ANN. § 391.170 (West, Westlaw through 2013 First Regular Sess. and 2013 Extraordinary Sess.); Massachusetts, MASS. GEN. LAWS ch. 214, § 3A (Westlaw through Chapter 25 of the 2014 Second Annual Sess.); Nebraska, NEB. REV. STAT. § 20-202 (Westlaw through 2013 Sess.); Nevada, NEV. REV. STAT. §§ 597.770–597.810 (Westlaw

Twelve others recognize the doctrine through common law, some by a name other than the “right of publicity,” but have not codified it.<sup>84</sup>

In the states that recognize a right of publicity, the application and intricacies of the right differ dramatically.<sup>85</sup>

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through 2013 Sess.); New York, N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney, Westlaw through 2013 Sess.); Ohio, OHIO REV. CODE ANN. §§ 2741.01–2741.99 (West, Westlaw through 2013 portion of 2013–2014 Sess.); Oklahoma, OKLA. STAT. tit. 12, §§ 1448, 1449 (Westlaw through 2013 Sess.); Pennsylvania, 42 PA. CONS. STAT. § 8316 (Westlaw through 2013 legislation); Rhode Island, R.I. GEN. LAWS §§ 9-1-28 to -28.1 (Westlaw through Chapter 534 of 2013 Sess.); Tennessee, TENN. CODE ANN. §§ 47-25-1102 to -1107 (Westlaw through 2013 First Regular Sess.); Texas, TEX. PROP. CODE ANN. §§ 26.001–26.015 (West, Westlaw through 2013 Third Sess.); Utah, UTAH CODE ANN. §§ 45-3-1 to -6, 76-9-407 (West, Westlaw through 2013 Second Special Sess.); Virginia, VA. CODE ANN. § 8.01-40 (Westlaw through 2013 Sess.); Washington, WASH. REV. CODE §§ 63.60.010 to .060 (Westlaw through 2013 legislation) (but note that *Experience Hendrix L.L.C. v. HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122 (W.D. Wash. 2011), held part of this statute unconstitutional); and Wisconsin, WIS. STAT. § 995.50 (Westlaw through 2013 Act 116). Adkins, *supra* note 82, at 500–01; *Statutes*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/statutes> (last visited Jan. 27, 2015) (on file with the Washington and Lee Law Review).

84. See *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (recognizing the right of publicity in Michigan); *Pooley v. Nat’l Hole-in-One Ass’n*, 89 F. Supp. 2d 1108, 1112 (D. Ariz. 2000) (recognizing the right of publicity); *Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc.*, 867 F. Supp. 175, 189 (S.D.N.Y. 1994) (recognizing the right of publicity in Connecticut); *Minnifield v. Ashcroft*, 903 So. 2d 818, 824 (Ala. Civ. App. 2004) (recognizing the right of publicity); *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982) (same); *Ferguson v. Hawaiian Ocean View Estates*, 441 P.2d 141, 144 (Haw. 1968) (same); *Simpson v. Cent. Me. Motors, Inc.*, 669 A.2d 1324, 1326 (Me. 1996) (same); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 236 (Minn. 1998) (same); *Bear Foot, Inc. v. Chandler*, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998) (same); *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 460 (N.J. Super. Ct. Ch. Div. 1967) (same); *Gignilliat v. Gignilliat, Savitz, & Bettis, L.L.P.*, 684 S.E.2d 756, 760 (S.C. 2009) (same); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 85 (W. Va. 1983) (same).

85. See BLACK, *supra* note 70, at 45 (noting the differences between the right of publicity in Indiana and Washington); Adkins, *supra* note 82, at 505 (explaining that common differences include “the origins of state protection and the doctrine under which protection extends,” the specifics of what is protected, “assignability and descendibility,” requirements that the celebrity used the right during his or her lifetime, and duration); Christina Smedley, Case Note & Comment, *Commercial Speech and the Transformative Use Test: The Necessary Limits of a First Amendment Defense in Right of Publicity Cases*, 24 DEPAUL J. ART TECH. & INTELL. PROP. L. 451, 456 (2014) (summarizing general differences among states’ right of publicity laws); Wyman, *supra* note 25, at 168–69 (discussing the major differences between states’ laws and arguing that this



Because the right of publicity is specific to states, some scholarship advocates for a uniform right of publicity that standardizes the right's protections.<sup>86</sup> While this Note does not support that suggestion, it does endorse the readily identifiable standard as the best way to analyze right of publicity claims in the video game context.<sup>87</sup> This Note argues that there are benefits to states using the same standard for video games, but the recommended test need not be used by all states to be effective in those that do adopt it.<sup>88</sup> The different state laws remain important for discussing the video game context because the cases arise from various jurisdictions, including California,<sup>89</sup> New Jersey,<sup>90</sup> and Michigan,<sup>91</sup> and apply those various states' laws.

### *III. Precedent: Seminal Right of Publicity Cases and Cases in the Video Game Context*

This Part focuses on the cases that are critical to understanding the problem at issue. Subpart A addresses the general right of publicity cases that establish the tests currently considered in the video game context and that form the basis for this Note's suggested readily identifiable standard.<sup>92</sup> Subpart B

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variation contributes to the problem of unpredictability in evaluating right of publicity claims).

86. See, e.g., Adkins, *supra* note 82, at 505–24 (providing a comprehensive comparison between New York's, California's, Tennessee's, and Indiana's right of publicity statutes and arguing that the differences in state protections necessitate a uniform right of publicity).

87. See *infra* Part V.B (advocating for the readily identifiable standard and explaining why this is a better alternative than existing tests).

88. See *infra* Part V.B (maintaining that consistent application of the same test would be beneficial for protecting video game manufacturers' expectations).

89. See generally *In re NCAA Student–Athlete Name & Likeness Licensing Litig. (Keller)*, 724 F.3d 1268 (9th Cir. 2013) (arising out of California); *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018 (Cal. Ct. App. 2011) (same); *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47 (Cal. Ct. App. 2006) (same).

90. See generally *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (arising out of New Jersey).

91. See generally *Romantics v. Activision Publ'g, Inc.*, 574 F. Supp. 2d 758 (E.D. Mich. 2008) (arising out of Michigan).

92. See *infra* Part V.B (explaining the readily identifiable standard and how it is derived from existing precedent).

addresses the primary cases from the video game sphere that consider and apply the tests explained in subpart A.

*A. Seminal Right of Publicity Cases*

*1. Zacchini v. Scripps–Howard Broadcasting Co.*

*Zacchini v. Scripps–Howard Broadcasting Co.* is the only right of publicity case the Supreme Court has decided.<sup>93</sup> In *Zacchini*, Hugo Zacchini, a human cannonball entertainer, sued a local television broadcasting station that had both videotaped Zacchini’s performance after he told the reporter not to do so and showed the tape on the news.<sup>94</sup> The Supreme Court of Ohio recognized the right of publicity but found for the defendant.<sup>95</sup> It reasoned that a news station violates the right of publicity only when the station’s intent is to “appropriate the benefit of the publicity for some non-privileged private use” or “to injure the individual.”<sup>96</sup>

The Supreme Court of the United States reversed, finding that the First and Fourteenth Amendments do not require states to privilege the press against the right of publicity.<sup>97</sup> The Court

93. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 372 (Mo. 2003) (en banc) (observing that *Zacchini* “is the first and only right of publicity case decided by the Supreme Court”). The Supreme Court has, however, recently heard a video game case with First Amendment implications. In *Brown v. Entertainment Merchants Association*, the Court held that video games qualify for First Amendment protection. 131 S. Ct. 2729, 2733 (2011). Justice Scalia wrote,

Like 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). That suffices to confer First Amendment Protection.

*Id.*

94. See *Zacchini v. Scripps–Howard Broad. Co.*, 433 U.S. 562, 563–64 (1977) (describing how Zacchini asked the reporter not to film the human cannonball show and that the reporter videotaped the full performance the next day).

95. See *id.* at 564–65 (describing the complicated procedural posture including the trial court’s grant of summary judgment and reversal by the Ohio Court of Appeals).

96. *Id.* at 565 (internal quotations omitted).

97. See *id.* at 578–79 (“We conclude that although the State of Ohio may as

distinguished this case from *Time, Inc. v. Hill*,<sup>98</sup> which the Ohio Supreme Court relied on, by noting that *Hill* did not involve the right of publicity.<sup>99</sup> The Court concluded that *Hill* “does not mandate a media privilege to televise a performer’s act without his consent.”<sup>100</sup> Courts today view *Zacchini* as a mandate to balance individuals’ rights of publicity with the First Amendment, but the Supreme Court unfortunately failed to dictate what test courts should use for this balancing.<sup>101</sup>

## 2. Rogers v. Grimaldi: *The Rogers Test*

The Second Circuit’s *Rogers v. Grimaldi*<sup>102</sup> is the next seminal case. *Rogers* is a landmark right of publicity decision from 1989 that involves a movie title rather than a video game’s contents.<sup>103</sup> It remains important in the video game context because it established the *Rogers* test, one of the three tests courts have used and considered using in determining whether a video game violates a celebrity’s right of publicity.<sup>104</sup>

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a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.”).

98. 385 U.S. 374 (1967). In *Hill*, the Court considered whether the New York courts had unconstitutionally denied the publisher of *Life Magazine* First Amendment protections of speech and press. *Id.* at 376. The Court, dealing with New York’s right of privacy statute, reasoned that the freedom of the press was designed to benefit the public at large rather than the press itself. *Id.* at 389. It held that First Amendment protections precluded applying New York’s right of privacy statute in this case. *Id.* at 387–88. The Court concluded that the original jury conclusion awarding the plaintiff both compensatory and punitive damages was reasonable, and it remanded the case. *Id.* at 392, 398.

99. See *Zacchini*, 433 U.S. at 572–74 (noting that this case and *Hill* involved different claims and that *Hill* did not implicate broadcasting an act that the performer was paid for).

100. *Id.* at 570.

101. See Kyle D. Simcox, Comment, *Selling Your Soul at the Crossroads: The Need for a Harmonized Standard Limiting the Publicity Rights of Professional Athletes*, 63 DEPAUL L. REV. 87, 93 (2013) (noting *Zacchini*’s “lasting impact” and explaining that the lack of a clear test for balancing the right of publicity and the First Amendment is in part attributable to the Court’s failure to establish a test).

102. 875 F.2d 994 (2d Cir. 1989).

103. See *id.* at 1004–05 (explaining that the case’s right of publicity issue involves a movie title’s relationship to the plaintiff’s name).

104. See Blanke, *supra* note 24, at 63 (noting that the *Rogers* test, along

Ginger Rogers, an actress who was most famous for her roles in movies dancing with Fred Astaire, sued the company and directors who produced a movie entitled *Ginger and Fred*.<sup>105</sup> The film focused on two cabaret performers who became known as Ginger and Fred in Italy but had nothing to do with either Rogers’s or Astaire’s actual lives.<sup>106</sup> Rogers sued under three theories, and the District Court for the Southern District of New York granted summary judgment for the defendants.<sup>107</sup> The Second Circuit affirmed the district court’s ruling.<sup>108</sup>

The Second Circuit applied Oregon law to the right of publicity claim but noted that there was no precedent in Oregon on the issue.<sup>109</sup> The court then established and adopted the test that a movie title violates one’s right of publicity only if “the title [is] ‘wholly unrelated’ to the movie or [is] ‘simply a disguised commercial advertisement for the sale of goods or services.’”<sup>110</sup> It found that the title *Ginger and Fred* was “clearly related to the content of the movie” and thus that no right of publicity violation occurred.<sup>111</sup> Although the *Rogers* court’s language limits its holding to the movie title context,<sup>112</sup> courts have recently considered extending *Rogers*’s wholly unrelated standard, or simply a disguised commercial

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with the transformative use test and predominant use test, is one of three alternatives courts have tried).

105. See *Rogers*, 875 F.2d at 996–97 (describing Rogers’s career and fame and explaining how she commercially profited from her name).

106. See *id.* (describing the movie’s basic plot and its weak connection with the lives and careers of Rogers and Astaire).

107. See *id.* at 997 (listing Rogers’s Lanham Act, right of publicity, and right of privacy claims and describing the case’s early procedural posture).

108. See *id.* at 1005 (concluding that the district court properly rejected all three of Rogers’s claims).

109. See *id.* at 1002 (observing that “there are no reported decisions of any Oregon court on a right of publicity claim”).

110. *Id.* at 1004 (quoting *Guglielmi v. Spelling–Goldberg Prods.*, 603 P.2d 454, 457 n.6 (Cal. 1979) and *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 769 (N.Y. App. Div. 1980)).

111. *Id.*

112. See *id.* (identifying that the holding applies specifically to “the use of a celebrity’s name in a movie title”).

advertisement standard, to the video game context.<sup>113</sup> The Restatement also adopts the *Rogers* test.<sup>114</sup>

### 3. *White v. Samsung Electronics America, Inc.*

In 1992, the Ninth Circuit decided *White v. Samsung Electronics America, Inc.*<sup>115</sup> Vanna White, the popular Wheel of Fortune personality, sued Samsung for violating her right of publicity by using her image in an advertisement.<sup>116</sup> The advertisement featured a robot dressed like White posing next to a game show board similar to the Wheel of Fortune set.<sup>117</sup> The court concluded that the robot's features were "consciously selected to resemble White's hair and dress" and that the advertisement's background was "instantly recognizable as the Wheel of Fortune game show set."<sup>118</sup>

The Ninth Circuit held that the common law right of publicity is not limited to appropriation of one's "name or likeness" as the district court below had concluded.<sup>119</sup> It cited

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113. See, e.g., *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 157 (3d Cir. 2013) (describing and analyzing the *Rogers* test but rejecting it because it is a "blunt instrument, unfit for widespread application in cases that require a carefully calibrated balancing"); *Romantics v. Activision Publ'g, Inc.*, 574 F. Supp. 2d 758, 765–66 (E.D. Mich. 2008) (citing and applying the *Rogers* test and concluding that the game was not "wholly unrelated" to the plaintiffs' song); see also Recent Case, *supra* note 75, at 1218 (advocating that courts apply the *Rogers* test in the video game context because it is "appropriately deferential to core protected speech").

