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### Simplifying the Transformative Use Doctrine: Analyzing Transformative Expression in EA's NCAA Football Sport Video Games

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## ARTICLES

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### SIMPLIFYING THE TRANSFORMATIVE USE DOCTRINE: ANALYZING TRANSFORMATIVE EXPRESSION IN EA'S *NCAA FOOTBALL* SPORT VIDEO GAMES

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“The art of art, the glory of expression and the sunshine of the light of letters, is simplicity.”

Walt Whitman<sup>1</sup>

#### I. AN INTRODUCTION TO THE STUDY

At first glance, the quote from Whitman may seem poorly chosen for the start of an examination of the transformative content of sport video games. Yet it is Whitman’s use of the word “simplicity” in relation to the glory of expression that provides a perfect description for the aim of this study: to add a bit of simplicity to the transformative use doctrine by providing a means for examining the existence of transformative expression in sport video games. Sport video games (SVGs) provide the perfect medium for this examination because most SVGs can be described as creative commercial products that incorporate literal depictions of real athletes in realistic settings. The mix of the cre-

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<sup>1</sup> WALT WHITMAN, *LEAVES OF GRASS* viii (David S. Reynolds ed., 150th ed. 2005).

ative, the commercial, and the celebrity in SVGs is a recipe ripe for judicial review as to whether the transformative aspects of SVGs are enough to trump athlete publicity rights.

In fact, both the Ninth and Third Circuits have recently applied the transformative use test to right of publicity claims involving the use of student-athlete likenesses in the now discontinued *NCAA Football* franchise produced by EA Sports.<sup>2</sup> In both cases, the courts found in favor of the student-athlete plaintiffs based on the position that the *NCAA Football* SVGs did not include transformative use of student-athlete likenesses.<sup>3</sup> Despite the uniformity of their decisions and reasoning, several scholars have criticized the opinions from the Ninth and Third Circuits as resulting in a chilling effect on free speech.<sup>4</sup> A review of the extant literature on this subject revealed that there seems to be disagreement as to how much transformation is needed in order for the First Amendment to trump state publicity rights. The review also revealed that too little emphasis is given to the need for expressive content in transformative use. This article will add to the literature by providing the first quantitative examination of whether the *NCAA Football* SVGs included expressive transformative content. In order to conduct the examination, the current study conceptualized and then measured transformative expression. The construct “transformative expression” was conceptualized to include two thematic factors that were identified from a thorough review of relevant case law as Meaningful Expression and Aesthetic Expression. This conceptualization resulted in the following research question: do consumers perceive that the *NCAA Football* SVGs contain transformative expression?

Survey data and academic research have proven very useful for analyzing legal controversies in which consumer opinions are relevant to the claims at issue.<sup>5</sup> Furthermore, quantitative analysis is utilized in almost all contemporary intellectual property litigation.<sup>6</sup> Consumer opinions are relevant to transformative use controversies involving

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<sup>2</sup> *Keller v. Elec. Arts, Inc.* (*In re NCAA Student-Athlete Name & Likeness Licensing Litig.*), 724 F.3d 1268 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

<sup>3</sup> See *Keller*, 724 F.3d at 1271; *Hart*, 717 F.3d at 170.

<sup>4</sup> See, e.g., Thomas E. Kadri, *Fumbling the First Amendment*, 112:8 MICH. L. REV. 1519 (2014).

<sup>5</sup> Galen Clavio et al., *College Athlete Representations in Sports Video Games*, 6 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 57, 58 (2013).

<sup>6</sup> Ryan M. Rodenberg & Anastasios Kaburakis, *Sports Law Analytics*, ANALYTICS, at 29, 31.

SVGs because experience with the games provides consumers with a perspective for identifying transformative expression that is superior to that of a trier of fact in litigation who has little or no experience with the games. After all, the content in SVGs, whether sufficiently transformative or not, was designed to appeal to specific markets of consumers. Perhaps most importantly, the actual consumers know the features of the games better than a trier of fact or law who has little or no experience with the games. Thus, consumers of SVGs are best positioned to discern whether expressive content is found within the games.

The current study will yield both theoretical and practical implications. Theoretically, this study is the first of its kind in terms of conceptualizing transformative expression in order for it to be measured. From a practitioner perspective, the scale developed by this study could be modified and used by plaintiffs in right of publicity actions in jurisdictions that apply the transformative use doctrine to SVGs. The findings could also benefit SVG producers who may be uncertain as to the legal parameters of the transformative use doctrine and how the doctrine would apply to the games they produce.

## II. THEORETICAL FOUNDATION

The foundation for the current study was constructed from case law interpreting and applying the transformative use doctrine. The following section of this article provides a review of the cases relied upon in crafting the scale used to measure transformative expression in the *NCAA Football* SVGs. In this review, specific attention is directed at cases that were seminal in crafting the doctrine as a means for balancing the First Amendment with publicity rights. Also highlighted within this review are cases that applied the doctrine to video games. However, the foundation for the scale used in the current study extends beyond the cases referenced in this section. Specifically, the scale construction process for this study also included content analysis of all transformative use cases relied upon by the parties in *Keller* and *Hart*, as well as those cited within the opinions by the Ninth and Third Circuits in resolving those cases.<sup>7</sup> The aim of the content analysis was to discern the factual instances in which transformative expression was found in order to theorize thematic factors. The thematic factors were then used for the crafting of survey items for the scale used in the

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<sup>7</sup> See generally *Keller*, 724 F.3d 1268; *Hart*, 717 F.3d 141.

current study—a scale specifically designed to measure the existence of transformative content in SVGs. Prior to analysis of transformative expression, a brief discussion of right of publicity law is necessary in order to understand how the transformative use doctrine is balanced against publicity rights.

