Golden Gate University Law Review

Volume 46
Issue 1 *Ninth Circuit Survey*

Article 6

March 2016

In re NCAA Student-Athlete Name & Likeness Licensing Litigation: How Free Speech Lost a Key Battle in the War For Creativity

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Recommended Citation

Leoangelo Cristobal, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation: How Free Speech Lost a Key Battle in the War For Creativity*, 46 Golden Gate U. L. Rev. 7 (2016).
http://digitalcommons.law.ggu.edu/ggulrev/vol46/iss1/6

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NOTE

IN RE NCAA STUDENT-ATHLETE NAME & LIKENESS LICENSING LITIGATION: HOW FREE SPEECH LOST A KEY BATTLE IN THE WAR FOR CREATIVITY

*LEOANGELO CRISTOBAL**

> "Creativity is just connecting things. When you ask creative people how they did something, they feel a little guilty because . . . they just saw something . . . and synthesize[d] new things."[1]

INTRODUCTION

Sports, in particular football, baseball and basketball, have consistently been some of America's most popular pastimes.[2] Today, the National Basketball Association (NBA), the National Football League (NFL), and other major sports entities are etched on the minds, televisions, and wallets of millions of Americans across the United States.[3]

The popularity and permanence of sports continues to steadily increase over time. In addition to casual pick-up games at the park, basket-

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* J.D. Candidate 2016, Golden Gate University School of Law. I am incredibly grateful for the entire 2015-2016 Law Review Staff, Professor Eleanor Lumsden, and for every single individual who helped me throughout this process. Thank you for everything. For supporting me unconditionally throughout law school, I dedicate this note to Lauren Galapate.

[1] *Creativity Quotes*, BRAINYQUOTE.COM, http://www.brainyquote.com/quotes/keywords/creativity.html (last visited Oct. 25, 2015) (quoting Apple founder Steve Jobs).

[2] Chris Murray, *Murray: The Past, Present and Future of America's 10 Most Popular Sports*, RENO GAZETTE-J (July 13, 2014), http://www.rgj.com/story/sports/2014/07/12/murray-past-present-future-americas-popular-sports/12587687.

[3] Average per game attendance of the five major sports leagues in North America 2014/15, STATISTA, http://www.statista.com/statistics/207458/per-game-attendance-of-major-us-sports-leagues (last visited Oct. 25, 2015).

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ball enthusiasts can also participate in semi-professional leagues.[4] For fanatics, gamblers,[5] and casual sports fans alike, there is a cornucopia of competitive platforms in the ever-growing realm of fantasy sports.[6] For anyone with a penchant for virtual simulations, interactive video games like Madden NFL,[7] and the various National Collegiate Athletic Association (NCAA) sports video games, are readily available for purchase.

All of these innovative avenues have made sports increasingly accessible to the public. They have helped bring sports to life, and accordingly, they have generated a significant amount of profit for their creators.[8] These creative outlets allow the average person to get closer to the action, have a stake in the outcome, and simulate the glory of victory.

Recently, the Ninth Circuit Court of Appeals prevented a video game company from using California's Anti-Strategic Lawsuit Against Public Participation (Anti-SLAPP) statute to strike down a complaint filed against the company.[9] Led by former NCAA football player Sam Keller, a number of former college athletes sued Electronic Arts, Inc. (EA) for their rights of publicity in the video game *NCAA Football*.[10] EA brought a special motion to strike the complaint under California Code of Civil Procedure Section 425.16, but the United States District Court for the Northern District of California denied EA's motion.[11] EA appealed the decision and presented various affirmative defenses, including the argument that *NCAA Football* was creative and unique enough to qualify for free speech protection under the First Amendment.[12]

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[4] *The Drew League*, DREW LEAGUE, http://www.drewleague.com/about (last visited Oct. 25, 2015).

[5] *Terms of Use*, FAN DUEL, https://www.fanduel.com/legal (last modified Oct. 16, 2015).

[6] *What is Fantasy Sport?*, FANTASY4ALL, http://fantasy4all.com/what-is-fantasy-sport (last visited Oct. 25, 2015); Darren Heitner & Toni Gemayel, *The Hyper Growth Of Daily Fantasy Sports Is Going To Change Our Culture And Our Laws*, FORBES.COM (Sept. 16, 2015), http://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws.

[7] TAG Staff, *Why The Madden NFL Series Is So Popular in America*, THE AVERAGE GAMER (July 31, 2013), http://www.theaveragegamer.com/2013/07/31/why-the-madden-nfl-series-is-so-popular-in-america.

[8] Brian Goff, *The $70 Billion Fantasy Football Market*, FORBES.COM (Aug. 20, 2013), http://www.forbes.com/sites/briangoff/2013/08/20/the-70-billion-fantasy-football-market; John Gaudiosi, *Madden: The $4 billion video game franchise*, CNNMONEY (Sept. 5, 2013), http://money.cnn.com/2013/09/05/technology/innovation/madden-25.

[9] *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1279 (9th Cir. 2013).

[10] Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108, at *1 (N.D. Cal. Feb. 8, 2010).

[11] *Keller*, 2010 WL 530108, at *10.

[12] *In re NCAA*, 724 F.3d at 1273.

The Ninth Circuit majority disagreed with EA and affirmed the district court's decision to deny the motion to strike.[13] The court reasoned that *NCAA Football* did not pass the "transformative use" test: a five-factor test that balances the originality of a work with its borrowed parts, then determines if it has been "transformed enough" to be protected by the First Amendment.[14] The court concluded that EA could not rely on First Amendment protection of free speech to override the athletes' rights of publicity, and held that the former athletes' right of publicity claims were not barred by California's Anti-SLAPP statute.[15]

Although the Ninth Circuit correctly identified the "transformative use" test's key factors and case precedent, this Case Note will argue that the court should have adopted Judge Thomas' dissenting opinion. Judge Thomas stated that "the creative and transformative elements of EA's *NCAA Football* video game series *predominate* over the commercial use of the athletes' likenesses," and therefore the First Amendment protects EA from liability.[16]

Part I of this Note explains the relevant law governing *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, followed by a summary of the factual and procedural history of the case. Additionally, Part I summarizes how the majority opinion of the Ninth Circuit followed case precedent to apply the five-factor "transformative use" test. Part II explains the dissenting opinion and argues why it should have been the opinion adopted by the court. Additionally, Part II asserts that the majority decision hampers free speech in sports entertainment and places an unnecessary cap on creativity.

I. BACKGROUND

The Ninth Circuit concluded that EA could not rely on First Amendment protection or California's Anti-SLAPP statute to override the athletes' right of publicity claims.[17] The court affirmed the district court's decision to deny EA's motion to strike.[18]

Subpart A summarizes the factual and procedural history of the case. Subpart B explains all of the relevant law applying to the case. Subpart C specifically examines how the Ninth Circuit applied the five factors from the "transformative use" test to the facts in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*.