114. See *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003) (explaining that the "[u]se of another's identity in a novel, play, or motion picture is . . . not ordinarily an infringement [of the right of publicity, unless] the name or likeness is used solely to attract attention to a work that is not related to the identified person" (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995))).

115. 971 F.2d 1395, 1395 (9th Cir. 1992).

116. See *id.* at 1396 (explaining that the Wheel of Fortune-themed advertisement was one in a series of Samsung advertisements depicting technology in the future and that White sued claiming that one of the ads was a robotic impersonation of her identity).

117. See *id.* (describing the robot and the game show set).

118. *Id.*

119. See *id.* at 1397 (explaining that the district court had granted White summary judgment on her right of publicity claim because there was no appropriation of name or likeness and citing precedent that construed the right

both *Motschenbacher v. R.J. Reynolds Tobacco Co.*<sup>120</sup> and *Carson v. Here's Johnny Portable Toilets, Inc.*<sup>121</sup> as precedent that the right of publicity does more than prohibit an exhaustive list of activities.<sup>122</sup> The court explained that the right of publicity's decisive factor is not “*how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so.”<sup>123</sup> The court concluded that the ad “leave[s] little doubt about the celebrity the ad is meant to depict” and thus held that Samsung violated White's right of publicity.<sup>124</sup>

Judge Alarcon, dissenting on the right of publicity issue, vehemently advocated that the majority's standard intruded too far into First Amendment protections.<sup>125</sup> He contended that White's prominence in the game show arena makes this case unique because any image of a game show hostess will inevitably remind a viewer of Vanna White.<sup>126</sup> Judge Alarcon would thus have adopted a more stringent test and dismissed White's claim because the advertisement showed a robot instead of a human like White.<sup>127</sup> This Note's suggested readily identifiable standard adopts Judge Alarcon's view and advocates that a video game violates the right of publicity only when an image is *immediately* identifiable as *definitively* appropriating one's image.<sup>128</sup>

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of publicity to be much broader).

120. 498 F.2d 821 (9th Cir. 1974).

121. 698 F.2d 831 (6th Cir. 1983).

122. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992) (explaining that these cases “teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity”).

123. *Id.*

124. *Id.* at 1399.

125. See *id.* at 1402 (Alarcon, J., dissenting) (arguing that the record does not support the majority's finding that Samsung violated White's right of publicity).

126. See *id.* at 1405 (“I quite agree that anyone seeing the commercial advertisement would be reminded of Vanna White. *Any* performance by another female celebrity as a game-show hostess, however, will also remind the viewer of Vanna White because Vanna White's celebrity is so closely associated with the role.”).

127. See *id.* at 1403 (“In this case, it is clear that a metal robot and not the plaintiff, Vanna White, is depicted in the commercial advertisement. The record does not show an appropriation of Vanna White's identity.”).

128. See *infra* Part V.B (explaining the readily identifiable standard).

4. Comedy III Productions, Inc. v. Gary Saderup, Inc.: *The Transformative Use Test*

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,<sup>129</sup> the Supreme Court of California adopted the transformative use test, which is the primary test that courts have used to evaluate right of publicity claims relating to video games.<sup>130</sup> *Comedy III* arose from the defendant's production and sale of t-shirts that displayed an image that the defendant drew resembling The Three Stooges.<sup>131</sup> The court first described the purposes behind both the California right of publicity statute discussed above and the First Amendment's freedom of expression.<sup>132</sup> It then concluded that balancing the two interests requires determining whether the expression sufficiently transforms the person's likeness.<sup>133</sup> The court explained that the *Comedy III* test, now

129. 21 P.3d 797 (Cal. 2001).

130. See Bahlert, *supra* note 24, at 160 (explaining that the transformative use test is “[c]urrently . . . the most popular test”); Blanke, *supra* note 24, at 63 (identifying the transformative use test as one of the three major balancing tests that courts apply in video game right of publicity cases); Beth A. Cianfrone & Thomas A. Baker III, *The Use of Student–Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity*, 20 J. LEGAL ASPECTS SPORT 35, 52–53 (2010) (explaining the test's origin in *Comedy III* and its importance in the video game context); *supra* Part III.B (illustrating the test's popularity in video game cases). Although *Comedy III* first adopted the transformative use test in the right of publicity context, the test is likely based on a 1990 article by Pierre Leval on fair use in copyright. See Gutmann, *supra* note 25, at 221–22 (discussing Leval's definition of a transformative use and its similarity to *Comedy III*'s transformative use test). Leval articulated and explained the four factors listed in federal copyright law for determining whether a work is a fair use, including “the purpose and character of the use, the nature of the copyrighted work, the quantity and importance of the material used, and the effect of the use upon the potential market or value of the copyrighted work.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990); see also 17 U.S.C. § 107 (2012) (listing the same factors).

131. *Comedy III*, 21 P.3d at 800–01 (explaining the defendant's business of “making charcoal drawings of celebrities” and noting that the business made \$75,000 selling t-shirts that featured such a drawing of The Three Stooges).

132. See *id.* (explaining the statute's purpose of preventing appropriation of individuals' personas and the First Amendment's dual purposes of permitting the free flow of ideas and respecting “individual development and self-realization” (internal quotations omitted)); *supra* notes 85–89 and accompanying text (explaining California's basic right of publicity statute).

133. See *Comedy III*, 21 P.3d at 808 (“This inquiry into whether a work is ‘transformative’ appears to us to be necessarily at the heart of any judicial

known as the transformative use test, balances the two interests because a sufficiently transformed expression is both “especially worthy of First Amendment protection” and “less likely to interfere with the economic interest protected by the right of publicity.”<sup>134</sup>

The *Comedy III* court extensively discussed how courts should apply the transformative use test.<sup>135</sup> The court explained that considerations include (1) “whether the celebrity likeness is one of ‘raw materials’ from which an original work is synthesized . . . or whether [it] is the very sum and substance of the work in question”; (2) whether the work “is so transformed that it has become primarily the defendant’s own expression”; (3) “whether the literal and imitative or the creative elements predominate the work”; (4) whether the work’s “marketability and economic value . . . derive primarily from the fame of the celebrity depicted”; and (5) whether the defendant’s goal is to “commercially exploit” the celebrity’s fame.<sup>136</sup> After applying these five considerations, the court concluded that the t-shirt design was not sufficiently transformative and that the defendant thus violated *Comedy III*’s right of publicity.<sup>137</sup>

## 5. Winter v. DC Comics

The California Supreme Court retrenched the transformative use test nine years after *Comedy III*. In *Winter v. DC Comics*,<sup>138</sup> the Winters brothers, who were well-known musicians, alleged

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attempt to square the right of publicity with the First Amendment.”).

134. *Id.*

135. *See id.* at 809–10 (providing guidance on what courts using the transformative use test should consider when looking at an expressive work).

136. *Id.* Although the *Comedy III* court did not explicitly list these as considerations, the Ninth Circuit has interpreted them as “five factors” for courts to consider in the video game context. *In re NCAA Student–Athlete Name & Likeness Licensing Litig. (Keller)*, 724 F.3d 1268, 1274 (9th Cir. 2013). *But see id.* at 1285 (Thomas, J., dissenting) (arguing that the *Comedy III* court consciously did not label these considerations as “analytical factors” because of the need to conduct a “holistic examination” under the transformative use test).

137. *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001) (applying the five considerations and finding that protecting the defendant’s work would effectively nullify the right of publicity).

138. 69 P.3d 473 (Cal. 2003).



that DC Comics violated the brothers' rights of publicity by appropriating their likenesses in a comic book series.<sup>139</sup> The comics featured two characters that physically resembled the brothers and shared their first names.<sup>140</sup> The court distinguished *Comedy III* based on the comic books' inherent transformative nature.<sup>141</sup> It held that the defendants' comics sufficiently transformed the Winter brothers' likenesses and that the First Amendment thus protected the comics.<sup>142</sup>

### 6. Doe v. TCI Cablevision: *The Predominant Use Test*

In *Doe v. TCI Cablevision*,<sup>143</sup> the Supreme Court of Missouri adopted and applied the predominant use test.<sup>144</sup> This test, developed in 2003 after the *Rogers* and transformative use tests, is the third and final standard currently relevant in right of publicity cases in the video game context.<sup>145</sup> Anthony "Tony"

139. See *id.* at 476 (explaining the Winters brothers' careers and the comic book series's storyline).

140. See *id.* (discussing the similarities between the Winters brothers and the comic book characters and emphasizing that the Winters brothers were from Texas and that the comic books featured a cowboy theme).

141. See *id.* at 479–80 (“The artist in *Comedy III* . . . essentially sold . . . pictures of The Three Stooges, not transformed expressive works by the artist. Here, by contrast, defendants essentially sold . . . [c]omics depicting fanciful, creative characters, not pictures of the Winter brothers. This makes all the difference.”). The *Winters* court's distinction indicates that it would have accepted Judge Alarcon's argument and decided *White* differently because the robot in *White* was a “fanciful, creative character[ ]” rather than a picture of White. See *id.* (distinguishing the creativity in *Winter* from the picture of The Three Stooges at issue in *Comedy III*).

142. See *id.* at 480 (summarizing the court's transformative use test analysis).

143. 110 S.W.3d 363 (Mo. 2003) (en banc).

144. See *id.* at 374 (quoting and citing Mark Lee's formulation of this test and using the test to conclude that the right of publicity outweighed the First Amendment in this case).

145. See Blanke, *supra* note 24, at 63 (including the predominant use test as one of the three major balancing tests used by courts in video game right of publicity cases); Cianfrone & Baker, *supra* note 130, at 52 (same); Gutmann, *supra* note 25, at 219 (same). Although considered in many subsequent cases, no court has applied the predominant use test since *TCI Cablevision*. Gutmann, *supra* note 25, at 220. Jon Garon suggests that the case's “factually specific nature” explains its inconsistency with other opinions. Jon M. Garon, *Playing in the Virtual Arena: Avatars, Publicity, and Identity Reconceptualized Through*

Twist, a former National Hockey League (NHL) player, sued the defendants after discovering that they had produced and sold a comic book titled *Spawn* that featured an evil character named Tony Twist.<sup>146</sup> Twist was an “enforcer” whose primary role was to fight opposing players and thereby protect his teammates.<sup>147</sup> The defendants admitted that they intentionally named the character after the real Twist.<sup>148</sup>

After relabeling Twist’s case as a right of publicity claim,<sup>149</sup> the *TCI Cablevision* court explained the existing approaches, including the Restatement’s relatedness test and the transformative use test.<sup>150</sup> The court rejected both alternatives, reasoning that the tests accounted solely for expression and thereby precluded a defendant’s commercial purposes.<sup>151</sup> Instead, the court adopted what it termed the predominant use test and quoted Mark Lee’s original articulation of this test.<sup>152</sup> Under the

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*Virtual Worlds and Computer Games*, 11 CHAP. L. REV. 465, 505 (2008). He argues that *TCI Cablevision* is “far less persuasive” than other opinions because the comic book uses Twist’s name as a marketing ploy, unrelated to the comic itself. *Id.* at 504.

146. See *TCI Cablevision*, 110 S.W.3d at 365–66 (describing the background of Twist’s career, the teams he played for, how his career ended after a motorcycle accident, and explaining the Tony Twist character’s role in the *Spawn* comic).

147. See *id.* at 366 (explaining the role of an enforcer and Twist’s notorious reputation for inflicting pain on his opponents).

148. See *id.* (noting that McFarlane, one of the founders of the company that marketed and produced *Spawn*, admitted numerous times that the company based the Tony Twist character on the real Twist and that the company would continue to use hockey players’ names in comic books).

149. See *id.* at 368 (explaining that Twist filed a misappropriation action but that a case like this that involves a celebrity seeking to recover money derived by others from using his name is “more precisely labeled a right of publicity action”).

150. See *id.* at 373 (explaining these tests and their origins).

151. See *id.* at 374 (“The weakness of [the two tests] is that they give too little consideration to the fact that many uses of a person’s name and identity have both expressive and commercial components.”). The court elaborated: “These tests operate to preclude a cause of action whenever the use of the name and identity is in any way expressive, regardless of its commercial exploitation. . . . Though these tests purport to balance the prospective interests involved, there is no balancing at all—once the use is determined to be expressive, it is protected.” *Id.*

152. See *id.* (asserting that the predominant use test “better addresses the cases where speech is both expressive and commercial”); see also Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity—Free*

predominant use test, a product that “predominantly exploits the commercial value of an individual’s identity” violates the right of publicity whereas the First Amendment protects a product with the “predominant purpose” of “mak[ing] an expressive comment on or about a celebrity.”<sup>153</sup> The court concluded that the comic book’s predominant purpose was exploiting Twist’s identity and thus held that the defendants violated Twist’s right of publicity.<sup>154</sup>

### *B. Video Game Right of Publicity Cases*

#### *1. Kirby v. Sega of America, Inc.*

*Kirby v. Sega of America, Inc.*<sup>155</sup> is the first major video game right of publicity case. The plaintiff, Kierin Kirby, was a singer, dancer, and member of the musical group Deee-Lite, best known for its hit “Groove is in the Heart.”<sup>156</sup> Kirby sued Sega over its production of the video game *Space Channel 5*, a futuristic Japanese game involving aliens that invade Earth.<sup>157</sup> After Sega’s Japanese subsidiary contacted her about promoting a North American version of the game, Kirby claimed that *Space Channel 5*’s main character, Ulala, looked and danced like Kirby.<sup>158</sup> Nahoko Nezu, the dancer and choreographer who created Ulala’s dance moves, maintained that the dance moves were her own and

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*Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003) (arguing that whether a creative work violates a celebrity’s right of publicity depends on “[w]hat is being exploited”).

