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The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity

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The video game industry is a growing and popular segment of the United States' entertainment industry, as video game sales for 2008 reached in excess of $8 million (Entertainment Software Association [ESA], 2009). Sport video games (SVGs) are among the top selling genres within the video gaming industry and comprise approximately 15.3% of the total game sales (ESA, 2009). Gaming corporations manufacture numerous sport related video games that span a wide range of sports appealing to a traditional sport demographic of 18-34 year old males (Richtel, 2005). SVGs are popular for many reasons, including their interactive and fantasy based nature, as well as visual authenticity in replicating a sport.

The growing popularity of SVGs has interested sport managers and led to academic research on the topic. SVGs have been examined in sport literature for their influence as a marketing tool for the sport (Kim, Walsh, & Ross, 2008), the motives that drive a gamer to play SVGs (Kim & Ross, 2006; Kim, Ko, & Ross, 2007), and the effectiveness of SVG in-game advertising (Cianfrone & Zhang, 2009; Cianfrone, Zhang, Trail, & Lutz, 2008; Walsh, Kim, & Ross, 2009). While the current research indicates a growing importance of SVGs to the sports industry, the topic of collegiate SVGs raises a glaring issue that has rarely been addressed (Kaburakis et al., 2009). The use of student-athlete likenesses in the collegiate games has potential implications for both the National Collegiate Athletic Association (NCAA) and student-athletes. The topic has prompted numerous discussions by the NCAA and the Knight Commission on Intercollegiate Athletics in regard to the current state of the NCAA Bylaws, the maintaining of student-athlete amateurism among increased commercialism, and potential legal action by student-athletes

(Christianson, 2007; NCAA, 2009a; Reardon, 2008). In an effort to address this, the late NCAA Commissioner Myles Brand established a Division I presidential task force to examine the issue of commercialism, including student-athlete likenesses in 2007/2008 (Christianson, 2007). In May 2009, Sam Keller, a former NCAA football player, filed a class action lawsuit on behalf of college football and basketball players against Electronic Arts, Inc. (EA), and Collegiate Licensing Company (CLC; *Keller v. Electronic Arts, Inc., NCAA, CLC, Class Action Complaint*, 2009). Keller alleged that EA has violated his and the class' right of publicity. A second class action lawsuit was filed in June 2009 by two former college quarterbacks against EA for violating the publicity rights of student-athletes (*Hart et al. v. EA Inc., et al., 2009*). These two class action lawsuits demonstrate the need to examine the use of student-athlete likenesses in SVGs.

This paper explores the legal issues surrounding the use of student-athlete likenesses in collegiate SVGs by using the facts and legal claims raised by Keller in his complaint. A brief background of NCAA SVGs will be discussed. We will then examine the right of publicity, specifically with the application of the statutory and common law right of publicity in the Keller lawsuit and how those rights would be applied in determining whether student-athlete likenesses is unlawfully appropriated in college SVGs. Included in this analysis are the defenses raised by EA based on the First Amendment and public affairs exception to the California statutory right of publicity. Finally, strategies to reduce liability will be discussed.

NCAA SPORT VIDEO GAME BACKGROUND

Collegiate video games are a popular segment of SVGs with EA Sports' *NCAA Football* series sales consistently grossing among the top sports titles ("Top Ten," 2007). The NPD Group reported the July 2009 release of the *NCAA Football 10* game resulted in 689,000 games sold in the first two weeks alone (Cifaldi, 2009). The NCAA currently licenses two SVGs, both produced by gaming publisher EA Sports (a subset of Electronic Arts and heretofore referred to as EA), the *NCAA Football* series and *NCAA Basketball* series (formerly known as *NCAA Basketball March Madness*). Both games are extremely popular due to their realistic features.

SVGs can be very realistic because of lucrative licensing contracts between sport organizations and gaming manufacturers. These agreements allow publishers the rights to use the league logos, teams, uniforms, exact specifications of stadiums, and coaches' and player likenesses within the games. CLC is the licensing agent responsible for facilitating the licensing

agreements that EA has with NCAA Football, NCAA Basketball, and each school featured in the game (D. Hughes, personal communication, November 17, 2008). EA holds the exclusive rights to develop these NCAA games, which allows them to exclusively feature certain trademark indicia of each school, as well as select marks (D. Hughes, personal communication, November 17, 2008). The most lucrative EA/NCAA deal is with the popular *NCAA Football* franchise, which consistently makes EA the CLC's top selling non-apparel collegiate license, netting large royalties for the NCAA and its member institutions leading the category since the third quartile of 2003 (Hughes, 2008). The royalties for the licenses can be rewarding for individual institutions. For example, for the 2005-06 season, the University of Florida and Ohio State University each earned $130,500 in licensed royalties from EA (Bachman, 2007). The games have proven to be an added revenue source, in addition to being a strong promotional tool, for the NCAA and its member institutions.

The relationship between EA, CLC, and the NCAA allows EA to use NCAA Football and Basketball attributes; however, unlike their professional counterparts (*Madden NFL* and *NBA Live* games), the collegiate games do not include athlete names to abide by NCAA Bylaws and maintain student-athlete amateurism. The method of video game development, where player attributes, but not name are used to enhance realism, is known as "scrambling" (Kaburakis et al., 2009). However, the use of student-athlete likenesses and names would increase the demand and popularity of the video games, and further promote individual athletes and universities. When referring to the inclusion of student-athlete likenesses and names within the video games, *NCAA Basketball* game producer Sean O'Brien admits "we want it in the game. . .The NCAA knows we want it and they're investigating it for us" (Gaudiosi, 2008, para. 20). In reference to the *NCAA Football* series, Mike Low, Director of Licensing at the University of Notre Dame, claims: "Fans love the effort they (EA Sports) put into making the stadium, the traditions, the mascots and the whole game environment so realistic." ("CLC grants EA Sports," 2005, para. 4). Low stops short of indicating the likenesses of the players in the games because they are student-athletes and that would violate NCAA Bylaws. Yet, the exact specifications and authenticity that popularize SVGs also provide the basis for claims that the games violate student-athlete publicity rights.

THE RIGHT OF PUBLICITY AND STUDENT-ATHLETE LIKENESSES

The remainder of this paper will address the legal issues associated with the right of publicity by analyzing the violations alleged in the class action lawsuit brought by Sam Keller, former quarterback for Arizona State and Nebraska, against EA and the NCAA. Keller's complaint also includes allegations involving conspiracy, violation of California's Unfair Competition Act, breach of contract, and unjust enrichment (*Keller, Class Action Complaint*, 2009). However, this paper will address only the right of publicity claims alleged in the complaint and the defenses to those claims. On June 15, 2009, Ryan Hart, former quarterback at Rutgers University, and Troy Taylor, a former quarterback at the University of California, also filed a class action lawsuit against EA claiming that the SVG producer violated their publicity rights (*Hart et al. v. EA Inc., et al., 2009*). The claims made by Hart and Taylor are similar to those found in the *Keller* complaint. This paper will focus on the *Keller* case as it was filed first and is further along in the stages of litigation.

Right of Publicity

At its root, the right of publicity is a state common law doctrine, even though it is often supported by legislation (Matzkin, 2001). The doctrine is closely associated with the right to privacy because it extends the privacy right that people have in protecting their identity and controlling its use in a commercial setting. Specifically, the right of publicity protects individual rights, especially those associated with public figures or celebrities, to control the commercial value and exploitation of their name or likeness and prevent others from unfairly appropriating this value (*McFarland v. Miller*, 1994). The right was first recognized in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* (1953), a case in which a chewing gum manufacturer sued another chewing gum manufacturer over the use of a professional baseball player's likeness.

In the *Haelan* case, a professional baseball player entered into a contract with the plaintiff granting it the exclusive right to use the player's photograph on baseball cards that were sold in packs along with the plaintiff's gum. The defendant, a rival chewing gum/baseball card producer, "deliberately induced the ball-player to authorize defendant, by a contract with defendant, to use the player's photograph in connection with the sales of defendant's gum either during the original or extended term of the plaintiff's contract" (*Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 1953, p. 867). The defendants argued that the contract between the athlete and the plaintiff was nothing more

than a release of the player's personal right to privacy and did not confer to the plaintiff any proprietary right in the player's name or likeness. The defendants argued that the baseball player only possessed "a personal and non-assignable right not to have his feelings hurt by such a publication" (*Haelan Laboratories, Inc.*, 1953, p. 867). The defendant concluded that no cause of action could arise from its use of the player's photograph on its cards since no property or legal rights were granted to the plaintiff.

The majority in *Haelan* rejected the defendant's arguments and in doing so recognized a legal right of publicity. The *Haelan* (1953) court held:

> [I]n addition to and independent of [the] right of publicity. . .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. (p. 868)

Following the lead of the court in *Haelan*, other states began to recognize the right of publicity as a right independent of the right of privacy. Nineteen states have enacted statutes aimed at protecting publicity rights and twenty-eight states recognize the right under common law (Tate, 2009). Keller's complaint includes allegations of both statutory and common law right of publicity violations. Specifically, Keller claims that EA deprived him and the class of their publicity rights under both California Code §3344 and California common law, and the NCAA deprived them of their publicity rights under Indiana Code 32-36-1-8 (*Keller, Class Action Complaint*, 2009). The claims stem from the alleged use of student-athlete likenesses in *NCAA Football*, *NCAA Basketball*, and *NCAA March Madness* sport video games. The following sections will analyze the right of publicity using Keller's statutory and common law claims against EA and his statutory claim against the NCAA.