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[13] *Id.* at 1284.
[14] *Id.* at 1274.
[15] *Id.* at 1279.
[16] *Id.* at 1286–87 (Thomas, J., dissenting) (emphasis added).
[17] *Id.* at 1284.
[18] *Id.*

A. FACTUAL AND PROCEDURAL HISTORY OF *IN RE NCAA STUDENT-ATHLETE NAME & LIKENESS LICENSING LITIGATION*

Originally, this case consisted of multiple individual suits filed by former college athletes,[19] including legendary players like Bill Russell and Oscar Robertson.[20] Out of all the suits filed, the most prominent lawsuits were *O'Bannon v. National Collegiate Athletics Association*[21] and *Keller v. Electronic Arts, Inc.*[22]

In *O'Bannon*, former college basketball player Edward O'Bannon named the NCAA and the Collegiate Licensing Company (CLC) as defendants.[23] On behalf of himself and other similarly situated athletes, O'Bannon alleged that the NCAA and the CLC violated various antitrust laws.[24] In *Keller*, former college football player Sam Keller named EA, the NCAA, and the CLC as defendants.[25] On behalf of himself and other similarly situated athletes, Keller alleged that EA and the NCAA violated their rights of publicity.[26]

Pursuant to a court order, the *O'Bannon* and *Keller* lawsuits were consolidated.[27] However, before the cases were officially consolidated, the United States District Court for the Northern District of California decided multiple motions to dismiss brought by the defendants in both *O'Bannon* and *Keller*.[28]

The district court released its decisions for both cases on February 8, 2010.[29] In both *O'Bannon* and *Keller*, District Court Judge Wilken denied all but two of the defendants' motions to dismiss.[30] EA filed an additional motion to strike pursuant to California Anti-SLAPP law in *Keller,* but Judge Wilken also denied that motion.[31]

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[19] Steve Eder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.,* N.Y. TIMES (June 9, 2014), http://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html?_r=0.

[20] *Id.*

[21] O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09-1967 CW, 2010 WL 445190, at *1 (N.D. Cal. Feb. 8, 2010).

[22] Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108, at *1 (N.D. Cal., Feb. 8, 2010).

[23] *O'Bannon*, 2010 WL 445190, at *1.

[24] *Id.* at *1–2.

[25] *Keller*, 2010 WL 530108, at *1.

[26] *Id.* at *2.

[27] *O'Bannon*, 2010 WL 445190, at *8.

[28] *Id.* at *1; *Keller*, 2010 WL 530108, at *2.

[29] *O'Bannon*, 2010 WL 455190, at *8; *Keller*, 2010 WL 530108, at *11.

[30] *O'Bannon*, 2010 WL 455190, at *8 (granting Defendants' motion to dismiss Newsome's complaint and O'Bannon's claim for accounting); *Keller*, 2010 WL 530108, at *11.

[31] *Keller*, 2010 WL 530108, at *10–11.

With both cases consolidated and re-classified as *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, EA appealed Judge Wilken's decision to deny the additional motion to strike to the Ninth Circuit.[32] EA argued that Anti-SLAPP law allowed it to eliminate the suit with a special motion to strike.[33] EA argued that its rights under both the First Amendment and California's Anti-SLAPP statute prevailed over the former athletes' rights of publicity.[34] EA argued that *NCAA Football* was so transformative that it should weigh in favor of First Amendment protection, and therefore EA's motion to strike should prevail.[35]

The Ninth Circuit held that as a matter of law, the First Amendment did not protect EA's use of the former college athletes' likenesses.[36] The dissenting opinion argued the video game was transformative enough to warrant First Amendment protection,[37] but the majority opinion held otherwise and EA's affirmative defense failed.

The former college athletes proceeded to bring their class-action suit against defendants EA, the NCAA, and the CLC based partly on the violation of antitrust laws, and partly on the violation of rights of publicity. However, shortly following the resolution of EA's appeal, both EA and the CLC reached a settlement with the plaintiffs regarding the right of publicity claims brought against EA and the CLC.[38] EA settled with the plaintiffs for $40,000,000.[39] Shortly afterward, the NCAA also settled with the plaintiffs on the right of publicity claims for $20,000,000.[40]

The former college athletes continued their case against the NCAA based solely on violations of antitrust law.[41] On August 8, 2014, that case was decided on its merits in favor of the plaintiffs, and a permanent injunction was ordered against the NCAA.[42] The NCAA promptly appealed that decision to the Ninth Circuit,[43] but on September 30, 2015,

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[32] *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1272 (9th Cir. 2013).

[33] *See In re NCAA*, 724 F.3d at 1272–73 (stating the Anti-SLAPP statute and explaining the two-step evaluation of an Anti-SLAPP motion).

[34] *In re NCAA*, 724 F.3d at 1272–73.

[35] *See id.* at 1276–79 (identifying EA's and Judge Thomas' arguments).

[36] *Id.* at 1278–79.

[37] *Id.* at 1287 (Thomas, J., dissenting).

[38] *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F.Supp. 2d 996, 1000 (N.D.Cal. 2013).

[39] *NCAA settles with former athletes*, ESPN (Jun. 9, 2014), http://espn.go.com/college-sports/story/_/id/11055977/ncaa-reaches-20m-settlement-video-game-claims.

[40] *Id.*

[41] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014).

[42] *Id.* at 963.

[43] O'Bannon v. Nat'l Collegiate Athletic Ass'n, Nos. 14-16601, 14-17068, 2015 WL 5712106, at *9 (9th Cir. 2015).

the Ninth Circuit affirmed in part and reversed in part the district court's decision.[44]

B. Relevant Law

The Ninth Circuit analyzed EA's use of former college athletes' images and likenesses by considering California's right of publicity statute, California's Anti-SLAPP statute, and the "transformative use" test as applied by previous California state and federal courts.

1. Rights of Publicity and California's Anti-SLAPP Statute

The reason for protecting rights of publicity was to encourage individuals, particularly in the field of entertainment, to pursue their craft.[45] The focus was on the economic value of the individual's talents and energy, which was the result of much time, effort, and expense.[46] Rights of publicity do not involve *how much* gets "published," but rather *who* gets to "publish."[47] A right of publicity allows the *individual* to reap the rewards of his or her endeavors.[48]

In California, the right of publicity evolved into California Civil Code Section 3344(a). In relevant part, California's right of publicity statute states that:

> Any person who knowingly uses another's . . . likeness, in any manner, on or in products, merchandise, or goods . . . without such person's prior consent . . . shall be liable for any damages . . ..[49] [U]se of a . . . likeness in connection with . . . public affairs . . . shall not constitute a use for which consent is required. . . .[50]

The former college athletes argued that EA violated this right because EA never asked for permission to use their image or likeness in *NCAA Football*.[51] However, EA viewed the lawsuit as a Strategic Lawsuit Against Public Participation (SLAPP) and filed a special motion to strike.[52]

[44] *O'Bannon*, 2015 WL 5712106, at *1 (affirming scholarships up to the full cost of attendance but reversing the $5000 cash compensation as erroneous).