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

154. *See id.* (finding that “Twist’s name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression”).

155. 144 Cal. App. 4th 47 (Cal. Ct. App. 2006).

156. *Id.* at 50.

157. *See id.* at 51 (describing the game’s premise).

158. *See id.* at 52 (explaining that Kirby’s lawsuit followed the offer to use Kirby and possibly “Groove is in the Heart” to promote a new version of the game).

that she had never heard of Kirby.<sup>159</sup> Kirby alleged six causes of action, including a right of publicity violation.<sup>160</sup>

The *Kirby* court noted that it was obliged to follow the California Supreme Court’s transformative use test.<sup>161</sup> The court described how *Comedy III* formulated the test and explained both the factors that *Comedy III* and *Winter* developed and how these factors led to the two cases’ respective outcomes.<sup>162</sup> The court concluded that “Ulala [was] more than a mere likeness or literal depiction of Kirby” and that Kirby’s right of publicity claim thus failed under the transformative use test.<sup>163</sup> It determined that Sega added significant new expression to Kirby’s image and rejected Kirby’s contention that the new expression must “say something” about Kirby to receive First Amendment protection.<sup>164</sup> The court focused on the many physical differences between Ulala and Kirby<sup>165</sup> and distinguished this case from *Comedy III* because of the absence of a “literal depiction.”<sup>166</sup>

## 2. *Romantics v. Activision Publishing, Inc.*

The U.S. District Court for the Eastern District of Michigan decided *Romantics v. Activision Publishing, Inc.*<sup>167</sup> in 2008 using

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159. *Id.* at 51.

160. *See id.* at 53 (explaining that Kirby’s complaint included misappropriation, Lanham Act, unfair competition, and other claims in addition to the right of publicity claim).

161. *See id.* at 58–59, 61 (noting that the California Supreme Court had adopted and applied this test in *Comedy III* and *Winter* and explaining that the court was “bound to follow the decisions of [the California] Supreme Court, not those of another state”).

162. *See id.* at 58–60 (clarifying that the *Comedy III* court designed the test to balance a famous person’s right to control her identity with First Amendment protections and noting that *Winter* clarified that the test’s “pivotal issue is whether the work is transformative, not the form of literary expression”).

163. *Id.* at 59.

164. *See id.* at 60 (explaining that the differences between Kirby and Sega’s new expression “are not trivial” and declining to add to the transformative use test’s requirements).

165. *See id.* at 59 (noting that Ulala and Kirby “share similarities” but focusing on differences in height, body build, hairstyle, fashion, and dancing style).

166. *Id.* at 61.

167. 574 F. Supp. 2d 758 (E.D. Mich. 2008).

the *Rogers* test.<sup>168</sup> The current members of the rock band The Romantics claimed that the publisher and distributor of the video game *Guitar Hero Encore: Rocks the 80s* violated the members' right of publicity.<sup>169</sup> The game included The Romantics' song "What I Like About You."<sup>170</sup> The plaintiffs alleged that the song in the game sounded so similar to the band's original version that the game would mislead consumers to believe that the plaintiffs had "sponsored or endorsed" the video game.<sup>171</sup> The nature of the claim distinguishes this case from most other right of publicity cases involving video games that traditionally deal with the celebrities' images rather than their sound.<sup>172</sup>

The court first observed that Michigan's right of publicity did not apply to the sound of a voice or a combination of voices.<sup>173</sup> It then explained that the First Amendment would protect the defendants' expression even if the plaintiffs had a right of publicity over their voices.<sup>174</sup> The court cited the *Rogers* test for determining when the First Amendment shields "expressive works" from right of publicity claims.<sup>175</sup> The Sixth Circuit had adopted the *Rogers* test in *Parks v. LaFace Records*,<sup>176</sup> but its respective district courts had not applied it in the video game

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168. See *id.* at 765 (citing the *Rogers* test as the means of determining whether the First Amendment outweighs one's right of publicity).

169. See *id.* at 762 (explaining the relationship between the parties and the plaintiffs' claims).

170. See *id.* (describing the song's popularity).

171. *Id.* at 762–63.

172. See, e.g., *In re NCAA Student–Athlete Name & Likeness Licensing Litig. (Keller)*, 724 F.3d 1268, 1284 (9th Cir. 2013) (noting that the athletes' images are at issue); *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018, 1022 (Cal. Ct. App. 2011) (explaining that the issue is whether the game transforms the band members' images).

173. See *Romantics v. Activision Publ'g, Inc.*, 574 F. Supp. 2d 758, 764 (E.D. Mich. 2008) (explaining that a right of publicity exists in Michigan but declining to extend the doctrine to a voice or voices "even if distinctive").

174. See *id.* at 765 (agreeing with the defendants that even a "cognizable claim" would be "preempted by the First Amendment").

175. *Id.*

176. See *Parks v. LaFace Records*, 329 F.3d 437, 447–50 (6th Cir. 2003) (adopting the *Rogers* test after noting the other circuits that had adopted it and after rejecting the "likelihood of confusion factors" and "alternative avenues test").

context until *Romantics*.<sup>177</sup> The *Romantics* court determined that the game’s original content and a user’s choices in playing the game rendered the game an expressive work and thus necessitated applying the *Rogers* test.<sup>178</sup> The court concluded that the *Guitar Hero Encore: Rocks the 80s* survived the *Rogers* test because the song was not wholly unrelated to the game’s content and because the song was not a disguised commercial advertisement for the game.<sup>179</sup>

### 3. No Doubt v. Activision Publishing, Inc.

*No Doubt v. Activision Publishing, Inc.*<sup>180</sup> is the most recent right of publicity case involving a music group and a video game. The famous rock band No Doubt<sup>181</sup> sued Activision over depictions of No Doubt in the video game *Band Hero*, a part of Activision’s *Guitar Hero* series.<sup>182</sup> No Doubt had licensed its members’ likenesses to Activision for use in the game but argued that Activision used the members’ likenesses in ways that

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177. See *id.* at 450 (“Although the *Rogers* test has been criticized, we find it the most appropriate method to balance the public interest in avoiding consumer confusion with the public interest in free expression.” (citation omitted)).

178. See *Romantics*, 574 F. Supp. 2d at 766 (explaining that the game was an expressive work because it “allows players to customize their game play experience, contains large amounts of original artwork, and requires complex synchronization so that the audio and visual elements of the [g]ame line up with a player’s manipulation of the controller”).

179. See *id.* (applying the *Rogers* test and clarifying why the video game passed the test). The court concluded, “Given that the purpose of the [g]ame is to allow players to pretend they are in a rock band, the [s]ong is not wholly unrelated to the content of the work. . . . [N]either the song nor [the p]laintiffs are referenced in the [g]ame’s advertising, and it is possible to play the [g]ame and never encounter the [s]ong. Thus, the [s]ong cannot be ‘a disguised commercial advertisement.’” *Id.*

180. 192 Cal. App. 4th 1018 (Cal. Ct. App. 2011).

181. See *id.* at 1023 (calling No Doubt “internationally-recognized” and noting that Gwen Stefani is the band’s lead singer).

182. See *id.* at 1022–23 (explaining No Doubt’s allegations and Activision’s response); see also Marta Baffy, Note, *Right of Publicity Licensing in a New Age: No Doubt v. Activision Publishing, Inc.*, 28 CARDOZO ARTS & ENT. L.J. 359, 362–63 (2010) (describing *Band Hero*’s features and how the game fits into the *Guitar Hero* series).

violated the agreement.<sup>183</sup> *Band Hero* featured avatars<sup>184</sup> that intentionally resembled the band members, but the game allowed the members to sing other bands' songs, to sing in the voices of the opposite sex, and to perform without the full band.<sup>185</sup> No Doubt claimed that the agreement permitted Activision to use the members' likenesses "only in conjunction with the selected No Doubt songs" and that it did not permit Activision to alter the members' avatars.<sup>186</sup> No Doubt brought six claims, including a right of publicity action.<sup>187</sup>

The trial court found for No Doubt, applying the transformative use test and concluding that Activision did not sufficiently transform the band members' avatars.<sup>188</sup> The California Court of Appeal first explained the transformative use test as articulated by *Comedy III* and as applied in *Winter* and *Kirby*.<sup>189</sup> It emphasized that the avatars clearly resembled the band members.<sup>190</sup> The court explained that surrounding the

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183. See *No Doubt*, 192 Cal. App. 4th at 1023–24 (quoting the agreement's language and explaining No Doubt's claims relating to features in the game that No Doubt was not informed about).

184. See Jason Ross, Note, *Licensing and Access Problems Producers of Video Games Face in Foreign Markets: A Case Study*, 35 HASTINGS INT'L & COMP. L. REV. 429, 429 n.2 (2012) ("An avatar is a computerized puppet controlled by the human player that interacts within the virtual game world."). This Note uses "avatar" and "character" interchangeably.

185. See *No Doubt*, 192 Cal. App. 4th at 1024 (explaining No Doubt's qualms with these features of the game that the band claimed represented "additional exploitation of their likeness").

186. *Id.*; see also Baffy, *supra* note 182, at 365–68 (citing No Doubt's complaint and elaborating on the band's basis for its allegations).

187. See *No Doubt*, 192 Cal. App. 4th at 1025 (summarizing No Doubt's claims including fraudulent inducement, breach of contract, and injunctive relief among others).

188. See *id.* (explaining the lower court's application of the transformative use test and noting the lower court's finding that Activision may have also contracted away certain First Amendment rights).

189. See *id.* at 1030–33 (describing the test and how the courts applied it in these cases).

190. See *id.* at 1033 (noting that Activision admitted that the avatars were "painstakingly designed to mimic [the No Doubt members'] likenesses"). The court also focused on the lack of a feature that would allow users to alter the characters: "The game does not permit players to alter the No Doubt avatars in any respect; they remain at all times immutable images of the real celebrity musicians, in stark contrast to the 'fanciful, creative characters' in *Winter* and *Kirby*." *Id.*

avatars with creative elements is not sufficient to pass the transformative use test; instead, the game must transform the celebrity’s image.<sup>191</sup> It distinguished this case from *Kirby* by explaining that *Kirby* involved a completely new character performing acts distinct from the plaintiff’s acts, whereas the avatars in *Band Hero* performed music just as the real No Doubt members did.<sup>192</sup> The court thus concluded that Activision violated No Doubt’s right of publicity and affirmed the trial court’s judgment.<sup>193</sup>

#### 4. Hart v. Electronic Arts, Inc. and In re NCAA Student–Athlete Name & Likeness Licensing Litigation (Keller)

*Hart* and *Keller* are the two most recent right of publicity decisions in the video game context.<sup>194</sup> The cases’ facts are nearly

191. *See id.* at 1034 (explaining that the transformative use test requires that an added element alter the celebrity’s likeness).

192. *See id.* (“In *Kirby*, the pop singer was portrayed by an entirely new character—the space-age news reporter Ulala. In [this case], by contrast, . . . the avatars perform rock songs, the same activity by which the band achieved and maintains its fame.”); Blanke, *supra* note 24, at 52–53 (discussing the differences between *Kirby* and *No Doubt* and concluding that the *No Doubt* court found these differences to be “dispositive”).

193. *See No Doubt*, 192 Cal. App. 4th at 1034 (finding that Activision did not add any new elements to the band members’ images and thus holding that Activision’s First Amendment defense failed). Although the *No Doubt* court writes as if this was a clear case, commentary prior to the decision viewed it as much closer. *See Baffy*, *supra* note 182, at 382–83 (noting that *No Doubt*’s outcome was “not clear” and explaining how Activision could have avoided the suit by revealing the game’s features to the band).

194. Although they are the most recent decisions, former athletes are still litigating the right of publicity as it relates to sports-themed video games. *See generally* O’Bannon v. Nat’l Collegiate Athletic Ass’n, No. 09-CV-3329-CW (N.D. Cal. Aug. 8, 2014). The *O’Bannon* plaintiffs, twenty current and former Division I football players and athletes, originally brought a right of publicity claim against Electronic Arts in addition to their antitrust and right of publicity claims against the NCAA. *See id.* at \*6 (explaining that the plaintiffs originally sued both Electronic Arts and Collegiate Licensing Company). The plaintiffs reached a settlement with Electronic Arts before the Northern District of California decided *O’Bannon*. *See id.* (acknowledging the settlement). But *O’Bannon* remains important for studying the right of publicity. The court rejected the NCAA’s argument “that the First Amendment and certain state laws preclude student-athletes from asserting any rights of publicity.” *Id.* at \*68. Finally, the court noted that the Ninth Circuit, in *Keller*, rejected the NCAA’s argument that the First Amendment exempts video game companies



identical.<sup>195</sup> Electronic Arts produced the *NCAA Football* video game series.<sup>196</sup> The games allow users to play with Division I football teams composed of avatars that are accurate visual representations of the team's players in real life.<sup>197</sup> The avatars' talent levels also mimic those of the real college athletes.<sup>198</sup> The avatars are only one dimension of how each game mimics a real college football environment,<sup>199</sup> a feature that has facilitated the series's success.<sup>200</sup>

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from having to acquire licenses to use "student-athletes' names, images, and likenesses." *Id.* at \*75 n.13. For a fuller analysis of *O'Bannon* and its significance in both the right of publicity and antitrust contexts, see Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319 (2014).