### A. *The Right of Publicity*

The right of publicity is a state law right that stems from the right of privacy—extending a privacy protection into a property protection.<sup>8</sup> Specifically, the right of publicity extends the privacy rights that people have in protecting their identities in a way that now allows celebrities to control the commercial value of their identities so as to prevent unfair appropriation.<sup>9</sup> To date, more than half the states either have codified publicity right protection or have recognized the right under common law.<sup>10</sup> The right was first recognized in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, a case in which a chewing gum manufacturer sued another gum maker over which company had the right to use a professional baseball player’s likeness on baseball cards.<sup>11</sup> The plaintiff in *Haelan* had entered into a contract with a professional baseball player for the exclusive use of the player’s likeness on baseball cards; however, the defendant “deliberately induced” the player to enter into a contract for the use of the player’s likeness on the defendant’s cards.<sup>12</sup> The defendant in *Haelan* argued that the right conferred through the contract to the plaintiff involved only a release of the player’s personal right of privacy, and therefore did not extend to include the transfer of a property right in the player’s name or likeness.<sup>13</sup> The defendant’s position was that since the player conveyed only a right “not to have his feelings hurt by such a publication,” there was no cause of action because the plaintiff did not have the exclusive contractual right to use the player’s name or likeness on baseball cards.<sup>14</sup>

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<sup>8</sup> Beth A. Cianfrone & Thomas A. Baker III, *The Use of Student-Athlete Likeness in Sport Video Games: An Application of the Right of Publicity*, 20 J. LEGAL ASPECTS OF SPORT 35, 38 (2010).

<sup>9</sup> *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994).

<sup>10</sup> Kadri, *supra* note 4, at 1521; see Jonathan Faber, *Statutes*, RIGHTOFPUBLICITY.COM, <http://rightofpublicity.com/statutes> (last visited Dec. 29, 2014).

<sup>11</sup> 202 F.2d 866 (2d Cir. 1953).

<sup>12</sup> *Id.* at 867.

<sup>13</sup> *Id.* at 867.

<sup>14</sup> *Id.*

The majority in *Haelan*, however, rejected the defendant's position and, in doing so, gave first recognition to what we now know as the right of publicity by holding:

[A] man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture. . . This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses [sic], trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.<sup>15</sup>

Following *Haelan's* reasoning, states started to develop laws protecting publicity rights.<sup>16</sup> While there is no uniform source of legal authority on the right of publicity, section 46 of the Restatement (Third) of Unfair Competition provides the "best summary" for how the right is generally understood to work.<sup>17</sup> Section 46 states that "one who appropriates the commercial value of a person's identity by using it without consent the person's name, likeness, or other indicia of identity for the purposes of trade is subject to liability."<sup>18</sup> From the Restatement's version of the right of publicity, there are the two core components that have been identified as (a) "indicia of identity" and (b) "commercial value."<sup>19</sup> The "indicia of identity" requirement involves anything that indicates the identity of the plaintiff to a third party.<sup>20</sup> The "commercial value" component requires plaintiffs to show that their identity is worth something.<sup>21</sup>

The two core components of "indicia of identity" and "commercial value" are thematically similar to two factors found in a study that conceptualized and measured California's right of publicity law.<sup>22</sup> In that study, the two thematic factors of Identity Use and Identity Value

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<sup>15</sup> *Id.* at 868.

<sup>16</sup> Cianfrone & Baker, *supra* note 8, at 39.

<sup>17</sup> Brian D. Wassom, *Uncertainty Squared: The Right of Publicity and Social Media*, 63 SYRACUSE L. REV. 227, 231 (2013).

<sup>18</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

<sup>19</sup> Wassom, *supra* note 17, at 231.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 232.

<sup>22</sup> Thomas A. Baker III et al., *Conceptualizing and Measuring the Use of Student-Athlete Likeness in EA's NCAA Football*, 28 J. SPORT MGMT. 281 (2014).

were conceptualized based on analysis of the statutory<sup>23</sup> and common law applications of California's right of publicity law.<sup>24</sup> The Identity Use factor was found to require plaintiffs in right of publicity cases to show that the defendant used their voice, signature, photograph, or likeness without their consent.<sup>25</sup> The key to this factor is that it can be used to find evidence that third parties are able to identify the plaintiffs in the defendant's work.<sup>26</sup> The Identity Value factor was found to require the plaintiffs to show that the use of their identity resulted in a commercial advantage for the defendant and an injury to the plaintiffs.<sup>27</sup> To satisfy the Injury Value factor, the plaintiffs must provide evidence of the commercial value in the use of their identity by the defendant.<sup>28</sup>

Following that conceptualization, the two factors were used to construct a scale to measure the use of student-athlete likeness in the *NCAA Football SVGs* and to examine the impact of use of likeness on SVG consumption.<sup>29</sup> Data (N = 621) were collected from *NCAA Football SVGs* consumers, all of whom had experience in purchasing and playing the games.<sup>30</sup> The results of the study (based on t test, factor analysis, and hierarchical regression analyses) showed that consumers perceived the use of student-athlete likeness in the *NCAA Football SVGs*.<sup>31</sup> The results also indicated that dimensions of the student-athlete likeness were empirically supported in that Identity Use and Identity Value were found to be positively related to the consumer behaviors of purchase intention and word of mouth.<sup>32</sup> The current study followed the same methodological approach used in that study to examine use of likeness in the *NCAA Football SVGs*, except with the focus on conceptualizing and measuring transformative expression within the context of the *NCAA Football SVGs*. The existence of transformative expression is the most important component of the trans-

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<sup>23</sup> CAL. CIV. CODE § 3344 (West 2012).

<sup>24</sup> Baker et al., *supra* note 22, at 281.

<sup>25</sup> See *id.* at 283.

<sup>26</sup> See *id.* at 284.

<sup>27</sup> *Id.* at 285.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 286.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 288.

<sup>32</sup> *Id.* at 288–90.

formative use doctrine, a First Amendment-based defense to right of publicity challenges.<sup>33</sup>

### B. *Transformative Expression*

The transformative use test is one of several methods that courts use to balance state policies for publicity right protection against the constitutionally protected right to free expression.<sup>34</sup> The California Supreme Court crafted the transformative use test from the doctrine of fair use in copyright in *Comedy III Productions, Inc. v. Gary Saderup, Inc. (Comedy III)*.<sup>35</sup> The test balances the First Amendment with the right of publicity by protecting transformative expression.<sup>36</sup> Transformative expression is found when the appropriated celebrity identity includes “significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”<sup>37</sup> A transformative inquiry determines whether the use of celebrity likeness serves as the “raw materials” from which a new and original work is created.<sup>38</sup> If so, the product containing the celebrity likeness has been transformed into “the defendant’s own expression rather than the celebrity’s likeness.”<sup>39</sup> The policy behind the transformative use test can be traced to the Supreme Court’s reasoning in *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>40</sup> the only right of publicity action to ever reach the high court. In *Zacchini*, the Court cautioned against the chilling of free expression by requiring courts to balance the public’s interest in the challenged expression against the individual’s right to prevent unjust enrichment.<sup>41</sup> By requiring transformative expression, the California Supreme Court fashioned a method for filtering expressive speech that deserves First Amendment protection from commercial exploitation based on whether the use of celebrity likeness has been significantly transformed into something new, something expressive.<sup>42</sup> However, it

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<sup>33</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc. (Comedy III)*, 21 P.3d 797, 808–10 (Cal. 2001).