[45] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Cal. Civ. Code § 3344(a) (West 2015).

[50] Cal. Civ. Code § 3344(d) (West 2015).

[51] Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108, at *1 (N.D. Cal., Feb. 8, 2010).

[52] *Keller*, 2010 WL 530108, at *10–11.

The goal of SLAPP litigation is not to "win" based on the merits of the claim. Ultimately, SLAPP litigation attempts to "silence" defendants who are brought into court, burden them with litigation expenses, and force them to stop exercising their constitutional right of speech.[53]

As a response to attacks on valid exercises of freedom of speech, California enacted an Anti-SLAPP statute.[54] The statute states that:

> [A] cause of action against a person arising from . . . free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.[55]

The statute was designed to protect parties from lawsuits that were merely attacks on the First Amendment right of freedom of speech.[56] In the area of public affairs, it provides a defense against meritless claims brought by individuals attempting to silence and punish their opponents.[57] It seeks to impede lawsuits concerning speech[58] and attempts to prevent unnecessary litigation and expense in free speech disputes.

The statute allows a defendant like EA to preemptively eliminate a SLAPP lawsuit with a motion to strike.[59] An Anti-SLAPP special motion to strike is a procedural remedy that eliminates lawsuits that try to stifle the valid exercise of free speech.[60] Once a defendant makes a prima facie case that the defendant's actions are connected with a public issue in furtherance of the right to freedom of speech, the burden is on the plaintiff to establish a reasonable probability that it will prevail on its claim.[61]

In this case, EA had to establish a prima facie case that its actions were connected with a public issue in furtherance of the right to freedom of speech, and the former college athletes had to establish that it was reasonably probable they would prevail on their right of publicity

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[53] Eric J. Handelman, *Establishing Proof in Filing of Anti-SLAPP Motion,* 123 AM. JUR. 3D PROOF OF FACTS § 1 (2011).

[54] *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1272 (9th Cir. 2013) (citing Batzel v. Smith, 333 F.3d 1018, 1024–26 (9th Cir. 2003)).

[55] CAL. CODE CIV. PROC. § 425.16(b)(1) (West 2015).

[56] *In re NCAA*, 724 F.3d at 1272 (citing Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003)).

[57] Eric J. Handelman, *Establishing Proof in Filing of Anti-SLAPP Motion,* 123 AM. JUR. 3D PROOF OF FACTS § 1 (2011).

[58] *Id.*

[59] CAL. CODE CIV. PROC. § 425.16(b)(1) (West 2015).

[60] Eric J. Handelman, *Establishing Proof in Filing of Anti-SLAPP Motion,* 123 AM. JUR. 3D PROOF OF FACTS § 2 (2011).

[61] *In re NCAA*, 724 F.3d at 1272 (citing Batzel v. Smith, 333 F.3d 1018, 1024–26 (9th Cir. 2003)).

claim.[62] The former athletes agreed that *NCAA Football* involved EA's "right to express itself through video games," and EA agreed that the former athletes stated a right of publicity claim under California law.[63] Neither side contested that the respective burdens were met.[64] Instead, EA brought four affirmative defenses: (1) the "transformative use" test; (2) the *Rogers* test; (3) the "public interest" test; and (4) the "public affairs" exemption.[65]

Although EA raised four potential defenses, their most significant defense was the "transformative use" test.[66] The California Supreme Court has determined that a defendant will succeed on its special motion to strike if it was entitled to the "transformative use" defense as a matter of law.[67] Therefore, EA would be entitled to this defense as a matter of law if no jury could *reasonably* conclude that the work lacked sufficient transformation.[68]

2. *The "Transformative Use" Test*

The "transformative use" test is "a balancing test between the First Amendment and the right of publicity based on whether the work in question *adds significant creative elements* so as to be transformed into *something more than a mere celebrity likeness or imitation.*"[69] If a piece of work is transformed enough, it is particularly worthy of protection under the First Amendment and less likely to impact the economic interests that are guarded by the right of publicity.[70]

The court recognized several factors within that test: (1) the raw material versus the sum and substance of the work; (2) whether a purchase is motivated by the celebrity or motivated by the work of the artist; (3) whether the literal/imitative elements or creative elements predominate; (4) whether the marketability/economic value comes primarily from the celebrity; and (5) whether it was a conventional portrait exploiting the celebrity's fame or more the artists' skills/talents.[71]

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[62] *Id.* at 1272–73 (citing Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003)).

[63] *Id.* at 1273.

[64] *Id.*

[65] *Id.*

[66] *See id.* at 1273–79 (showing the focus of the Ninth Circuit's analysis was the "transformative use" test).

[67] *Id.* at 1274 (quoting Hilton v. Hallmark Cards, 599 F.3d 894, 910 (9th Cir. 2010)).

[68] *Id.* (citing Hilton v. Hallmark Cards, 599 F.3d 894, 910 (9th Cir. 2010)).

[69] *Id.* at 1273 (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 799 (Cal. 2001)) (emphasis added).

[70] *Id.* (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001)).

[71] *Id.* at 1274.

When considering the raw material and the sum and substance of the work, if "the celebrity likeness is one of the 'raw materials' from which an original work is synthesized," then it is *much more likely* to be seen as transformative; however, if "the depiction or imitation of the celebrity is the very sum and substance of the work in question," it is *much less likely* to be considered transformative.[72]

While analyzing the motivation behind purchases, the work of the artist is protected only if it is "primarily the defendant's own expression" and that expression is "something other than the likeness of the celebrity."[73] This factor requires an examination of whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity or to buy the expressive work of that artist.[74]

When considering which elements predominate, "[t]o avoid making judgments concerning 'the quality of the artistic contribution,' a court should conduct an inquiry [that is] 'more quantitative than qualitative.' "[75] A court must consider "whether the literal and imitative or the creative elements predominate in the work."[76]

Additionally, the California Supreme Court indicated that a "subsidiary inquiry" which analyzes whether "the marketability and economic value of the challenged work derive[s] primarily from the fame of the celebrity depicted" is helpful in determining transformation in close cases.[77]

Finally, when "an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame," the work is not transformative.[78]

C. Application of the "Transformative Use" Test

The "transformative use" test was critical in determining the balance between the college athletes' rights of publicity and the protection that the First Amendment provides to creative expressions like *NCAA Football*. To come to its decision, the Ninth Circuit majority relied on various California[79] and Federal cases that had applied the "transformative use"

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[72] *Id.* (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 (Cal. 2001)).
[73] *Id.*
[74] *Id.* (citing J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 8:72 (2d ed. 2015)).
[75] *Id.* (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 (Cal. 2001)).
[76] *Id.*
[77] *Id.* (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 810 (Cal. 2001)).
[78] *Id.*
[79] *Id.* at 1272 (citing Thomas v. Fry's Elec., Inc., 400 F.3d 1206 (9th Cir. 2005) (*per curiam*)) (explaining that the Anti-SLAPP statue is applicable in federal courts).