195. See *Bahlert*, *supra* note 24, at 163 ("[T]he only significant factual difference between the two [cases] was the identity of the plaintiff.>").

196. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 145 (3d Cir. 2013); *In re NCAA Student-Athlete Name & Likeness Licensing Litig. (Keller)*, 724 F.3d 1268, 1271 (9th Cir. 2013). Electronic Arts first produced the annual game in 1993, but the company did not title the game *NCAA Football* until its 1997 version. *Hart*, 717 F.3d at 146. Electronic Arts chose not to release the game's 2014 version because of the litigation surrounding previous versions. Tom Risen, *Electronic Arts Cancels NCAA 2014 Video Game After Lawsuit*, U.S. NEWS & WORLD REP. (Sept. 27, 2013, 5:26 PM), <http://www.usnews.com/news/articles/2013/09/27/electronic-arts-cancels-ncaa-2014-video-game-after-lawsuit> (last visited Jan. 27, 2015) (on file with the Washington and Lee Law Review).

197. See *Hart*, 717 F.3d at 146 (noting the similarities between *Hart*'s avatar and the athlete in real life, including number, height, weight, home state and town, college team, and class year); *Keller*, 724 F.3d at 1272 (describing the similarities between *Keller* and his avatar, including number, "height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features, and school year"); *Bahlert*, *supra* note 24, at 150 (summarizing the similarities that Electronic Arts intentionally replicates); Edelman, *supra* note 53, at 554–55 ("[I]n *NCAA Football 12*, the avatar that represents University of Florida running back Chris Rainey possesses Chris Rainey's actual height, weight, skin complexion, and hair style. In addition, both Chris Rainey and his virtual counterpart wear the same jersey number, visor, gloves, and sweatbands.>").

198. See Edelman, *supra* note 53, at 568 ("Moreover, Electronic Arts does not stop at simply copying the visual likeness of college athletes. *NCAA Football* avatars also have specific ratings based on athleticism and tendencies of the actual players they represent.>").

199. See *Hart*, 717 F.3d at 146 (noting *NCAA Football*'s "focus on realism and detail—from realistic sounds, to game mechanisms, to team mascots"); *Keller*, 724 F.3d at 1271 (describing the game's accurate representations of stadiums, coaches, cheerleaders, fans, and noises).

200. See *Hart*, 717 F.3d at 146 (explaining that the game's success is due in

The *NCAA Football* games have various game play modes, differing with each year’s specific game.<sup>201</sup> Examples include “Dynasty Mode,” in which the user acts as a college team’s head coach for up to thirty years, and “Campus Legend Mode,” in which the user controls a single player for that player’s college career.<sup>202</sup> Unlike the game in *No Doubt*, which did not allow users to alter the celebrities’ avatars,<sup>203</sup> users of *NCAA Football* games “can change the digital avatar’s appearance and most of the vital statistics.”<sup>204</sup>

Hart brought a right of publicity action regarding the 2004, 2005, and 2006 *NCAA Football* games.<sup>205</sup> The district court granted summary judgment for Electronic Arts, and Hart appealed.<sup>206</sup> The Third Circuit began by noting that video games qualify as speech under the First Amendment<sup>207</sup> and explaining that the court thus had to balance Hart’s right of publicity against Electronic Arts’ First Amendment rights.<sup>208</sup> The court considered the predominant use test, the *Rogers* test, and the transformative use test.<sup>209</sup> After discussing *TCI Cablevision*, the court rejected the predominant use test because of its subjective nature.<sup>210</sup> The court then declined to apply the *Rogers* test

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large part to its reproduction of real life); Cianfrone & Baker, *supra* note 130, at 47 (noting that “EA prides itself on producing the most realistic college football and basketball games on the market”).

201. *See id.* (describing the game’s typical single game format and the newer more advanced “multi-game” modes).

202. *See id.* (describing the game modes in more detail); *Keller*, 724 F.3d at 1271–72 (same).

203. *See supra* note 190 (noting the lack of a transformative element in *Band Hero*).

204. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 146 (3d Cir. 2013).

205. *Id.* at 147.

206. *See id.* (explaining the case’s procedural posture and the district court’s reasoning for granting the defendant’s motion for summary judgment).

207. *See supra* note 93 (explaining that the Supreme Court’s recent *Brown* decision expressly conferred First Amendment rights on video games).

208. *See Hart*, 717 F.3d at 148–49 (citing *Brown* and explaining the balancing process).

209. *See id.* at 153 (explaining that these three tests “are of particular note” among the balancing tests adopted since *Zacchini*).

210. *See id.* at 153–54 (explaining the test’s origin, its application in *TCI Cablevision*, and the court’s reasons for rejecting it); *infra* note 306 and accompanying text (highlighting just how little the *Hart* court thought of the predominant use test).

because it would effectively allow any video game company to use a celebrity's image in a game related to that celebrity's area of fame.<sup>211</sup>

The *Hart* court settled on the transformative use test based on its “flexible—yet uniformly applicable—analytical framework.”<sup>212</sup> It described the test's formation in *Comedy III* and its application in *Winter, Kirby*, and *No Doubt*.<sup>213</sup> In applying the transformative use test, the Third Circuit first noted the remarkable resemblance between Hart and his avatar in *NCAA Football*.<sup>214</sup> Although the court noted that the avatar was thus “not transformative,” it explained that the game's feature allowing a user to alter players demanded further consideration.<sup>215</sup>

The court clarified that the ability to alter avatars is not by itself enough for a game to pass the transformative use test.<sup>216</sup> If it were, the court explained, producers like Electronic Arts could completely appropriate a celebrity's likeness and avoid liability

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211. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 157–58 (3d Cir. 2013) (explaining that, under the *Rogers* test, Hart's claim would fail simply because he is a football player, and his likeness would accordingly not be “wholly unrelated” to a football video game). The court also compared the right of publicity to trademark law, noting that a “broader, more nuanced test” is needed for video game right of publicity cases. *Id.* at 158.

212. *Id.* at 163. The court noted that it favored the transformative use test over the *Rogers* test because the former “maintains a singular focus on whether the work sufficiently transforms the celebrity's likeness or identity.” *Id.* It preferred the transformative use test over the predominant use test because the latter does not sufficiently consider “whether [a video game] was merely created to exploit a celebrity's likeness.” *Id.* Finally, the court explained that “the [t]ransformative [u]se [t]est is most consistent with other courts' ad hoc approaches to right of publicity cases.” *Id.* at 164.

213. See *id.* at 158–63 (explaining how the courts articulated and applied the test in each of these cases).

214. See *id.* at 166 (noting similarities in physical appearance, clothing accessories, biographical information, and activity (i.e., playing football)).

215. See *id.* at 166–67 (explaining that the “ability to alter the avatar's appearance” prohibited the court from quickly ruling for Hart based on the lack of a transformative element). The court distinguished this case from *No Doubt* by explaining that there is even less “transformative content” in *NCAA Football* than in *Band Hero* and by noting that *Band Hero* lacks an option to alter avatars. *Id.* at 166.

216. See *id.* at 167 (noting that changeability is not “sufficient to surmount the already-existing First Amendment protections”).

simply by adding such a feature.<sup>217</sup> The court emphasized that Hart’s avatar was the “*default* position” and that any transformation was “predicated on the users’ desire to alter the avatar’s appearance.”<sup>218</sup> It further reasoned that minor alterations to the player’s information and accessories were insufficient transformations<sup>219</sup> and that more major alterations, like those of the player’s physical body, were not transformations of Hart’s likeness at all, but rather the user’s creation of a new player.<sup>220</sup> The Third Circuit thus reversed the district court’s judgment and held that the *NCAA Football* games did not transform Hart’s likeness and that Electronic Arts violated Hart’s right of publicity.<sup>221</sup>

Unlike *Hart*, *Keller* was a class action lawsuit against Electronic Arts.<sup>222</sup> The district court in *Keller* concluded that Electronic Arts lacked a First Amendment defense and accordingly held for the former college athletes.<sup>223</sup> Electronic Arts appealed, asserting both the transformative use test and the *Rogers* test as affirmative defenses.<sup>224</sup> The Ninth Circuit first discussed the transformative use test as formulated in *Comedy*

217. *See id.* (summarizing the policy considerations against allowing video game companies this easy way around the right of publicity).

218. *Id.* at 168.

219. *See id.* (“The ability to make minor alterations—which substantially maintain the avatar’s resemblance to [Hart] . . . is likewise insufficient, for [a]n artist depicting a celebrity must contribute something more than a merely trivial variation.” (quoting *Winter v. D.C. Comics*, 69 P.3d 473, 478–79 (Cal. 2003))). *But see* Garon, *supra* note 145, at 504 (arguing that the precedent prior to *Hart* indicated that a user’s ability to “manipulate the names and likeness to create new characters, cast those characters into a variety of sports, enhance the play of the characters, and evolve the people in a wide variety of ways” was sufficiently transformative).

220. *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 168–69 (3d Cir. 2013) (explaining that Hart’s likeness would no longer exist after these larger changes).

221. *See id.* at 170 (summarizing the transformative use test analysis).

222. *In re NCAA Student–Athlete Name & Likeness Licensing Litig. (Keller)*, 724 F.3d 1268, 1272 (9th Cir. 2013).

223. *See id.* at 1271 (discussing the case’s procedural history); Blanke, *supra* note 24, at 53 (explaining that the contradictory district court judgments in *Hart* and *Keller* are a major difference between the cases); Bucher, *supra* note 26, at 19 (same).

224. *See Keller*, 724 F.3d at 1273 (explaining that the issue on appeal was whether one of Electronic Arts’ affirmative defenses applied).

*III* and as applied in *Winter*, *Kirby*, and *No Doubt*.<sup>225</sup> The court accepted this as the correct test based on the court's obligation to follow state law and the existing California precedent for the transformative use test in the video game context.<sup>226</sup> It noted that *No Doubt* "provide[d] persuasive guidance" and analogized *NCAA Football's* features to those of *Band Hero*.<sup>227</sup> The court emphasized that both this case and *No Doubt* lack transformed or completely new characters like those in *Kirby*.<sup>228</sup> The *Keller* court also cited *Hart* as persuasive precedent in its transformative use analysis.<sup>229</sup>

The Ninth Circuit rejected Electronic Arts' *Rogers* test defense.<sup>230</sup> It reasoned that the *Rogers* test protects consumers whereas the right of publicity protects celebrities.<sup>231</sup> Because the plaintiffs' claims related to celebrities, the *Rogers* test could not achieve the necessary balancing.<sup>232</sup> It also explained that the *Rogers* test is not well accepted in the right of publicity arena.<sup>233</sup> The court thus affirmed the district court's judgment.<sup>234</sup>

The dissenting opinions in both *Hart* and *Keller* agree with their respective majorities that the transformative use test is the proper balancing approach but insist that the majority opinions applied this test incorrectly.<sup>235</sup> Both dissents contend that the

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225. *See id.* at 1273–75 (describing the test's factors and its application in video game and non-video game California cases).

226. *See id.* at 1278 (noting that the court was bound to rule as it believed the California Supreme Court would).

227. *See id.* at 1277–78 (discussing the similarities between this case and *No Doubt*, including realistic settings, avatars doing what their respective celebrities do in real life, and avatars that look like the celebrities).

228. *See id.* at 1277 (distinguishing the "realistically portrayed" celebrities in this case and *No Doubt* from the fantastical character Ulala in *Kirby*).

229. *See id.* at 1278 (noting that the Ninth Circuit's conclusion aligned with that of the Third Circuit in *Hart*).

230. *See id.* at 1280 (explaining that the court's rejection of the *Rogers* test is consistent with *Hart*).

231. *Id.* at 1280–81.

232. *See id.* at 1281 (describing the plaintiffs' arguments and concluding that the *Rogers* test "is simply not responsive to Keller's asserted interests").

233. *See id.* at 1281–82 (explaining that the only circuit to use the *Rogers* test in a right of publicity case was the Sixth Circuit in *Parks* but that the Sixth Circuit later declined to apply the test in another right of publicity decision).

234. *Id.* at 1284.

235. *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 171 (3d Cir. 2013) (Ambro, J.,

proper inquiry is whether the video game as a whole—not an individual avatar—is transformative.<sup>236</sup> The opinions identify the many creative and transformative elements elsewhere in the *NCAA Football* games.<sup>237</sup> The dissenting judges also distinguish these cases from prior right of publicity cases in the video game context by noting the *NCAA Football* games’ high number of avatars,<sup>238</sup> use of “publicly available data,”<sup>239</sup> and ability for users to alter avatars.<sup>240</sup>

#### IV. Scholars’ Suggested Alternatives to Current Tests

Scholars recognize that multiple, inconsistently applied tests create major problems.<sup>241</sup> They have suggested numerous alternatives for remedying issues with the right of publicity as a whole.<sup>242</sup> Two scholars have proposed new tests specifically for the video game context, although no court deciding a major case has seriously considered either of them.<sup>243</sup>

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dissenting) (disagreeing with the majority opinion’s “interpretation and application” of the transformative use test); *In re NCAA Student–Athlete Name & Likeness Licensing Litig. (Keller)*, 724 F.3d 1268, 1284 (9th Cir. 2013) (Thomas, J., dissenting) (asserting that the transformative use test’s balancing favors Electronic Arts’ First Amendment freedoms).

