IT'S IN THE GAME: REDEFINING THE TRANSFORMATIVE USE TEST FOR THE VIDEO GAME ARENA♦

INTRODUCTION

The quarterback takes the snap from the center and drops back to pass. Although the back of his jersey does not display his name, there is no question that the quarterback is none other than Arizona State's Sam

Keller. He is wearing Keller's number 9 Arizona State jersey, and sports a long white wristband on his left arm and a short black armband on his right, just as Keller does. Underneath the visor that Keller traditionally wears, one can plainly observe that the quarterback's face and complexion bears a striking resemblance to Keller.

Keller avoids a rusher, looking nimble for a 230 pound man. He does his best to stay true to his pocket-passer style before rising to his full six-foot-four height and launching a ball downfield to number 80, wide receiver Derek Hagan. Hagan will go on to be Arizona State's all-time leader in receptions, receiving yards, receiving touchdowns and play in the National Football League.[1] The ball soars downfield into Hagan's arms for a touchdown and the crowd at Sun Devil Stadium roars.

But this is not a *real* touchdown. This is not a *real* football game. It is Electronic Arts' *NCAA Football 2006*, and the *real* Sam Keller (whose likeness is featured in the game) is at the center of a legal battle,[2] the outcome of which will be crucial to the entire video game industry.[3]

The main battle in the courts is one between the right of publicity and the First Amendment.[4] The right of publicity, generally, protects a person from another's use of their name or likeness for commercial purposes.[5] There is no federal right of publicity statute and the specific laws on the subject can differ from state to state.[6] California, for example, prohibits "knowingly us[ing] another's name, voice, signature, photograph, or likeness, in any manner on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such person's prior consent."[7] New York, however, makes it a criminal act to use "for the purposes of trade, the name, portrait or picture of any

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1 *Derek Hagan*, THESUNDEVILS.COM, http://www.thesundevils.com/sports/m-footbl/mtt/hagan_derek00.html (last visited February 7, 2012).

2 Keller v. Elec. Arts, Inc., No. 09-1967, 2010 WL 530108 (N.D. Cal. Feb 8, 2010), *appeal docketed*, No. 10-15387 (9th Cir. Feb. 22, 2010).

3 Katie Thomas, *Image Rights vs. Free Speech in Video Game Suit*, N.Y. TIMES, Nov. 16, 2010, at A1, *available at* http://www.nytimes.com/2010/11/16/sports/16videogame.html ("'The implications here are enormous,' said Rob Carey, Keller's lawyer. 'I don't think we anticipated such a drastic, far-reaching defense, and then when EA Sports did that, that's when everybody started to cover their own turf.'").

4 *Id*. ("The case is drawing attention because it gets to the heart of a highly contested legal question: when should a person's right to control his image trump the free-speech rights of others to use it?").

5 Bear Foot, Inc. v. Chandler, 965 S.W.2d 386, at 389 (Mo. Ct. App. 1998).

6 4 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMP., TR. & MONO. § 22:32 (4th Ed.).

7 CAL. CIV. CODE § 3344 (West 1984).

living person without having first obtained the written consent of such person."[8]

This right serves the purpose of protecting an individual's right to the value of the image and reputation that he or she worked to build.[9] Courts have found the right of publicity to encompass many areas, including impersonations,[10] clothing,[11] artwork,[12] greeting cards,[13] and comic books.[14] The one defense that has been invoked with consistency, to defend these and other similar works from right of publicity claims, is the First Amendment.[15] Courts have formulated multiple tests to deal with this conflict in all of the areas above. But recently, there has been a failure to adequately apply these tests—most importantly, the widely-accepted transformative test—to right of publicity cases involving video games.

This Note proposes a redefined version of the transformative test, explains its application, and illustrates the logic behind it. In doing so, the Note will use the decisions in *Keller v. Electronic Arts, Inc.*[16] and *Hart v. Electronic Arts, Inc.*,[17] among others, to illustrate how this rule would deal with cases in the gray area that is the murky video game zone. Part I will briefly discuss the background of the conflict between the right of publicity and the First Amendment. In addition, it will delve into some of the more popular balancing tests used to deal with this conflict. Part II will focus in on the *Keller* and *Hart* decisions, and will shine a spotlight on the problems presented when applying the current transformative test to modern video games. Part III will introduce the key elements of the redefined transformative test which focuses in on the overall realism of the secondary work. Part IV will deal with the appropriate application of the redefined test, using important precedential right of publicity decisions to show how the new test still honors the intent of the current iteration. Finally, Part V will look to possible future uses of the right of publicity and examine

[8] N.Y. CIV. RIGHTS LAW § 51(Consol. 2000).
[9] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) ("[T]he right of publicity also secures for plaintiffs the commercial value of their fame and prevents the unjust enrichment of others seeking to appropriate that value for themselves.").
[10] *See* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1989); Waits v. Frito-Lay, Inc. 978 F.2d 1093 (9th Cir. 1992).
[11] *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001).
[12] *See* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003).
[13] *See* Hilton v. Hallmark Cards, 580 F.3d 874 (9th Cir. 2009).
[14] *See* Winter v. DC Comics, 69 P.3d 473 (Cal. 2003); Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003).
[15] *See generally*, Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165 (2010).
[16] No. 09-1967, 2010 WL 530108 (N.D. Cal. Feb 8, 2010).
[17] 808 F. Supp. 2d. 757 (D.N.J. 2011).

whether the redefined test can still be appropriately applied, using the recent "twitterjacking" instances as an example.[18]

I. BACKGROUND

A. *The First Amendment and* Zacchini

The First Amendment provided protection for so-called "commercial speech"[19] but the protection is no longer given to commercial speech at the same level as it is to other types of speech.[20] The defendants in these right of publicity cases argue that First Amendment protection alone is sufficient to permit the use of images and similar likenesses. Meanwhile, the plaintiffs in these cases argue that the presence of the right of publicity claim alone means that there must be some limit on what can and cannot be used. "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."[21] Consequently, when it comes to the right of publicity, courts must draw a line which cannot be crossed, and beyond which the First Amendment no longer provides protection. The Supreme Court presented a rough draft of this line in their one and only discussion of the issue—the case of *Zacchini v. Scripps-Howard Broadcasting Co.*[22]

