HELP! AN AVATAR STOLE MY RIGHT OF PUBLICITY

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Many video games use the likenesses of individuals to provide an element of realism to the games. This is especially true in video games in a sports setting. In games such as NCAA Football and NCAA Basketball, both developed and distributed by EA Sports, the players depicted are not paid for the use of their likenesses. Does the First Amendment protect game developers such as EA Sports from liability, or do these players have a right to compensation under the common law right of publicity? Is there a “fair use” exception, as normally used in intellectual property cases, that provides a better measure of these competing claims? The courts have not fully resolved these questions yet. We will discuss some of the cases that have been – or are being – heard to highlight the issues and to predict what may ultimately be determined.

I. THE ISSUES

The right of publicity is a common law or statutory right closely akin to intellectual property. This right is “the right of an individual, especially public figure or celebrity, to control commercial value of his name or picture or likeness or to prevent others from unfairly appropriating that value for their commercial benefit.”\(^1\) Unfortunately, this right is not recognized in every state, and there are significant differences among the states that do recognize the right. Only about half of the states recognize such a right, and in a number of these the right to publicity falls within the coverage of the right to privacy.\(^2\) In some of the other states the right is protected by laws against unfair competition.\(^3\) If neither of these protections is available to a person, he or she may still have rights under the Lanham Act, but only if his

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\(^1\) BLACK’S LAW DICTIONARY 1195 (6th ed. 1990).


\(^3\) Id.
or her identity can be established as a trademark,⁴ or the name or likeness is used to falsely advertise a product or designate its origin.⁵

The First Amendment to the U.S. Constitution provides for a number of fundamental rights, including the right to free speech. However, while freedom of speech is a fundamental right, it is not an absolute right. There are numerous restrictions on freedom of speech, such as restrictions on language that creates a clear and present danger, fighting words, and obscenity. Commercial speech is also protected, but its protections are less than the speech of individuals. Since freedom of speech is a fundamental right, the courts normally require a showing of a compelling state interest before upholding any restrictions on speech. Commercial speech is entitled to this same strict scrutiny analysis before a limitation on that speech will be upheld.

What happens when an individual alleges that his or her right to publicity has been infringed upon, but the alleged infringer asserts that it is protected by the First Amendment’s provision for freedom of speech? Does the right of publicity, a right under a state’s statutory enactment or its common law, permit a limitation on the fundamental federal right of freedom of speech? Should the fact that the individual is asserting a state right and the other party is asserting a federal right matter? These are some of the issues that the courts needed to address in several recent cases. While these cases are in the appellate courts now, the jury is still out – in a manner of speaking.

Electronic Arts, Inc. creates and develops video games. One of its brands is EA Sports, which has a line of video games that includes NCAA Football, NBA Live, and Madden NFL. The NCAA Football game is produced under a license with Collegiate Licensing Company (CLC), the licensing agent of the NCAA. The license gives EA Sports “the right to use member school names, team names, uniforms, logos, stadium fight songs, and other game elements.”⁶ However, EA does not license the likeness and identity rights of the intercollegiate players.⁷ In 2009, Ryan Hart, a former quarterback for Rutgers University, filed suit against Electronic Arts, alleging that EA had violated his right of publicity under New Jersey law. EA moved for summary judgment, asserting that its conduct was protected under the First Amendment.⁸ The District Court granted this motion and Hart appealed. The Third Circuit found that the District Court erred in granting the

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⁴ Id.
⁷ Id.
⁸ See Brown v. Entm’t Merchas. Ass’n, 131 S. Ct. 2729, 2733 (2011), in which the Supreme Court ruling that video game are protected as expressive speech under the First Amendment.
motion for summary judgment, and reversed and remanded the case for further proceedings consistent with its ruling.

In 2009, Sam Keller, formerly a quarterback for Arizona State University and then the University of Nebraska, filed suit against EA, asserting that it had violated his right of publicity by including his likeness in the NCAA Football game without his permission and without compensation. Once again, EA relied on the protection of the First Amendment (the court also denied the applicability of California’s anti-SLAPP statute). However, in this case the District Court held that EA was not entitled to protection under the First Amendment. Upon appeal the 9th Circuit upheld this ruling.