<sup>34</sup> Two other tests are the predominant purpose test and the Rogers test. Andy Selars, *The Right of Publicity and Free Speech: DMLP Joins Amicus Brief in Hart v. Electronic Arts*, DIGITAL MEDIA L. PROJECT (May 31, 2012), <http://www.dmlp.org/blog/2012/right-publicity-and-free-speech-dmlp-joins-amicus-brief-hart-v-electronic-arts>.

<sup>35</sup> *Comedy III*, 21 P.3d at 808.

<sup>36</sup> *Id.* at 799.

<sup>37</sup> *Id.*

<sup>38</sup> *Winter v. D.C. Comics*, 69 P.3d 473, 477 (Cal. 2003).

<sup>39</sup> *Id.*

<sup>40</sup> 433 U.S. 562 (1977).

<sup>41</sup> *Id.* at 576.

<sup>42</sup> Cianfrone & Baker, *supra* note 8, at 53.



is necessary to note that commercial works can include sufficient transformative content to warrant First Amendment protection.<sup>43</sup>

Often, the distinction between the expressive and the commercial is clear. For example, if a celebrity's image is used in a work of art, such as the Marilyn Diptych, Andy Warhol's most famous work that included fifty images of Marilyn Monroe, then the work is likely expressive and deserving of First Amendment protection.<sup>44</sup> On the converse end of the spectrum, courts are less likely to protect the unauthorized use of celebrity likeness in advertisements that lead the public to believe that the celebrity actually endorses the product.<sup>45</sup> Somewhere in the middle of the proverbial spectrum, cases exist that involve controversies concerning commercial products that include expressive components. Those are the cases for which the transformative use test was crafted because it is in those less clear situations that courts must discern whether there exists enough expressive content to outweigh the commercial purpose of the product. Video games, SVGs in particular, provide perfect examples of the problems courts face in applying the transformative use doctrine to commercial products with creative components.

### 1. Transformative Use and Video Games

In *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, a California district court found in favor of a video game manufacturer's right to free expression in the virtual representation of an actual strip club in a video game.<sup>46</sup> The game at issue was *Grand Theft Auto, San Andreas*, a very popular and commercially successful video game that was set in the fictional city of Los Santos, which was supposed to represent the real city of Los Angeles.<sup>47</sup> The court recognized that the defendant used a literal representation of the actual strip club, but did so in a game that allowed consumers to experience West Coast "gangster cul-

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<sup>43</sup> See *id.*

<sup>44</sup> See *Winter v. D.C. Comics*, 69 P.3d 473 (Cal. 2003).

<sup>45</sup> Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1178-79 (2006); see also *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (exemplifying evocation appropriation involving the use of celebrity game show hostess Vanna White, who successfully prevailed against an advertiser's use of a robot with features that were found to have evoked White's image in the advertisement).

<sup>46</sup> *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 444 F. Supp. 2d 1012, 1019 (C.D. Cal. 2006).

<sup>47</sup> *Id.* at 1017.

ture” in an extremely unrealistic way.<sup>48</sup> In the game, the defendants were found to have infused a degree of ultraviolence and ridiculousness that rendered the game comical.<sup>49</sup> Thus, the parodic aspects of the game provided the basis for First Amendment protection.<sup>50</sup> In this decision, the court defined the protected parody as a “literary or artistic work that imitates the characteristic style of an author or work for comedic effect or ridicule.”<sup>51</sup>

Perhaps the best example of the transformative use doctrine at work in a video game right of publicity action comes from California’s Second District with its decision in *Kirby v. Sega of America, Inc.*<sup>52</sup> In *Kirby*, the court was confronted with an action brought by Kierin Kirby, the former lead singer of the musical group Deee-Lite, against Sega of America, a video game producer, for the alleged use of her persona in the creation of a character for the game *Space Channel 5*.<sup>53</sup> The character at controversy in the game was named Ulala, and the court found material similarities between Kirby and Ulala.<sup>54</sup> However, the court found in favor of the game producer because the court found enough transformative content to warrant First Amendment protection.<sup>55</sup> First, the court found that Ulala was not a literal depiction of Kirby, but instead was based on a Japanese style “anime” creation that was inspired by elements of Kirby’s persona.<sup>56</sup> As such, Ulala’s physique was different from Kirby’s, and Ulala’s hairstyle and dress style also differed from that of Kirby.<sup>57</sup> Second, the court placed a significant amount of attention on the fact that Ulala was a character with a storyline and background that made her a unique character and distinguished her from Kirby.<sup>58</sup> Ulala was not a musician in a band, but was instead a twenty-fifth century reporter.<sup>59</sup> Ulala lived in a fantasy world that was in no way similar to the life lived by Kirby.<sup>60</sup> Even the dance

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<sup>48</sup> *Id.* at 1033.

<sup>49</sup> *Id.* at 1039.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1042 n.142.

<sup>52</sup> 50 Cal. Rptr. 3d 607 (Cal. Ct. App. 4th 2006).

<sup>53</sup> *Id.* at 609.

<sup>54</sup> *Id.* at 616.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *See id.*

moves Ulala used in the game were dissimilar to those for which Kirby was known in her videos with Deee-Lite.<sup>61</sup>

The court in *Kirby* looked to these facts and considered them in comparison to the facts presented to the California Supreme Court in *Comedy III* and *Winter v. D.C. Comics*,<sup>62</sup> both seminal transformative use cases. In *Comedy III*, the court was presented with an action challenging the literal depiction of the Three Stooges on lithographs and tee shirts.<sup>63</sup> The court found that the defendant's work did not contain significant transformative or creative contributions, but was merely a literal depiction of the Three Stooges, used for the purpose of deriving value from their fame.<sup>64</sup> In *Winter*, the court was confronted with the depictions of well-known musicians Johnny and Edgar Winter in a comic book miniseries.<sup>65</sup> Unlike its determination in *Comedy III*, the California Supreme Court in *Winter* found the requisite transformative content in that the Winter brothers were the "raw materials" for the creation of new and creative characters, named the Autumn brothers, for the books.<sup>66</sup> As such, the plaintiffs were depicted in a fanciful and creative way that gave birth to something new and expressive that deserved First Amendment protection.<sup>67</sup> The court in *Kirby* used these two contrasting cases and found that the facts at issue more closely resembled those in *Winter*.<sup>68</sup> In doing so, the court recognized that "[v]ideo games are expressive works entitled to as much First Amendment protection as the most profound literature."<sup>69</sup>

In *No Doubt v. Activision Publishing, Inc.*, the ska-pop rock band No Doubt sued a video game producer, Activision, Inc. (Activision), over the use of the band's identity in a version of the popular video game *Guitar Hero*.<sup>70</sup> The band members had authorized the use of their likenesses and music in the game, but did so without the knowledge that Activision included features in the game that allowed players to use No Doubt's likeness to perform songs from other musicians.<sup>71</sup> No Doubt

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<sup>61</sup> *Id.* at 609, 616.