test.[80] The majority's opinion relied primarily on five cases, and the court held that as a matter of law, EA was not entitled to the affirmative defense provided by the "transformative use" test.[81]

1. Court Precedent

a. *Comedy III Productions, Inc. v. Gary Saderup, Inc.*

Reproductions, in addition to original works of art, are equally entitled to First Amendment protection.[82] However, to resolve the conflict between the inherent right of publicity and the protection afforded by the First Amendment, a balancing test must be applied.[83]

In the landmark case *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,[84] the California Supreme Court first articulated the "transformative use" test.[85] In that case, images of The Three Stooges had been placed onto t-shirts.[86] The court explained that in order to qualify for protection under the law, an artist had to create more than just a trivial change to the celebrity's image.[87] Applying the "transformative use" test, the court ultimately held that the skill of the artist had been subordinated by "the overall goal of creating [a] literal, conventional depiction" of The Three Stooges that "exploit[ed] their fame."[88] Despite it's holding, the court created a test that protected works containing "significant transformative elements."[89] The court concluded that such works would not only be especially worthy of First Amendment protection, but also "*less likely to interfere with the economic interest protected by the right of publicity*."[90]

b. *Winter v. DC Comics*

The First Amendment will protect comic books that are significantly expressive.[91] In *Winter v. DC Comics*,[92] the California Supreme Court again analyzed the balance between rights of publicity and protection

[80] *Id.* at 1274–79.
[81] *Id.* at 1284.
[82] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 799 (Cal. 2001).
[83] *Id.*
[84] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001).
[85] *Id.* at 800.
[86] *Id.*
[87] *Id.* at 810–11.
[88] *Id.* at 811.
[89] *Id.* at 808.
[90] *Id.* at 804 (emphasis added).
[91] Winter v. DC Comics, 69 P.3d 473, 476 (Cal. 2003).
[92] Winter v. DC Comics, 69 P.3d 473 (Cal. 2003).

under the First Amendment.[93] In that case, the "real-life" Winter brothers sued DC Comics for making a comic that allegedly used their likenesses.[94] The comic depicted the brothers as two half-human, half-worm brothers named the "Autumn brothers."[95] The characters looked like the Winter brothers and wore similar accessories.[96]

The court held that the images in the comic contained significant expressive content and were not just conventional depictions of the brothers.[97] The images resembled the rocker brothers, but were "distorted for . . . parody, or caricature."[98] The court explained that they were *cartoon characters in a larger expressive story*, and therefore the expression was transformative and protected under the First Amendment.[99]

c. *Kirby v. Sega of America, Inc.*

The First Amendment will also protect expressive video games with imitative qualities.[100] In *Kirby v. Sega of America, Inc.*,[101] popular American singer Kierin Kirby was depicted in a video game as a "fanciful, creative character."[102] Despite being portrayed as a singing, dancing, space-age reporter,[103] the California Court of Appeal held that the video game-version was more a likeness than a literal depiction.[104] It was a creative character that existed in "the context of a unique and expressive video game."[105] Similar to *Winter*, the court held that the expression was sufficiently transformative and protected by the First Amendment.[106]

d. *No Doubt v. Activision Publishing, Inc.*

The First Amendment does not protect the commercial use of *exact* celebrity recreations.[107] In *No Doubt v. Activision Publishing, Inc.*,[108] literal recordings and footage were used to create singing avatars of the

[93] *See id.* at 473.
[94] *Id.* at 476.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 479.
[98] *Id.*
[99] *Id.*
[100] Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 617–18 (Cal. App. Ct. 2006).
[101] Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607 (Cal. App. Ct. 2006).
[102] *Id.* at 618 (quoting Winter v. DC Comics, 69 P.3d 473, 480 (Cal. 2003)).
[103] *Id.* at 610.
[104] *Id.* at 618.
[105] *Id.*
[106] *Id.*
[107] No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 400–01 (Cal. App. Ct. 2011).
[108] No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397 (Cal. App. Ct. 2011).

members from the band No Doubt.[109] The members of No Doubt agreed to participate in a motion capture photography session.[110] Their likenesses were then used in a video game called "Band Hero," where avatars representing the band members sang on stages and performed songs that the real-life band wrote and sang.[111] The game allowed players to unlock special levels where the avatars could perform different songs, perform solo, or even sing in different voices.[112] The avatars could also be "manipulated to perform at fanciful venues."[113]

The band believed the video game company's use of their likeness in "Band Hero" went beyond the scope of their agreement, and they filed a complaint alleging a violation of their rights of publicity.[114] The video game company filed an Anti-SLAPP motion[115] and argued that the creative elements in "Band Hero" made it a "protected First Amendment activity involving an artistic work."[116]

Even though the video game had creative elements, the California Court of Appeal held that the avatars were "exact depictions of No Doubt's members doing exactly what they do as celebrities."[117] The court also held that the video game company's use of No Doubt's likeness was "motivated by the commercial interest in using the band's fame to market *Band Hero,* because it encourage[d] the band's sizeable fan base to purchase the game so as to perform as . . . the members of No Doubt."[118] The game was not transformative enough and not protected under the First Amendment, and the video game company could not prevail on a special motion to strike.[119]

e. *Hart v. Electronic Arts*

Although decided in a New Jersey court, *Hart v. Electronic Arts*[120] applied and relied on the same laws that California had used.[121] In that case, the court held that *NCAA Football* did not sufficiently transform the players' identities, and therefore EA could not escape a right of pub-

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109 *Id.* at 400.
110 *Id.*
111 *Id.*
112 *See id.* (allowing lead singer Gwen Stefani's voice to be changed to a male's voice).
113 *Id.* at 411.
114 *Id.* at 402.
115 *Id.* at 403.
116 *Id.* at 406.
117 *Id.* at 411.
118 *Id.* at 411-12.
119 *Id.*
120 Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013).
121 *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1278 (9th Cir. 2013) (citing Hart v. Elec. Arts, Inc., 717 F.3d 141, 158, 165 (3d Cir. 2013)).

licity claim.[122] The court considered the whole transformative context of the video game but held that it counted for very little in affecting the "celebrity identity" or the appeal of the game.[123]

The dissenting opinion in *Hart* felt that there was sufficient expressive transformation in *NCAA Football*.[124] Furthermore, the dissent disregarded *No Doubt* and *Kirby* because the Supreme Court of California, the original architects of the "transformative use" test, did not decide those cases.[125] The dissent was persuaded by the fact that *No Doubt* focused on "individual depictions" rather than the entirety of the work, and therefore asserted that the case was wrongly decided.[126]

The majority opinion in *Hart* believed that the dissenting opinion was flawed because it did not actually "attempt to explain or distinguish" *No Doubt* and *Kirby*.[127] The majority in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* agreed; it explained that *No Doubt* was consistent with the Supreme Court of California's decisions,[128] and it was confident that *No Doubt* served as persuasive guidance.[129]

2. *Application to NCAA Football*

The majority in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* believed that a trier of fact could reasonably conclude that *NCAA Football* was not transformative enough.[130] The court analogized the facts in *No Doubt* to the facts in the case at issue. In *No Doubt*, the rock stars were performing their songs on stage in the video game "Band Hero" just like they did in reality.[131] Similarly, the majority argued that the images of the former athletes were copied into *NCAA Football*.[132] Furthermore, they stated that the versions of the athletes portrayed in *NCAA Football* were doing the same things they had done in real life to become famous[133]– running, jumping, and competing on a football field.