Ed O’Bannon played basketball for UCLA and later played in the NBA. Following his retirement from the NBA, O’Bannon decided to file suit on behalf of himself and former NCAA student-athletes against the NCAA, the CLC, and Electronic Arts, Inc. This case, In Re NCAA Student-Athletes Name & Likeness Licensing Litigation, was also filed in the Northern District of California. (After surviving a motion to dismiss, it was consolidated with Keller v. Electronic Arts.) O’Bannon is asserting that the defendants infringed upon the right of publicity of NCAA student-athletes by using their likenesses without any agreement from or compensation to the student-athletes. It also alleges that the defendants have violated the Sherman Antitrust Act.

We will examine each of the three cases, paying particular attention to their similarities. We will then look at the possible implications and repercussions that might ensue should these former student-athletes ultimately prevail in their cases. Before getting to these three cases, we need to discuss Zacchini v. Scripps-Howard Broadcasting Co., one of the first cases to address the conflict between a person’s right to publicity and the protection afforded by the First Amendment for freedom of expression.

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10 The California Anti-SLAPP statute, Code of Civil Procedure 425.16, is designed to protect the petition and free speech rights of Californians. It “provides for a special motion to strike a complaint where the complaint arises from activity exercising the rights of petition and free speech.” California Anti-SLAPP Project, California’s Anti-SLAPP Law and Related State Statutes, http://www.casp.net/california-anti-slapp-first-amendment-law-resources/statutes/ (last visited Jan. 8, 2014).
11 In re NCAA Student- Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013).
12 2013 U.S. Dist. LEXIS 160739 (N.D.Cal., 2013).
A. Zacchini v. Scripps-Howard Broadcasting Co.

The Zacchini case is the only U.S. Supreme Court opinion addressing a conflict between the First Amendment and an individual’s right of publicity. In this case an Ohio television news program recorded and then broadcast the “human cannonball” act of Mr. Zacchini at a county fair. The film clip ran approximately 15 seconds, and it was aired on the evening news. Zacchini sued under Ohio law, alleging that the station had violated his right of publicity under Ohio law. Scripps-Howard defended by asserting its First Amendment rights, in particular arguing that it had the right to air the recording since it was “news.” Zacchini stated that he was an entertainer, that his act was developed by his father, and that only members of his family had performed the act for the last fifty years. He alleged that taping and broadcasting his act without his permission was “an unlawful appropriation of [his] professional property.” Scripps-Howard moved for summary judgment, which was granted by the trial court.

The Ohio Court of Appeals reversed, determining that Zacchini had stated a cause of action for conversion and for infringement of a common law copyright. The judges also agreed that the First Amendment did not protect the station when it broadcast the entire act without permission of the actor. The Ohio Supreme Court agreed in theory with the appellate court, yet it ruled in favor of Scripps-Howard, noting in its syllabus of the case:

A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual’s right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.

The U.S. Supreme Court reversed, finding that the right of publicity is “analogous to the goals of patent and copyright law,” since these areas protect an individual’s right to “reap the reward of his endeavors.” The Court found that Scripps-Howard had “appropriated the very activity by which the entertainer acquired his reputation in the first place.” As a result, the court held:

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14 Mr. Zacchini had noticed a person (a free-lance reporter) the previous evening and asked him not to film the performance. The reporter agreed, but returned the following evening at the request of the station manager and recorded the performance for the station.
15 47 Ohio St. 2d 224, 351 N.E. 2d 454, 455 (Ohio 1976).
16 Zacchini, supra note 13, at 573.
17 Id. at 576.
Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner….18

Following the Zacchini opinion, courts began to develop different balancing tests in deciding conflicts between the First Amendment and the right of publicity. According to the Hart court, “three tests are of particular note: the commercial-interest based Predominant Use Test, the trademark-based Rogers19 Test, and the copyright-based Transformative Use Test.”20