<sup>62</sup> *Id.* at 617–18.

<sup>63</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 800–01 (Cal. 2001).

<sup>64</sup> *Id.* at 810–11.

<sup>65</sup> *Winter v. D.C. Comics*, 69 P.3d 473, 476 (Cal. 2003).

<sup>66</sup> *Id.* at 479.

<sup>67</sup> *Id.* at 480.

<sup>68</sup> *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 615–16 (Cal. Ct. App. 4th 2006).

<sup>69</sup> *Id.* at 615.

<sup>70</sup> 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011).

<sup>71</sup> *Id.* at 400.

objected to this added feature and filed a right of publicity action against the game producer.<sup>72</sup> With the game's use exceeding that which was covered in the licensing agreement with No Doubt, Activision had to rely on the transformative use doctrine to protect the unauthorized use of No Doubt's likeness.<sup>73</sup> In doing so, the defendant pointed to several creative components of the game, such as how and where the band performed, as evidence that the game had transformative expressive content.<sup>74</sup> However, the California appeals court denied the defendant's requested protection and found that the game was distinguishable from the facts in *Kirby* because the literal avatars of No Doubt, no matter the backdrop or setting, "perform[ed] rock songs, the same activity by which the band achieved and maintained its fame."<sup>75</sup> The court found that the graphics and background content of the game did not transform the literal representations of No Doubt into new, expressive creations.<sup>76</sup>

## 2. Transformative Use and SVGs

The factual juxtaposition of *Kirby* and *No Doubt* provided a framework for the Ninth Circuit in *Keller* and the Third Circuit in *Hart* with their respective applications of the transformative use test to right of publicity actions involving the use of student-athlete likenesses in the *NCAA Football* SVGs. It is important to note that SVGs are a major segment of the popular and lucrative \$21 billion gaming industry.<sup>77</sup> Accounting for about thirteen percent of all video games sold in 2013, SVGs such as *Madden NFL*, *FIFA*, *NBA 2K*, and, until recently, the *NCAA Football* series, are consistently among the top twenty games sold.<sup>78</sup> Those SVGs garner revenue for the gaming publishers and developers, as well as the associated sport organizations.<sup>79</sup> The games are popular, in part, due to their ability to visually mirror a real televised game broadcast, complete with common sports camera angles, on-screen sta-

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<sup>72</sup> *Id.* at 400, 402.

<sup>73</sup> *Id.* at 406.

<sup>74</sup> *Id.* at 410.

<sup>75</sup> *Id.* at 410–11.

<sup>76</sup> *Id.* at 411–12.

<sup>77</sup> ENTMT SOFTWARE ASS'N, ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAMING INDUSTRY 13 (2014), available at [http://www.theesa.com/wp-content/uploads/2014/10/ESA\\_EF\\_2014.pdf](http://www.theesa.com/wp-content/uploads/2014/10/ESA_EF_2014.pdf).

<sup>78</sup> *Id.* at 11.

<sup>79</sup> See, e.g., Kristi Dosh, *Is EA Sports Revenue Worth the Schools' Risk?*, ESPN (Aug. 21, 2013), [http://espn.go.com/blog/nfnation/post/\\_/id/81020/is-ea-sports-revenue-worth-schools-risk](http://espn.go.com/blog/nfnation/post/_/id/81020/is-ea-sports-revenue-worth-schools-risk).

tistical graphics, and electronic images of famous commentators announcing the game. Licensing agreements between the sport leagues and publishers allow the games to showcase league- and team-specific graphics and images that are realistic and appealing.<sup>80</sup> The league, team, uniform, stadium, and player likenesses are represented in the games, which along with game announcers commentating about each play creates a virtual game that visually mimics a live televised game.<sup>81</sup> The detail of the games includes exact specifications of the player attributes (e.g., name, height, weight, physique, skill level, uniform number).<sup>82</sup> These attributes are highlighted both visually and aurally, with game announcers describing the players by name through the in-game commentary.<sup>83</sup> Likewise, the games are littered with advertisements and sponsorships, adding to the visual depiction representing a televised game.<sup>84</sup> At issue recently, in both *Keller* and *Hart*, is the very element of realism that is central to the game play, specifically the player likenesses within the SVGs.

Turning to the Ninth's Circuit's opinion in *Keller* first, the case was initiated by Sam Keller, a former quarterback for Arizona State University and the University of Nebraska.<sup>85</sup> Keller filed a class action on behalf of all student-athletes featured in the *NCAA Football* and *NCAA Basketball* SVGs.<sup>86</sup> On July 31, 2013, the Ninth Circuit affirmed the district court decision in *Keller*, which held that the video game manufacturers cannot use former athletes' likenesses without consent or compensation.<sup>87</sup> Furthermore, the Ninth Circuit affirmed the district court's decision that EA's use of student-athlete likenesses did not qualify for First Amendment protection as transformative because the SVGs literally recreated the very setting in which Keller and the other student-athletes had achieved their celebrity status (college football).<sup>88</sup> In reaching its decision in *Keller*, the Ninth Circuit aligned the avatars at issue in the case with those in *No Doubt*.<sup>89</sup> Specifically, both cases

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<sup>80</sup> Steve Berkowitz, *NCAA Ending Deal with Video Game Maker EA*, USA TODAY SPORTS (July 17, 2013, 9:53 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/07/17/ncaa-ending-videogame-contract-with-ea-electronic-arts/2525843/>.

<sup>81</sup> Cianfrone & Baker, *supra* note 8, at 40–44; *see also* Baker et al., *supra* note 22.

<sup>82</sup> Cianfrone & Baker, *supra* note 8, at 40–41.

<sup>83</sup> *Id.* at 43–44.