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[122] *Id.* (citing Hart v. Elec. Arts, Inc., 717 F.3d 141, 168 (3d Cir. 2013)).

[123] *Id.* (citing Hart v. Elec. Arts, Inc., 717 F.3d 141, 166, 169 (3d Cir. 2013)).

[124] *Id.* (citing Hart v. Elec. Arts, Inc., 717 F.3d 141, 175 (3d Cir. 2013) (Ambro, J., dissenting)).

[125] *Id.* (citing Hart v. Elec. Arts, Inc., 717 F.3d 141, 172 (3d Cir. 2013) (Ambro, J., dissenting)).

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 1276.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 1278.

In his dissent, Judge Thomas urged the court to look at the game as a whole and to focus on the immutability of the characters.[134] However, the majority emphasized the importance of the creation of "fanciful creative characters" or "entirely new characters."[135] The court distinguished the facts in *Winter* and *Kirby* from the facts in *No Doubt*.[136] The brothers in *Winter* had been morphed into worm-like creatures,[137] and the singer in *Kirby* had been portrayed as a space-age reporter.[138] In contrast, the members of the band in *No Doubt* were never transformed into new characters.[139] The majority argued that whether a character is immutable is not dispositive; rather, whether or not characters were transformed into entirely new characters is dispositive.[140] The court also utilized *Hart* as persuasive authority that was consistent with the Supreme Court of California's previous decisions.[141]

The Ninth Circuit ultimately held that, because *NCAA Football* realistically portrayed former college athletes in the context of college football games, the district court ruled correctly, and EA could not "prevail as a matter of law based on the transformative use defense at the Anti-SLAPP stage."[142] However, their approach did not account for a wider view that encompasses the social aspects and creativity of the video game.

II. ANALYSIS

This Note focuses on the application of the "transformative use" test in the *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* case. Part II of this Note explains the application of the "transformative use" test in Judge Thomas' dissenting opinion. Additionally, Part II addresses the significance of the court declining to adopt Judge Thomas's opinion.

A. THE PROPER APPROACH TO THE "TRANSFORMATIVE USE" TEST

Although EA made commercial use of the former athletes' likenesses, the creative and transformative elements of its video game un-

[134] *Id.* at 1287 (Thomas, J., dissenting).
[135] *Id.* at 1277 (majority opinion) (citing No Doubt v. Activision Publ'g., Inc., 122 Cal. Rptr. 3d 397, 410 (Cal. App. Ct. 2011)).
[136] *Id.*
[137] Winter v. DC Comics, 69 P.3d 473, 479 (Cal. 2003).
[138] Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 616 (Cal. App. Ct. 2006).
[139] No Doubt v. Activision Publ'g., Inc., 122 Cal. Rptr. 3d 397, 409–10 (Cal. App. Ct. 2011).
[140] *In re NCAA*, 724 F.3d at 1277.
[141] *Id.* at 1278.
[142] *Id.* at 1279.

equivocally outweighed that use. The careful approach of Judge Thomas's dissenting opinion should have prevailed, and EA's motion to strike should have succeeded.

The right of publicity is not absolute. "In every jurisdiction, any right of publicity must be balanced against the constitutional protection afforded by the First Amendment."[143] Additionally, a special motion to strike a SLAPP lawsuit succeeds if a defendant is entitled to the "transformative use" defense as a matter of law.[144] EA is entitled to the "transformative use" defense as a matter of law if the only *reasonable* conclusion was that the game was transformative.[145] While this is a high standard, it is not insurmountable.[146]

Judge Thomas correctly explained that *Comedy III*'s focus was "a more *holistic* examination of whether the transformative and creative elements . . . predominate[d] over commercially based literal or imitative depictions."[147] The elements of transformation and creativity in a video game must be examined as a whole.[148] The focus is not on whether an individual persona or image has been changed; the focus is on whether the entire work is predominately transformative.[149]

1. A Careful Examination of NCAA Football Reveals Its Creativity

The most popular features of *NCAA Football* involved role-playing by the gamer.[150] The gamer could create a "virtual image" of him/herself as a potential college football player.[151] The gamer could decide what position he/she wanted to play, compete in tryouts, or simulate high school football seasons. Then, based on their skill rankings, the gamer could choose which college to attend and play college football.[152]

Once "in college," *NCAA Football* presents the gamer with even more choices: one could choose a major, the amount of time to spend on social activities versus practice, and even the football position he/she

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[143] *Id.* at 1284 (Thomas, J., dissenting).

[144] Hilton v. Hallmark Cards, 599 F.3d 894, 910 (9th Cir. 2010).

[145] *Id.*

[146] *See generally* Winter v. DC Comics, 69 P.3d 473 (Cal. 2003) (holding that a comic book with characters resembling the Winter brothers was sufficiently transformative); *see also* Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607 (Cal. App. Ct. 2006) (holding that a video game with a character resembling Kierin Kirby was sufficiently transformative).

[147] *In re NCAA*, 724 F.3d at 1285 (Thomas, J., dissenting) (emphasis added).

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

wanted to play.[153] All of these decisions could affect the player's performance.[154]

The gamer could change the entire scope of the game by changing the "mode" of the game.[155] They could enter a mode where they competed for the Heisman Trophy,[156] or they could enter a mode where they became a virtual coach that scouted, recruited, and developed fictional players for the team.[157] This mode allowed a gamer to be a coach and promote the team's evolution over a multitude of seasons.[158]

Gamers could create completely new characters or alter the abilities and physical characteristics of current players.[159] Sam Keller could play against himself, or a different version of himself on a different team.[160] Alternatively, a gamer could play the game without ever bumping into Sam Keller.[161]

NCAA Football allowed gamers to make a bevy of changes.[162] Even though the gamer can choose *not* to change anything, everything that happens in the game is still *fictional*.[163] The game was realistic, but ultimately it was a creative reconstruction of reality. Disagreeing with that notion punishes creativity and strips value from the right to free speech. If the ability to change so much about a player's characteristics and environment in *NCAA Football* is not creative enough, no line could ever be drawn to stop regulating realistic video games.