Hugo Zacchini was known for his human cannonball act,[23] which he performed in Ohio in 1972.[24] This fifteen second act, in its entirety, was captured on video by a freelance reporter and broadcasted on the local news.[25] Zacchini argued that the television station had used the video of his act without consent.[26] He further argued that because his act depended on being viewed for revenue, the fact that a large amount of people were able to view his act on television made those people less

[18] Twitterjacking is the impersonation of a celebrity on Twitter in an attempt to deceive the public into thinking that the tweets posted were written by the celebrity whose name appears on the account. *See* Joshua Rhett Miller, *'Twitterjacking' – Identity Theft in 140 Characters or Less*, FOX NEWS (May 1, 2009), http://www.foxnews.com/story/0,2933,518480,00.html.

[19] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("We are . . . clear that the Constitution imposes . . . no restraint on government as respects purely commercial advertising."). This case was later partially overruled by Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976), cited *infra* note 20.

[20] *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563 (1980).

[21] Beth A. Cianfrone & Thomas A. Baker III, *The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity*, 20 J. LEGAL ASPECTS SPORT 35, 50 (2010).

[22] 433 U.S. 562 (1977).

[23] *Id*. at 563.

[24] *Id*.

[25] *Id*. at 563–64.

[26] *Id*. at 564.

likely to pay to see the act.[27]

The Court found that the freedom of expression was limited in a case such as this because a performer has a right to be compensated for the effort that he put into his performance.[28] Additionally, the Court noted that there should be an "economic incentive for [a performer] to make the investment required to produce a performance of interest to the public."[29] The Court compared Zacchini's rights to protect himself and his performance to those available in the areas of copyright and patent law.[30] While not providing a clear guideline for future cases in and of itself, *Zacchini* set the groundwork for the modern right of publicity and established the general areas one should look to when forming the tests needed to balance the right of publicity with First Amendment rights.

Importantly, the Court allowed a celebrity to maintain control over the value of his reputation in the form of his act. The Court allowed Zacchini to protect his identity because he put the time, effort, and expense into creating it. *Zacchini* deals with an exact copy of a performance, not with secondary uses, and it is therefore not directly applicable to most modern day right of publicity cases. However, the basic principle of protecting the rights of celebrities from works that mimic their real life reputations remains. Thus, it follows that a test in this area should be narrowly tailored to differentiate between reality and imagination. None of the tests currently in use are successful in this regard.

B. *The Balancing Tests*

In the cases since *Zacchini*, courts have applied a number of different balancing tests. There are three that will be discussed in this Section: the *Rogers* Test, the Predominant Use Test and the Transformative Use Test.

1. The *Rogers* Test

The *Rogers* Test originated in the Second Circuit case of *Rogers v. Grimaldi*.[31] In *Rogers*, the well-known dancer Ginger Rogers filed suit against the producers of a movie which featured characters that mimicked Ginger Rogers and Fred Astaire.[32] The characters themselves

[27] *Id*. at 576.
[28] *Id*. at 575–76.
[29] *Id*. at 576.
[30] *Id*.
[31] 875 F.2d 994 (2d Cir. 1989).
[32] *Id*. at 996.

were Italian dancers who came to be called Ginger and Fred.[33] The court created a two-prong test to determine whether a work is protected under the First Amendment.[34] The first prong states that the title of the work is unprotected if it has no artistic relevance to the original work.[35] The second prong says that even if there is relevance, there is still no protection if the work in question "explicitly misleads as to the source or the content of the work."[36] This test, though not favored by the majority of courts, has been applied in select instances including cases from both the Second[37] and Ninth Circuits.[38]

Aside from the fact that relevance is subjective and difficult to define, this test is still unfaithful to the original principles of the right of publicity. A work can be a complete imitation even if there is no explicit deception present in it. These works, despite having little to no redeeming creative value on their own would still unquestionably pass the *Rogers* test. Therefore, it is not appropriate for application to most media, much less the complex world of video games.

2. Predominant Use Test

The Predominant Use Test, though widely discussed, has only been applied once — the Supreme Court of Missouri case of *Doe v. TCI Cablevision*.[39] In that case, former professional hockey player Tony Twist sued Todd McFarlane, creator of the comic book *Spawn*, for the use of a character in the comic book called Anthony "Tony Twist" Twistelli.[40] Twistelli was portrayed as being a mobster and a violent criminal.[41] The plaintiff was known as a tough "enforcer" in his time in the National Hockey League[42] and McFarlane freely admitted that the character was based on the plaintiff.[43] However, due to the negative connotations that were attached to his name as a result of the fictional

[33] *Id*. at 997.
[34] *Id*. at 999.
[35] *See id.* "In the context of allegedly misleading titles using a celebrity's name, that balance will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever."
[36] *Id*.
[37] *See* Cliffs Notes, Inc. v. Bantam Doubleday Publ'g Group, Inc., 886 F.2d 490 (2d Cir. 1989).
[38] *See* Mattel, Inc. v. MCA Records, Inc., 296 F. 3d 894 (9th Cir. 2002).
[39] 110 S.W.3d 363 (Mo. 2003).
[40] *Id*. at 365.
[41] *Id*. at 366 ("The fictional "Tony Twist" is a Mafia don whose list of evil deeds includes multiple murders, abduction of children and sex with prostitutes.").
[42] *Id*.
[43] *Id.* "McFarlane admitted that some of the Spawn characters were named after professional hockey players, including the 'Tony Twist" character: 'Antonio Twistelli, a/k/a Tony Twist, is actually the name of a hockey player of the Quebec Nordiques.' And, again, in the November 1994 issue, McFarlane stated that the name of the fictional character was based on Twist, a real hockey player, and further promised the readers that they 'will continue to see current and past hockey players' names in my books.'"

character, Twist lost endorsements and suffered damage to his reputation.[44] The court decided to apply a "more balanced balancing test – a sort of predominant use test."[45] According to this test, when "the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight."[46]