236. See *Hart*, 717 F.3d at 171 (“I believe it is necessary to review the likeness in the context of the work in its entirety, rather than focusing on the individual’s likeness.”); *Keller*, 724 F.3d at 1285 (asserting the need to evaluate the game as a whole).

237. See *Hart*, 717 F.3d at 175 (describing the game series’s creative elements including “original graphics, videos, sound effects, and game scenarios”); *Keller*, 724 F.3d at 1271–72 (identifying creative elements such as the ability to create new players and the multiple game modes).

238. See *Keller*, 724 F.3d at 1287 (contrasting the high number of football players in the *NCAA Football* games to the relatively low number of band members in *No Doubt’s Band Hero*).

239. *Id.* at 1288.

240. See *Hart*, 717 F.3d at 175 (arguing that the ability to alter avatars “furthers the game’s transformative interactivity”).

241. See *supra* notes 25–27 and accompanying text (explaining that scholars are aware of the need for uniform application of a single test).

242. See, e.g., Adkins, *supra* note 82, at 502 (advocating for a “Uniform Right of Publicity Act”); Smedley, *supra* note 85, at 471–72 (proposing a new spin on the transformative use test to remedy inconsistencies in right of publicity cases generally).

243. See *supra* Part III.B (explaining the tests that courts have used and

Brittany Adkins suggests a uniform right of publicity act that would govern the right of publicity as a whole.<sup>244</sup> Adkins articulates four benefits of a uniform act that would apply in the right of publicity arena: (1) enabling businesses to operate interstate, (2) simplifying the law for individuals who frequently travel between states, (3) cutting the costs of doing business through “simplif[ied] transactions,” and (4) reducing forum shopping.<sup>245</sup> Adkins’s uniform act would include “an expansive scope of rights” that are “both freely assignable and freely descendible” and would include provisions on the available remedies.<sup>246</sup> Although her suggestion has substantial merit,<sup>247</sup> it ignores the significance of the substantial variation among the laws enacted by various states.<sup>248</sup> The states that recognize a right of publicity have defined this right according to their policy decisions, making it unlikely that these states will choose to abandon their traditional laws for a new act that combines snippets of various states’ laws.<sup>249</sup>

Other scholars advocate for a federal right of publicity.<sup>250</sup> Alex Wyman argues that “the need for consistent federal treatment of [the right of publicity] is more urgent than ever

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considered in right of publicity cases in the video game context).

244. See Adkins, *supra* note 82, at 502 (asserting that the “confused and convoluted litigation” spawning from the current state-specific system mandates a uniform act).

245. *Id.* at 525.

246. *Id.* at 530, 534, 542. Although these are the primary features of Adkins’s suggestion, the proposal includes numerous specific provisions, definitions, and intricacies that Adkins borrows from the California, Indiana, and Tennessee right of publicity statutes. See *id.* at 528–45 (explaining precisely what Adkins’s uniform act would include and the importance of each provision).

247. See *id.* at 527 (explaining that a uniform act would offer “protection of federalism, . . . conservation of state legislative resources, . . . and the benefit of learning from the experience of other states”).

248. See *supra* Part II.D (describing the differences among a small sampling of state right of publicity statutes).

249. See Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811, 854–55 (1991) (noting the importance of public policy in the creation of state law and warning federal courts against forcing policy decisions on states).

250. See Bahlert, *supra* note 24, at 154 (explaining that the right of publicity’s variation among states “has led many to call for a federal right of publicity statute”).

before.”<sup>251</sup> Susannah Rooney suggests using the Lanham Act,<sup>252</sup> which governs federal trademark law, to administer the right of publicity.<sup>253</sup> She argues that Congress has authority to regulate the right of publicity under the Commerce Clause and that it would be a “logical step” for the federal government to standardize the right of publicity because it already regulates other intellectual property rights.<sup>254</sup> Rooney proposes that the Lanham Act approach would have three major benefits, similar to those envisioned by Adkins.<sup>255</sup> She believes her proposal would reduce forum shopping,<sup>256</sup> carve back some states’ expansive laws that protect “minute elements of a person’s identity,”<sup>257</sup> and better protect First Amendment rights.<sup>258</sup> Wyman expressly rejects Rooney’s suggestion, reasoning instead that the Lanham Act would be an “inadequate federal approach” for evaluating the right of publicity.<sup>259</sup>

Sean Whaley also advocates for a federal right of publicity, albeit not specifically under the Lanham Act as Rooney

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251. Wyman, *supra* note 25, at 173. He asserts that “we need a federal right of publicity not just to clarify the mess of laws on the subject, but also to restrain the right to prevent it from impinging on our constitutional rights any further.” *Id.* at 175.

252. 15 U.S.C. §§ 1051–1114n (2012); see Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1309–13 (2011) (describing the history behind false advertising claims under the Lanham Act).

253. See Rooney, *supra* note 27, at 924 (proposing that this change is necessary in light of new technology and inconsistent and unpredictable application of state laws).

254. See *id.* at 945–46 (explaining the expansive scope of Congress’s Commerce Clause power and describing the similarities between the right of publicity and copyright, patent, and trademark law).

255. See *id.* at 924 (introducing these benefits as the principle reasons for regulating the right of publicity under the Lanham Act).

256. See *id.* at 934 (explaining that inconsistent domicile rules in states’ right of publicity laws leave forum shopping “uncorrected”).

257. *Id.* at 924.

258. See *id.* at 944 (contending that Rooney’s suggestion would allow Congress to protect the First Amendment by limiting the right of publicity).

259. See Wyman, *supra* note 25, at 171. Wyman rejects using the Lanham Act to evaluate right of publicity claims because many federal courts of appeals have already rejected using it and because the right of publicity and the Lanham Act “address very distinct problems.” *Id.* at 171–72.



suggests.<sup>260</sup> Like Rooney, however, Whaley recognizes that the federal government currently regulates other intellectual property rights.<sup>261</sup> Whaley also asserts that a federal right of publicity would advance both the right of publicity's economic incentive to make a name for oneself and the moral right to develop one's identity.<sup>262</sup> Finally, he argues that federal regulation would reduce administrative costs and forum shopping.<sup>263</sup>

Although their policy considerations are laudable, Rooney's and Whaley's suggested alternatives are flawed for two reasons. First, the right of publicity needs to remain with states because many individuals are well-known in some states but not in other states.<sup>264</sup> A federal test would not account for different levels of familiarity to the same degree that the readily identifiable standard will.<sup>265</sup>

Second, a federal right of publicity would encroach on state sovereignty.<sup>266</sup> Under states' police powers, each state has the authority to regulate the morality of its citizens.<sup>267</sup> Even Whaley concedes that moral rights are "an important foundation of

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260. See Whaley, *supra* note 70, at 259–60 (introducing Whaley's proposed federal right of publicity).

261. See *id.* at 260 (explaining that the right of publicity, like the federally regulated trademark and unfair competition laws, "protect[s] the value of certain intangible property used in commerce").

262. See *id.* at 261–65 (discussing economic and moral justifications for a federal right of publicity).

263. See *id.* at 266–67 (articulating the public policy advantages of a federal right of publicity).

264. See *infra* note 372 and accompanying text (introducing the concept of "regionally known personas").

265. See Rooney, *supra* note 27, at 950–55 (explaining the specifics of Rooney's proposal, which does not account for differing levels of familiarity with the celebrity); *infra* note 332 and accompanying text (explaining that the readily identifiable standard applies from the perspective of someone familiar with the individual in question).

266. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (explaining that the framers crafted state sovereignty, an essential element of a federalist system, to ensure that "the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed").

267. See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (explaining that morality, along with public health and safety and other areas of regulation, fall within states' traditional police powers).

publicity rights.”<sup>268</sup> The right of publicity is a moral right because a company can violate it by using a celebrity’s likeness in conjunction with a product that the celebrity views as morally objectionable.<sup>269</sup> Alternatively, a person may morally object to any appropriation of her likeness.<sup>270</sup> A federal right of publicity would place the power to regulate this moral right with the federal government and thereby violate a foundational principle of the United States’ federalist system.<sup>271</sup> Nineteen states do not recognize the right of publicity under either a statute or the common law.<sup>272</sup> A federal right of publicity law would force a moral law on these states that their democratically elected state legislatures have declined to adopt themselves.<sup>273</sup>

Joseph Gutmann has suggested an alternative to existing tests for the video game context.<sup>274</sup> Using the lower court *Hart* and *Keller* opinions as a springboard, Gutmann advocates for a “redefined transformative test” that will be “simpler and better equipped to deal with . . . increased litigation” in the booming video game industry.<sup>275</sup> The core of the redefined transformative

268. Whaley, *supra* note 70, at 271. Admittedly, Rooney disagrees. She argues that the elements of an individual’s “commercial value,” which the right of publicity protects, do not “fit[] neatly into an inherent moral right.” Rooney, *supra* note 27, at 927.

269. See KWALL, *supra* note 47, at 122–23 (explaining the multiple forms of moral objections that the right of publicity guards against).

270. See *id.* at 123 (listing examples of this type of general moral objection).

271. See Usha Rodrigues, Note, *Race to the Stars: A Federalism Argument for Leaving the Right of Publicity in the Hands of the States*, 87 VA. L. REV. 1201, 1211 (2001) (noting the “elementary proposition” that the right of publicity falls under the rights governed by state law in a federalist society).

272. See *supra* notes 83–84 (listing the nineteen states that have right of publicity statutes and the twelve that recognize the right under common law).

273. See Rodrigues, *supra* note 271, at 1212 (arguing that a federal right of publicity would be “premature” until states reach more of a consensus on how much protection a right of publicity should confer). Rodrigues warns that adopting a federal right of publicity at this stage of the right’s development could result in “a model of persona protection that might cement into an unwieldy and oppressive regime.” *Id.* at 1227.

274. See Gutmann, *supra* note 25, at 217 (introducing his test and the need for it).

275. *Id.* at 227. Gutmann emphasizes the increasing popularity of video games within unexpected demographics. He cites a 2011 study that provides that video and computer games are played in 72% of American households, that 29% of video game players are over 50, and that 33% of video game players report gaming as their favorite computer activity. *Id.* at 226–27.

test is distinguishing video games that place characters in an “altered reality” from those that feature avatars in an “imitation of life.”<sup>276</sup> A video game is in the altered reality category and is thus transformative “[e]ven if the likeness has similarities to an actual person, as long as the intention is for the likeness’[s] path in the game to be open to different scenarios from the ones present in the person’s life.”<sup>277</sup> Gutmann cites *Kirby* as the “baseline” case in this category.<sup>278</sup>

A game is an imitation of life and thus not sufficiently transformative if “the likeness’s intended path in the game . . . match[es] the path taken by the actual person in his or her life.”<sup>279</sup> Gutmann extensively describes what factors courts should consider in making the classification, including the video game character’s environment and the “changeability” of avatars.<sup>280</sup> He reasons that the changeability feature in *Hart* and *Keller* weighs toward altered reality classification, but concludes that the clear similarities between the games and reality put the *NCAA Football* games in the imitation of life category.<sup>281</sup>

Gutmann’s work is commendable for its attempt to establish a standard that, if adopted, would help video game companies predict the outcome of litigation and would help courts reach consistent results.<sup>282</sup> Gutmann’s suggestion also takes a step in the right direction by ignoring interactivity in determining

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276. *Id.* at 227.

277. *Id.* at 228.

278. *See id.* at 229 (explaining that *Kirby* fits within the altered reality category because Ulala “was given a new environment, new characteristics[,] and a new profession”).

279. *Id.* at 231. Gutmann argues that no major case involves a clear imitation of life video game. *Id.* at 233. He asserts, however, that *Hilton v. Hallmark Cards*, 580 F.3d 874 (9th Cir. 2009), is a good non-video game illustration because it considered a greeting card that featured a photo of Paris Hilton doing exactly what she did on her television show *The Simple Life*. *Id.*

280. *See id.* at 228–38 (describing the altered reality and imitation of life categories in detail and using *No Doubt* to demonstrate how courts should apply the redefined transformative test).

281. *See id.* at 230–31 (evaluating the classification of *Hart* and *Keller* under the redefined transformative test).

282. *See id.* at 248 (explaining that Gutmann intended to resolve inconsistent opinions by creating a test that is “fair, easily applicable, and faithful to the ideas upon which [*Comedy III*’s transformative use test] was based”).

whether a video game violates the right of publicity.<sup>283</sup> But his redefined transformative test has several serious flaws. First, the test’s changeability suggestion evades logic. Gutmann asserts that the user’s ability to alter characters makes a game transformative, but the Third Circuit observed in *Hart* that this feature, standing alone, cannot give a video game First Amendment protection.<sup>284</sup> Instead, courts must evaluate video games in their default form.<sup>285</sup> Second, the redefined transformative test’s use of a video game producer’s intent as an “integral piece”<sup>286</sup> would be difficult to prove and thus contradicts Gutmann’s purpose of simplifying litigation.<sup>287</sup> Third, it is possible to have a single game that has various game modes, some of which qualify as altered reality and others of which qualify as imitation of life.<sup>288</sup> For example, the *Hart* and *Keller* courts noted that the *NCAA Football* games include the primary single game mode as well as a dynasty mode in which the user acts as a team’s coach.<sup>289</sup> Gutmann would classify the former game mode as an imitation of life but the latter as an altered

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283. See *id.* at 228 (explaining that the redefined transformative test would not consider interactivity). Gutmann’s reasoning on this point is straightforward and logical: “The fact that a user can control a character is not relevant, because control alone does not make any change to the work. It is the way that the character can be used, and whether such manner of use diverts from reality, that is key.” *Id.*

284. See *supra* note 216 and accompanying text (explaining that transformative elements beyond changeability are necessary to pass the transformative use test).