II. THE BALANCING TESTS

A. The Predominant Use Test

This test was first applied in Doe v. TCI Cablevision, a case in which a hockey player, Anthony (Tony) Twist, sued a number of persons involved in producing the Spawn comic books for their use of a villain called Anthony “Tony Twist” Twistelli. Twist asserted that the character infringed on his right to use his name and identity. The Supreme Court of Missouri rejected the other tests, noting that they gave “too little consideration to the fact that many uses of a person’s name and identity have both expressive and commercial components.”21 Instead, it chose to use what it called a “sort of” predominant use test:

If a product is being sold that predominantly exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some ‘expressive’ content in it that might qualify as ‘speech’ in other circumstances. If, on the other hand, the predominant purpose of the product is to make an

18 Id. at 574-75.
19 Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).
20 Hart, supra note 4, at 153.
21 Doe, supra note 13, at 374.
expressive comment on or about a celebrity, the expressive values should be given greater weight.\textsuperscript{22}

Applying this test, the court ruled for Twist, holding that “the metaphorical reference to Twist, though a literary device, has very little literary value compared to its commercial value.”\textsuperscript{23}

\section*{B. The Rogers Test}

The Rogers Test compares the impact on the image of the celebrity with the work in question as a whole. In its analysis and application of the right of publicity under Oregon law, the Second Circuit noted Oregon’s “concern for the protection of free expression,” and held that Oregon would not “permit the right of publicity to bar the use of a celebrity’s name in a movie title unless the title was wholly unrelated to the movie or was simply a disguised commercial advertisement for the sale of goods or services.”\textsuperscript{24} The court found that the title of the movie was clearly related to the content of the movie rather than any attempt to sell goods or services through a disguised advertisement.

\section*{C. The Transformative Use Test}

“The Transformative Use Test was first articulated by the Supreme Court of California in \textit{Comedy III}.”\textsuperscript{25} In that case an artist produced and sold t-shirts and prints with a charcoal rendering of the Three Stooges. Comedy III, which owned the rights to the Three Stooges, filed suit and the court found that the right of publicity could apply to expressive speech. According to the court, “the very importance of celebrities in society means that the right of publicity has the potential of censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent or otherwise attempt to redefine the celebrity’s meaning.”\textsuperscript{26} The opinion went on to say the right is similar to copyright in that it “offers protection to a form of intellectual property that society deems to have social utility,”\textsuperscript{27} and that “the right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity’s image by censoring

\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Rogers, supra note 19.
\textsuperscript{25} Hart, supra note 6, at 159 (citing Comedy III Prod., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 21 P.3d 797 (Cal. 2001)).
\textsuperscript{26} Comedy III, supra note 15, at 803.
\textsuperscript{27} Id. at 804.
disagreeable portrayals.” The court decided that the similarity to copyright law made application of the fair use factor in deciding the case. In particular, the court relied on the first fair use factor, the purpose and character of the usage. The California Supreme Court then applied the test used by the U.S. Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*

[T]he central purpose of the inquiry into the fair use factor “is to see … whether the new work merely supersedes the objects” of the new creation, or instead adds something new, with a further purpose or different character, altering the first with new express, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.

Works that contain significant transformative elements are not likely to interfere with the economic interests on which the right of publicity is based. These elements may include satire, lampooning, factual reporting, fictionalized portrayals, or social criticism. Perhaps the key question is whether the literal and imitative elements or the creative elements are predominant in the work. The court then held that the balance between the conflicting rights turns on

[W]hether the celebrity likeness is one of the ‘raw materials’ from which the original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask … whether the product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness. And when we use the word ‘expression,’ we mean expression of something other than the likeness of the celebrity.

Using this standard the court found that the portraits of the Three Stooges did violate their right of publicity. The court stated that it could “discern no significant transformative or creative contribution” and that “the marketability and economic value of [the work] derives primarily from the fame of the celebrities depicted.”