<sup>84</sup> *See generally id.*

<sup>85</sup> *See Keller v. Elec. Arts, Inc.*, 724 F.3d 1268 (9th Cir. 2013).

<sup>86</sup> *Id.* at 1272.

<sup>87</sup> *Id.* at 1284.

<sup>88</sup> *Id.* at 1276.

<sup>89</sup> *Id.* at 1275.

involved the literal depiction of actual people in video games set in the same situations that made the plaintiffs in both cases famous. Where in *No Doubt* the avatars represented real musicians performing music, in the *NCAA Football SVGs* the avatars were of actual student-athletes playing college football. EA did its best to counter the literal use of student-athlete avatars in the *NCAA Football SVGs* with the position that the games included a transformative component that allowed consumers to alter the characteristics of student-athlete avatars.<sup>90</sup> EA relied on this feature to distinguish its avatars from those in *No Doubt*, which had avatars that could not be altered by gamers.<sup>91</sup> Yet the Ninth Circuit was not swayed by this feature, finding that the California Court of Appeals' decision in *No Doubt* did not turn on the immutability of the avatars.<sup>92</sup> Instead, the court found that the "key contrast" between the protected uses of likeness in *Winter* and *Kirby* that distinguished them from the unprotected appropriations in *Keller* and *No Doubt* was in how the public figures in the protected pair of cases were "transformed into 'fanciful, creative, characters.'"<sup>93</sup> Thus, the defendants in *Winter* and *Kirby* infused their new creations with transformative expression, something that was missing in literal avatars depicted in *Keller* and *No Doubt*. Following the Ninth Circuit's decision in *Keller*, the Supreme Court of the United States denied EA's request for certiorari, and the parties reached a \$40 million settlement that provided each member of the class with \$5,000 for every year that their likenesses were used.<sup>94</sup> Also as a result of the Ninth Circuit's ruling, as well as the NCAA's decision to no longer license the use of its name to the games, EA canceled the successful *NCAA Football* game franchise.<sup>95</sup>

The Third Circuit reached the same conclusion in *Hart*, a right of publicity action brought against EA by former Rutgers quarterback Ryan Hart.<sup>96</sup> The main procedural distinction between *Hart* and *Keller* was that the district court in the former had ruled against the plaintiff and in favor of EA on the grounds that the *NCAA Football SVGs* were

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<sup>90</sup> *Id.* at 1276–77.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1276.

<sup>93</sup> *Id.* at 1277.

<sup>94</sup> Elec. Arts, Inc. v. Keller, 135 S. Ct. 42 (2014); Tom Farrey, *Players, Game Makers Settle for \$40M*, ESPN (May 31, 2014), [http://espn.go.com/espn/otl/story/\\_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm](http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm).

<sup>95</sup> Tom Risen, *Electronic Arts Cancels NCAA 2014 Video Game After Lawsuit*, U.S. NEWS & WORLD REP. (Sept. 27, 2013), <http://www.usnews.com/news/articles/2013/09/27/electronic-arts-cancels-ncaa-2014-video-game-after-lawsuit>.

<sup>96</sup> *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

transformative.<sup>97</sup> Unlike the Ninth Circuit, the district court in *Hart* was convinced by EA that the game features that allowed consumers to alter student-athlete avatars provided the requisite transformative content to warrant First Amendment protection.<sup>98</sup> Another important distinction between *Hart* and *Keller* is found in the fact that the Third Circuit in *Hart* was charged with interpreting New Jersey state law in balancing the right of publicity against the First Amendment's freedom of expression.<sup>99</sup> The district court in *Hart* selected the transformative use test as the appropriate standard, and on appeal the Third Circuit did the same.<sup>100</sup> Yet where the district court found sufficient transformative content in the *NCAA Football SVGs*, the Third Circuit did not and reversed the district court's summary judgment in favor of EA.<sup>101</sup> Like the Ninth Circuit in *Keller*, the Third Circuit linked the facts to those in *No Doubt* and even stated that "the lack of transformative context is even more pronounced [in the *NCAA Football SVGs*] than in *No Doubt*."<sup>102</sup> In addressing the game features that allowed avatars to be modified by consumers, the court in *Hart* found that "the ability to modify the avatar counts for little where the appeal of the game lies in users' ability to play as, or alongside their preferred players or team."<sup>103</sup>

Another commonality to both the *Keller* and *Hart* decisions is the fact that both triggered strong dissenting opinions. In *Hart*, Judge Ambro's dissent focused on his view that the creative components of the *NCAA Football SVGs* contained sufficient transformative content because all aspects of the game should have been considered, not just the realistic avatars of student-athletes.<sup>104</sup> Ambro believed that the court in *Hart* was wrong to consider *Kirby* and *No Doubt* as influential because those cases were not decided by the "architect of the Transformative Use Test, the Supreme Court of California."<sup>105</sup> Instead, Ambro believed his view was the better prediction for how the California Supreme Court would have resolved the facts in *Hart*.<sup>106</sup>

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<sup>97</sup> *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 794 (D.N.J. 2011).

<sup>98</sup> *Id.*

<sup>99</sup> *Hart*, 717 F.3d at 158.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 170.

<sup>102</sup> *Id.* at 166.

<sup>103</sup> *Id.* at 168.

<sup>104</sup> *Id.* at 175 (Ambro, J., dissenting).

<sup>105</sup> *Id.* at 172 n.4.

<sup>106</sup> *Id.* at 174.

Similarly, Judge Thomas' dissenting opinion in *Keller* also used a gestalt approach in finding sufficient transformative content in the SVGs.<sup>107</sup> Specifically, Thomas found that "when the video game series is examined carefully, and put in the proper context . . . the creative and transformative elements of the games predominate over the commercial use of the likeness of the athletes within the games."<sup>108</sup> Another common link between the views taken by Ambro and Thomas in their dissents is in their collective caution that the decisions from which they were dissenting would result in a chilling effect on free expression.<sup>109</sup> And they are not alone in their views; a review of relevant legal scholarship on the transformative use test and its applications in *Keller* and *Hart* revealed a number of scholars who believe the same as Ambro and Thomas, that decisions like *Keller* and *Hart* will have a chilling effect on free expression.<sup>110</sup> Accordingly, the current study addresses the following question: were the Ninth and Third Circuits correct in their failures to find sufficient transformative expression in the *NCAA Football* SVGs?