Keller's Common and Statutory Claims against EA Sports

Keller alleged that California law controlled his claims against EA because the company's principal place of business is located in Rosewood, California (*Keller, Class Action Complaint*, 2009). The right of publicity in

California is protected both by statute and by common law (*Eastwood v. Superior Court*, 1983). To state a claim under California common law for the right of publicity Keller must show: (1) that EA used his and the class' identity ("name, voice, likeness, etc."); (2) to EA Sports' advantage, commercially or otherwise; and (3) resulting in injury (*Eastwood*, 1983, p. 417). The statutory right in California is almost identical to the common law right of publicity except that it does not require an advantage, but does require that the defense knowingly used the plaintiff's name or likeness (California Civil Code §3344, 2009). California §3344 also provides statutory minimum for damages in the amount of $750 (California Civil Code §3344,). The statutory cause of action is intended to complement, not supplant, the common law right of publicity (*Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 2002).

(1) The Use of Identity Requirement

In his complaint, Keller addressed both the statutory and common law use of identity requirements through his allegations that EA "has used and continues to use" Keller and the class' names and likenesses for the purpose of advertising, selling, and soliciting purchases of EA's NCAA SVGs (*Keller, Class Action Complaint*, 2009). For his statutory claim, Keller adds that EA knowingly used his and the class' likenesses in its college football and basketball video games (*Keller, Class Action Complaint*). Keller's allegations that EA used his and the class' likenesses primarily center on one feature used by EA to realistically replicate college sports in its NCAA SVGs; (a) the personal profiles feature. However, two additional SVG features, (b) personal skill set and (c) audio commentary, will also be analyzed even though these features were not discussed in detail by the Keller complaint. It is important to discuss these features because Keller could introduce evidence on them at trial to support his use of identity argument.

(a). Personal profiles.

In EA's NCAA SVGs the players on the screen look very lifelike. Each game has player profile information within the rosters, although no names. The student-athlete's essential traits and characteristics, including height, weight, position, and hometown are included in the rosters. In most instances, the on screen players' hometowns are very similar, if not the same as the real life student-athlete. Also, the player's visual appearance is very comparable, with skin and hair color matching the player. In the *NCAA Basketball* game, it is even more apparent, as players' haircuts (e.g., shaved head vs. longer hair) are typically very accurate relative to their real life counterpart. Further,

accessories, such as glasses, facemask types, and arm bands, are very often similar to what a specific player typically wears.

The Keller complaint alleged that the personal profile characteristics used by EA to replicate a realistic video game representation of college sports resulted in the use of student-athlete likenesses for the purpose of right of publicity actions under California common law and California §3344. Keller's arguments for use of likeness focused primarily on the similarities between real-life student-athletes and the SVG personal profiles. For example, Keller drew comparisons between himself and his electronic quarterback counterpart for Arizona State University in *NCAA Football 05* and Nebraska in *NCAA Football 08*. Keller played quarterback for Arizona State in 2004 (which coincided with the *NCAA Football 05*) before transferring to the University of Nebraska in 2007 (which coincided with *NCAA Football 08*). Keller claimed that EA used his identity because the players who allegedly represented Keller in *NCAA Football 05* and *NCAA Football 08* resembled Keller in every material way (height, weight, position, and hometown) and even wore a visor like Keller.

However, there were two key differences between Keller's likeness for Nebraska in the 2007 football campaign and the player Keller claimed represented him in *NCAA Football 08*. When Keller first arrived at Nebraska he was initially assigned the number 5, but he managed to switch back to the number 9 shortly before playing his first game at Nebraska (*Keller, Class Action Complaint*, 2009). That switch was made not long before the EA released *NCAA Football 08* for sale to the public. Thus, it is alleged that EA did not have adequate time to change the jersey number for Keller's counterpart in *NCAA Football 08*. Accordingly, the Nebraska player who wore number 5 in *NCAA Football 08* had the same personal profile traits as the Arizona State player who wore number 9 in *NCAA Football 05*. In 2007, Keller also switched the tint of his visor from dark to a clear for the first game of the 2007 season. This change in visors also was not reflected in *NCAA Football 08* because it was the first time in his college career (dating back to his days at Arizona State) that he played with a clear visor (*Keller, Class Action Complaint*). The complaint included pictures of both the players Keller claimed represented him in *NCAA Football 05* and *NCAA Football 08*. Keller alleged that "[i]t is not coincidental" that the two players were "virtually identical in all material respects" (*Keller, Class Action Complaint*, 2009, p. 12).

Keller lists several other anecdotal examples of how EA violates the publicity rights of student-athletes. One example was that of Jake Long, the first overall pick in the 2008 National Football League (NFL) Draft (*Keller,*

Class Action Complaint, 2009). The complaint provided Long's screen shots from EA Sports' *Madden NFL 09* video game and EA Sports' *NCAA Football 08*. Keller argued that the two pictures were "virtually identical" (*Keller, Class Action Complaint*, p. 6). EA compensated Long along with all other NFL players for the use of their identity in the *Madden NFL 09* video game through an agreement reached between EA Sports, the NFL, and the National Football League Players Association (NFLPA). EA did not compensate Long for the use of his likeness in *NCAA Football 08*.

Keller alleged that "with rare exception," the similarities that respectively existed between Keller and Long and their *NCAA Football* counterparts are also found for "virtually every real-life Division I football or basketball player in the NCAA" (*Keller, Class Action Complaint*, 2009, p. 4). Keller used these similarities to support his claim that EA Sports' usage of student-athlete identity is both real, and done with knowledge of the appropriation.

Keller alleged that only one identifying personal profile characteristic was missing in EA's NCAA SVGs, the names of student-athletes on the backs of jerseys (*Keller, Class Action Complaint*, 2009). While names are not included in the games initially, the gamer has the ability to add/edit the athlete's names and save them to the gaming console, so they are available in all future games. The *NCAA Football 09* has a "Locker Room" feature that allows gamers to download current game rosters from an online source. Also, another option to obtain video game rosters is to buy them through a private company, such as Gamerosters.com, that sells NCAA player rosters (Associated Press, 2008). Keller alleged that EA facilitates the use of player names by building these options into the NCAA SVGs and providing the "EA Locker" tool (*Keller, Class Action Complaint*).

(b). Player skill set.

The game play and player skill set is another area where the game publishers have enhanced the realism in the game to a point that raises the likeness issue. The players' movement and skill sets are very similar to the real players. Each game has rating categories for various skill attributes (e.g., in *NCAA Basketball* free throw percentage, three point percentage, etc.). In the *NCAA Football* game, quarterbacks who are known for their passing skill are rated high in the passing categories. Teams' playbooks are also very similar to those used by the actual teams; teams who typically use the triple option or spread offense out of the shotgun formation have a playbook that mimics this. Similarly, a basketball team with a fast break offense is more likely to make quick passes in the video game. EA even has a deal with the Blue Ribbon

College Basketball Yearbook for scouting reports on the teams (Gaudiosi, 2008). Keller did not focus on the use of player skill set in the complaint, only referencing the fact that both Keller and the players he claimed represent him in *NCAA Football 05* and *NCAA Football 08* had the same style of play; all three were pocket passers (*Keller, Class Action Complaint*, 2009). However, the realism provided by EA's player skill set feature could be used at trial by Keller to strengthen his use of likeness allegations because skill sets can be used to identify individual student-athletes.

(c). Audio commentary.

Adding to the realism and authenticity of the NCAA SVGs, the *NCAA Football* and *Basketball* games utilize game announcers who provide in-game commentary. The *NCAA Football* games' commentators, Brad Nessler, Kirk Herbstreit, and Lee Corso provide typical remarks on the game play (Electronic Arts, 2008b). The *NCAA Basketball* features real life personalities Brad Nessler, Dick Vitale, and Erin Andrews (Electronic Arts, 2008a). The commentary is realistic, but does not include player names initially. However, manually adding a player's name into the game triggers the announcer to say that player's name during the game. For example, after programming the University of Florida quarterback Tim Tebow into the *NCAA Football 09* game, Nessler may say "Tebow in the gun". The announcers also say simple names for players, even if that is not their actual name. For example, if "Matt Carter" is programmed into the starting quarterback position, the announcer will state "Carter to throw". It is apparent that the commentators pre-record the comments and the names, and only common last names or names of the star players' are pre-recorded. For example, when "Ryan Perriloux" is added as quarterback (the former Louisiana State University and current Jacksonville State University quarterback) the commentators recognized his name and said it perfectly, even though it is an uncommon name. Yet, when "Perrillew" (the proper pronunciation, but incorrect spelling) is entered into the gaming system, the announcer did not recognize or say his name during the entire game. This indicates that EA identifies the popular college players and pre-records their names and spelling information into the game.