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28 Id. at 807.
30 Id.
31 Comedy III, 21 P.3d 797 at 810.
32 Id. at 811.
III. THE FIRST AMENDMENT V. RIGHT OF PUBLICITY CASES

A. Hart v. Electronic Arts, Inc.

The Hart court discussed each of the three tests that it found to be “of particular note,” explaining why it chose to reject or to apply each of them. It rejected the Predominant Use Test, finding it “subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics. These two roles cannot co-exist.”

It also rejected the Rogers Test, finding it to be “a blunt instrument, unfit for widespread application in cases that require a carefully calibrated balancing of two fundamental protections; the right of free expression and the right to control, manage, and profit from one’s own identity.”

The court decided to apply the Transformative Use Test in evaluating Hart’s argument. It found this test provided a flexible, but uniformly applicable framework for analysis, focusing on whether the work sufficiently transforms the celebrity’s likeness. This, in turn, allows the court to consider the extent to which a work is the creator’s own expression or a mere copying of the celebrity’s identity. The court found that Hart’s “avatar” in NCAA Football was a “mere copying” of his identity, and thus not entitled to First Amendment protection under the Transformative Use Test.

As the court pointed out, the game “identified” Hart. It included not only his likeness, but also his biographical information. By using both, the digital avatar is readily identifiable as Mr. Hart. Unless the game then provides some “transformative” aspect to the avatar so that the resulting image becomes the creator’s – EA’s – work and not just a copy of the person represented. But as the court notes, “The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game. This is not transformative; the various digitized sights and sounds in the video game do not alter or transform [Hart’s] identity in a significant way.”

The court also held that EA did not satisfy the transformative use test even though the game allows a user to change the appearance of the avatars in the game. The court stated:

[T]he mere presence of this feature, without more, cannot satisfy the Transformative Use Test. True, interactivity is the basis upon

33 Hart, supra note 6, at 154.
34 Id. at 157.
35 Id. at 145.
36 Hart, supra note 6, at 166.
which First Amendment protection is granted to video games in the first instance. However, the balancing test in right of publicity cases does not look to whether a particular work loses First Amendment protection. Rather, the balancing inquiry looks to see whether the interests protected by the right of publicity are sufficient to surmount the already existing First Amendment protections.37

B. Keller v. Electronic Arts, Inc.

In 2011 Sam Keller filed suit against Electronic Arts, Inc. asserting that his right of publicity has been violated by Electronic Arts with its depiction of him in the NCAA Football game distributed by EA Sports. Keller was relying on California’s Civil Code §3344 and California common law. The court held:

The district court concluded that the game developer, Electronic Arts (“EA”), had no First Amendment defense against the right-of-publicity claims of the football player, Samuel Keller... [The Ninth Circuit affirmed]. Under the “transformative use” test developed by the California Supreme Court, EA’s use does not qualify for First Amendment protection as a matter of law because it literally recreates Keller in the very setting in which he has achieved renown. The other First Amendment defenses asserted by EA do not defeat Keller’s claims either.38

The EA also asserted that the suit violated California’s Anti-SLAPP statute, filing a special motion to dismiss, as authorized by the statute. The court denied the applicability of the Anti-SLAPP statute to this case.

The 2005 version of NCAA Football had Keller as the quarterback for Arizona State, with all of the same characteristics possessed by Keller, including his jersey number. The 2008 version had Keller as the Nebraska quarterback, although the jersey number was incorrect. The court noted, however, that Keller changed jersey numbers before the season began.