### 3. Meaningful and Aesthetic Expression

In addressing this important research question, the authors of this article conducted an exhaustive examination of relevant right of publicity actions in which the transformative use test was applied. Since the focus of this study was on the application of the transformative use test to SVGs, relevant cases were mined from the briefs filed by the plaintiffs and the defendants in both the *Keller* and *Hart* litigations. Additionally, the opinions from the Ninth and Third Circuits in *Keller* and *Hart* were also examined, as well as the cases relied upon by the circuits in reaching their respective opinions. From this review, two

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<sup>107</sup> *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268, 1285 n.2 (9th Cir. 2013) (Thomas, J., dissenting).

<sup>108</sup> *Id.* at 1285.

<sup>109</sup> See *Hart*, 808 F. Supp. 2d at 174 (Ambro, J., dissenting); *Keller*, 724 F.3d at 1290 (Thomas, J., dissenting).

<sup>110</sup> See Kadri, *supra* note 4; Jordan M. Blanke, *No Doubt About It—You've Got to Have Hart: Simulation Video Games May Redefine the Balance Between and Among the Right of Publicity, the First Amendment, and Copyright Law*, 19 B.U. J. SCI. & TECH. L. 26 (2013); Wesley W. Wintermeyer, *Who Framed Rogers v. Grimaldi?: What Protects Trademark Holders Against First Amendment Immunity for Video Games?*, 64 ALA. L. REV. 1234 (2013); Timothy J. Buchar, *Game On: Sports-Related Games and the Contentious Interplay Between the Right of Publicity and the First Amendment*, 14 TEX. REV. ENT. & SPORTS L. 1 (2012) (criticizing how the inconsistent application of the transformative use doctrine will complicate sport-related licensing agreements).



thematic factors emerged for situations in which courts were willing to protect expression despite the commercial nature of a product. The thematic factors were identified as Meaningful Expression and Aesthetic Expression.

The thematic factor identified as Meaningful Expression describes transformative expression in which the use of another's likeness is infused with new meaning—creating a new and expressive work that deserves First Amendment protection. Aesthetic Expression is the theme that describes artistic expression. These two themes include a variety of expressions covered by the First Amendment's aim of protecting "the creative fruits of intellectual and artistic labor."<sup>111</sup> Meanings protected by the First Amendment could include historical accounts, news, political commentary, social commentary, and comedic/satirical expressions. However, it is important to note that no specific type of meaning is needed in order for a work to be expressive. What is necessary is that the transformation must be infused with some new meaning in order to qualify as having Meaningful Expression. The same is true for Aesthetic Expression in that the work must be transformed in an artistically expressive way. Where Meaningful Expression involves some form of message, whether express and overt or the product of subtext, Aesthetic Expression was conceptualized to include visual expression that relates to characteristics of art or beauty. Aesthetic Expression involves the expression found in design—in this instance, SVG game design. Note that both Meaningful Expression and Aesthetic Expression are terms that were conceptualized in this study to describe the types of expressions that courts will protect as transformative expression based on the application of the transformative use doctrine in right of publicity cases; thus, neither term can be found in existing case law. Both Meaningful Expression and Aesthetic Expression were conceptualized for the purpose of measuring consumer perception as to whether the *NCAA Football* SVGs contain sufficient transformative expression to deserve protection under the First Amendment. Both thematic factors involved are determinations concerning the existence of expressions that are very subjective. This study aimed to conceptualize transformative expression so that the concept can be objectively measured in SVGs based on consumer perception. Consumers' familiarity with the *NCAA Football* SVGs provides consumers with an understanding of the games that is necessary to

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<sup>111</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (quoting *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994)).

properly detect the existence of transformative expression. After all, the SVGs were designed to appeal to a target market and are consumed by that market; thus, perceptions of the product from that specific target market should be legally significant based on their position as “reasonable consumers.”<sup>112</sup>

### III. METHODS

#### A. Sampling Method

A purposive sampling method was used to collect consumers of the *NCAA Football* SVGs from classes at a large university in the southeastern United States. Only those who had experience in purchasing and playing the *NCAA Football* SVGs could participate in the study. The reason for this requirement is that consumers of the *NCAA Football* SVGs had the requisite familiarity with games necessary to provide perceptions on the degree of expressive content included in the games. To ensure fidelity to the sampling requirements, participants were asked a series of questions about the *NCAA Football* SVGs. First, they were asked whether they had owned and played an *NCAA Football* game. If the answer to that question was “no,” the participant could not complete the survey. Participants were also given a list of versions of the *NCAA Football* games (from the first game in 1988 to the last in 2014) that included the names of athletes on the cover for each year. Participants were then asked to provide the number of hours per week that they played the *NCAA Football* SVGs. A total of 333 surveys were collected, but only 227 were found to be usable. A total of 106 were discarded due to incompleteness. From this group, sixty-three percent stated that they played *NCAA Football* more than one hour per week during the football season, and eighty-eight percent stated that they played at least one hour per week during the season, providing a basis for familiarity with the content of the *NCAA Football* SVGs. Of the participants, eighty-four percent were males between ages eighteen and twenty-six, demonstrating that the participants matched the target population for SVGs.<sup>113</sup>

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<sup>112</sup> See *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (9th Cir. 2008); *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008) (determining that the target markets for products were reasonable consumers for the purpose of determining deception in false advertising cases). Note that both cases come from Ninth Circuit application of California law, in jurisdictions that also apply the transformative use test.

<sup>113</sup> Young Jae Kim, Yong Jae Ko & Steven D. Walsh, *An Examination of the Psychological and Consumptive Behaviors of Sport Video Gamers*, 17 *SPORT MKTG. Q.* 44 (2008).

### B. Instrument

No existing scales have attempted to measure transformative expression in SVGs. Thus, it was necessary to develop items that were unique to this study for the purpose of conceptualizing “transformative expression” based on case law that has applied the transformative use doctrine to right of publicity cases. A review of the relevant law revealed two themes that emerged from the cases based on the use of a research technique referred to as “identifying raw-data themes.”<sup>114</sup> The themes were identified as (1) Meaningful Expression and (2) Aesthetic Expression. A total of nine items related to the Transformative Expression Sport Video Game (“TESVG”) scale were written<sup>115</sup> by modifying a methodology adopted by DiMatteo and Rich<sup>116</sup> in which items were developed from disputed legal issues raised in judicial opinions. In this instance, the items were developed based on situations identified by courts as examples of transformative expression. The cases used for scale development included all the transformative use cases cited by the plaintiffs and defendants in *Keller* and *Hart*, as well as the opinions from the Ninth and Third Circuits in *Keller* and *Hart*.<sup>117</sup> These cases were used because they were most relevant to the application of the transformative use doctrine to SVGs.