Furthermore, the announcers rarely say an entered player's name during the football game, unless it is a quarterback; however, this changes when a popular player's name was added. When "Darren McFadden," the former University of Arkansas Heisman Trophy contending tailback, was manually programmed into a game the announcer said his name when he touched the ball. Brad Nessler, one of the game commentators, admitted that NCAA

players' names are pre-recorded into the games. Nessler confesses, "[w]e add player's names, although I know they aren't supposed to" (Carmony, 2008). While Keller does not address the use of audio commentary in the complaint, an argument could be made that the use of commentary that identifies individual student-athletes further demonstrates how EA and the NCAA allow student-athlete likenesses to be used without repercussion by the NCAA or remuneration to the student-athlete.

Case law on use of identity.

The question remains as to whether EA's virtual representations of college football and basketball are so accurate as to violate student-athlete publicity rights. There are two significant Ninth Circuit cases that addressed the issue of how exact a depiction must be to give rise to an actionable right of publicity claim.

The first case, *Motschenbacher v. R.J. Reynolds Tobacco Co.* (1974), involved a racecar driver who sued a tobacco company for using an altered photo of his racecar in a cigarette advertisement. The photograph at issue in the case was altered to change the racing number and added a spoiler to the car, on which could be seen the name of their product. Motschenbacher argued that the car was uniquely identified as his own because the defendants did not alter the photograph to remove a distinctive white pinstripe, a mark that appears on no other racecars. The Ninth Circuit reversed the district court's ruling that the advertisement did not appropriate Motschenbacher's identity as a matter of law. In doing so, the Court found that the lower court erroneously failed to attribute proper significance to the distinctive decorations on the car used in the advertisement (*Motschenbacher*, 1974). The Court recognized that the "peculiar" markings on the car caused some persons to think that it was Motschenbacher who endorsed the product (*Motschenbacher*, 1974, p. 827). In other words, the car had a "distinctive and recognizable nature" resulting in commercial value that could be "affixed" to Motschenbacher's identity (Hanlon & Yasser, 2008, p. 270, citing *Motschenbacher*, 1974).

Another significant case is *White v. Samsung Electronics America, Inc.* (1992), brought by Vanna White, a hostess for the game show Wheel of Fortune. She brought action against Samsung because it aired an advertisement featuring a female-shaped robot dressed in a wig, gown, and jewelry that turned letters on a game board made to resemble the board used on Wheel of Fortune. The Court ruled in favor of White and found that if viewed separately, individual aspects of the advertisement said little; but if viewed all together, those aspects left little doubt about the celebrity depicted

in the advertisement (*White*, 1992, p. 1399). Perhaps the most relevant aspect of the White (1992) case involved this hypothetical fact pattern posed by the court to explain its ruling:

> [c]onsider a hypothetical advertisement which depicts a mechanical robot with male features, an African-American complexion, and a bald head. The robot is wearing black hightop Air Jordan basketball sneakers, and a red basketball uniform with black trim, baggy shorts, and the number 23 (though not revealing 'Bulls' or 'Jordan' lettering). The ad depicts the robot dunking a basketball one-handed, stiff-armed, legs extended like open scissors, and tongue hanging out. Now envision that this ad is run on television during professional basketball games. Considered individually, the robot's physical attributes, its dress, and its stance tells us little. Taken together, they lead to the only conclusion that any sports viewer who has registered a discernable pulse in the past five years would reach; the ad is about Michael Jordan (p. 1399).

Similarly, the features used by EA in its college football video game provide little, if taken individually. When taken as a whole, a persuasive argument could be made that the identifying characteristics used in the *NCAA Football* and *NCAA Basketball* are more detailed and identifying than those used in *Motschenbacher*, *White*, and the hypothetical created by the court in *White*. In *NCAA Football 05* and *NCAA Football 08*, the quarterbacks for Arizona State and Nebraska were not cars or robots, but electronic resemblances of a human being purposefully made to resemble Keller in every way, from the jersey he wore to his pocket-passer style of play. In addition, game users can upload Arizona State's roster for *NCAA Football 05* and Nebraska's roster for *NCAA Football 08* and have Keller listed as the quarterback wearing numbers 9 and 5 respectively for those two in those two games. When taken together, the personal, physical, and skill characteristics in *NCAA Football 05 and NCAA Football 08* might make it reasonable to conclude that Sam Keller's identity is depicted in those games.

(2) The Advantage and (3) Injury Requirements

Even if Keller is successful in establishing that EA used and continues to use student-athlete likenesses in its NCAA SVGs, he still has to prove that this use resulted in both an advantage to EA and in an injury to him and the class. Under California common law, Keller must prove that EA benefited through

the use of student-athlete likenesses in its video games (*Eastwood v. Superior Court*, 1983, p. 417). In his complaint, Keller argued that use of student-athlete likenesses in the *NCAA Football* and *NCAA Basketball* games allowed EA the advantage of producing a more realistic SVG. In fact, Keller's complaint stated that heightened realism in regards to player likeness translated into increased sales and this resulted in increased revenues for EA (*Keller, Class Action Complaint*, 2009). This increase in revenue would provide EA with a commercial advantage through the use of student-athlete likenesses.

Keller does not need to show an advantage for his statutory right of publicity. However, both California statutory and common law rights of publicity require Keller to prove that he and class were injured by EA's use of student-athlete likenesses. For his statutory claim, Keller must establish that EA profited off of use student-athlete likenesses (California Code §3344(a), 2009). Keller can do this by presenting to the court evidence consisting "only of the gross revenue attributable to such use" (California Code §3344 (a)). It might be difficult for Keller and the class to attribute an accurate percentage of gross revenues from the *NCAA SVGs* that is linked to the use of student-athlete likenesses. It may be even more difficult for Keller to satisfy the injury requirement under California common law.

This difficulty stems from the fact that the right of publicity protects the rights of individuals to control the economic value associated with their names or likenesses (*McFarland v. Miller,* 1994). This rationale creates a problem for Keller because most student-athletes who play NCAA football and basketball do not have much economic value in their names or likenesses. Typically, only celebrities possess the requisite value in their names or likenesses needed to prove a right of publicity claim. In fact, some jurisdictions require celebrity status to recover at common law for right of publicity violations (*Landham v. Lewis Galoob Toys, Inc., 2000*). Some college football and basketball players have attained celebrity status,[1] but that is not the case for most student-athletes. One California case addressed the split in jurisdictions and assumed without comment that a right of publicity exists for non-celebrities if their names or likenesses were commercially exploitable to some extent (*Dora v.*

1. Examples of celebrity college football players from the 2009 season could include Tim Tebow and Sam Bradford (both are former Heisman Trophy winners). Examples of celebrity college basketball players from the 2008-9 season could include Blake Griffin (the number one player picked in the 2009 NBA Draft) and Tyler Hansbrough (four-time All-American and first-round NBA draft pick).

Frontline Video, Inc., 1993, n 2).[2] Thus, Keller must demonstrate that his and the class' likenesses is commercially exploited by EA.

Perhaps the best way for Keller to show exploitation would be to use the collective value for all NCAA football and basketball student-athletes. Using the NFL as an example, not every NFL player has celebrity status, even in football circles. For example, Stanley Arnoux,[3] the fourth-string strong side linebacker for the New Orleans Saints, probably has little value in his name and likeness. But the agreement between EA and the NFLPA includes the use of likeness for non-celebrity NFL players as well as celebrity NFL players.[4] The agreement includes every player on NFL rosters because EA prides itself on producing the most realistic professional football SVG on the market. The exclusive use of NFL player likeness gives EA a commercial advantage over other SVG publishers; EA compensates NFL players for the value of this commercial advantage. The complaint stated that the NFLPA, through its licensing arm, is paid nearly $35 million for each year that players are featured in the *Madden NFL* video games (*Keller, Class Action Complaint*, 2009).

Similarly, EA prides itself on producing the most realistic college football and basketball games on the market. Keller argued that student-athlete likeness is a necessary component in producing realistic college football and basketball SVGs (*Keller, Class Action Complaint*, 2009). But unlike their NFL counterparts, NCAA football and basketball players are not compensated for the use of their likenesses and this would provide Keller with the basis for his exploitation argument. A problem with this argument is the fact that the NCAA has authority to use student-athlete likenesses and allow third parties to use student-athlete likenesses "as necessary to explain the academic and membership affairs" (NCAA, 2009b). The NCAA possesses that authority in perpetuity, which is the basis for recent antitrust challenges against the NCAA, including one brought by former UCLA basketball player Ed O'Bannon (*O'Bannon v. NCAA and CLC, 2009*).[5] NCAA Bylaws outline

2. The case in *Dora* involved an individual who was not a celebrity to the general public, but attained a degree of celebrity status among some members of the surfing sub-culture (*Dora v. Frontline Video, Inc.*, 1993, n 2).

3. Stanley Arnoux is a rookie who was selected in the fourth round of the NFL draft (New Orleans Saints, 2009).

4. Examples of celebrity NFL players could include Peyton Manning and Tom Brady.

5. The O'Bannon antitrust case is in the process of being consolidated with the Keller lawsuit (S. Paynter, personal communication, September 1, 2009). As of February 8, 2010, the NCAA's Motion to Dismiss the O'Bannon case was denied (*O'Bannon v. NCAA and CLC, Order on NCAA's and CLC's Motion to Dismiss*, 2010). The NCAA's licensing contracts will be open for discovery. The NCAA's Motion to Dismiss the Keller case is being granted in part with Keller having an opportunity to amend the Right of Publicity complaint against the NCAA under Indiana state law and the breach

the ways in which the NCAA and its member institutions can use student-athlete likenesses. NCAA Bylaws includes a requirement that student-athletes maintain their amateur status, thus prohibiting them from being compensated for likeness usage in commercial products (NCAA Division I Manual art. 12.01.1, 2009. Student-athletes must comply with NCAA Bylaws as a precondition to participation in NCAA events (NCAAa, 2009a).