This test is an improvement from the *Rogers* test since it does look to the creative intent behind a work. This is relevant because a secondary work should only receive protection if there is intent to make a distinct creative work. However, this test does not provide any guidance for determining what "predominant" means and it fails to account for the case of a work that does mean to make an expressive comment but still results in a direct imitation of a celebrity's likeness. Under the Predominant Use Test, this work would be protected even though it is against the fundamental protective principle established in *Zacchini*.[47]

3. Transformative Use Test

The Transformative Use Test is based largely on the concept described by Judge Pierre Leval in a 1990 law review article discussing fair use in copyright.[48] Leval described a transformative use as one that "must be productive and must employ the quoted matter in a different manner or for a different purpose from the original."[49] Under this test, Leval added that a use "that merely repackages or republishes the original is unlikely to pass the test."[50] Leval proposed four factors, based on the copyright fair use doctrine,[51] to help determine whether a particular use was transformative.[52] These factors included the purpose

[44] *See* Doe v. McFarlane, 207 S.W.3d 52, 63 (Mo. Ct. App. 2006) ("Twist had all the qualities necessary to be an endorser for or associated with major brand products based on his engaging personality, ability to interact with consumers, tremendous base of hockey fans and work ethic.").

[45] Doe, 110 S.W.3d at 374.

[46] *Id*. (quoting Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity - Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003).).

[47] *Zacchini v. Scripps-Howard Broadcasting Co*., 433 U.S. 562 (1977) (stating that a performer has the right to protect the investment that he puts into his original work or performance).

[48] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

[49] *Id*. at 1111.

[50] *Id*.

[51] 17 U.S.C. § 107(a) (2006). ("[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism,
comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").

[52] *Id*. at 1110.

and character of the use as well as the nature of the original work.[53] Leval's article led to courts' creating a test, based on how transformative a particular work is, to determine whether it is entitled to First Amendment protection.[54]

The Ninth Circuit has held that in judging transformativeness a court must inquire into

> 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. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word "expression," we mean expression of something other than the likeness of the celebrity.[55]

Courts in other jurisdictions have used similar versions of this "sum and substance" definition to provide guidance when applying the transformative test to right of publicity cases.[56]

This version of the transformative test has been useful in solving right of publicity claims in most types of media. Whereas some instances involving video games are seen as clearly transformative[57] or clearly not,[58] others present significant problems when it comes to interpreting the test in light of this relatively new technology. Courts deciding on the same video game have come to different conclusions despite using the same test.[59] As the technology advances, issues involving features such as interactivity and changeability will only increase and the murky zone of video games will only get murkier.

The transformative test needs to be changed in a way which draws a line between video games intended to be played in an "Altered Reality" and those which are an "Imitation of Life." "Altered Reality" games are those which, though they bear a relation to an actual person, are not meant to imitate his or her life and have sufficient original expression to reflect this goal. "Imitation of Life" games are those which are designed and intended to be used to reflect a replication of an

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[53] *Id*.

[54] Hart v. Elec. Arts, Inc., 808 F. Supp. 2d. 757, 778 (D.N.J. 2011).

[55] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 (Cal. 2001). This suggested inquiry was followed by the Ninth Circuit in Hilton v. Hallmark Cards, 580 F.3d 874, 889 (9th Cir. 2009).

[56] *See e.g.*, ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 936 (6th Cir. 2003); C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 822 (8th Cir. 2007).

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

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

[59] *See* Keller v. Elec. Arts, Inc., No. 09-1967, 2010 WL 530108 (N.D. Cal. Feb 8, 2010); Hart, 808 F. Supp. 2d. 757.

actual person's life in an environment comparable to one in which said person has built his or her reputation.

II. THE NCAA FOOTBALL CASES: *KELLER* AND *HART*

"[L]ack of clear guidelines can encourage judges to be art critics or base decisions on external factors like the fame of the artist."[60]

An examination of *Keller* and *Hart* should be the starting point for the crafting of a new transformative test, because they epitomize the type of case that is difficult to accurately and consistently decide under the current iteration. They also exemplify why the transformative test, as currently defined, is nearly impossible to apply in the video game arena. Essentially, judges are granted leave to decide for themselves what a transformative video game is and what factors should be most important in determining this.

A. Keller v. Electronic Arts, Inc.

In 2009, Sam Keller sued Electronic Arts ("EA") arguing that the company had profited over the use of his likeness in their *NCAA Football* video game franchise.[61] In 2010, the District Court in California denied EA's motion to dismiss and ruled that the game's version of Keller was not sufficiently transformative to overcome the right of publicity.[62] The court cited *Kirby v. Sega of Am., Inc.*[63] as an example of a use that was transformative, and distinguished *Kirby* from the facts of *Keller*.[64] In *Kirby*, the plaintiff and character had different names, professions, and appearances.[65] In addition, the game was set in the twenty-fifth century and involved an invasion of earth.[66] Because of the obvious differences between the game and reality, the court determined the subsequent work to be sufficiently transformative.[67] The court also cited *Winter v. DC Comics*, in which the representation of a celebrity as a half-worm half-human creature was not considered transformative.[68]

On the other side of the scale, the court cited *Comedy III Prods.*,

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60 David Tan, *Political Recoding of the Contemporary Celebrity and the First Amendment*, 2 HARV. J. SPORTS & ENT. L. 1, 25 (2011).

61 Katie Thomas, *College Stars Sue Over Likenesses in Video Games*, N.Y. TIMES, July 4, 2009, at A1, *available at* http://www.nytimes.com/2009/07/04/sports/04ncaa.html.

62 Keller, 2010 WL 530108, at *11.

63 50 Cal. Rptr. 3d 607 (Cal. Ct. App. 2006).

64 Keller, 2010 WL 530108, at *4–5.

65 Kirby, 50 Cal. Rptr. 3d at 609–10.

66 *Id*. at 616.

67 *Id*.