For the Meaningful Expression theme, types of meanings were selected based on their mention in cases (e.g., historical accounts, news, political commentary, social commentary, and satire/comedy). However, to keep the instrument manageable for participants, a decision was made to develop items that featured one specific type of meaning and items that were unspecific in regards to meaning type, because no discernable meaning type is needed for First Amendment protection. An initial scale was presented to a Delphi panel of experts that includes four sport management professors with extensive experience of the transformative use doctrine, SVG literature, and measurement. The panel identified only minor concerns with how items were worded, and changes were made to the items based on the panel’s suggestions. The panel selected comedy/satire for the specific type of

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<sup>114</sup> CATHERINE MARSHALL & GRETCHEN B. ROSSMAN, *DESIGNING QUALITATIVE RESEARCH* (3d ed. 1999).

<sup>115</sup> See Table 1 *infra*.

<sup>116</sup> Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067 (2006).

<sup>117</sup> See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268 (9th Cir. 2013).

meaning for Meaningful Expression because, from the list of meanings found in court decisions, comedy/satire was determined to be the specific type of meaning that was most applicable to the features found in the *NCAA Football SVG* series.

Items were measured with a seven-point Likert-type scale that ranged from one (strongly disagree) to seven (strongly agree). The TESVG scale consisted of four items for each of the two factors of transformative expression. The items for the TESVG scale were designed to measure perceptions as to whether transformative expression is found within the *NCAA Football SVGs*. Various demographic variables were also assessed that consisted of the following: age, gender, ethnicity, education, *NCAA Football SVG* play experience, *NCAA Football SVG* game play partner, hours of *NCAA Football SVG* play per week, and the total monetary amount spent on *NCAA Football SVGs*.

### C. Data Analyses

A total of nine items measuring transformative expression were subject to exploratory factor analysis (EFA). The total sample size used for EFA was 227. Procedures in Predictive Analytics Software (PASW) version 20.0 were employed to conduct EFA and calculate reliability coefficients. The primary purpose of the EFA was to identify a unique and reliable simple factor structure from a sample of variables. Following an EFA, internal consistency reliability was examined by calculating the Cronbach's alpha coefficients for the identified factors ( $>.60$ ).<sup>118</sup> In the EFA, principal axis factoring with direct oblimin rotation was used. The following were used to retain factor and items: (a) a factor had an eigenvalue equal to or greater than 1.0<sup>119</sup>; (b) an item had a factor loading equal to or greater than .40<sup>120</sup>; (c) an item should not be double loaded; and (d) a factor had at least three items.<sup>121</sup> The scree plot test was also used to help make a decision on the number of extracted factors.<sup>122</sup>

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<sup>118</sup> See Lee J. Cronbach, *Coefficient Alpha and the Internal Structure of Tests*, 16:3 *PSYCHOMETRIKA* 297, 331–32 (Sept. 1951).

<sup>119</sup> See Henry F. Kaiser, *An Index of Factorial Simplicity*, 39:1 *PSYCHOMETRIKA* 31, 34–36 (Mar. 1974).

<sup>120</sup> See JIM NUNNALLY & IRA BERNSTEIN, *PSYCHOMETRIC THEORY* 447–89 (3d ed. 1994).

<sup>121</sup> See JOSEPH F. HAIR, JR. ET AL., *MULTIVARIATE DATA ANALYSIS* 91–151 (7th ed. 2010).

<sup>122</sup> See R.B. Cattell, *The Scree Test for the Number of Factors*, 1 *MULTIVARIATE BEHAVIORAL RESEARCH* 245–76 (Apr. 1966).

## IV. RESULTS

An exploratory factor analysis (EFA) was conducted for identifying a simple structure among the transformative expression items as well as reducing redundant items.<sup>123</sup> As a result of the EFA, the Kaiser-Meyer-Olkin (KMO) measure of sampling adequacy value was .783, exceeding the threshold value of .70. Bartlett's Test of Sphericity (BTS) was 627.894 ( $p < .001$ ). The results of the KMO measure and BTS indicated that the sample size and correlation among the nine items were sufficient for EFA. As a result, two dimensions emerged with nine items meeting the retention criteria, explaining a total of sixty percent variance. The scree plot test also suggested that a two-factor model was appropriate and interpretable. The two factors were labeled as follows: (a) Meaningful Expression (six items), and (b) Aesthetic Expression (three items).

The results of the rotated pattern matrix are presented in Table 1.<sup>124</sup> Upon confirming the factor structure, internal consistency among the items was assessed through Cronbach's alpha. The alpha coefficients for the factors were .82 (Meaningful Expression) and .67 (Aesthetic Expression). The results of the reliability analysis indicated that items representing factors were all internally consistent.

## V. DISCUSSION

The Ninth Circuit in *Keller* and the Third Circuit in *Hart* each recently determined that EA's NCAA Football SVG series did not include sufficient transformative use of student-athlete likeness to deserve First Amendment protection from the student-athlete plaintiffs' right of publicity actions.<sup>125</sup> The findings from those two cases have sparked debate as to the proper application of the transformative use doctrine.<sup>126</sup> Much of that debate has focused on how much transformation is necessary to trigger First Amendment protection.<sup>127</sup> The problem with that focus is that it is misguided. The First Amendment was designed to protect expression, not alteration.<sup>128</sup> Accordingly, al-

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<sup>123</sup> *See id.*

<sup>124</sup> *See* Table 1 *infra*.

<sup>125</sup> *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268 (9th Cir. 2013).

<sup>126</sup> *Measuring Fair Use: The Four Factors*, STAN. U. LIBR., <http://fairuse.stanford.edu/overview/fair-use/four-factors/> (last visited Mar. 4, 2015).

<sup>127</sup> *Id.*

<sup>128</sup> U.S. CONST. amend. I.

terations or modifications of celebrity likeness that lack sufficient transformative expression should not warrant First Amendment protection in right of publicity actions.