These NCAA prohibitions are problematic for plaintiffs in *Keller* because a court could find that they have waived their publicity rights through their agreement to comply with NCAA bylaws. Keller asserts that NCAA Bylaw 12.5 specifically prohibits the commercial licensing or use of student-athlete name or likeness (*Keller, Class Action Complaint*, 2009). NCAA Bylaw 12.5.1.1 limits university use of student-athlete name and likeness in institutional, charitable, education or nonprofit promotions (NCAA, 2009a). NCAA Bylaw 12.5.1.1(h) allows the use of student-athlete name or likeness on commercial products that are sold only at member at the member institution, outlets owned by the institution, or outlets that are owned and operated by charitable organizations (NCAA, 2009a). However, 12.5.1.1(h) prohibits the use of commercial products that include a individual student-athlete's name, picture or likeness and lists examples of this type of use (jerseys or likeness on a bobble head doll) (NCAA, 2009a). Further, NCAA Bylaw 12.5.2.2 states that student-athletes or their institutions must take action to prevent the unauthorized use of student-athlete name or likeness in the promotion of commercial products (NCAA, 2009a). Thus, if Keller is successful in proving that EA uses student-athlete likenesses in its games in violation of NCAA Bylaws, then this finding could jeopardize EA's contractual relationship with the NCAA and CLC. It is unclear how a court would resolve any of these arguments. For this reason, the injury requirement could pose the most trouble for Keller and the class in their common law right of publicity claim against EA.

Keller's Statutory Claim against the NCAA

Keller's complaint against the NCAA alleged that the organization, along with EA and CLC, "willfully and intentionally" used and continues to use Keller and the class' publicity rights (*Keller, Class Action Complaint*, 2009, p. 17). Keller stated that because the NCAA is a domiciliary of Indiana, its alleged use of his and the class' likenesses violated Indiana Code §32-36-1-1. The Indiana Code defines the right of publicity as a property interest possessed

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of contract complaint. Further, the Court denied EA's and CLC's Motions to Dismiss and EA's Motion to Strike (*Keller v. EA, NCAA, CLC, Order on Defendants' Motions to Dismiss*, 2010).

by personalities in their: (1) name, (2) voice, (3) signature, (4) photograph, (5) image, (6) likeness, (7) distinctive appearance, (8) gestures, or (9) mechanisms (Indiana Code §32-36-1-7, 2009). It is important to note that the Code uses the term "personality" rather than "person" in describing those who possess publicity rights. The code defines "personality" as a person, living or dead, whose: (1) name, (2) voice, (3) signature, (4) photograph, (5) image, (6) likeness, (7) distinctive appearance, (8) gesture, or (9) mannerisms has commercial value, even if the person has never authorized its use (Indiana Code §32-36-1-6, 2009).

To qualify as "personalities" under the Indiana Code, Keller and the class must prove to the court that they possess commercial value in their names and likenesses. This raises problems and concerns similar to those presented in the discussion on California's common law injury requirement. Specifically, the problem the plaintiffs face in overcoming the fact that most members of the class have little value in their names and likenesses. Another problem is the fact that NCAA amateurism regulations (Bylaw 12.1.2) prohibit student-athletes from profiting off of their names and likenesses as a condition precedent to athletic participation in NCAA events (NCAA, 2009a). Unlike California common law, the Indiana statutory right of publicity recognizes possible use of student-athlete likenesses (Indiana Code §32-36-1-8, 2009). Indiana Code §32-36-1-8 states that written consent for the use of publicity rights is void if solicited by an athlete agent from a student-athlete in violation of state law (Indiana Code §32-36-1-8(b), 2009). This section qualifies the prior section, which requires consent for the use of a personality's name or likeness (Indiana Code §32-36-1-8(a), 2009). It is unclear as to whether the Indiana Code intended to list student-athletes as possible "personalities" for the purpose of Indiana's statutory right of publicity.

The Indiana Code's right of publicity is similar to the California Code §3344 because it also provides for a statutory minimum in damages for publicity violations. For violations to their publicity rights, plaintiffs in Indiana can claim the greater of $1,000 or actual damages derived from the use of their names and likenesses (Indiana Code §32-36-1-10, 2009). To prove actual damages, the plaintiff must establish the gross revenue attributable to the unauthorized use, and the defendant is required to prove deductible expenses (Indiana Code §32-36-1-11, 2009). This provision is almost identical to the damages provision in California's right of publicity statute, California Code §3344, subd. (a). Both these statutes present Keller and the class with the problem of reaching an accurate percentage of the gross revenues from the NCAA SVGs that is linked to the use of student-athlete likenesses.

Perhaps the biggest hurdle that Keller and the class face in their right of publicity claim against the NCAA concerns the use of their names and likenesses. The Indiana Code requires proof that the NCAA must have created, or caused to be created, the merchandise bearing the plaintiffs' names and likenesses (Indiana Code §32-36-1-9, 2009). This is problematic for the plaintiffs because EA Sports, not the NCAA, made the NCAA SVGs. Thus, the plaintiffs' right of publicity case against the NCAA turns on how the court interprets "cause to be created." In the complaint, Keller alleged that the NCAA used his and the class' "names, images, likenesses, and distinctive appearances" through an "unlawful conspiracy" with EA and the CLC (*Keller, Class Action Complaint*, 2009, p. 17). The NCAA, through its' licensing agent, the CLC, contractually permits EA to use certain trademark indicia of each school in the NCAA SVGs. However, NCAA spokesperson Stacey Osburn stated that the NCAA's agreement with EA "clearly prohibits the use of names and pictures of current student-athletes in their electronic games" (Gullo & Levinson, 2009). Thus, the express terms of the contract between the NCAA, CLC, and EA do not support Keller's conspiracy claim. Even if Keller could prove that the NCAA was aware of the use of student-athlete likenesses by EA, that awareness may not provide basis for a conspiracy claim. Further, if the NCAA did "unlawfully conspire" with EA, Keller still must prove that the conspiracy "caused" the creation of the NCAA SVGs.

It is difficult to determine how a federal court in California will answer these questions concerning Indiana law. This difficulty is heightened by the fact that there are no reported Indiana cases that resolve these issues. Only a handful of reported cases from Indiana exist that even address the right of publicity. None of those cases answer any of the issues associated with the Keller complaint.

EA'S FIRST AMENDMENT DEFENSE TO KELLER'S COMMON LAW CLAIMS

Even if Keller can establish that EA violated his and the class' publicity rights in the NCAA SVGs, the First Amendment could defend the video game producer if its games warrant protection based on the freedom of expression. There exists an "inherent tension" between the right of publicity and the right of freedom of expression under the First Amendment (*ETW v. Jireh Publishing, Inc.*, 2003). Tension stems from the fact that the First Amendment exists to preserve an uninhibited marketplace of ideas and to further individual rights of self-expression (*Winter v. D.C. Comics*, 2003). In the very case in which the United States Supreme Court first recognized the right of publicity,

the Court also recognized the right's conflict with freedom of expression protection provided by the First Amendment (*Zacchini v. Scripps-Howard Broadcasting Co.*, 1977). In *Zacchini*, the Court addressed the conflict by balancing the individual's right of publicity against the First Amendment considerations. The need to prevent the chilling of free expression had to be balanced against the need to prevent unjust enrichment by the theft of good will. In balancing these interests, the Court recognized that "[n]o social purpose is served by having the defendant get some free aspect of the plaintiff that would have market value and for which he would normally pay" (*Zacchini*, 1977, p. 576).

The issue of whether the First Amendment should trump right of publicity interests can turn on whether the court recognizes the use of a person's name or likeness as expressive, in which case it is protected, or commercial, in which it is generally not protected (*Doe v. TCI Cablevision et al.*, 2003). Expressive work includes the use of a person's identity in news, entertainment, and creative works like film and literature that provide some expression of ideas about a person or artistic imagination through the use of the person's name or likeness. An example of expressive work could include a documentary film exploring the impact of Wayne Gretzky on the popularity of hockey in the United States, or a news report on Brett Favre's return to the NFL from retirement. Commercial speech includes advertising or the use of a person's name or likeness on merchandise (*Doe*, 2003). An example of commercial speech would be a television commercial featuring Peyton Manning endorsing Gatorade. The line between expressive and commercial speech is blurred by situations in which both expression and commercial interests are at play. Examples could include a painting of a historic moment in sport that uses the literal depiction of an athlete (*ETW*, 2003), or the creation of a comic book villain who has the same name as real-life hockey star (*Doe*, 2003). Further, the Supreme Court has recognized that First Amendment protection can even extend to commercial speech in order to protect free expression in some instances (*44 Liquormart, Inc. v. Rhode Island*, 1996).