After disposing of the Anti-SLAPP issue, the court turned to its analysis of this case in light of the Transformative Use Test. In Comedy III, supra, the California Supreme Court determined that there are five factors to consider in determining whether a work that includes the likeness of a celebrity is entitled to First Amendment protection due to its “transformative use.” These

37 Id. at 167.
38 Keller, supra note 9, at 1271.
factors are: (1) whether the image of the celebrity is a “raw material” from which an original work is synthesized, or whether the image is the “sum and substance of the work; (2) whether the work is primarily the artist’s own expression, including something other than the celebrity’s image or likeness; (3) whether creative elements dominate the work, or is it merely imitative; (4) whether the marketability and value of the work rely primarily on the fame of the celebrity; and (5) whether the artist’s skill is subordinate to the celebrity’s fame.39

California courts had applied the Transformative Use Test in four cases prior to Keller’s suit. In two of them the defendant was found to have violated the plaintiff’s right to publicity and in two of them the defendant was found to have “transformed” the image sufficiently to be granted First Amendment protection. In Comedy III, supra, the rendering of the Three Stooges on t-shirts was found not to be transformative. In No Doubt v. Activision Publishing, Inc.,40 Activision’s game Band Hero allowed game players to choose avatars while “performing” as members of a rock band. Avatars of the members of No Doubt, a rock group, were included and No Doubt was one of the bands included in the game. While the group had licensed Activision to use its likenesses, it had not licensed the uses available in the game. Band Hero allowed a gamer to have No Doubt play any song, not just songs the group had recorded. The avatars could also be manipulated to perform solo or with other bands, and the gamer could alter the voices of the band members. No Doubt objected to these uses, and the group sued. The court found that No Doubt’s right to publicity should prevail because the game was not transformative. “It reasoned that the video game characters were ‘literal recreations of the band members,’ doing ‘the same activity by which the band achieved and maintains its fame.’”41 The fact “that the avatars appear in the context of a videogame that contains many other creative elements[ ] does not transform the avatars into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.”42 The court concluded that “the expressive elements of the game remain manifestly subordinated to the overall goal of creating a conventional portrait of No Doubt so as to commercially exploit its fame.”43

By contrast, the court found a transformative use in both Winter v. DC Comics44 and in Kirby v. Sega of America, Inc.45 In the Winter case, DC Comics had characters Johnny and Edgar Autumn, half-worm half-human

39 Id. at 1274.
41 Id. at 411.
42 Id.
43 Id.
villains in several comic books. The comic book villains allegedly evoked images of the Winter brothers, Johnny and Edgar, two well-known musicians. The Winters sued, asserting that the characters violated their right of publicity. The court disagreed, finding that the depictions were transformative. It reasoned that the comic books “are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs’ mere likenesses… To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature.” The court relied on the fact that the brothers “are but cartoon characters . . . in a larger story, which is itself quite expressive.”

In the Kirby case, Kierin Kirby’s image was used in a video game. Kierin Kirby was a singer with the group Dee-Lite. She was known for her costumes and for the use of her “signature” expression, “oooh la la.” Sega included a character names Ulala, a reporter from outer space. Gamers could control the dance moves of Ulala while playing the game.

The court held that “Ulala is more than a mere likeness or literal depiction of Kirby,” pointing to Ulala’s “extremely tall, slender computer-generated physique,” her “hairstyle and primary costume,” her dance moves, and her role as “a space-age reporter in the 25th century,” all of which were “unlike any public depiction of Kirby.” It went on to note that, “[a]s in Winter, Ulala is a ‘fanciful, creative character’ who exists in the context of a unique and expressive video game.”

C. The O’Bannon Case

The O’Bannon case, In re NCAA Student-Athlete Name & Likeness Licensing Litigation, also involved the issue of the athletes’ right of publicity, but at this stage it was seeking certification of two classes. The first class was seeking injunctive relief, while the second – the subclass – was seeking damages for alleged antitrust violations. The plaintiffs were twenty-five current or former student-athletes who played Division 1 football or basketball between 1953 and the present. Four of the plaintiffs alleged violations of their right of publicity by the NCAA, EA, and CLC. The other twenty-one plaintiffs alleged that the defendants violated antitrust laws by conspiring to restrain competition in the commercial use of their names, images and likenesses. EA and the CLC agreed to settle their claims with the plaintiffs, leaving the NCAA as the lone defendant.