285. See *infra* Part V.B (explaining that evaluation in the default form is necessary to avoid giving video game companies an easy route around right of publicity liability).

286. Gutmann, *supra* note 25, at 235.

287. See D. Don Welch, *Removing Discriminatory Barriers: Basing Discriminatory Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 773–75 (1987) (outlining why it is so difficult for courts to determine intent).

288. See Mary Catherine Moore, Note, *There is No “T” in NCAA: Why College Sports Video Games Do Not Violate College Athletes’ Rights of Publicity Such to Entitle Them to Compensation for Use of Their Likenesses*, 18 J. INTELL. PROP. L. 269, 289 (2010) (recognizing the mix of realistic and fantasy game modes in video games).

289. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 175 (3d Cir. 2013) (outlining the various game modes); *In re NCAA Student–Athlete Name & Likeness Licensing Litig. (Keller)*, 724 F.3d 1268, 1271–72 (9th Cir. 2013) (same).

reality.<sup>290</sup> His redefined transformative test does not address how courts should categorize such games.<sup>291</sup>

Finally, Charles Bahlert has proposed the “reality-mimicking predominant use test,” which is essentially a hybrid of the transformative use and predominant use tests.<sup>292</sup> Bahlert’s test would instruct courts to consider six factors in evaluating video games:

- (1) The purpose and character of the use;
- (2) [e]vidence of intent;
- (3) [w]hether the use contains the actual name or likeness of the person versus more generalized indicia of identity;
- (4) [e]xtent of appropriation;
- (5) [e]xtent to which the person is distinctive or famous; [and]
- (6) [the d]efendant’s prior dealings in same or similar circumstances.<sup>293</sup>

Bahlert argues that considering intent is necessary to protect the right of publicity’s policy justifications.<sup>294</sup> But, as explained below, considering intent is extremely subjective.<sup>295</sup> Bahlert’s Brennan-like pragmatic approach thus muddies the transformative use test’s waters.

#### V. A Better Alternative: The Readily Identifiable Standard

This Part addresses the need for a workable solution by proposing the readily identifiable standard. Subpart A explains what an effective test must do, in part by highlighting the three existing tests’ flaws. Subpart B outlines in detail the specifics of the readily identifiable standard, including which of a game’s elements the test will and will not consider. Subpart B also explains how the new test aligns with public policy and how it

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290. See *supra* notes 277–279 and accompanying text (defining the imitation of life and altered reality categories).

291. See Gutmann, *supra* note 25, at 227 (explaining that Gutmann’s test is a “[m]ethod of delineation” that depends on a clear classification for each video game).

292. See Bahlert, *supra* note 24, at 166 (explaining that Bahlert’s test “expand[s] the [t]ransformative [u]se [t]est to include a defendant’s underlying purpose in using a person’s likeness”).

293. *Id.* at 167.

294. See *id.* (discussing these justifications).

295. See *infra* notes 359–364 and accompanying text (explaining why the readily identifiable standard will ignore a video game producer’s intent).

differs from the transformative use test. Subpart C applies the readily identifiable standard to the cases discussed in Part III.B.

### A. Goals in Crafting a New Test

It is easiest to illustrate what an effective test for analyzing right of publicity claims in the video game context must do by first examining and rehashing why the existing alternatives are problematic.<sup>296</sup> The three existing alternatives all include aspects of what the proper test needs to do but each unfortunately lacks other necessary traits.<sup>297</sup>

The *Rogers* test, as applied in the video game context, has several defects. First, the Second Circuit designed it to apply specifically to celebrities’ names in titles, not to video games or even to celebrities’ images.<sup>298</sup> This Note does not intend to imply that courts should not apply the *Rogers* test outside of the movie title context. Courts have admittedly applied the test consistently and sensibly in Lanham Act claims.<sup>299</sup> But the Third Circuit noted in *Hart* that the significant differences between the right of publicity and trademark law necessitate a different test for each.<sup>300</sup> Second, the *Rogers* test is inappropriate for the right of publicity in the video game context because most video game cases involve a celebrity’s image.<sup>301</sup> It is much harder for a court

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296. See ALEXANDER LOWEN, *BIOENERGETICS* 30 (1994) (“No one is exempt from the rule that learning occurs through recognition of error.”).

297. See, e.g., Garon, *supra* note 145, at 505–06 (arguing that “[t]he Missouri predominant use test goes too far in requiring a direct reference to the particular celebrity as a prerequisite to protecting free expression interests” while “California[’s transformative use test] goes too far in excluding the market effect from publicity fair use analysis”).

298. See *supra* note 112 and accompanying text (explaining that the Second Circuit limited its holding in *Rogers* to movie titles).

299. See *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1243 (9th Cir. 2013) (explaining that the *Rogers* test is appropriate for evaluating Lanham Act claims because it properly evaluates artistic relevance); *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099–1100 (9th Cir. 2008) (same).

300. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 158 (3d Cir. 2013) (“[T]he right of publicity is broader [than trademark protections] and, by extension, protects a greater swath of property interests. Thus, it would be unwise for us to adopt a test that hews so closely to traditional trademark principles.”).

301. See *supra* note 172 and accompanying text (explaining that the claims in all of Part III.B’s cases other than *Romantics* related to depictions of the

to determine whether a celebrity's image is wholly unrelated to a video game's content than it is to decide whether there is a sufficient link between a movie's title and content.<sup>302</sup> Third, the test "does not adequately account for the right's strong policy rationales of rewarding moral rights and labor and preventing unjust enrichment" because it "favor[s] the First Amendment over the right of publicity in nearly every expressive scenario."<sup>303</sup> Finally, it "fails to account for evidence of bad faith to commercially exploit a persona."<sup>304</sup>

The predominant use test's fatal flaw is its inherently subjective nature.<sup>305</sup> The *Hart* court accurately concluded that the test is "subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics."<sup>306</sup> The predominant use test also gives too much weight to the First Amendment. A video game company is unlikely to appropriate an individual's likeness for the sheer purpose of doing so; rather, a company would do so for financial gain.<sup>307</sup> But the predominant use test will protect all video games

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celebrities' images).

302. See 2 J. THOMAS MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 10:31 (4th ed. 1996) (asserting that the *Rogers* test is even inappropriate for the movie title context because it requires courts to make subjective judgments).

303. Bahlert, *supra* note 24, at 158. Bahlert acknowledges that the *Rogers* test succeeds at being a "bright-line test," but he criticizes its "extremely low requirements." *Id.* Gutmann suggests that this shortcoming makes the *Rogers* test "unfaithful to the original principles of the right of publicity." Gutmann, *supra* note 25, at 220.

304. Bahlert, *supra* note 24, at 158.

305. See Gutmann, *supra* note 25, at 221 (explaining that the predominant use test is not a viable alternative because it "does not provide any guidance for determining what 'predominant' means"); Simcox, *supra* note 101, at 106–07 (criticizing the subjective inquiry that the predominant use test requires and arguing that such analysis is especially dangerous "in cases involving the determination of the aesthetic or creative merit of expression"); Smedley, *supra* note 85, at 464 (noting that "recent courts have rejected [the predominant use test] on the basis that its results are too subjective and focus too much on the intended use of the celebrity's likeness rather than focusing on the work itself"); Recent Case, *supra* note 75, at 1218–19 (arguing that applying the predominant use test "inescapably requires judges to engage in the dubious task of making aesthetic judgments about creative works").

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

307. See Pamela Lynn Kunath, Note and Comment, *Lights, Camera, Animate! The Right of Publicity's Effect on Computer-Animated Celebrities*, 29 LOY. L.A. L. REV. 863, 886–87 (1996) (explaining that appropriation of a

without that main intention, regardless of whether the game has an incidental effect of commercial exploitation.<sup>308</sup>

The transformative use test is the most workable of the three tests, in large part because it can be summarized in a single sentence.<sup>309</sup> Like the predominant use test, however, the transformative use test is “vague and unpredictable, as it depends wholly on whether the judge deems a work of art to have sufficient ‘creative contribution.’”<sup>310</sup> In other words, the test is subjective and difficult to apply consistently as the contradicting district court rulings in *Hart* and *Keller* highlight.<sup>311</sup> The inconsistencies promise to become more frequent as video game technology advances because this innovation will force more courts to select and apply a test.<sup>312</sup>

The transformative use test also disregards “commercial components” and instead considers solely expression.<sup>313</sup> This approach creates two problems. First, as the *TCI Cablevision* court explained, ignoring commercial aspects allows a video game producer to avoid liability for intentionally appropriating a

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celebrity’s likeness is motivated by commercial purposes).

308. See Gutmann, *supra* note 25, at 221 n.47 (insisting that this permissive standard contradicts *Zacchini’s* “fundamental protective principle” that a famous person has a right to protect the fruits of his labor). Bahlert suggests that the “[t]est’s focus on a defendant’s commercial purpose is arguably ‘dangerous.’” Bahlert, *supra* note 24, at 160.

309. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001) (describing the transformative use test as “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”).

310. Wyman, *supra* note 25, at 174. Wyman goes on to explain that “instead of helping define the First Amendment’s boundaries, this recent and increasing application of the transformative use test only blurs the lines.” *Id.* at 175.

311. See Bahlert, *supra* note 24, at 165 (“Due in part to its subjectivity, the [t]ransformative [u]se [t]est inevitably leads to unpredictable results. The district court holdings in *Keller* and *Hart* support this phenomenon. Two judges, examining virtually identical facts, reached opposite conclusions.”); *supra* note 26 (explaining that these distinct outcomes necessitate a more workable test).

312. See Gutmann, *supra* note 25, at 222 (“[Some cases] present significant problems when it comes to interpreting the [transformative use] test in light of this relatively new technology. . . . As the technology advances, issues . . . will only increase and the murky zone of video games will only get murkier.”).

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



celebrity's likeness.<sup>314</sup> Second, “[f]ocusing on expression forces judges to make subjective decisions, which means the application of the test results in conflicting and unpredictable outcomes.”<sup>315</sup> Accordingly, Kyle Simcox argues that the transformative use test is “outdated” because it “fails to recognize the modern realities of video games.”<sup>316</sup> He reasons that the process of creating video games is inherently creative, and a test that considers whether a game sufficiently transforms individuals’ likenesses is thus unusable.<sup>317</sup>

A workable test needs to include considerations and components that correct the current tests’ imperfections. First, the test must apply specifically to the video game context.<sup>318</sup> Proper balancing of the right of publicity and the First Amendment depends on the specific medium that allegedly violates an individual’s right of publicity.<sup>319</sup> The same test is thus not appropriate for evaluating a right of publicity claim based on a celebrity’s image in electronic entertainment and a right of publicity claim based on a movie or book title.<sup>320</sup> This necessarily

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314. See *id.* (rejecting the transformative use test for this reason); accord Garon, *supra* note 145, at 500 (arguing that the transformative use test “may allow for much greater exploitation of an actor or athlete’s identity than ha[s] been historically permitted” because the test “does not take the commercial nature of the use into account”).

315. Bahlert, *supra* note 24, at 151.

316. Simcox, *supra* note 101, at 119.

317. See *id.* (describing the transformative process of video game creation that companies design to give users a fantasy experience).

318. See Erika T. Olander, Comment, *Stop the Presses! First Amendment Limitations of Professional Athletes’ Publicity Rights*, 12 MARQ. SPORTS L. REV. 885, 898 (2002) (asserting that whether the First Amendment protects commercial use of a celebrity’s identity is “context-specific”).

319. See Bucher, *supra* note 26, at 2 (“[T]hough the balancing of right of publicity and First Amendment interests may seem straightforward to some, the context in which an individual claims that his right of publicity has been infringed changes the analysis.”); Wyman, *supra* note 25, at 174 (arguing that “these cases exponentially increase the chances that filmmakers, videogame creators, biographers, journalists and others will choose to censor themselves rather than risk liability from the nebulous right of publicity laws” and that “this self-censorship . . . is causing the right of publicity to infringe on First Amendment rights”).

320. See *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1015–16 (3d Cir. 2008) (declining to apply the *Rogers* test to a right of publicity claim about a video game’s promotional video because the other circuits had applied it only in the context of book and movie titles, other than once regarding a book cover and

eliminates the possibility of adopting a test from another context as the *Romantics* and *TCI Cablevision* courts did.<sup>321</sup>

Second, an effective standard must be capable of consistent application.<sup>322</sup> A body of cases that consistently apply the same test will establish expectations that video game companies can rely on in creating new games.<sup>323</sup> If companies have a better idea of when a game will violate someone’s right of publicity, logic dictates that the companies will not cross that line.<sup>324</sup> As a result, fewer video games will violate celebrities’ rights of publicity, and litigation will decrease.

Third, the test must account for consumer expectations only to the degree necessary in the video game context and thus allot the appropriate amount of First Amendment protection.<sup>325</sup> There is a high risk of consumer confusion in video games.<sup>326</sup> The “commercialized nature of celebrity endorsements” is responsible for this frequent confusion.<sup>327</sup> But, as Jon Garon observes, the possibility of consumer confusion provides little incentive to reduce video game producers’ First Amendment rights because “audiences are not harmed by the confusion” in video games.<sup>328</sup>

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once regarding a painting). In the case *Facenda* references in which the Sixth Circuit adopted the *Rogers* test to evaluate a painting, the dissent notably argued that the majority should not have applied the *Rogers* test because previous courts limited their holdings to the context of titles. *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 944 (6th Cir. 2003) (Clay, J., dissenting).