The "celebrities" in *NCAA Football* are more like the brothers in *Winter* and the character in *Kirby*. Despite being easy to identify as the real Winter brothers, the brothers were depicted as mythical creatures in a comic book.[164] Kierin Kirby was also easily identifiable, but her characteristics were transformed within the context of a unique and expressive science fiction video game.[165] Similarly, the virtual players that populated the world of *NCAA Football* were easily recognizable as ver-

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[153] *Id.* at 1285–86.

[154] *Id.* at 1286.

[155] *Id.*

[156] One of the most prestigious awards given to a collegiate football player in any given season.

[157] *In re NCAA*, 724 F.3d at 1286 (Thomas, J., dissenting).

[158] *Id.*

[159] *Id.* (for example, former quarterback Sam Keller could be changed into an overweight running back with absolutely no ability to throw a football).

[160] *Id.*

[161] *Id.*

[162] *Id.* (for example, a player's school, a player's team, the conduct of the game, the weather, the crowd noise, the mascots, and all other environmental factors could all be modified).

[163] *Id.*

[164] Winter v. DC Comics, 69 P.3d 473, 479 (Cal. 2003).

[165] Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 616 (Cal. App. Ct. 2006).

sions of real players, but the video game allowed gamers to wildly influence what they did, where they did it, and what they looked like.[166]

NCAA Football differs from the video game "Band Hero" in *No Doubt*. In that case, the court stressed "immutab[ility]" while distinguishing "Band Hero" from the comic book in *Winter* and the video game in *Kirby*.[167] "Band Hero" created literal recreations of the band No Doubt that were "painstakingly designed to mimic their likenesses."[168] Although there were some creative elements in "Band Hero," the actual No Doubt band members posed for motion picture photography specifically to capture and mimic their likeness.[169]

In contrast, the college athletes in *NCAA Football* could be transformed in limitless ways. Unlike the immutable avatars in *No Doubt,* the players in *NCAA Football* were "completely mutable and changeable at the whim of the gamer."[170] Additionally, the athletes in *NCAA Football* did not pose for motion picture photography. The majority relied heavily on *No Doubt* for the proposition that putting realistic avatars in a video game destroys First Amendment protection.[171] However, *No Doubt* actually denied such a restrictive construction.[172] That court held that literal reproductions of celebrities *could* be transformed into "expressive works based on the context into which the celebrity image is placed."[173] The entire context of *NCAA Football* makes it more like the comic book in *Winter* and the video game in *Kirby*, and less like the video game in *No Doubt*.

Judge Thomas opined that there should be no punishment for realism.[174] He explained that *NCAA Football*'s artistic elements show how little Sam Keller's likeness or any of the athletes' likenesses contributed to the gamers' experience.[175] With so much freedom to change the qualities of the game, a reasonable jury would find that the elements of creativity weigh significantly more than any imitative elements.

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[166] *In re NCAA*, 724 F.3d at 1285–86 (Thomas, J., dissenting).

[167] *Id.* at 1287.

[168] No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 409 (Cal. App. Ct. 2011).

[169] *In re NCAA*, 724 F.3d at 1286–87 (Thomas, J., dissenting).

[170] *Id.* at 1287.

[171] *Id.* at 1275–79.

[172] *No Doubt*, 122 Cal. Rptr. 3d at 410.

[173] *Id.* (citing Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001)) (noting, for instance, the Warhol silkscreens featuring celebrity portraits, through "careful manipulation of context," convey an ironic message about the "dehumanization of celebrity" through reproductions of celebrity images).

[174] *In re NCAA*, 724 F.3d at 1287 (Thomas, J., dissenting).

[175] *Id.*

2. *This Case Is Not A Traditional Right of Publicity Case*

The creativity of the game alone would be enough to understand how transformative it was.[176] However to truly obtain balance, the actual publicity rights at stake must also be considered.[177] Judge Thomas applied a quantitative and qualitative analysis to the publicity rights at stake,[178] and through that lens, it is clear that *NCAA Football* is distinguishable from the works in other traditional right of publicity cases.

a. A Quantitative Look

In traditional right of publicity cases, there were always a finite number of actors involved. In *Comedy III*, there were *three* Stooges.[179] In *Winter*, there were *two* rock star brothers.[180] In *Kirby*, there was *one* Kierin Kirby.[181] In *No Doubt*, there was *one* specific band.[182]

In *NCAA Football*, there are *thousands* of virtual actors.[183] The sheer number of athletes present in *NCAA Football* diminishes the "significance of the publicity rights at issue."[184] This is especially important when considering the weight of a player's "fame" against the appeal of the creative aspects of the video game.[185]

Despite any level of popularity that individual players may have had at the time, the school's overall brand, the school's traditions, and the team itself contributed more to consumers' decision to buy *NCAA Football* than anything else. Millions of fans across the country root for their NCAA team religiously.[186] It is unlikely that a fan of *NCAA Football*, looking at the covers of the last 18 *NCAA Football* video games,[187] would say that they bought the game because of the player on the cover. There is no evidence showing that Sam Keller, or any of the players, had

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[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 800 (Cal. 2001).

[180] Winter v. DC Comics, 69 P.3d 473, 476 (Cal. 2003).

[181] Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 609 (Cal. App. Ct. 2006).

[182] No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 401 (Cal. App. Ct. 2011).

[183] *In re NCAA*, 724 F.3d at 1287 (Thomas, J., dissenting).

[184] *Id.* at 1287–88.

[185] *Id.* at 1287.

[186] Tom Giratikanon et al., *N.C.A.A. Fan Map: How the Country Roots for College Football*, NYTIMES.COM (Oct. 3, 2014), http://www.nytimes.com/interactive/2014/10/03/upshot/ncaa-football-fan-map.html?WT.mc_id=2015-Q1-KEYWEE-AUD_DEV-0101-0331&WT.mc_ev=click&bicmp=ad&bicmlukp=WT.mc_id&bicmst=1420088400&bicmet=1451624400&ad-keywords=FEBAUD DEV&kwp_0=9534&kwp_4=71545&kwp_1=123574&_r=0&abt=0002&abg=0.

[187] Chip Patterson, *Time Capsule: The EA Sports NCAA Football Cover Athletes*, CBSSPORTS (Sept. 27, 2013), http://www.cbssports.com/collegefootball/eye-on-college-football/23875567/time-capsule-the-ea-sports-ncaa-football-cover-athletes.

any individual marketing power.[188] Additionally, in each of the aforementioned cases, the commercial image of the particular celebrity or celebrities was key to the production of the expressive work.[189] In contrast, the commercial images of the players in *NCAA Football* were just a fraction of the creative puzzle.