EA asserts that its NCAA video games are expressive works that warrant First Amendment protection because they include transformative content and information in which the public has a strong interest (*Keller v. Electronic Arts, Inc., NCAA, Collegiate Licensing Company, Electronic Arts' Motion to Dismiss Complaint; Memorandum of Points & Authorities*, 2009). Transformative content includes any creative content that transforms literal depictions into wholly new and creative works (*Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 2001). Courts have found that the public has a strong

interest in protecting expressions that include news and information about current events, entertainment, or sports (*Gionfriddo v. Major League Baseball*, 2001). EA makes two separate arguments for First Amendment protection by claiming that its games have both creative and informatively important content. These two separate arguments involve two different grounds for First Amendment protection; thus, it is important to analyze each of these claims separately.

Transformative Content

The term "transformative content" derives from the transformative use test, which is one of three tests that emerged from three different lines of cases where courts balanced the competing interests of free expression and the right of publicity (Grady, McKelvey, & Clement, 2005). The tests that emerged from the other two lines are: (a) the *Restatement (Third) of Unfair* Competition's related use test, and (b) the predominant purpose test created and used by the Missouri Supreme Court in *Doe v. TCI Cablevision et al.* (2003).

The related use test originated from the *Restatement (Third) of Unfair Competition* and focuses on the related use of the celebrity's name or likeness. To earn First Amendment protection under the related use test, the defendant's use of name or likeness in an express work must be is sufficiently related to the celebrity (*American Law Institute*, 1995). If the aim of the use is merely to draw attention to the work, then the use is not sufficiently related and thus it does not merit First Amendment protection.

The predominant purpose test was first suggested by intellectual property litigator Mark Lee (2003) and first used by the Missouri Supreme Court in *Doe, a/k/a Tony Twist v. TCI Communications, et al.* (*Twist, 2003*). The point of the predominant purpose test is to determine the predominant, purpose of the defendant's purported appropriation of the plaintiff's likeness (Lee, 2003). If the product's primary purpose is to exploit the commercial value of an individual's identity, then the product should not garner First Amendment protection.

The transformative use test comes from the California Supreme Court's decision in *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) and is based on the concept of transformative fair use from copyright law (Garon, 2008). Through the transformative use test, expression deserves First Amendment protection when the work containing the celebrity's likeness is so transformed by additional, transformative elements that it has "become primarily the defendant's own expression rather than the celebrity's likeness"

(*Comedy III Productions, Inc.*, 2001, p. 809). The inquiry can also be phrased as determining "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question" (*Comedy III Productions, Inc.*, p. 809).

The facts in *Comedy III* involved a literal depiction of the Three Stooges on T-shirts. The California Supreme Court held that the depiction of the Three Stooges did not contain enough creative or transformative content to demand First Amendment protection. The court found that "when an artist's skill and talent is manifestly subordinate to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist's right of free expression is outweighed by the right of publicity" (*Comedy III Productions, Inc.*, 2001, p. 810).

For a better understanding of how the transformative use test works, it is helpful to contrast the California Supreme Court's decision in *Comedy III* with its subsequent decision in *Winter v. D.C. Comics* (2003). In *Winter*, brothers Johnny and Edgar Winter brought a right of publicity lawsuit against D.C. Comics for using their likenesses in creating the "August brothers" characters in a comic book titled "August of our discontent," a play on Shakespeare's "winter of our discontent" (*Winter*, 2003, p. 476). Unlike its decision in *Comedy III*, the court in *Winter* found that the appropriator's use of likeness was expressive rather than literal. The court's distinction was based on D.C. Comic's fanciful interpretation of the brothers as half-human, half-worm creatures (*Winter*,p. 479). The court used the transformative use test and found that the Winter brothers were mere parts of raw materials used by artists to create comic book characters in a larger story, which was also quite expressive. "To the extent the drawings of the August brothers resemble the plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature" (p. 479). Accordingly, the court held that the Winter brothers' likenesses were transformed into something new, expressive and deserving of First Amendment protection (pp. 479-480).

There is a sport-related case out of the Sixth Circuit, *ETW v. Jireh Publishing*, that combined the Restatement's related use test with the transformative use test (Grady et al., 2005). In *ETW*, the licensing agent for Tiger Woods brought a right of publicity action against Jireh Publishing for marketing prints made by an artist named Rick Rush of Woods' victory at the Masters Tournament in 1997. The prints were of Woods in his final round of that historic competition, but behind Woods were the images of other famous golfers of the past looking down on Woods. The artist, Rush, was famous for his artistic renditions of famous sports personalities and sporting events. Some

of Rush's notable works included prints of Paul "Bear" Bryant, the Pebble Beach Golf Tournament, and Michael Jordan. Applying the related use test, the court found that the use of Woods' likeness was related to the work and the use did not reduce the commercial value of Woods' likeness. The court found that any effect on Woods' right to publicity was negligible and significantly outweighed by society's interest in protecting free artistic expression (*ETW*, 2003, p. 938). Using *Comedy III* as a guide, the court also found the existence of transformative content in the work through the inclusion of past golfing greats and the fact that the image of Woods was not a literal depiction, but an expressive image (*ETW*, 936). Ultimately, the court held that Jireh Publishing's use of Woods' image was protected by the First Amendment (p. 938).

EA will have to establish that its games contain the requisite transformative elements needed for First Amendment protection. To do this, EA will have to argue that its case should be decided like *Winter* rather than *Comedy III*. EA will have to demonstrate that the depictions of student-athletes in NCAA SVGs are expressive rather than literal. This could pose a problem for EA because the game maker prides itself on presenting a realistic presentation of college sports through its games. EA even promotes the game's realism in their marketing slogan, "it's in the game" (formerly, "if it's in the game, it's in the game," EA Sports, n.d.). While student-athlete likeness in the EA games is somewhat distorted, said likeness is not "distorted for purposes of lampoon, parody, or caricature" (*Winter*, 2003, p. 479). EA argues that even though its games do not parody student-athletes (like the use of likeness in *Winter*), its depictions are still expressive, like that of Tiger Woods in *ETW*. However, it will be difficult for EA to rely on *ETW* to support a free speech defense allowing it to use athlete likeness without compensation when it is shown that EA compensates Tiger Woods for the use of his likeness in the video game *Tiger Woods PGA Tour*.

Transformative Content in Video Games

EA asks that the court direct its attention away from the depiction of student-athletes in its NCAA SVGs, and instead focus on the "larger story" presented in the games, which EA claims is "quite expressive." (*Electronic Arts' Motion to Dismiss Complaint*, 2009, p.10). EA points to its "feats of computer engineering combined with artistic expression" as proof of transformative elements that deserve First Amendment protection (*Electronic Arts' Motion to Dismiss Complaint*, p. 11). The game producer argues that student-athlete likenesses "represents only a small part of the many raw

materials that make up the games." (p. 11). To support its position, EA cites *Romantics v. Activision* (2008), *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.* (2006), and *Kirby v. Sega of America, Inc.*, (2006) as examples of cases where courts applied the First Amendment to protect expressions in video games.

In *Romantics v. Activision* (2008), musicians sued the makers of the video game *Guitar Hero* for the use of their song *What I Like about You* in the game. *Guitar Hero* allows players to play guitar in a virtual and customizable rock band, earning points for accuracy in replicating the songs. Based on those facts, the court applied the related use test and held that *Guitar Hero* was an expressive work because players can "customize their game play experience" and the game "contain[ed] large amounts of original artwork, and require[d] complex synchronization so that the audio and visual elements of the [g]ame line up with a player's manipulation of the controller" (*Romantics,* 2008, p. 766). At first, it would appear that the facts in *Romantics* provide a strong argument that EA's games are expressive works that warrant First Amendment protection. After all, the NCAA SVGs include large amounts of original artwork and gamers have some degree of control in customizing their gaming experience. However, the facts in *Romantics* are not completely analogous to the facts presented in *Keller*. First, the game producer in *Romantics* had a valid synchronization license for copyright to the song. Second, the plaintiffs were not visually represented in the video game. The plaintiffs argued the game exploited their publicity rights because their "distinctive sound" could be identified in the song (*Romantics,* p.764).

The problem with the "distinctive sound" argument was that not all the plaintiffs performed on the version of the song used in the game (*Romantics,* 2008). In fact, the lead singer of the Romantics was not even the same lead vocalist in the version of the song used in the game. As for the plaintiffs who were present on the recording, the court refused to accept that the combination of background voices in the song identified the plaintiffs (*Romantics,* 2008, p.765). The plaintiffs would have had a more persuasive argument that their publicity rights were commercially violated had the game producer used a virtual representation of the plaintiffs in the game. Rights to music and images of artists in video games have commercial value. On September 9, 2009, the makers of *Rock Band*, a rival competitor of *Guitar Hero*, released a video game similar to *Guitar Hero* that allows players to play along with music from the Beatles along with video images of the Beatles. The Beatles version of *Rock Band* is the result of a contractual collaboration between the game producer, Viacom Inc., and surviving members of the Beatles and their heirs (Fritz, 2009). In consideration for the rights to the Beatles catalog and their

images, Viacom has guaranteed Beatles rights holders a minimum of $10 million and that amount could grow to reach $40 million or more if the game sells as expected (Fritz, 2009). Similarly, rights to athletes' likenesses in video games also have commercially exploitable value. This value is evidenced by EA's agreement with the NFLPA, by which EA paid the NFLPA $35.1 million in 2008 for the use of NFL player and team likeness in *Madden NFL* (Kaplan, 2008).