68 Winter v. DC Comics, 69 P.3d 473, 480 (Cal. 2003).

Inc. v. Gary Saderup, Inc.[69] as an example of a clearly non-transformative use.[70] In that case, the defendant sold lithographs and T-shirts bearing charcoal drawings of the Three Stooges.[71] *Comedy III* held that the artwork had "no significant transformative or creative contribution," and the use was not entitled to First Amendment protection.[72] The court in *Keller*, however, did not cite any case on the non-transformative side of the spectrum that encompassed the video game-specific elements in play in *Keller*, such as interactivity and changeability.

The court found that because Keller's characteristics in the game, including height, weight and hometown, matched those of the real life Keller, there was no transformation of the person himself as there was in *Winter*.[73] In addition, the court stated that the outcome should be different from *Kirby* because Sam Keller was represented in the same environment in which he built his reputation in real life, as opposed to a totally different setting.[74] For these reasons, the court denied EA's motion to dismiss.[75]

B. Hart v. Electronic Arts, Inc.

The District Court of New Jersey did, however, grant summary judgment to EA under nearly identical circumstances. Former Rutgers quarterback Ryan Hart sued EA for misappropriating his likeness for commercial use in the same *NCAA Football* video game franchise.[76] Once again, the court dealt with the "thorny question of whether the First Amendment grants EA the right to impinge upon [p]laintiff's . . . common law right of publicity."[77] The court favored the transformative test but refused to adopt it explicitly.[78] In their examination, the court cited *Kirby* as its baseline on the transformative side,[79] but cited No Doubt *v. Activision Publ'g, Inc.*[80] as its baseline for a non-transformative video game.[81] That case did not qualify for First

[69] 21 P.3d 797 (Cal. 2001).
[70] Keller v. Elec. Arts, Inc., No. 09-1967, 2010 WL 530108, at *5 (N.D. Cal Feb 8, 2010).
[71] Comedy III, 21 P.3d at 800.
[72] *Id*. at 811.
[73] Keller, 2010 WL 530108, at *5.
[74] *Id*. at *4.
[75] *Id*. at *11.
[76] Hart v. Elec. Arts, Inc., 808 F. Supp. 2d 757, 760 (D.N.J. 2011).
[77] *Id*. at 771.
[78] *Id*. at 776. ("In my view, and as explained in more detail herein, the transformative test is more refined than the Rogers test and better balances the competing interests of the right of publicity and the First Amendment . . . . That said, I need not explicitly adopt either test.")
[79] *Id*. at 782.
[80] 122 Cal. Rptr. 3d. 397 (Cal. Ct. App. 2011).
[81] Hart, 808 F. Supp. 2d at 782.

Amendment protection because "the avatars in No Doubt were exact replicas of the No Doubt band members who could not be altered in any way by the video game user."[82] The court distinguished *Hart* as a closer call because the players' avatars in the game were subject to alteration by users if they so chose.[83]

It is largely this built-in ability to edit that led the court to find that *NCAA Football* did constitute a transformative use. According to *Hart*, the fact that there are varied "potential formulations of each virtual player alone makes the game a transformative use of Hart's image."[84] The court noted that these are only *potential* changes and the starting point remains an untransformed image of Ryan Hart.[85] The court stated that the fact that interactivity is part of the "nature of video games" means that as long as those edits are available to be interacted with, they are enough to transform the images of all of the players throughout the game.[86] In support of its argument for transformativeness, the court also made reference to environmental elements in the game which were the original creations of EA, such as cheerleaders and stadiums.[87]

C. *The California/New Jersey Contradiction*

In each of these two cases, the judges pulled their own definitions of "sum and substance" and the transformative test. In California, the judge determined this to mean the player's original built-in attributes are the *only* things that matter, and the specifics of the environment, along with interactivity and changeability, can be completely discounted. In New Jersey, the judge determined that "sum and substance" meant the *exact opposite* in that the transformative nature of the game's specific environment (down to the individual cheerleaders) should be considered, and that changeability is not only considered, but its presence alone is dispositive. The same test should not be yielding definitions that are polar opposites which both, on their faces, could be seen as correct. There is simply nothing in the test that discusses the role of changeability, interactivity, and environment—all of which are central to the modern video game.

The redefined transformative test proposed in this Note will show exactly how these three categories play into determining whether a right of publicity claim can prevail. None of the three are determinative in

[82] *Id*.
[83] *Id*.
[84] *Id*. at 785.
[85] *Id*.
[86] *Id*.
[87] *Id*. at 784.

and of themselves as to whether the likeness is transformative (and this is important because it contradicts the mistaken logic of *Hart* with regard to "changeability"). Rather, intent, heretofore ignored, should play a key role in deciding whether these three factors—changeability, interactivity, and environment—are meant to be used in a way that truly transforms a celebrity's image. *Keller* and *Hart* are useful as examples to show how intent can determine the transformativeness of a secondary use—literally using EA's slogan: "It's in the game!"

There seems to be a good chance that either *Keller*, *Hart* or both will come before the U.S. Supreme Court in the next few years.[88] The Court has been largely silent on the issue since *Zacchini*, and diametrically opposed rulings in cases involving the same video game emphasize the confusion in this particular area.[89] Without clear factors or any sort of consistency between jurisdictions, the transformative test has become essentially impossible to predict with any accuracy. This is contrary to the purpose of a test, which should make settling an issue easier by laying out factors that can apply to all areas and all media. In addition, the Court would have to deal with the many alternate tests that have been introduced to resolve the conflict between the right of publicity and the First Amendment. The redefined test proposed in this Note would be an appropriate solution for a Court faced with a mess of confusing and contradictory precedent. By wiping the slate clean with a new standardized test, the Court would be adequately setting up this particular area of law for future courts to approach without uncertainty.

Consistency is particularly important when looking to the multitude of issues those future cases in this area of law will be forced to confront. Video games are becoming exponentially more popular with every passing year and every technological advancement. A 2011 report by the Entertainment Software Association stated that 72 percent of American households play computer and video games.[90] This is not limited to the younger portion of the population which has been thought to be more adept when it comes to advanced technology and gaming. The average age of a game player is 37 years old, and in 2011, 29% of

[88] A. Rayman, *Sam Keller v. EA Sports, et al.: Round II*, THE MATADOR SPORTS (Feb. 14, 2011), http://thematadorsports.com/blog/?p=9514 ("Regardless of the 9th Circuit ruling, this case will certainly see the steps of the US Supreme Court.").