Because there were an exorbitant amount of athletes in *NCAA Football*, the rights of publicity at stake were relatively insignificant. A gamer could play *NCAA Football* for his or her entire life and *never* see a given athlete. Therefore, as a quantitative and practical matter, there is no certainty of any specific right of publicity ever being infringed.[190]

b. A Qualitative Look

Taking a qualitative perspective means understanding what the video game actually used to produce the final product. The critical inquiry is whether the "marketability and economic value of the game" comes from the "pure commercial exploitation of a celebrity image" or from the "creative elements within."[191]

Although the purpose of the right of publicity is to protect monetary gains at risk for the celebrity, the "celebrity" statuses of the former college athletes did not drive *NCAA Football*'s marketability. Fans love the *team* and the *school*.[192] The school's brand contributes to fandom more than obsessions over particular players do. The players on the team change every year, but fans stay loyal to the team and school regardless of who is actually playing. Some players stand out, but it is the playing-style of the specific school that perseveres and attracts fans to *NCAA Football*.[193]

What matters most is which *school* a fan associates with. Sometimes it is because the fan attended that school; sometimes it is because the fan has ties or respect for that school. Either way, the *school's* brand contributes significantly to the appeal of anything related to the school, includ-

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188 *In re NCAA*, 724 F.3d at 1287 (Thomas, J., dissenting).

189 *Id.* at 1288.

190 *Id.*

191 *Id.* at 1286 (concluding that *NCAA Football*'s marketability and economic value came from the creative elements within).

192 Tom Giratikanon et al., *N.C.A.A. Fan Map: How the Country Roots for College Football*, NYTIMES.COM (Oct. 3, 2014), http://www.nytimes.com/interactive/2014/10/03/upshot/ncaa-football-fan-map.html?WT.mc_id=2015-Q1-KEYWEE-AUD_DEV-0101-0331&WT.mc_ev=click&bicmp=ad&bicmlukp=WT.mc_id&bicmst=1420088400&bicmet=1451624400&ad-keywords=FEBAUDDEV&kwp_0=9534&kwp_4=71545&kwp_1=123574&_r=0&abt=0002&abg=0.

193 Tracey Lien, *The unpredictability and innovation of NCAA football*, POLYGON (Apr. 3, 2013), http://www.polygon.com/2013/4/3/4177002/ncaa-football-unpredictability-innovation.

ing the depiction of the school's football team in a video game like *NCAA Football*.

Although it is not dispositive that the college athletes were relatively anonymous, it is relevant when balancing the athletes' potential rights of publicity and the First Amendment's guarantee of freedom of speech. In this case, the "celebrity" status of the players did not drive *NCAA Football*'s marketability. This is unlike *No Doubt*, where the game "Band Hero" explicitly tried to exploit and use the celebrity of the world-famous band No Doubt. Here, it is the opposite – many fans of *NCAA Football* likely did not know who Sam Keller and Edward O'Bannon, Jr. were. The popularity of *NCAA Football* stemmed from the fame and appreciation of the *schools* within the game.[194] Ultimately, the profits from *NCAA Football* were more likely driven by the popularity of the NCAA's teams and the public's passion for college football. Therefore, there were arguably no rights of publicity at risk in the first place.

B. The Significance of the Court's Holding: A Cap on Creativity

The Ninth Circuit's unnecessarily strict interpretation of the "transformative use" test weakens the First Amendment, and its holding fastens an unnecessary cap on creativity. Judge Thomas described the consequences best:

> [A]ll realistic depictions of actual persons, no matter how incidental, are [now] protected by a state law right of publicity *regardless of the creative context*. This logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings. . . . [T]he motion picture *Forrest Gump* might as well be just a box of chocolates . . . [and] *Midnight in Paris* [is] reduced to a pedestrian domestic squabble. . . . [This is a] potentially dangerous and out-of-context interpretation of the transformative use test.[195]

Judge Thomas was correct when he intimated that EA's video game was art.[196] The realism of the game was a reflection of the skill of the artists who crafted it, from the "lifelike roar of the crowd" to the "crunch

[194] Tom Giratikanon et al., *N.C.A.A. Fan Map: How the Country Roots for College Football*, NYTimes.com (Oct. 3, 2014), http://www.nytimes.com/interactive/2014/10/03/upshot/ncaa-football-fan-map.html?WT.mc_id=2015-Q1-KEYWEE-AUD_DEV-0101-0331&WT.mc_ev=click&bicmp=ad&bicmlukp=WT.mc_id&bicmst=1420088400&bicmet=1451624400&ad-keywords=FEBAUDDEV&kwp_0=9534&kwp_4=71545&kwp_1=123574&_r=0&abt=0002&abg=0.

[195] *In re NCAA*, 724 F.3d at 1290 (Thomas, J., dissenting) (emphasis added).

[196] *Id.* at 1287 (referring to the realism of EA's games and the skill of EA's artists as "artistic elements").

of the pads."[197] These artistic elements, and *not* Sam Keller and other Plaintiffs' likenesses, are a central part of what drove the popularity of *NCAA Football*.[198]

Today's video game quality has reached an unprecedented level.[199] It is clear from his opinion that Judge Thomas can appreciate the value of creativity in video games.[200] Graphics have grown increasingly more realistic, and video games are undoubtedly expressive works of art produced by skillful artists.[201]

The design of *NCAA Football* should be no exception. The artists behind the game should not be seen as less-talented simply because they create images that mirrored "real-life." Their ability to challenge the traditional boundaries of realism should be celebrated as a creative novelty, not frowned upon as an uninspired plundering. If designers at a company like EA are forced to stop producing creative games like *NCAA Football*, other artists will eventually have to deal with an unnecessary cap on their talents.

NCAA Football was a video game, and its expressive nature alone should have allotted EA more First Amendment protection in the creation and development of their game.[202] However, video games also serve as creative outlets for the *people* who play them. Through *NCAA Football*, EA provided college football fans with a creative way to enjoy their team. Gamers could experience a simulated version of what it felt like to make social decisions in college and strategize plays as a football player.[203] They could create new contests against schools they have never played before.[204] In an attempt to change history, they could also recreate games against familiar rival schools for another chance at victory.[205]

Realistic sports video games like *NCAA Football* foster creativity for both the artists who design them and the fans that play them. Designers use their creative abilities to make video games fun, innovative, and realistic. Protecting that kind of creativity in video games is important because it helps gamers strategize, solve problems, work with others, and

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[197] *Id.*

[198] *Id.*

[199] Romeo Vitelli, *Are There Benefits in Playing Video Games?*, PSYCHOLOGY TODAY (Feb. 10, 2014), https://www.psychologytoday.com/blog/media-spotlight/201402/are-there-benefits-in-playing-video-games.

[200] *In re NCAA*, 724 F.3d at 1287 (Thomas, J., dissenting).

[201] *Id.*

[202] *Id*. at 1284 (citing Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011)).

[203] *Id.* at 1285–86.

[204] *Id.* at 1286.