Yet discerning the existence of transformative expression is problematic because the process results in determinations that are very subjective. This is particularly true for the application of the transformative use doctrine to SVGs, commercial products that combine creative and realistic features. However, the fact-sensitive and subjective nature of transformative expression examinations of SVGs did not dissuade the district court in *Hart* from deciding, as a matter of law, that the *NCAA Football* series contained transformative use, or the Third Circuit from reversing that decision based on its finding that the use of student-athlete likeness in the games was not sufficiently transformative.<sup>129</sup> The subjective nature of transformative expression in SVG inquiries is also problematic for cases that reach the trier of fact because the arbiters who will resolve those cases most likely will lack the familiarity with the SVGs that is necessary to discern the existence of transformative expression. Accordingly, courts need evidentiary guidance that goes beyond isolated screen shots and witness testimony; they need help from the people best positioned to detect the existence of expression in the games, the consumers for whom the games were designed.

Courts have utilized consumer perception research in intellectual property cases and false advertising cases. In the context of false advertising, courts have turned to quantitative studies that measure consumer perception for providing evidence as to whether the “reasonable consumer” would find an advertisement to be misleading.<sup>130</sup> The key requirement for that evidence is that consumers used in false advertising studies should fall within the relevant target market for the products at issue.<sup>131</sup> While the use of empirical evidence in litigation is increasing, there are very few quantitative studies focused on the use of student-athlete likeness in SVGs,<sup>132</sup> and no study as of yet has empirically examined the application of the transformative use doctrine to SVGs. The aim of the current study was to fill the void in the literature by providing a tool that can be used to objectively examine the existence of transformative expression in SVGs based on

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<sup>129</sup> *Hart*, 717 F.3d at 144, 170.

<sup>130</sup> See *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008).

<sup>131</sup> See *id.*

<sup>132</sup> See *Baker et al.*, *supra* note 22; *Clavio et al.*, *supra* note 5.

consumer perception. To accomplish this aim, the current study reviewed the case law relevant to the application of the transformative use doctrine to SVGs, and based on this review a conceptual model for the TESVG scale was developed to determine whether transformative expression can be found in the use of student-athlete likeness in the *NCAA Football SVGs*.

The EFA yielded a two-factor conceptual model, with Meaningful Expression and Aesthetic Expression explaining the existence of transformative expression in the *NCAA Football SVGs*. For the purpose of specificity, the results showed that consumers perceived the existence of significant amounts of Meaningful Expression and Aesthetic Expression in the *NCAA Football SVGs*. Therefore, the results contradict the findings from both the Ninth Circuit in *Keller* and Third Circuit in *Hart* that the *NCAA Football SVGs* do not have sufficient transformative expression to warrant First Amendment protection. The findings from this study are also inconsistent with traditional legal studies conducted by members of the current research team<sup>133</sup> but consistent with other traditional legal studies that are critical of the decisions in *Keller* and *Hart*.<sup>134</sup>

The main contribution of the current study is that it provides a foundation for the use of a tool in the TESVG scale that can be used to provide empirical evidence of the existence, or lack thereof, of transformative expression in SVGs. The scale in the current study can be further validated and replicated in studies that measure transformative expression in SVGs and other simulated video games. As such, this study provides a first and important step toward building a better understanding of transformative expression in SVGs. Furthermore, the conceptual model can be modified to apply to other SVGs, such as *Madden*, *MLB The Show*, *NBA Live*, *NBA Jam*, and *Tiger Woods PGA Tour*. Thus, the TESVG scale could be used in cases involving the use of professional athlete likeness in SVGs. While the *NCAA Football SVG* series may no longer exist, the popularity of SVGs will result in the creation of more games, and as a result the continued increase of SVG production may lead to more right of publicity actions in the future.

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<sup>133</sup> See Cianfrone & Baker, *supra* note 8.

<sup>134</sup> See, e.g., Kadri, *supra* note 4.

## VI. LIMITATIONS AND SUGGESTIONS FOR FUTURE RESEARCH

As with other empirical studies, the current study has several limitations. First, this was an exploratory study yet the first of its kind. Thus, the TESVG scale needs to be tested in other situations and with other populations to gauge the scale's validity and reliability. To that end, future studies may find new variables that add to the existing knowledge of transformative expression and how it can be examined in the context of SVGs. The current study also only used two types of meanings for Meaningful Expression (comedic/satire and non-specific meanings). Future studies should include other meaning types so as to test the application and validity of this construct. For example, if additional studies find that other meaning types (e.g., historical information, social commentary, political commentary, etc.) also load in the Meaningful Expression factor, then that information will support the conceptual model used in this study.

The generalizability of the TESVG scale also needs to be tested through additional studies that utilize new samples. The current study was conducted by examining consumer perception from a target market for the *NCAA Football* SVGs that was mined from a large research institution in the southeastern United States. Thus, future studies should find participants who are SVG consumers from other parts of the country. The scale could also be tested in studies outside the United States by making relevant modifications to the items to make them applicable to SVGs like the incredibly successful *FIFA* series.

While the scope of the current study does need to be framed by the fact that it was an exploratory study in nature, the significance of the study also needs to be recognized. The current study was an important first step that should lead to many others. There is both a practical and theoretical need for instruments like the TESVG and its underlying model for explaining transformative expression in SVGs. Until this study, no study had ever attempted to conceptualize and measure transformative expression in SVGs. Without instruments like the TESVG scale and investigations like that which was conducted in the current study, understanding of transformative expression in SVGs would continue to be limited to the subjective opinions of an extremely small sample of a population that lacks familiarity with the games in controversy.



TABLE 1. RESULTS OF THE PATTERN MATRIX FOR THE  
TRANSFORMATIVE ITEMS (N = 227)

	<u>F1**</u>	<u>F2***</u>
<i>Meaningful Expression (6 items)</i>		
<i>NCAA Football</i> included student-athlete images to deliver a comedic message.	.72	
<i>NCAA Football</i> added comedic elements to player images to make them more than just representations of actual people.	.66	
<i>NCAA Football</i> includes football player images are used in a way that mocks or discredits college football.	.85	
<i>NCAA Football</i> altered the images of football players in a way that added new information, insights, and understandings to the original images.	.52	
<i>NCAA Football</i> added elements or qualities to the images of football players that changed my understanding of college football, or life in general.	.75	
<i>NCAA Football</i> used actual student-athlete images to ridicule college football.	.81	
<i>Aesthetic Expression (3 items)</i>		
The football players in <i>NCAA Football</i> are artistic creations rather than realistic depictions of actual student-athletes.		.85
The football players in <i>NCAA Football</i> are not artistic characters, but instead realistic depictions of actual student-athletes.		.52
The depictions of football players in <i>NCAA Football</i> are works of art and have artistic meaning or messages, similar to the depiction of a person in a painting.		.84

\*\*Meaningful Expression.

\*\*\*Aesthetic Expression.