[89] *See Courts, Sports and Videogames: What's in a Game?*, LAW 360 (Portfolio Media Inc., New York, N.Y.), Jan. 4, 2012, at 1. ("The most extreme recent example of this lack of clarity is that two courts on opposite sides of the country have rendered diametrically opposed decisions on the rights of football players whose avatars appear in the same videogame, leaving lawyers in a difficult position when advising their clients on rights of publicity in the very active videogame space.").

[90] ENTERTAINMENT SOFTWARE ASSOCIATION, 2011 SALES, DEMOGRAPHIC AND USAGE DATA: ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY 2 (2011).

gamers were over the age of 50.[91] Video games are purchased and played almost equally among the two genders and 33% of gamers say that playing computer or video games is their favorite computer activity.[92]

These statistics do not even take into account the influence that the iPad, iPhone, and similar mobile devices have and will continue to have on the video game industry. "Approximately 44 percent of Americans already have smartphones,"[93] and that number seems likely to rise. In addition, tablet video games are becoming an increasingly popular pastime with 44% of the applications being developed for the iPad coming in the area of gaming.[94] Electronic Arts itself produces a version of *NCAA Football* for both the iPhone and iPad.[95]

As this industry continues to expand, so too will the litigation focused on this area. This increase in litigation can only be exacerbated by the continued lack of clarity in right of publicity doctrine. EA has already become involved in video game litigation regarding a case similar to *Keller* and *Hart*, albeit one that involves the appropriation of a property likeness as opposed to that of a person.[96] This likely means an increase in litigation involving interactivity, changeability, and environments. The redefined test will be simpler and better equipped to deal with this increased litigation as it applies to the right of publicity.

III. "ALTERED REALITY" AND "IMITATION OF LIFE"

The new redefined transformative test will be based on the idea of two possible uses and directions for a video game character. The line will be drawn between a game that intends for the character to be in an "Altered Reality" and one that has the character doing an "Imitation of Life." This method of delineation helps determine whether it is a transformative or non-transformative version of a particular celebrity that a game maker is using to commercially profit.

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91 *Id*.

92 *Id*. at 3.

93 Mark Tacchi, *Guest Commentary: What's ahead for the ticketing industry in 2012*, TICKET NEWS (Jan. 12, 2012, 12:18 PM), http://www.ticketnews.com/features/Guest-Commentary-2012-Whats-ahead-for-the-ticketing-industry011212539.

94 *See* A.J. Glasser, *How the iPad will (or won't) change video games*, MACWORLD (Apr. 3, 2010, 1:57 PM), http://www.macworld.com/article/150327/2010/04/ipad_games.html.

95 *NCAA Football for iPhone*, EA GAMES, http://www.ea.com/sports-ncaa-football-iphone (last visited Jan. 17, 2012).

96 *See* Elec. Arts, Inc. v. Textron, Inc. et al, No. 5:2012cv00118 (N.D. Cal filed Jan. 6, 2012). In that case, EA's *Battlefield 3* contains three separate types of military helicopters, each of which Textron claims to have trademarks on. *See id*., Pl. Compl. at ¶ 3–4.

A. *Altered Reality*

"Altered Reality" is based on the variety of directions that a character is meant to take in a video game. Even if the likeness has similarities to an actual person, as long as the intention is for the likeness' path in the game to be open to different scenarios from the ones present in the person's life, it will be considered transformative. In addition, if one of the main intentions of the game is for likenesses to be open to change, this too will be transformative. However, if changeability is merely a minor feature in the game that is not intended for use in the base version, it will not transform the likeness.[97] Additionally, interactivity itself will play *no role* in determining whether a game is transformative. The fact that a user can control a character is not relevant, because control alone does not make any change to the work. It is the way that the character can be used, and whether such manner of use diverts from reality, that is key. A celebrity's reputation is dependent on maintaining a particular identity. A likeness enters an "Altered Reality" when it crosses over from realistic to fanciful and thereby does not earn the protection that a truly realistic depiction has.

An important aspect of the journey that a character takes in a game is the environment in which he takes it. *Hart* was correct in its determination that surroundings are part of the "sum and substance" of a game, but it incorrectly assumed that simply because the game contained its own distinctive environment, the likeness within it was automatically transformed. If the environment is as non-transformative as the character, both in its characteristics and its relation to the celebrity's real life environment, then its existence will not change the status of the character. However, if the environment is different from the one in which the celebrity built his or her reputation, it *will* transform the character even if it matches the celebrity exactly. This is an important piece of the "Altered Reality" part of the test. Taking a familiar likeness and giving it new direction will be transformative. The original reasoning behind the right of publicity was to enable celebrities to protect the reputation they built in the particular arena in which they built it.[98] By changing the environment and taking the

[97] A base version, as used in this Note, is the original version of the game before changes, additions, or deletions are made by a user of the work. This will generally apply only in the area of video games where all aspects of the work are not readily apparent.

[98] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) ("Ohio has recognized what may be the strongest case for a 'right of publicity' involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first

celebrity out of the area in which he is known, the game maker creates a heretofore unexplored "Altered Reality." Because the game is a new expression of the celebrity's likeness, the First Amendment will prevail. This is preferable to the current transformative test which has no specific provision for environment and can deem the same football stadium environment non-transformative, as in *Keller*, or transformative, as in *Hart*. In the new test it is only realism that matters, because an artificial environment that imitates life is not truly an original creation and therefore should not alone allow a secondary user to hijack the identity of a celebrity merely by placing him in that "creation."