321. See *Romantics v. Activision Publ’g, Inc.*, 574 F. Supp. 2d 758, 768–69 (E.D. Mich. 2008) (adopting the *Rogers* test in the video game context for the first time); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc) (borrowing the predominant use test from an article by Mark Lee).

322. See Andreas N. Andrews, Note and Comment, *Stop Copying Me: Rethinking Rights of Publicity Verses the First Amendment*, 32 TEMP. J. SCI. TECH. & ENVTL. L. 127, 129 (2013) (arguing that a single test is needed for “consistency and efficiency”).

323. See *id.* (insisting that a single test is needed to allow “video game companies . . . [to] tailor their artistic creations around a consistent application of the law”).

324. See Theodore C. Stamatakos, Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 480 (1990) (noting that “[t]he essence of deterrence is predictability”).

325. See Blanke, *supra* note 24, at 35, 44, 55–56 (illustrating the controversy surrounding video games’ First Amendment rights).

326. See *supra* note 80 and accompanying text (identifying this risk).

327. Garon, *supra* note 145, at 498.

328. *Id.*

Whereas a consumer is likely to buy or use a book, movie, or video game based on its name, a video game user will usually decide to play a game before ever seeing what its characters look like.<sup>329</sup> Consumer confusion is thus less important in the context of a video game's avatars than in the context of a title or a similar circumstance in which a consumer decides to buy or use a product based on appropriation of a celebrity's likeness. Video game avatars should thus receive more First Amendment protection than the titles and similar external components of a work.<sup>330</sup>

### *B. The Readily Identifiable Standard Explained*

This Note contends that a different test could better address these goals. By both necessity and design, the readily identifiable standard can be simplified in a single sentence:<sup>331</sup> A video game violates an individual's right of publicity if a person familiar with the individual would look at a video game character and know *immediately* that the character is *definitively* based on the real individual.<sup>332</sup> Conversely, a video game deserves First Amendment protection if the individual's likeness is not both immediately and definitively obvious. Although most right of publicity cases in the video game context deal with a celebrity's image,<sup>333</sup> the readily identifiable standard can also apply to a video game's other elements. For example, a video game will

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329. *See id.* (explaining that consumer confusion in video games does not affect users' choice to buy or play the game because "[t]he audience member's choice to read, watch, or play has already been made").

330. *See id.* (arguing that there should be an inverse relationship between the importance of consumer confusion and the amount of First Amendment deference given to creative works); *see also* Edelman, *supra* note 53, at 586 (arguing that "courts must recognize that the scales of justice point in favor of protecting college athletes' publicity rights in commercial video games").

331. *See supra* note 309 and accompanying text (noting the importance of simplicity in a test).

332. *See infra* note 340 and accompanying text (explaining that some courts have already been evaluating right of publicity claims from the perspective of someone familiar with the plaintiff).

333. *See supra* note 172 and accompanying text (noting that *Romantics* is an exception to this trend because it involves a right of publicity claim relating to sound).

violate a celebrity’s right of publicity if the celebrity’s song is immediately and definitively recognizable in the game.

The readily identifiable standard borrows the term “readily identifiable” from *Motschenbacher*, which used the phrase in describing how the plaintiff customized his race cars.<sup>334</sup> But the real source of the test is Judge Alarcon’s dissent in *White*.<sup>335</sup> Although he does not use the words “readily identifiable,” Judge Alarcon discusses both *Motschenbacher* and *Carson* at length and effectively applies the readily identifiable standard.<sup>336</sup> He ultimately concludes, “It is patently clear to anyone viewing the commercial advertisement that Vanna White was not being depicted. No reasonable juror could confuse a metal robot with Vanna White.”<sup>337</sup> Because it is not immediately and definitively clear that the advertisement is based on White’s image—particularly because the figure is a robot in the advertisement and because there are distinct differences between the picture’s background and the Wheel of Fortune game set<sup>338</sup>—Judge

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334. See *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 822 (9th Cir. 1974) (describing how the plaintiff used a “distinctive narrow white pinstripe” to make his cars “more readily identifiable”). The Sixth Circuit quoted the phrase in a discussion of *Motschenbacher* nearly a decade later. See *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 844 (6th Cir. 1983) (discussing *Motschenbacher* in determining whether a portable toilets company violated an entertainer’s right of publicity through use of his nickname in the corporation’s name).

335. See *supra* notes 125–127 (discussing Judge Alarcon’s dissent and his reasoning).

336. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1403–04 (9th Cir. 1992) (Alarcon, J., dissenting) (noting that there were many more similarities between the images and celebrities in *Motschenbacher* and *Carson* than in *White*).

337. *Id.* at 1404. In his dissent to the denial of the petition for rehearing en banc, Judge Kozinski echoed Judge Alarcon’s reasoning. See *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1519 (9th Cir. 1993) (en banc) (Kozinski, J., dissenting) (arguing that the majority went too far by “not allowing *any* means of reminding people of someone”). Although Judge Alarcon applies his standard from the perspective of “anyone,” his logic implies that the viewer would need some familiarity with Vanna White. His reasoning is thus consistent with the readily identifiable standard. See *supra* note 332 and accompanying text (clarifying that the readily identifiable standard applies from the position of a person who is familiar with the celebrity).

338. See *White*, 971 F.2d at 1405 (contending that the robot’s image is clearly distinct from White’s and asserting that “[t]he Wheel of Fortune set . . . is not an attribute of Vanna White’s identity”).

Alarcon's opinion is a great example of applying the readily identifiable standard.

Additional precedent supports the readily identifiable standard, although not necessarily its "immediately" and "definitively" language or its application in the video game context. In *Cohen v. Herbal Concepts, Inc.*,<sup>339</sup> a right of privacy case, the New York Court of Appeals concluded that a photograph violates an individual's right of privacy only if "someone familiar with the person[] in the photograph could identify them by looking at [it]."<sup>340</sup> The court explained that this determination requires a court to consider how clear the person's image is and any other features in the picture that help show whether it does or does not depict the individual.<sup>341</sup> It determined that the photograph of a nude mother and child was similar enough to the plaintiffs' images to justify the jury's determination.<sup>342</sup> The New York Supreme Court later applied the *Cohen* test in a right of publicity case.<sup>343</sup> The court concluded that the defendant, a baseball jersey manufacturer, violated New York Mets players' rights of publicity because someone familiar with the plaintiffs could identify their images on the jersey at issue.<sup>344</sup>

It is easiest to highlight the readily identifiable standard's intricacies by explaining what factors a court applying the test

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339. 472 N.E.2d 307 (N.Y. 1984).

340. *Id.* at 308; see also Eames, *supra* note 48, at 52 (citing *Cohen* in the process of explaining how courts resolve right of publicity issues involving non-celebrities). Many courts use this "someone familiar with" principle, which the readily identifiable standard adopts, to evaluate right of publicity claims. See, e.g., Cheatham v. Paisano Publ'ns, Inc., 891 F. Supp. 381, 387 (W.D. Ky. 1995) (explaining that the plaintiff's right of publicity claim hinged on whether "her friends and customers" could identify her from the photograph).

341. See *Cohen*, 472 N.E.2d at 309 (explaining that the result "will necessarily depend upon the court's determination of the quality and quantity of the identifiable characteristics displayed in the advertisement and . . . an assessment of the clarity of the photograph, the extent to which identifying features are visible, and the distinctiveness of those features").

342. See *id.* (noting similarities between the plaintiffs' physical features and those in the photograph and reasoning that the plaintiffs were more identifiable because they were together in the photograph).

343. See *Shamsky v. Garan, Inc.*, 632 N.Y.S.2d 930, 933–34 (1995) (citing *Cohen* and quoting its standard).

344. See *id.* at 934 (describing the similarities between the players and the image on the jersey and explaining that baseball fans, as persons familiar with the plaintiffs, could identify them from the jersey).

will and will not consider. In short, the standard will consider all of a video game’s features that can be seen and heard but will not consider nonobservable components that do not help determine whether an individual’s likeness is immediately and definitively identifiable. In the context of an individual’s image, for example, the readily identifiable standard will consider a game’s setting and an avatar’s surroundings. The game board scene in *White*, if the advertisement had been part of a video game, is a prime example of such a setting.<sup>345</sup> A court applying this test would have also considered the space-age setting of *Space Channel 5* in *Kirby*<sup>346</sup> and the impressively lifelike stadiums in *Hart* and *Keller* that are filled with countless realistic avatars.<sup>347</sup>

The readily identifiable standard will also consider an avatar’s unique characteristics because these aid in the decision of whether an avatar is immediately and definitively based on a right of publicity plaintiff. For example, the height, weight, and biographical information given in the *NCAA Football* games helps show what athlete an avatar is based on, even in the absence of a name.<sup>348</sup> If the *White* advertisement were in a video game, a court applying the readily identifiable standard would consider the robot’s dress and jewelry that resembled those that White wore in real life.<sup>349</sup>

Finally, this new test will consider the sounds made and actions taken by a video game’s avatars. A court applying the readily identifiable standard would thus consider what songs No Doubt sang in *Band Hero*, just as the court that applied the transformative use test did.<sup>350</sup> If Ginger Rogers were in a video

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345. See *supra* note 118 and accompanying text (explaining that the *White* court considered the game show scene).

346. See *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 59 (Cal. Ct. App. 2006) (describing how the game is set in the 2400s).

347. See *In re NCAA Student–Athlete Name & Likeness Licensing Litig. (Keller)*, 724 F.3d 1268, 1271 (9th Cir. 2013) (identifying the presence of “realistic virtual versions of actual stadiums” filled with “virtual athletes, coaches, cheerleaders, and fans”).

348. See *supra* note 197 (describing the similarities between characters in the *NCAA Football* games and the athletes in real life).

349. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (noting the similarity between the robot’s clothing and accessories and those of Vanna White).

350. See *No Doubt v. Activision Publ’g, Inc.*, 192 Cal. App. 4th 1018, 1034

game, a court applying the readily identifiable standard would consider her dancing style.<sup>351</sup> A court using this test would also consider a baseball player's batting stance, a celebrity's famous expressions, and an individual's tattoos<sup>352</sup> because these too factor into the immediately and definitively identifiable analysis.

The readily identifiable standard will not consider a video game's components that a user cannot observe. Examples include the ability to alter characters, settings, and other aspects of the game.<sup>353</sup> As the Third Circuit reasoned in *Hart*, changing a video game's avatar creates a new character.<sup>354</sup> Likewise, the readily identifiable standard will ignore interactivity—a user's ability to control an avatar and the avatar's activity.<sup>355</sup> Interactivity does not change the avatar's potential appropriation of an individual's likeness and is thus not appropriate for evaluating a right of publicity claim.<sup>356</sup> Considering either changeability or interactivity is also a problem because doing so would provide video game producers an easy avenue around right of publicity

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(Cal. Ct. App. 2011) (explaining that No Doubt in *Band Hero* sang songs that the real band maintained it would never have sung).

351. See *supra* note 105 and accompanying text (explaining that Rogers became famous for dancing with Fred Astaire in films).

352. Meredith Hatic argues that tattoos can be a large part of a person's likeness that the right of publicity must protect. See Meredith Hatic, Note, *Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 396, 420 (2012) (asserting that the right of publicity gives former NBA star Rasheed Wallace an interest to protect his image, which includes his tattoos).

353. See Bahlert, *supra* note 24, at 168 (“[T]he mere ability to change the virtual players' appearances should not . . . end the analysis where the intent of the game makers is to mimic reality.”).

354. See *supra* notes 219–220 and accompanying text (explaining the court's reasoning about minor and major alterations of video game characters). A video game user's creation of an avatar that closely resembles a famous person has no right of publicity consequences as the user will not profit from the celebrity's likeness. See Rodrigues, *supra* note 271, at 1202 (“The right of publicity is a property right in the *commercial use* of one's persona.” (emphasis added)).

355. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2767–77 (2011) (Breyer, J., dissenting) (explaining the interactive component of video games and arguing that interactivity distinguishes video games from movies and books).

356. See *supra* note 283 and accompanying text (explaining Gutmann's argument that courts should not consider the ability to control video game avatars in balancing the right of publicity and the First Amendment because it does not change the avatar).

liability.<sup>357</sup> The companies could simply incorporate these features into a game, which would be “merely a guise to escape liability.”<sup>358</sup> Courts must thus evaluate a video game in its default form and without giving any weight to interactivity or changeability.<sup>359</sup>

A video game producer’s intent is another component that users cannot observe and that courts applying the readily identifiable standard will not consider. In *Zacchini*, the Supreme Court of the United States rejected the Ohio Supreme Court’s right of publicity test that had considered intent.<sup>360</sup> Although the *TCI Cablevision* court argued that ignoring intent might allow video game companies to escape liability for intentional appropriation,<sup>361</sup> any depiction of an individual that does not violate that person’s right of publicity under the readily identifiable standard is not appropriation at all.<sup>362</sup> The new test thus avoids the problem *TCI Cablevision* anticipated.<sup>363</sup> Lastly, determining a video game producer’s intent is extremely difficult to discern<sup>364</sup> and may sometimes require a trier of fact to guess as to the producer’s intent.<sup>365</sup>

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357. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 167 (3d Cir. 2013) (explaining that it is dangerous to consider the ability to alter avatars in right of publicity cases).

358. *Parks v. LaFace Records*, 329 F.3d 437, 454 (6th Cir. 2003); see *Hart*, 717 F.3d at 167 (warning that changeability alone cannot give a video game First Amendment protection because this would “open[ ] the door to cynical abuse” as “video game companies could commit the most blatant acts of misappropriation only to absolve themselves by including a feature that allows users to modify the digital likenesses”).