[205] *Id*.

multi-task.[206] Additionally, sports video games like *NCAA Football* keep sports relevant in the life of the average person, and when sports are relevant, people are happier.[207] People stress less, and people have more self-esteem.[208]

Furthermore, *NCAA Football* is a collegiate football video game, and college football is a subject of substantial public interest. A live, college football game can draw over 26 million viewers at a given time.[209] College football generates anywhere from $8 million to $123 million for an individual school.[210] Overall, it could generate as much as $2.7 billion.[211]

A video game about collegiate football involves a subject of substantial public interest,[212] so *NCAA Football* deserves even more protection than a typical video game. Similar to how a creative and highly successful video game about a dancing space reporter is protected,[213] a video game about a subject so deeply beloved by the public[214] and as profitable as college football should be protected too.

EA was concerned that they would no longer be able to design video games like *NCAA Football*. Ultimately EA's concerns came to fruition, much to the dismay of fans everywhere.[215] As a result of this dispute, the *NCAA Football* series was taken off the shelves, and for all intents and purposes, it is unlikely to return to the market.[216]

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[206] Melanie Pinola, *Top 10 Ways Video Games Can Improve Real Life*, LIFEHACKER (June 13, 2015, 8:00 AM), http://lifehacker.com/top-10-ways-video-games-can-improve-real-life-171109 3093.

[207] *The Science Behind Sports and Happiness*, HAPPIFY, http://my.happify.com/hd/the-science-behind-sports-and-happiness-infographic (last visited Oct. 25, 2015).

[208] *Id.*

[209] *College Football TV Ratings*, SPORTS MEDIA WATCH, http://www.sportsmediawatch.com/college-football-tv-ratings/2 (last visited Oct. 25, 2015).

[210] *College Athletics Revenues and Expenses – 2008*, ESPN, http://espn.go.com/ncaa/revenue (last visited Oct. 25, 2015); Alicia Jessop, *The Economics of College Football: A Look At The Top-25 Teams' Revenues And Expenses*, FORBES.COM (Aug. 31, 2013), http://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-a-look-at-the-top-25-teams-revenues-and-expenses/.

[211] Kevin Trahan, *15 big facts about the NCAA's wealth and competitive imbalance*, SBNATION.COM (June 13, 2014), http://www.sbnation.com/college-football/2014/6/13/5807452/ncaa-money-revenue-obannon-trial.

[212] *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1284 (9th Cir. 2013) (Thomas, J., dissenting) (citing Moore v. Univ. of Notre Dame, 968 F. Supp. 1330, 1337 (N.D. Ind. 1997)).

[213] *See* Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 608–09 (Cal. App. Ct. 2006).

[214] *See* CAL. CIV. CODE § 3344(d) (exempting the use of a likeness in connection with any public affairs from liability).

[215] Kevin Trahan, *EA Sports' NCAA Football Game Will Be Back If The NCAA Loses In Court*, VICE SPORTS (Aug. 5, 2015), https://sports.vice.com/en_us/article/ea-sports-ncaa-football-game-will-be-back-if-the-ncaa-loses-in-court.

[216] *Id.*

American football is a sports staple, and while the NFL is an enormous enterprise that attracts international popularity,[217] college football attracts a large audience in its own right.[218] Sports fans, and in particular college sports fans, come from various walks of life and take on all sorts of shapes and sizes.[219] A sports fan may not have athletic talent, but a fanatic is just that: an insane, but "divinely inspired" supporter.[220] Diehard fans, casual fans, and non-fans all love sports video games,[221] and in order to provide fans with innovation in the realm of sports entertainment, it is necessary to maintain artistic freedom.

The Ninth Circuit's decision could have an unintentional ripple effect on society. The creative work of artists and the importance of sports in society may seem attenuated from the specific dispute between EA and the former college athletes, but these two elements are actually quite connected. Like sports, free speech and artistic freedom should be protected – not just for fun, but because they are necessary for the growth of a thoughtful and creative society.

CONCLUSION

The transformative and creative elements in a video game must be examined as a whole. "The salient question is whether the *entire* work is transformative, and whether the transformative elements *predominate*, rather than whether an *individual* persona or image has been altered."[222] The dissent recognized that the "transformative use" test unequivocally requires a holistic analysis.[223]

The majority undervalued the creative elements of a video game. *NCAA Football* is realistic, but its features are not static; ultimately, it is

[217] Andrew Chin, *China fast catching American football fever with 10 teams formed,* SOUTH CHINA MORNING POST (Nov. 25, 2012), http://www.scmp.com/sport/china/article/1090060/china-fast-catching-american-football-fever-10-teams-formed.

[218] Regina A. Corso, *Football Continues to be America's Favorite Sport; the Gap With Baseball Narrows Slightly this Year*, HARRIS INTERACTIVE (Jan. 17, 2013), http://www.theharrispoll.com/sports/Football_Continues_to_be_America_s_Favorite_Sport__the_Gap_With_Baseball_Narrows_Slightly_this_Year.html.

[219] *Sports Fandom and the NCAA Student-Athlete*, NCAA, http://www.ncaa.org/health-and-safety/sports-fandom-and-ncaa-student-athlete (last visited Oct. 25, 2015).

[220] Thomas Van Schaik, *The Psychology Of Social Sports Fans: What Makes Them So Crazy?*, SPORTS NETWORKER, http://www.sportsnetworker.com/2012/02/15/the-psychology-of-sports-fans-what-makes-them-so-crazy (last visited Oct. 25, 2015).

[221] Benny Bedlam, *A Non-Sports Fan's Love for Sports Video Games*, UNREALITY MAG., http://unrealitymag.com/video-games/a-non-sports-fans-love-for-sports-video-games (last visited Oct. 25, 2015).

[222] *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1287 (9th Cir. 2013) (Thomas, J., dissenting) (emphasis added).

[223] Hart v. Elec. Arts, Inc., 717 F.3d 141, 170–76 (3d Cir. 2013) (Ambro, J., dissenting).

Golden Gate University Law Review, Vol. 46, Iss. 1 [2016], Art. 6

historically fictional. Any one who plays *NCAA Football* can edit the players' abilities, physical attributes, and even the college that their avatar attends and plays for. A gamer can edit the mode of the game and change environmental conditions. Various factors are at the mercy of the gamer's creative whims, and the bottom line is that the person playing the video game has the power to change it.

The transformative and creative elements alone weigh in favor of First Amendment protection; however, the actual rights of publicity at stake also lend to the conclusion for First Amendment protection due to the sheer number of athletes involved. The game never identifies any of the thousands of college players within the real world of the NCAA, and the commercial impact of any one particular player is diluted as a result.

The utilization of athletes' likenesses is just one of the raw materials from which *NCAA Football* is constructed. EA's expression in this video game predominates over any commercial use of a former college athlete's likeness. Furthermore, the marketability and economic value of the game comes from its creative elements and not from the pure commercial exploitation of any of the former players' fame. The ideas posited within the dissenting opinion should have been adopted by the majority decision, and EA should have prevailed in its attempt to strike the complaint down in the name of freedom of speech.

http://digitalcommons.law.ggu.edu/ggulrev/vol46/iss1/6