Changeability is another feature that can serve to identify an "Altered Reality" use. If a fundamental part of the game involves editing characters and their characteristics, the characters in the game will be transformative, even if they are not required to be edited in this way. The fact that the game is set up in a manner that encourages a user to change a celebrity's characteristics shows that the likeness is meant to be taken in a new direction, different from the one that the real life celebrity is originally known by. If the game is intended to be used in this manner, then the maker's goal is not to commercially profit from the area in which a celebrity built his or her reputation. Rather the game maker means to profit over the creation of users' own individual expressions of the likeness. Under the current test, there is no way to distinguish changeability that is crucial to the game from changeability that is tangential and largely unnecessary to the game.

The baseline "Altered Reality" video game case is *Kirby*, cited by both *Keller* and *Hart* as discussed *supra*.[99] The character in that game was given a new environment, new characteristics and a new profession.[100] Each of these alone gives the likeness a new reality and transforms it. This is a very clear case according to the redefined test, but a likeness with only a small change to its environment could still be transformative as long as the likeness is put in a sufficiently "Altered Reality."

The *NCAA Football* cases do not qualify for the "Altered Reality" delineation but they are extremely close to it. The environments in which Sam Keller and Ryan Hart were placed were crafted by the Electronic Arts game makers.[101] This includes their stadiums, fans,

place.").

[99] *See supra* text accompanying notes 63, 79.

[100] Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 610 (Cal. Ct. App. 2006).

[101] Hart, 808 F. Supp. 2d. 757, 784 (D.N.J. 2011).

referees, cheerleaders, and mascots.[102] Under the redefined test, one must determine whether the environments themselves are transformative either via their characteristics or their relation to the celebrity's real life environment. Thus, if the environment does not exist in the same form in reality as it does in the game, or if the environment is real but unrelated to the player, then the entire use is transformative. This is not the case here. EA explicitly sells its game on the basis of its realistic environments.[103] Even minute details, such as "stadium run outs, from Bevo [The mascot of the University of Texas] to Chief Osceola [The mascot of Florida State University]" are included in the games.[104] As the court in *Keller* stated: "the game's setting is identical to where the public found Plaintiff during his collegiate career: on the football field."[105] Keller and Hart built their reputations, not only on a football field as the court correctly observed, but in the very stadiums they were placed in, in front of the same "generic" cheerleaders and fans.

What makes this particular pair of cases a close call is the changeability built into the game. "Each virtual player's unique attributes, including personal characteristics (height, weight, athletic ability), accessories (helmet visor, wristband), physical abilities (speed and agility, throwing arm, passing accuracy), and biographical details (place of origin) can . . . be edited by the user."[106] The presence of changeability, though, is not enough. It is only transformative if it is included as a central means from which the maker intends to profit. The game does not expressly say that the players represent real life players, but many characteristics built into the base version of the game match reality.[107] The court in *Hart* concedes that the players in the game mimic real life with the goal of "capitaliz[ing] upon the fame of those players."[108] Indeed, if EA's aim was to profit specifically from the realistic quality of the likenesses, it certainly was not deriving its main source of profit from the ability to change that very realism. Rather, the game, in its base format, attempts to maximize realism, and the changeability is merely tangential. EA is directly taking the

[102] *Id*.
[103] Matt Cesca, *NCAA Football 12 Interview with Assistant Designer Jordan Peterson*, GAMESEYEVIEW (July 11, 2011), http://www.gameseyeview.com/2011/07/11/ncaa-football-12-interview-with-assistant-designer-jordan-peterson ("We truly attempt to make each in game experience as realistic as we can").
[104] *Id*.
[105] Keller v. Elec. Arts, Inc., No. 09-1967, 2010 WL 530108, at *5 (N.D. Cal Feb 8, 2010).
[106] Hart, 808 F. Supp. 2d. at 761.
[107] *See* Keller, 2010 WL 530108, at *5 ("For example, the virtual player wears the same jersey number, is the same height and weight and hails from the same state.").
[108] Hart, 808 F. Supp. 2d. at 783.

likenesses of college athletes and using those players' reputations to its own benefit. EA added its own original bells and whistles, but they are not innately expressive and do not change the fact that the use of players' likenesses goes directly against the very principles of reputation protection that the right of publicity was conceived upon.[109] Therefore the *NCAA Football* franchise does not fall into the "Altered Reality" category.

B. *Imitation of Life*

An "Imitation of Life" game will be identifiable by the fact that the likeness's intended path in the game will match the path taken by the actual person in his or her life. This means that the likeness is used in environments that mimic the ones in which the person built his or her reputation. If the likeness is intended to be used in many environments including others in addition to the one described above, this will be enough to make the game transformative because the user would not be directed into the real life arena of the actual celebrity. Additionally, an "Imitation of Life" will not exist if a game is intended to be used in a manner in which the character(s) is (or are) changed either physically or in description.[110] However, if the game is intended for use with its base version, and that is where the commercial profit is mainly intended to derive from, then changeability alone will not change the "imitation" status of the game. Interactivity plays no role in whether a likeness is transformative. The user can play the game in an interactive manner but unless he can use the likeness in an intended way that affects "changeability" or environment, it will not be a transformative "Altered Reality." The reasons for this will be discussed *infra*.[111]

The idea of the right of publicity is to protect the reputation of a celebrity whose likeness has not been altered in any significant manner, and is thereby having his work and effort profited from. But even in a transformative work, there are times where the secondary work could not have profited without use of a celebrity's likeness.[112] The original

[109] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) ("[T]he right of publicity also secures for plaintiffs the commercial value of their fame and prevents the unjust enrichment of others seeking to appropriate that value for themselves.").

[110] *See supra* text accompanying notes 98–100.

[111] *See infra* text accompanying notes 133–139.

[112] *See* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 938 (6th Cir. 2003). In ETW Corp., the work was a painting relating to Tiger Woods and his victory at the 1997 Masters Golf Tournament. This work was meant to capitalize off Woods's fame. However the court ruled that because the painting was still transformative because it "consist[ed] of a collage of images in addition to Woods's image which [we]re combined to describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods's achievement in that event." *Id.*

transformative test intended to draw the line by using a determination of whether a work has become "primarily [the second user's] own expression."[113] The "Imitation of Life" category honors this original intent by looking not for the mere presence of certain elements, but rather at the essence of the game as a whole. Looking at the characters, the environment, and the intent, courts must determine whether a game aims to have its celebrity likeness imitate a particular life. If there are no alterations to the journey from the one the celebrity takes (or took) in real life, then there is no transformation. Even if alternate "lives" are available, if they are simply tangential then they are not the main source of profit for the secondary user and are thus not *primarily* the user's own expression.