EA also relies on *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*(2006) , a district court case out of California in which the owners of a strip club claimed that a video game infringed upon their trademark by including a club in the game with a similar name. Even though *E.S.S. Entertainment 2000, Inc.* did not involve publicity rights, EA relies on the court's holding that the creation of virtual cities in a video game "clearly" qualified as artistic work deserving of First Amendment protection (*Electronic Arts' Motion to Dismiss Complaint*, 2009 p. 8). In its *Grand Theft Auto* video game series, Rockstar Games creates cartoon-style versions of real-world urban cities like Los Angeles, New York, and Miami. The facts in *E.S.S. Entertainment 2000, Inc.* involved the Los Angeles edition of the *Grand Theft Auto*, *San Andreas*, which featured the fictional city of Los Santos.

EA asserts that the creation of virtual communities in *E.S.S. Entertainment 2000, Inc.* is analogous to the creation of the virtual college football and basketball settings (including football stadiums and basketball arenas) featured in its' NCAA SVGs. However, one creative component, parody, is missing in the NCAA SVGs that was present in the *Grand Theft Auto* games. The court in *E.S.S. Entertainment 2000, Inc.* recognized that *San Andreas* allowed players to experience the game's version of West Coast "gangster culture," and this experience fit in with signature brand of humor found in the *Grand Theft Auto* video game series (*E.S.S. Entertainment 2000, Inc.*, 2006, p. 1017). While the court acknowledged the artistic ability of the artists who created the virtual city of Los Santos, it was the parodic aspect of the game that provided the basis for First Amendment protection. The court defined parody as a "literary or artistic work that imitates the characteristics style of an author or work for comic effect or ridicule" (*E.S.S. Entertainment 2000, Inc.*, p. 1042). EA imitates the characteristics of NCAA athletic competitions in its NCAA video games, but not to the point of comedic effect or ridicule. Thus, the protection afforded the expressions in *San Andreas* by the court in the *E.S.S. Entertainment 2000, Inc.* case might not apply to the expressions in EA's NCAA SVGs.

The third case cited by EA involving protected expressions in video games is *Kirby v. Sega of America, Inc.* (2006). *Kirby* is the only case of the three

video game cases relied upon by EA that involves an application of the transformative use test. In *Kirby*, the former lead singer of the musical group "Deee-Lite," brought a right of publicity action against Sega of America, inc. (Sega) for its use of a character named "Ulala" in the video game "Space Channel 5" (*Kirby*, 2006). Kirby claimed Sega used her "unique public identity" in creating "Ulala" based on the visual representation of the character and the fact that Kirby used the words "ooh la la" in three of her songs (*Kirby*, p. 609). The Second District Court in California heard the case de novo on appeal from a summary judgment order granted in favor of Sega. In ruling on the appeal, the court looked to the California Supreme Court's finding in *Winter* that courts can often resolve right of publicity questions as a matter of law by viewing the work at controversy and comparing it to the likeness of the person or persons portrayed (*Kirby*, p. 612). The court recognized the existence of material similarities between Kirby and Ulala; however, the court found enough transformative elements in Ulala to uphold the dismissal of Kirby's claims (*Kirby*, p. 617).

Similarly, EA argued that its' NCAA SVGs, include enough transformative content to afford First Amendment protection. EA cites *Kirby* for the contention that the use of a person's persona is allowed when it is not the game's "very sum and substance" (*Electronic Arts' Motion to Dismiss Complaint*, 2009, p. 10). EA argued that Kirby supported its argument that the computer engineering and artistic creation of virtual locations, fans, coaches, and other game elements found in the NCAA SVGs provide the requisite degree of transformative elements. The court in *Kirby* did not grant video game producers an all-access pass to appropriate likeness simply by transforming said likeness into a video game image in a video game setting. In fact, the court in *Kirby* made very clear that courts should resolve the issue by examining and comparing the allegedly expressive work with the images of the plaintiff to see if the work contains "enough distinctive and expressive content" (*Kirby*, 2006, p. 617). Accordingly, it is important to analyze the factual determinations made in *Kirby* to see how they align with the facts in *Keller*.

In applying the transformative use test, the court was guided in its factual determinations by the decisions in *Winter* and *Comedy III* (*Kirby*, 2006). Central to its decision was the fact that Ulala was not a literal depiction of Kirby. Ulala was taller than Kirby and had a computer-animated physique that was dissimilar to Kirby's. Evidence demonstrated that Ulala was based, at least somewhat, on the Japanese style of "anime" rather than Kirby's persona and this was reflected in Ulala's hairstyle and primary costume, both of which varied from Kirby's hair style and manner of dress. The court found that any

similarity between Kirby and Ulala was nothing more than raw material used in composing a new and expressive video game character (*Kirby*, 2006, pp. 617-618). Thus, Sega's use of likeness was more like D.C. Comic's creative depiction of the August brother characters in *Winter* than the near literal depiction of the Three Stooges in *Comedy III.* Conversely, there are no new characters created in the NCAA SVGS, like Ulala in *Kirby* or the August brothers in *Winter*. For its NCAA SVGs, EA designed unnamed players who resemble their real-life counterparts in height, weight, position, skin color, hair style, and hometown. As previously mentioned, in *NCAA Football 09*, EA has even made it possible for gamers to import the names of the players onto the jerseys, in the rosters, and in the in-game commentary so as to make the depiction of student-athletes in the games even more literal.

The court in *Kirby* also placed significant emphasis on the fact that the character Ulala was set as a 25th Century reporter, and this varied greatly from any public depiction of Kirby (*Kirby*, 2006). However, student-athletes and their video game counterparts in the EA NCAA SVGs are set in the same year, school, arena and stadiums. In the NCAA video games, EA does not create a fictional, creative world that differs in any significant way from NCAA athletics, but instead takes pride in creating a realistic representation of college basketball and football. Lastly, the court in *Kirby* looked to the dance moves utilized by Ulala and found them to be substantially different than those of Kirby in her music videos (*Kirby*, p.616). The court recognized that Ulala's dance movements were short, quick, and based on the choreography of a dancer who had no knowledge of Kirby's work. In the NCAA SVGs, the players are designed to have the same skill sets and moves as their real-life student-athlete counterparts, based on the player rankings. Accordingly, an argument could be made that court's application of the transformative use test in *Kirby* could actually assist Keller and the class in their right of publicity claims against EA rather than harm them. After all, the court in *Kirby* looked to specific points of comparison in finding transformative content and those comparative points seem to favor student-athletes rather than EA.

Garon (2008) posed a hypothetical that could warrant First Amendment protection for the use of athlete likeness in a SVG based on the decision in *Kirby*. In Garon's hypothetical, a SVG producer created a virtual world incorporating the "best and worst aspects" of video games like *Second Life*, *Madden NFL*, and *Grand Theft Auto* (Garon, 2008, p. 502). Garon called his hypothetical game "*PRO*" and stated that the hypothetical game created a parody of professional sports leagues and included to-the-death fighting, open steroid abuse, free agency, and interchangeability of players between sports. In this hypothetical, *PRO* would serve as a satirical comment on the "inherent

nature of professional sport" (Garon, 2008, p. 503). Based on how the court applied the transformative use test in *Kirby*, and the court's trademark infringement decision in *E.S.S. Entertainment 2000, Inc.*, there is obvious cause for Garon's concern that *PRO* might garner First Amendment protection, even though the game utilizes the unlicensed use of professional athlete likenesses. After all, the makers of *PRO* could argue that the athlete likeness in its games is nothing more than raw material and the game's satirical, fictional characteristics transforms this material into something new, something expressive.

Unlike Garon's *PRO* video game, the *NCAA Football and Basketball* SVGs do not claim to provide satirical expressive content about the inherent nature of college athletics. A court would need an incredibly strong lens to find any hint of parody or satire in EA's depictions of college football and basketball. Thus, the decisions in *Romantics*, *E.S.S. Entertainment 2000, Inc.*, and *Kirby* have not changed the transformative use test to provide any special exception for expressions in video games. Only the *Kirby* decision even applied the transformative use test, and it did so in a way consistent with how the test was applied in *Comedy III, Productions, Inc.*, and *Winter*. EA still needs to prove that its NCAA video games add something new and expressive that transforms the use of student-athlete likenesses into speech warranting First Amendment protection. If the court by utilizing the transformative use test were to find that EA's use of student-athlete likenesses is literal rather than expressive, then EA would lose the case and nothing presented in *Romantics*, *E.S.S. Entertainment 2000, Inc.*, or *Kirby* changes that fact. However, EA has a second argument for First Amendment protection based on the public's strong interest in the content expressed in the NCAA video games.

Strong Public Interest in Expression

Independent of EA's transformative use argument is its argument that the NCAA SVGs deserve First Amendment protection as expressions in which the public has a strong interest. Expressions protected by the First Amendment as important to the public are virtually identical to those protected by the public affairs exception to the right of publicity found in California Code §3344, which is discussed in the next section of this paper. Accordingly, EA's statutory public affairs argument overlaps with its First Amendment public interest argument because both involve determinations of whether the public should have access to the information provided in the NCAA SVGs. For its public interest argument, EA relies primarily on *Gionfriddo v. Major League Baseball* (2001) and *C.B.C. Distribution and Marketing Inc. v. Major League*

Baseball Advanced Media, L.P., (2007) for protecting the expressions in their NCAA SVGs.