46 Winters, supra note 40, at 479.
47 Id.
48 Kirby, supra note 41, at 616.
49 Id. at 618.
50 In re NCAA Student-Athlete Name & Likeness Licensing Litigation, supra note 12.
The class seeking injunctive relief is defined as:

All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as “University Division” before 1973) college or university men’s basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men’s football team and whose images, likenesses and/or names may be, or have been, included in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees after the conclusion of the athlete’s participation in intercollegiate athletics.\(^{51}\)

The subclass seeking damages is defined as:

All former student-athletes residing in the United States who competed on an NCAA Division I (formerly known as “University Division” before 1973) college or university men’s basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men’s football team whose images, likenesses and/or names have been included in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees from July 21, 2005 and continuing until a final judgment in this matter.\(^{52}\)

The antitrust claims “arise from the NCAA’s written and unwritten rules, which allegedly prohibit student-athletes from receiving compensation for the commercial use of their names, images, and likenesses.”\(^{53}\) The plaintiffs assert that these rules prevent student-athletes from entering into group licensing agreements with either video game developers or broadcasters for the use of their names, images, and likenesses. According to the complaint, this restriction results in an unlawful restraint of trade or competition in the market. They are seeking monetary damages for these alleged violations.

The court first reviewed the requirements for certifying a class:

(1) The class is so numerous that joinder of all members is impracticable;
(2) There are questions of law or fact common to the class;

\(^{51}\) Id. at 1798 (Docket No. 651, Mot. Class Cert., at 2).
\(^{52}\) Id. (Docket No. 651, Mot. Class Cert., at 1-2).
\(^{53}\) Third Consolidated Amended Class Action Complaint (3CAC) at ¶¶12-15.
(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) The representative parties will fairly and adequately protect the interests of the class.54

The plaintiffs must also establish that one of the subsections of Rule 23(b) is met. Here they were seeking certification under both 23(b)(2) and 23(b)(3). Rule 23(b)(2) applies when the party opposing the class has acted or refused to act on grounds generally applicable to the class, making final injunctive or declaratory relief appropriate for the class as a whole. Rule 23(b)(3) permits certification when common questions of law and fact predominate over questions affecting only individual member of the class and resolution for the class is superior to other methods of adjudication.

The court found that both classes satisfied the numerosity, commonality, typicality, and adequacy requirements called for in Rule 23(a). The court also found that the class seeking injunctive relief had satisfied the standards for Rule 23(b)(2), and certified it as a class. However, the court held that the damages subclass did not satisfy the standards set out in rule 23(b)(3), and denied certification to this subclass. The court determined that the plaintiffs had not adequately addressed the issue of managing the class, nor did they provide a feasible method for determining which members of the class were harmed. Determining which members were harmed would require extensive efforts. The court said that “in light of these obstacles to manageability, class resolution does not provide a superior method for adjudicating this controversy.”55

IV. CURRENT STATUS

This matter is far from resolved at this point in time. As noted earlier, Electronic Arts, Inc. and the CLC had reached a settlement agreement, subject to court approval, with the plaintiffs in the O’Bannon case. The amount of the settlement is reportedly $40 million dollars.56 In July the NCAA announced that it will not renew its contract with EA for its NCAA Football game, noting that “[w]e are confident in our legal position regarding the use of our trademark in video games. But given the current business climate and costs of litigation, we determined participating in this game in

55 In re Student-Athlete Name & Likeness Licensing Litigation, at 1804.
not in the best interests of the NCAA.”\(^57\) An EA spokesman on that same date announced that EA would continue to provide a college football game, although it would no longer include the NCAA names and marks.\(^58\) However, two months later EA announced that it would not be offering a new college football game for next year, stating:

> We have been stuck in the middle of a dispute between the NCAA and student-athletes who seek compensation for playing college football. Just like companies that broadcast college football games and those that provide equipment and apparel, we follow rules that are set by the NCAA – but those rules are being challenged by some student-athletes. For our part, we are working to settle the lawsuits with the student-athletes. Meanwhile, the NCAA and a number of conferences have withdrawn their support of our game. The ongoing legal issues combined with increased questions surrounding schools and conferences have left us in a difficult position – one that challenges our ability to deliver an authentic sports experience, which is the very foundation of EA Sports games.\(^59\)