359. See *supra* notes 284–285 and accompanying text (explaining the need for evaluation in the default form).

360. See *Zacchini v. Scripps–Howard Broad. Co.*, 433 U.S. 562, 565 (1977) (explaining that the Ohio Supreme Court incorrectly considered whether the television station intended to appropriate *Zacchini*’s likeness).

361. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc) (arguing that balancing the right of publicity and the First Amendment requires considering intent).

362. See *Bucher*, *supra* note 26, at 1–2 (explaining that appropriation requires using an individual’s identity to one’s own advantage).

363. See *supra* note 151 and accompanying text (explaining the *TCI Cablevision* court’s fear of willful commercial exploitation).

364. See *supra* note 287 and accompanying text (describing the challenging task of discerning intent).

365. See Gerald Gunther, *Learned Hand and the Origins of Modern First*



The readily identifiable standard advances the goals of a workable test discussed in Part V.A and other public policy concerns in three ways. First, the test allocates the proper amount of First Amendment protection.<sup>366</sup> The readily identifiable standard is strict by design.<sup>367</sup> As noted above, video game companies should receive significant First Amendment protection because there is a low risk that consumers will decide to use or buy a game based on how the game depicts celebrities.<sup>368</sup> Entertainment is one of the primary means of expression under the First Amendment, and celebrities are in the unique, and arguably unenviable, position of often being the subjects of this expression.<sup>369</sup> A balancing test, like the readily identifiable standard, that favors creativity is not intended to allow video game producers to exploit celebrities.<sup>370</sup> The test is, however, designed to protect the freedom of expression that “is fundamental in our society” in an arena where policy favors First Amendment protection.<sup>371</sup>

Second, the readily identifiable standard protects the average person who is equally entitled to a right of publicity if her state recognizes the right.<sup>372</sup> Noncelebrities, although not recognizable

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*Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 740 (1975) (warning of the “risks to speech if juries were permitted to punish on the basis of guesses about intent”).

366. See *supra* note 325 and accompanying text (advocating that a workable test must properly consider the First Amendment).

367. See KWALL, *supra* note 47, at 63 (asserting that the proper balance between the First Amendment and moral rights like the right of publicity requires “a ‘thumb on the scales’ in favor of free speech”).

368. See *supra* notes 328–330 and accompanying text (contending that the low risk of consumer confusion as compared with titles of works necessitates additional First Amendment protection for video games).

369. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 803 (Cal. 2001) (explaining that the way that people view celebrities can make “the creative appropriation of celebrity images . . . an important avenue of individual expression”).

370. See BLACK, *supra* note 70, at 119–20 (warning of the danger that would result from overexploitation of celebrities’ images).

371. *Id.* at 134.

372. See KWALL, *supra* note 47, at 129 (arguing that the right of publicity protects, “at a minimum the names and likenesses of every individual” because celebrities and non-celebrities alike can be identified by their names and likenesses). The fact that courts designed the right of publicity to protect celebrities, *supra* note 49, does not preclude the right from also protecting non-

on a national or international scale, have “regionally known personas.”<sup>373</sup> The readily identifiable standard protects these personas by applying specifically from the perspective of “a person familiar with the individual.”<sup>374</sup>

Finally, the readily identifiable standard gives video game companies a workable standard that they can rely on.<sup>375</sup> The answer to the question of whether an individual is immediately and definitively identifiable from an avatar is easier to predict than the answer to whether the work is sufficiently transformative or whether creative aspects of the game predominate.<sup>376</sup> And, significantly, protecting video game producers in this way will in turn protect celebrities. A video game company’s knowledge of what line it cannot cross protects celebrities because the fear of lawsuits will deter the company from crossing this line.<sup>377</sup>

*C. Applying the Readily Identifiable Standard to Existing Precedent*

This Note does not, in the absence of a complete factual record, purport to predict for certain how a court applying the readily identifiable standard would decide the cases outlined in Part III.B. Applying the test’s guidelines to these decisions can, nevertheless, help to clarify how a court would likely apply this

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celebrities. Ann Margaret Eames clarifies that celebrity status is not a requirement for bringing a right of publicity claim. *See Eames, supra* note 48, at 51 (explaining that the right of publicity presently protects celebrities and non-celebrities alike, although previous courts would have rejected a non-celebrity’s right of publicity action because “her image [was] fungible”).

373. KWALL, *supra* note 47, at 128.

374. *See supra* note 332 and accompanying text (explaining that the readily identifiable standard applies from this viewpoint).

375. *See supra* notes 323–324 and accompanying text (noting the need for a consistent standard that video game producers can put their faith in).

376. *See supra* notes 305–306, 311 (explaining that both the predominant use test and transformative use test are too subjective and difficult to apply consistently).

377. *See Holly Forsberg, Diminishing the Attractiveness of Trolling: The Impacts of Recent Judicial Activity on Non-Practicing Entities*, 12 U. PITT. J. TECH. L. & POL’Y 1, 7 (2011) (noting that the fear of possible litigation deters production in the intellectual property arena).

test and what factors a court would consider in analyzing these decisions.

The most significant factor in applying the readily identifiable standard to *Kirby*'s facts is the tremendous difference in appearance between Ulala and Kierin Kirby.<sup>378</sup> The *Kirby* court identified significant contrasts, including size, fashion style, and Ulala being an anime character.<sup>379</sup> Beyond these differences in appearance, the "futuristic setting"<sup>380</sup> weighs against Kirby.<sup>381</sup> Finally, the difference between Kirby's "Groove is in the Heart" and the music in *Space Channel 5* decreases the likelihood of associating Kirby with Ulala.<sup>382</sup> These differences make it probable that Kirby's likeness is not immediately and definitively identifiable from Ulala's image.

It is harder to analyze *Guitar Hero Encore: Rocks the 80s*, the game at issue in *Romantics*, because the court did not extensively compare the band's original song with the game's version.<sup>383</sup> *Romantics* also presents an unusual case because the game acknowledges that the song belongs to The Romantics.<sup>384</sup> The *Romantics* court notes that this gives users notice that The Romantics are not performing "What I Like About You" in the game.<sup>385</sup> This reasoning aligns with the readily identifiable standard because this disclaimer would make it less likely that a user would be able to immediately and definitively identify The Romantics from the band in the game.<sup>386</sup> Because the band did

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378. See *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 59–60 (Cal. Ct. App. 2006) (describing the differences in appearance).

379. See *id.* at 59 (explaining that Ulala and Kirby "differ quite a bit").

380. *Id.* at 51.

381. See *supra* note 346 and accompanying text (explaining that a court applying the readily identifiable standard would consider *Space Channel 5*'s setting).

382. See *Kirby*, 144 Cal. App. 4th at 51 (explaining that *Space Channel 5*'s theme song "Mexican Flyer," by Ken Woodman, is not associated with Kirby or her band Deee-Lite).

383. See *Romantics v. Activision Publ'g, Inc.*, 574 F. Supp. 2d 758, 765 (E.D. Mich. 2008) (noting that the band "presented no evidence that their sound is identifiable separate from the [s]ong").

384. See *id.* at 762 (noting that the game displays the words "as made famous by The Romantics").

385. See *id.* (asserting that this disclaimer "informs players and onlookers that The Romantics are not actually performing the [s]ong").

386. See *supra* note 332 and accompanying text (stressing the difficulty of

not point to any visual similarities between itself and the band in the game,<sup>387</sup> it is unlikely that the two were visually similar. Additionally, a court applying the readily identifiable standard would not consider the user’s ability to “customize [the] game play experience” as the *Romantics* court did.<sup>388</sup> The factors thus seem to weigh against The Romantics and toward First Amendment protection for the game, just as the court held under the predominant use test.<sup>389</sup>

*No Doubt* is an atypical case because the band members agreed to appear in the game before later alleging that Activision violated the licensing agreement.<sup>390</sup> Activision thus likely violated the plaintiffs’ rights of publicity under the readily identifiable standard if the band members were *not* immediately and definitively identifiable from their avatars.<sup>391</sup> Whether the avatars resembled the real band members was not an issue.<sup>392</sup> But a court applying the readily identifiable standard to these facts would still evaluate the game’s other elements.<sup>393</sup> For example, a court would consider that a *Band Hero* user can make No Doubt “perform at fanciful venues including outer space or to sing songs [that No Doubt] would object to singing” because these are observable features.<sup>394</sup> The readily identifiable standard would also consider, however, that the avatars performed solely rock songs just as No Doubt did in real life.<sup>395</sup> It makes no

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satisfying this test).

387. *See Romantics*, 574 F. Supp. 2d at 765 (clarifying that the plaintiffs’ claim related to sound).

388. *Id.* at 766.

389. *See id.* (concluding that the plaintiffs’ right of publicity claim failed).

390. *See No Doubt v. Activision Publ’g, Inc.*, 192 Cal. App. 4th 1018, 1022 (Cal. Ct. App. 2011) (explaining No Doubt’s claim that the video game publisher used the members’ likenesses in ways that violated the agreement).

391. *See supra* note 332 and accompanying text (clarifying that a court will normally apply the test by asking whether the plaintiff is immediately and definitively identifiable).

392. *See No Doubt*, 192 Cal. App. 4th at 1033 (noting that Activision acknowledged the intentional visual similarities).

393. *See supra* Part V.B (explaining that a court applying the readily identifiable standard would consider all of a game’s observable components).

394. *No Doubt*, 192 Cal. App. 4th at 1034.

395. *See id.* (observing that the game’s avatars do exactly what made No Doubt famous).

difference under the readily identifiable standard that the game does not permit users to change the avatars.<sup>396</sup> The band members would thus likely succeed under this test if the differences in setting, style, and song choice outweighed the visual resemblances to the extent that the plaintiffs were not immediately and definitively identifiable.

*Hart* and *Keller* are likely the easiest of these five cases under the readily identifiable standard. The *NCAA Football* games include many observable components that a court applying the test would consider.<sup>397</sup> First, visual similarities between the avatars and real athletes, supplemented by the biographical information, go a long way toward immediate and definitive identification.<sup>398</sup> Second, the games place avatars in the “very setting” that the real athletes appear.<sup>399</sup> Unlike the unrealistic venues in *No Doubt*, the *NCAA Football* games include few fictional elements.<sup>400</sup> Third, other recognizable avatars surround a player, which makes identification easier.<sup>401</sup>

Although the *NCAA Football* video games feature various game modes,<sup>402</sup> the readily identifiable standard evaluates a game in its default form.<sup>403</sup> In the *NCAA Football* series, this is

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396. See *id.* at 1033 (noting that *Band Hero* lacks a changeability feature); *supra* notes 357–358 and accompanying text (explaining why the readily identifiable standard does not consider changeability).

397. See *supra* Part III.B.4 (identifying many of the games’ observable contents).

398. See *supra* notes 1–9 and accompanying text (describing the realistic depictions of *Hart* and *Keller* in *NCAA Football 2005*); *supra* note 348 and accompanying text (explaining that the test would consider these features because they are easily observable).

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

400. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013) (distinguishing *Hart* from *No Doubt* by noting that “the various digitized sights and sounds in [*NCAA Football*] do not alter or transform [*Hart*’s] identity in a significant way”).

401. See *supra* note 342 (explaining that the *Cohen* court weighed the presence of other identifiable individuals in the plaintiffs’ favor).

402. See *supra* notes 201–202 and accompanying text (explaining two of the game modes).

403. See *supra* note 358–359 and accompanying text (rationalizing that evaluation in the default form averts the problem of video game companies avoiding liability by including a changeability feature).

the traditional single game mode.<sup>404</sup> The games’ changeability feature will not save Electronic Arts under the readily identifiable standard as it nearly did in *Hart*.<sup>405</sup> A court applying this test would thus likely reach the same result as the Third and Ninth Circuits did in *Hart* and *Keller* and reject Electronic Arts’ First Amendment defense.<sup>406</sup>

### VI. Conclusion

The right of publicity’s current direction in video game cases necessitates change. Courts have inconsistently, illogically, and unjustifiably applied the right of publicity in these cases. Current tests do not adequately consider the First Amendment, resulting in a group of video game cases that are somewhat consistent but are foundationally wrong. Scholars’ suggested adaptations to these tests represent modest improvements at best. Having a black and white test that courts can easily apply in the same way to all video games is the optimal situation. Such a test would obviate the need for any discussion on the issue and even for this Note itself. The fact-specific nature of each video game, however, unfortunately makes this ideal scenario impracticable.<sup>407</sup>

The readily identifiable standard is the next best thing. It is workable, predictable, and protects video game companies’ First Amendment rights. By considering video games’ observable features while ignoring their invisible characteristics like changeability and intent, the readily identifiable standard returns to what the *Haelan* court designed the right of publicity to protect. States need to adopt this test before the increasing

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404. See *Hart*, 717 F.3d at 146 (describing the other game modes as “additional game modes” that have each been part of a newer version of the game).

405. See *id.* at 166–69 (discussing the ability to alter avatars in detail after noting that Electronic Arts would have little, if any, defense if the games had no changeability feature).

406. See *id.* at 170 (concluding that the First Amendment did not protect the *NCAA Football* games); *In re NCAA Student–Athlete Name & Likeness Licensing Litig. (Keller)*, 724 F.3d 1268, 1284 (9th Cir. 2013) (same).

407. See Matthew J. Mitten, *A Triple Play for the Public Domain: Delaware Lottery to Motorola to C.B.C.*, 11 CHAP. L. REV. 569, 579 n.71 (2008) (noting that the right of publicity analysis in the video game context is particularly difficult because the balancing will be somewhat different in every case).

number of video games causes this problem to get out of hand. If states do adopt the readily identifiable standard, future courts will have a much easier time evaluating the next Kierin Kirby or Ryan Hart's right of publicity claim.