In this same spirit, even seemingly minor environmental changes can make a work transformative. This can be demonstrated by using the case of *Brown v. Elec. Arts, Inc.*[114] as a model. That case was factually similar to *Keller* and *Hart* in that it involved the use of a football player's likeness in an EA football game. The two major differences are that Jim Brown, the plaintiff, played in the National Football League from 1957 to 1965[115] and that the game in question was EA's *Madden* series as opposed to *NCAA Football*. For separate reasons, the Court did not discuss the right of publicity or the original transformative test. But if that factual scenario were to be analyzed under the redefined transformative test proposed in this Note, it would be determined to be transformative. Jim Brown did play "on the football field"[116] as did Sam Keller and Ryan Hart, but he did not play in modern stadiums against modern players as he is depicted as doing in the *Madden* games. This seemingly minor change (modern versus historical) is enough to be determinative because it makes the "life" one of Jim Brown as a football player in modern times as opposed to Jim Brown as a football player between 1957 and 1965. The latter is where Brown built his reputation. The former is a new and, more importantly, *impossible* "life," since Jim Brown retired from football in 1966.[117] Brown's identity is bound up in his reputation as a mid-twentieth century football star. Therefore, a portrayal of Brown playing in the modern era is an alteration from true life and a new expression—one that is primarily EA's. Under the current test there is no way to define what "life

113 Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001).
114 722 F. Supp. 2d 1148 (C.D. Cal. 2010).
115 *Id*. at 1150.
116 Keller v. Elec. Arts, Inc., No. 09-1967, 2010 WL 530108, at *5 (N.D. Cal. Feb 8, 2010).
117 Larry Schwartz, *Jim Brown was hard to bring down*, ESPN CLASSIC, http://espn.go.com/classic/biography/s/Brown_Jim.html (last visited Fec. 13, 2012).

changes" make a game transformative. The redefined test separates the changes that alter crucial elements of a celebrity's character from those that leave the celebrity's identity clear and intact. Because the redefined test, via the "Altered Reality" and "Imitation of Life" delineations, provides clarity and separation in all of the above issues, it is markedly better and more effective that the current version.

There is no true clear-cut video game case to create a baseline for the "Imitation of Life" category. The court in *Hart* attempted to use the case of *No Doubt v. Activision Publ'g, Inc.*[118] as the archetype for a non-transformative video game[119] but, as discussed *supra*, [120] that court did not give enough credence to important factors that could have a significant effect on analysis under the redefined transformative test. The best example of a baseline "Imitation of Life" case is the non-video-game-related *Hilton v. Hallmark Cards*.[121]

Hilton involved a birthday card on which an oversized photo of Paris Hilton's head was placed on the body of a waitress who, in the course of her waitressing, used Hilton's well-known catchphrase: "That's hot."[122][123] The lawsuit alleged that this card was identical to scenes from an episode of Hilton's show "The Simple Life" during which Hilton tried her hand at waitressing.[124] The court agreed, stating that "[t]he version of Hilton in Hallmark's card . . . does almost exactly what Hilton did in 'The Simple Life': she serves food to restaurant customers. Even if one adds the literal use of Hilton's catchphrase, this case strikes us as quite close factually."[125]

The card at issue in this case contains all of the characteristics that would be present in an "Imitation of Life" video game. "The Simple Life" was a large part of how Hilton built her reputation[126] and the card seemed to be directly intended to mimic the episode in which Hilton herself spent time in a restaurant environment. The secondary use was

118 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011).
119 Hart v. Elec. Arts, Inc., 808 F. Supp. 2d. 757, 782–83 (D.N.J. 2011).
120 *See supra* text accompanying notes 80–87.
121 580 F.3d 874 (9th Cir. 2009).
122 *See That's Hot*, YOUTUBE.COM, http://www.youtube.com/watch?v=Xd9VwVPEhnQ (last visited November 23, 2011).
123 580 F.3d at 879.
124 *Id*. at 891.
125 *Id*.
126 *See Paris Hilton*, BIOGRAPHY.COM, http://www.biography.com/people/paris-hilton-11271420 (last visited November 23, 2011) "Hilton debuted her first reality television venture on FOX. She partnered with long-time friend Nicole Richie to create The Simple Life, a show that featured the two socialites attempting blue-collar jobs and performing menial tasks. It was feared that Hilton's scandal would ruin ratings and alienate potential audiences, but the show became an enormous success. Shortly after, Hilton was approached by Guess to appear in three worldwide campaigns. The following month, Hilton made a guest appearance on Saturday Night Live."

an attempt to profit off of this direct identity-building journey taken by the real life Hilton. Unlike a celebrity in a video game, an untransformed picture of Hilton's head was used on the card, as opposed to a pixelated avatar. However, the analogy still works because this head was transposed onto a "cartoon waitress's body."[127] These situations are thus comparable because both types of depiction fundamentally change the celebrities' likenesses while still leaving them easily recognizable. This is different from both the direct lithographs in *Comedy III*[128] and the completely transformative imagery in *Winter*.[129]

The *Hart* court attempted to distinguish the card from the *NCAA Football* games by saying that the changeability in the video game "distinguish[es] [it] from the greeting card in Hilton, where Paris Hilton's photograph was used in a single, static setting."[130] But the fact that a work is static does not mean it is impervious to change. In fact, the alteration of static works of art is a relatively common phenomenon that has occurred in instances involving works ranging from those of master painters[131] to modern-day graffiti artists.[132] The fact that change itself can occur should not alone be dispositive because nearly any artistic work can be changed, whether such change takes place in the virtual world or the physical one. Rather, the question should be whether the secondary user is intending to profit off the changeability *specifically*, and to such a degree that the entire work can be said to be transformative. The reason that *Hilton* can be used as a baseline non-transformative case is not because change to the greeting card was impossible. Indeed it was not. Rather, it is the baseline case under the redefined transformative test because change was not intended to be used in the work as a means of profiting from it.