The NCAA has stated that it is not interested in settling the anti-trust case. Speaking at the IMG Intercollegiate Athletics Forum in December of 2013, Mark Emmert, President of the NCAA, said “Right now, we’re not having any settlement talks. If their goal is to move toward a pay-for-play model, which is what it seems to be, there’s no consideration of that at all.”\(^60\)

V. WHAT’S NEXT?

The student-athletes who sued, asserting that the video games violated their right of publicity, have overcome the First Amendment defense asserted by EA, and both the Third and the Ninth Circuit Courts have recognized that these student-athletes do have a right to publicity and that their right to publicity has been violated.

The U.S. District Court for the Northern District of California has certified a class of student-athletes that is entitled to seek injunctive relief

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\(^{58}\) Id.


\(^{60}\) Nicole Auerbach, *NCAA's Emmert not talking settlement in O'Bannon lawsuit*, USA Today Sports (December 11, 2013).
from the NCAA’s rule that prohibits current and former student-athletes from entering into group licensing agreements with video game producer and broadcast outlets for the use of their names, images, and likenesses.\textsuperscript{61} The district court judge has scheduled a case management conference between the parties for February 20, 2014, and a trial was set for June, 2014.\textsuperscript{62}

Following a three week trial, District Court Judge Claudia Wilkens issued a ruling in favor of the plaintiffs.\textsuperscript{63} She also issued an injunction preventing the NCAA “from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering the FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid.”\textsuperscript{64}

The gist of the ruling is that the NCAA will be allowed to place a cap on the amount that the student-athletes can receive while they are in school, but that the cap cannot be an amount less than the cost of the student-athlete attending school. It also allows the schools and the conferences to put money in trust for the student-athletes, with the money becoming payable when they leave school or become ineligible. The NCAA will be able to place a cap on the amount that can be placed in trust, but it cannot be less than $5000 in 2014 dollars.\textsuperscript{65}

Schools will be allowed to offer less than the NCAA-established maximum, if they so desire, but they cannot conspire with other schools in setting the amount they will offer. They are allowed to vary the amount from year to year, but they will not be allowed to offer different amounts to students recruited for the same team in the same recruiting class.\textsuperscript{66}

The NCAA’s Division I Board of Directors voted to grant autonomy to the five “power conferences” (ACC, Big 10, BIG 12, PAC 12, and SEC).\textsuperscript{67} If approved at the next NCAA convention, these conferences would be permitted to provide “stipends” for student-athletes. These stipends should help the student-athletes offset the additional costs incurred by students beyond those currently covered by their scholarships. The current NCAA

\begin{itemize}
\item\textsuperscript{61} Tom Farrey, \textit{No past damages for college players}, ESPN.COM (Nov. 9, 2013), http://espn.go.com/espn/otl/story/_/id/9949204/players-seek-future-revenue-ncaa-pursue-damages.
\item\textsuperscript{62} Id.
\item\textsuperscript{64} Id.
\item\textsuperscript{65} Id.
\item\textsuperscript{66} Id.
\end{itemize}
rules only allow a student-athlete’s scholarship to cover tuition, room and board, fees and required books. However, most universities estimate the cost of attendance to be several thousand dollars higher than the items covered by the athletic scholarships.

The NCAA will no longer be granting a license to Electronic Arts, so future versions of EA Sports’ NCAA Football game should not involve the issue of taking a player’s right to publicity. Electronic Arts and the CLC have reached a tentative $40 million settlement with the O’Bannon plaintiffs, which, if approved, will resolve that controversy. And while the NCAA is adamant that it will not agree to a pay-for-play model, it has proposed that the power conferences should have the autonomy to grant “stipends” to student-athletes to cover the full cost of attending college. While not a pay-to-play model, it at least removes the financial burden on those athletes of paying the expenses not currently covered by their scholarships, a burden which currently requires them to pay in order to be allowed to play.

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69 *Id.*