In *Gionfriddo*, the Fourth Circuit of California upheld a summary judgment dismissing a right of publicity action brought by former Major League Baseball (MLB) players against MLB for the use of the players' likeness and biographical and statistical information in MLB promotional materials and game programs (*Gionfriddo v. Major League Baseball,* 2001). The court dismissed the case based on the First Amendment's protection for information of strong importance to the public and California Code §3344's public affairs exception (*Gionfriddo,* 2001, pp. 415, 417). The court recognized that the public has a strong interest in the daily news and this interest extends to entertainment features. The court interpreted the protection for entertainment features to include records and statistical information derived from professional baseball. In doing so, the court recognized that MLB is followed by millions of people across the country on a daily basis and the records and statistics "remain of interest to the public because they provide context that allows fans to better appreciate (or depreciate) today's performances" (*Gionfriddo*, 2001, p. 411).

As for MLB's use of player depictions from footage of the plaintiffs in past games, that was also protected as information important to the public. The court held that the footage involved historic moments in baseball's history and was used by the MLB to promote the public's interest in baseball (*Gionfriddo,* 2001, p. 414). Further, the court found that the plaintiffs could not prove how that use of past game footage (owned by MLB) exploited the plaintiffs' economic interests (*Gionfriddo,* p. 415). In fact, the court found that the use of the plaintiffs' depictions and statistical information by MLB in its promotional materials actually enhanced the plaintiffs' marketability (*Gionfriddo,* p. 415). For this reason, the court held that the public's strong interest in the information outweighed the plaintiffs' "negligible economic interests" (*Gionfriddo*, p. 415*).*

The Eighth Circuit in *C.B.C. Distribution and Marketing, Inc.* relied on *Gionfriddo* in its decision to extend First Amendment protection to include the unlicensed use of names, biographical data, and statistics for each player in MLB in a fantasy baseball game. Like *Gionfriddo*, the court in *C.B.C. Distribution* recognized the importance of the public value of information about the game of baseball, "the national pastime" (*C.B.C. Distribution and Marketing, Inc.* , p. 823; quoting, *Cardtoons L.C. v. Major League Baseball Players Association*, 1996, p. 972). The Eighth Circuit held that this substantial public interest outweighed the players' economic interests in their

biographical and statistical information (*C.B.C. Distribution and Marketing, Inc.*, 2007, p. 824).

The decisions in *Gionfriddo* and *C.B.C. Distribution* demonstrate a judicial willingness to protect expressions that include historical and statistical information related to MLB. EA asserts that this protection includes information about sports in general, including NCAA sports (*Keller , Electronic Arts' Motion to Dismiss Complaint*, 2009). Even if the court is willing to find a strong public interest in information about NCAA sports, that interest does not provide EA with carte blanche authority for the to use of athlete likeness. There are limits to the protections afforded by the First Amendment for information important to the public. First, a court must consider the precise information conveyed and the context of the communication to determine whether the public has a strong interest in that particular expression (*Gionfriddo v. Major League Baseball, 2001)*. Then, the court must balance the public's interest in the information against the sport personality's right of publicity interests (*Gionfriddo 2001*; *C.B.C. Distribution and Marketing, Inc*, 2007).

EA contends that the public has a strong public interest in the sports content of its NCAA SVGs (*Electronic Arts' Motion to Dismiss Complaint,* 2009). Keller and the class assert that First Amendment protections are limited to the reporting of publicly available sports data (*Keller, Opposition to Electronic Arts' Motion to Dismiss*, 2009). It is unlikely that the court would find that the public relies on NCAA SVGs to provide information about college sports. However, the court in *C.B.C. Distribution* protected the use of MLB player information in fantasy baseball games, so it is possible that the court in *Keller* could extend that protection to include the use of sports data in NCAA SVGs. There is one key distinction between the use of player bios and statistics in fantasy games and the use of that same information in SVGs; player statistics in fantasy games are updated regularly. Not only do fantasy sports games update player statistics, but they also provide participants with reports on player injuries, updates, and team news. SVGs do not provide users with updated information on players and teams, nor do they provide injury reports and news updates. Thus, SVGs are not as informative as fantasy sports games.

Additionally, EA has to demonstrate a public interest in student-athlete likenesses in SVGs. The court in *Gionfriddo* (2001) protected MLB's use of player depictions taken from past game footage, which it classified as "mere bits of baseball's history" (p. 411). The court found that MLB used the footage to convey information to the public to increase interest in baseball. EA's alleged use of student-athlete likenesses is very different than MLB's use of

old game footage in *Gionfriddo*. EA's NCAA SVGs do not use "bits" of historic moments in college sports taken from old games to increase interest in college sports. Instead, the NCAA SVGs "digitally replicate [student-athletes] for gamers to control. . .and . . .thus trespass far beyond the mere reporting of publicly available sports information" (*Keller, Opposition to Electronic Arts' Motion to Dismiss*, 2009, p. 13). Therefore, the public's interest in student-athlete likenesses in SVGs is not the same as its interest in MLB promotions that included historic footage from past games, footage that MLB owned the rights to use.

Even if it is determined that the public has an interest in student-athlete likenesses found in the NCAA SVGs, that interest must outweigh Keller and the class' economic interest in their publicity rights. In *C.B.C. Distribution and Marketing, Inc.*, the court relied heavily upon the Supreme Court's decision in *Zacchini* in balancing the public's interest in sports information against the players' right of publicity interests. In *Zacchini* the Supreme Court found that "no social purpose is served by having the defendant get some free aspect of the plaintiff that would have market value and for which he would normally pay" (*Zacchini*, 1977, p. 576). The Eighth Circuit in *C.B.C. Distribution and Marketing, Inc.,* viewed player records and statistics as information that was already available to those who wanted it because it was published throughout various media outlets, free of charge. Thus, public's interest in the information used on the defendant's website outweighed the plaintiffs' economic interest in that information '(*C.B.C. Distribution*, p. 823).

Conversely, a person's likeness for use in a video game is something of significant, rather than negligible, value for which a video game producer, like EA, would normally pay. EA already pays substantially for athlete likeness in its other SVGs like the *Madden NFL*, *NHL*, *NBA Live*, and *Tiger Woods* series through licensing fees (Lefton, 2004). In fact, other sport personalities are even compensated for the use of their likenesses in the NCAA SVGS, such as the broadcasters in *NCAA Football 10* and coaches via the National Association of Basketball Coaches (NABC) agreement with EA and *NCAA Basketball* (Gaudiosi, 2008).

Thus, the type of information and the way that information was delivered by the defendants in *Gionfriddio* and *C.B.C. Distribution and Marketing, Inc.* differ from EA's alleged use of student-athlete likenesseses in SVGs. The alleged use by EA of student-athlete likenesses does not involve historic game footage and it is not used to provide the public with information about college sports. Further, the use of athlete likeness in SVGs is something for which EA would normally have to pay. The informative value of the content about college sports in the NCAA SVGs is minimal, at best, when compared to the

value of the plaintiffs' rights to control the use of their identity in SVGs. The decisions in *Gionfriddio* and *C.B.C. Distribution* do not extend the First Amendment's public interest protection to the point that said protection consumes all publicity rights associated with sports. There is no way to accurately predict whether the court in *Keller* will extend public interest protection far enough to include EA's use of student-athlete likenesses in SVGs. However, what is certain is that the plaintiffs in *Keller* have more factual ammunition in their arsenal than that afforded the plaintiffs in *Gionfriddo* and *C.B.C. Distribution*.

EA'S PUBLIC AFFAIRS DEFENSE TO KELLER'S STATUTORY CLAIMS

Similar to its public interest argument, EA also asserts that the public affairs exemption in California Code §3344 protects the expressions in EA's NCAA SVGs (*Electronic Arts' Motion to Dismiss Complaint,* 2009). California Code §3344, subdivision (d) provides an exemption for material used in connection with any "public affairs, sports broadcast or account." Like its public interest argument, EA' s argument under California Code §3344(d) must show that the public has an interest in access to the information provided by the NCAA SVGs that warrants protection at the expense of the plaintiffs' right to publicity. EA relies primarily on three California appellate cases for its California Code §3344(d) argument.

The first is *Dora v. Frontline Video, Inc.* (1993), a case in which the court extended the public affairs exception beyond news and sports broadcasts to include a documentary featuring a surfing legend. The facts in *Dora* involved a film that documented an athlete's influence on the sport of surfing, and surf culture, during certain time in California history. Thus, the film at issue in *Dora* served the public by providing it with anthropological information on the development of surfing, a sport that appeals to large segments of the population.

EA also relies on *Montana v. San Jose Mercury News, Inc.*(1995), a case in which a former NFL quarterback, Joe Montana, sued a newspaper for using republished front-page pictures of the quarterback in posters sold by the newspaper. The posters were part of a souvenir section for readers that depicted the four championships won by Montana and the San Francisco 49s from 1980 to 1989. The court dismissed Montana's right of publicity claim finding that his name and likeness were used in the posters "for precisely the same reason they appeared on the original newspaper front pages: because

Montana was a major player in contemporaneous newsworthy sports events" (*Montana*, 1995, p.794).

Lastly, EA relied on the court's analysis in *Gionfriddo* to support its §3344(d) defense. In *Gionfriddo*, the court held that MLB's "uses" of the player's information and depictions in its promotional materials qualified as "public affairs" for the same reasons they qualified as matters of "public interest" in common law (*Gionfriddo*, 2001, p.416). Specifically, the depictions at issue in *Gionfriddo* were moments in baseball history that were used by MLB to inform the public in a way that increased interest in baseball (*Gionfriddo*, p.413).

EA contends that *Dora*, *Montana*, and *Gionfriddo* establish that the term "public affairs" in California Code §3344 protects much more than traditional news broadcasts and extends to informative and entertaining works that involve matters of public interest (*Electronic Arts' Motion to Dismiss Complaint*, 2009, p.18). EA points to the public's interest in college sports and states that it is equal to the public's interest in professional football, baseball and surfing. However, the decisions in *Dora*, *Montana*, and *Gionfriddo* did not protect the defendants' "uses" of the plaintiffs' identities in those cases solely because the public is interested in football, baseball, and surfing. All three decisions protected "uses" that provided the public with information about affairs of public interest. The courts in all three cases relied on the historical and newsworthy significance of the material presented by the defendants. *Dora*, *Montana*, and *Gionfriddo* each involved "uses" of footage or photographs of moments in time that appealed to public interest. Conversely, the NCAA SVGs do not capture any historical or newsworthy significant snapshot, or footage. EA is correct in its contention that consumer demand for its NCAA SVGs demonstrates public interest in college sports; however, the NCAA SVGs do not add to that interest through the dissemination of information. The NCAA SVGs are commercial products (games) that appeal to college sports fans rather than inform them. An argument could be made that the informative nature of the "uses" in *Montana* (a poster) and *Gionfriddo* (promotional materials) were minimal. But the courts in both of those cases found informative content that warranted protection based on California Code §3344(d). Accordingly, EA must convince the court in *Keller* that the NCAA SVGs posses informative content that deserves protection at the expense of the plaintiffs' statutory right of publicity. Otherwise, EA's California Code §3344(d) defense could fail.

STRATEGIES TO REDUCE LIABILITY

A verdict in favor of Keller and the class would drastically affect the NCAA's relationship with EA and could impact the amateur status of student-athletes. A 2008 right of publicity class action brought by former NFL players against the NFLPA could provide the NCAA and EA with cause for concern. The case, filed by Herb Adderley on behalf of himself and other former player, raised allegations similar to those raised by Keller and the class against EA and the NCAA (*Adderley v. NFLPA*, 2009). The NFLPA's agreement with EA did not cover members of the class; however, they asserted that the Madden franchise used their likeness in the same way that the NCAA SVGs use student-athlete likenesses. In November of 2008, a jury found in favor of Adderley and the class and awarded them damages in the amount of $28.1 million. The suit was eventually settled with the NFLPA for $26.25 million (*Adderley v. NFLPA*, 2009). Adderley has another class action pending against EA (Pigna, 2008). A second claim was also brought by Jim Brown, former NFL Hall of Famer, against the NFL game using vintage images. This case was dismissed based on the First Amendment (Elias, 2009). Recently, Adderley and Brown have asked the court in *Keller* to consider their amicus curiae brief supporting Keller's claims (Associated Press, 2009) . The jury's decision in favor of Adderley and the class suggests that EA and the NCAA may need to adjust their current relationship with student-athletes to avoid a similar negative outcome.

EA and the NCAA could reduce their legal exposure for appropriation of likeness by determining an appropriate remunerative amount. They can do this through the development of a trust through which current and past student-athletes whose likenesses have been appropriated could seek just payment. The problem with this approach is that it is costly and would cause the NCAA to pierce the veil of amateurism that currently exists in college sports.

The Knight Commission examined the issue in its October 2008 meeting and determined that student-athletes should not be exploited in commercial activities, including SVGs (Reardon, 2008). The Commission reinforced the NCAA's prohibition against athletes for their likeness or commercial endorsement (Reardon). The NCAA has expressed concern that its Bylaws do not adequately address issues created by advances in technology (Christianson, 2007). Former NCAA President Myles Brand proposed a system where NCAA staff would determine whether student-athlete exploitation has occurred in a commercial activity (Christianson, 2007). However, if the NCAA determined that student-athletes were being exploited by the NCAA SVGs, then it might have to end its licensing agreement with

EA. Another option is to modify the games so that players in the game do not share the same characteristics and skills as their student-athlete counterparts. Either result may strain what has been to date been a mutually beneficial relationship between EA and the NCAA.

Could an alternative exist that would allow EA to continue with business as usual while satisfying the NCAA's goals in promoting amateurism? Knight Commission member Len Elmore, who is also a partner at the law firm of Drier L.L.P., stated that "[i]f college athletes' names and likenesses are to be used in commercial products, advertisements or fantasy sports games, there must be a way to balance the inequities by providing some sort of benefit to athletes through mechanisms other than 'pay for play'" (Reardon, 2008). Knight Commission Chair Malcolm Moran echoed Elmore's position by stating that student-athletes do not need to be treated as professionals but do deserve a "reasonable slice of the pie" for the use of their likenesses in Fantasy Leagues and video games (Moran, n.d.)

Perhaps an equitable compromise can be reached that would allow the NCAA to provide student-athletes with a reasonable slice of the pie in exchange for the use of their likenesses while preserving the amateurism of college athletics. The NCAA could change the Bylaws to allow usage of student-athlete likenesses and contribute a fair percentage of royalties from the video games to the Student Athlete Opportunity Fund (SAOF). The SAOF is a discretionary source of monies, allotted from the CBS and ESPN media contracts, made available to NCAA member institutions (Brown, 2004). The schools can provide qualifying former and existing student athletes with assistance upon demonstration of financial or academic need (NCAA, n.d. 8). Also under this fund, for three years, current student-athletes can obtain up to $2,500 per year from the NCAA for "bona fide" education expenses and former student-athletes can obtain a single one-time payment of $500 that can be used to cover development expenses like resume preparation, career development expenses like resume preparation, career counseling, or job placement services (NCAA, n.d.).

If the NCAA and its member institutions shared the proceeds from its licensing agreement with EA with this fund, it would reduce the appearance that they are unjustly enriched at the expense of student-athletes whose likeness is appropriated in the NCAA SVGs. Under this approach, the NCAA could maintain its purported goal of preserving the amateurism of their athletics and athletes while providing for the student-athletes who make video games like EA's NCAA SVGs possible.

The threat of litigation posed by Keller's class action, coupled with the class action brought by Taylor and Hart, could lead to settlement discussions

involving EA, student-athletes, and the NCAA. The NCAA does have a history of response to student needs and correcting wrongs when those needs and wrongs are represented in a civil action. Recently, the NCAA added $128 million to the SAOF as part of a settlement agreement in a case brought by student-athletes alleging that the NCAA violated the Sherman Antitrust Act by entering into a horizontal agreement to deny student-athletes a legitimate share of the proceeds of "big-time" college sports (*White, Second Amended Complaint*, 2006, p. 3). It is possible that the NCAA would be willing to facilitate a settlement between EA and student-athletes that would resemble the settlement in *White. v. Nat'l Collegiate Athletic Association.* Accordingly, the Keller case could act as a catalyst for proactive measures resulting student-athletes receiving a reasonable "slice of the pie."

SUMMARY

New media sources, such as SVGs and fantasy sports, have posed problems for the NCAA in regards to balancing its financial interests, and those of its member institutions, with its goal of preserving amateurism in college sports. The use of student-athletes within SVGs has been a recent topic of discussion by the NCAA and the Knight Commission on Intercollegiate Athletics. The realism that allows EA's NCAA SVGs to be some of the highest selling licensed merchandise products for the NCAA lends itself to scrutiny and potential legal action. The current NCAA Division I Bylaw 12.5.2.1(b) states that student-athletes violate their eligibility when they are compensated for the use of their likenesses in the promotion of commercial products (NCAA, 2009a). Further, the Bylaws indicate the student-athletes may not be paid if their likenesses are used (NCAA, 2009a). However, Keller's complaint argued that EA's NCAA SVGs use student-athletes likeness, without student-athlete permission or remuneration. The arguments posed by Keller provide a strong case for his and the class' right of publicity arguments. It remains unclear whether the First Amendment would provide EA with protection for the use of student-athlete likenesses in video games as the question remains untested by the courts. It also remains unclear whether California Code §3344(d) provides a defense to Keller and the class' statutory claims against EA. What is clear is that the lack of expressive or informative content in the NCAA SVGs pose a problem for EA in seeking First Amendment and California Code §3344(d) protection. Also, problematic for EA is the fact that they compensate athletes for the use of likeness in all of their video games but the NCAA SVGs.

The NCAA Division I presidential task force and the Knight Commission suggest a legal standoff between an individual athlete and the NCAA may not be necessary (Christianson, 2007). The recent discussion on the use of student-athlete likenesses in video games and fantasy football games might spur action by the NCAA. The NCAA may be proactive and realize the strong basis for legal action against the organization and choose to amend their bylaws to allow this type of likeness, due to the relationship with EA. Otherwise, EA will remain vulnerable to legal action brought by student-athlete(s) based on the right of publicity. This issue will be tested in the *Keller* case and will continue to be a topic that affects EA, the NCAA, CLC, and, perhaps most importantly, student-athletes.

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