None of the available tests which deal with the First Amendment and right of publicity conflict use intent as a factor. However, if intent is ignored, a user can make an otherwise completely non-transformative work transformative by adding one irrelevant and minute aspect. There

127 Hilton, 580 F.3d at 879.

128 Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 800–01 (Cal. 2001).

129 Winter v. DC Comics, 69 P.3d 473 (Cal. 2003).

130 Hart v. Elec. Arts, Inc., 808 F. Supp. 2d. 757, 785 (D.N.J. 2011).

131 *See* Arthur Lubow, *The Secret of the Black Paintings*, N.Y. TIMES, July 23, 2003, at SM24; Harry de Quetteville, *Van Gogh painting uncovered by new Xray machine*, THE TELEGRAPH (Sept. 23, 2008 12:01 AM), http://www.telegraph.co.uk/science/science-news/3352325/Van-Gogh-painting-uncovered-by-new-Xray-machine.html.

132 *See* Rob Taylor, *Cleaners paint over priceless art*, REUTERS (Apr. 28, 2010, 10:45 AM), http://www.reuters.com/article/2010/04/28/us-australia-banksy-idUSTRE63R09F20100428; Gabrielle Steinhauser, *A Game of Tag Breaks Out Between London's Graffiti Elite*, WALL STREET JOURNAL (Mar. 3, 2010), http://online.wsj.com/article/SB10001424052748703795004575087043622126412.html.

is no provision in the current transformative test to deal with this. The redefined test closes this loophole by looking at intent to include a change as an integral piece of the work as opposed to a needless modification employed to take advantage of an outdated law.

It is true that intent itself can be seen as subjective. A strong argument can be made that the redefined test in relying on intent lacks clarity in the same way that the current version of the test does. If that were to be the case, then a redefining of the factors would still leave us with contradictions due to subjective application. The solution in the redefined test is to look at the evidence present in the work in question to see what, if anything, the creator meant to add or change. In video games, for example, it is possible to make objective determinations based on an alteration's place in the game. If an alteration is critical to the public appeal of the game and thereby a source of profit, it can be said that the work was meant to be its own expression. This determination, which looks to the base version of a game as the derivation of the profit, is discussed *infra* in Section III.

The only outstanding factor left to deal with is interactivity. It might seem that the very definition of interactivity implies that the controller of a video game avatar has some control over the outcome, and thus the "life" is not a direct imitation. However, this is not the case. There are very few cases that provide any substantive discussion on the topic of video game interactivity, possibly because the issue is one that is only borne out of very recently developed technology. One of the few cases that provide some guidance is not even a trademark case. It is the Supreme Court case of *Brown v. Entm't Merchants Ass'n*[133] which struck down a California law placing restrictions on the sale or rental of "violent video games."[134] The case is mainly a discussion of free speech under the First Amendment[135] but the relevant portion arises out of California's claim that the interactivity of video games creates a specific "special problem[]" regarding free speech that other media do not present.[136] The Court disagreed, stating:

> As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner has observed, all literature is interactive. "[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the

133 131 S. Ct. 2729 (2011).
134 *Id*. at 2732.
135 *Id*. at 2733.
136 *Id*. at 2737.

> characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own."[137]

The Court's position in *Brown* seems to be that interactivity in video games is not unique, but rather it is simply an outgrowth of the emotional, participatory feeling one can get from literature. If that is the case, then interactivity should theoretically be present in a number of different types of media to which the transformative test can be (and has been) applied. Comic books are a form of literature, thereby involving interactivity in cases such as *Winter*.[138] In addition, this principle could be extended to other forms of artistic work which invoke a similar response. Research has shown that art appreciation itself involves a similar emotional and psychological response[139] and therefore should not be separated from video games in terms of the effect of interactivity under a transformative analysis. Because courts have considered these different types of secondary artistic works and not included interactivity as a factor, precedent would suggest that interactivity, as the Supreme Court defines it, has no effect on the transformativeness of a given work, whether video game or otherwise. Based on this, the redefined test proposed in this Note does not factor in interactivity in and of itself when making the above determination.

The one problem that remains is the practical difference between interactivity in video games and interactivity in other artistic works which the Court does not recognize in *Brown*. Namely, the fact that in addition to the psychological response discussed by the Court, a video game player has actual control over the actions of a likeness and can therefore have power over the direction said likeness takes. In literature, despite the involvement of the reader, there is a definite conclusion to a given book. However in the video games discussed, the failure of a consumer to press a button may result in his or her avatar getting "dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces."[140] In this manner, the player controls the actions of a likeness. One might argue that this manipulation of a likeness is enough to transform it since there is no singular way that it can be used.

Nevertheless, this argument can be rebutted by the straightforward realization that having a singular path does not necessarily mean that a

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137 *Id*. at 2738. (citing American Amusement Machine Assn. v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001) (striking down a similar restriction on violent video games)).

138 Winter v. DC Comics, 69 P.3d 473 (Cal. 2003).

139 *See* BJARN SODE FUNCH, THE PSYCHOLOGY OF ART APPRECIATION 16 (Museum Tusculanum Press 1997) ("Fechner distinguishes between beauty in the general and in the restricted sense. He believed that art belongs in the latter category. Beauty in a restricted sense gives rise to a feeling of pleasure that is more profound than sensuous pleasure because it strikes an inner relationship to the psyche." (citing 1 GUSTAV THEODOR FECHNER, VORSCHULE DER AESTHETIK 15 (Breitkopf & Härtel 1876))).

140 *Brown*, 131 S. Ct. at 2749 (Alito, J., concurring).

"life" is being imitated. Indeed, when Sam Keller and Ryan Hart stepped onto their respective fields to play football, they too did not know whether they would win or lose. Over their respective careers, they proved themselves quite capable of achieving both outcomes.[141] The fact that the outcome of each game was in doubt is in fact part of the "life" that each player had. Regardless of whether the player is controlled, if the game's environment is one in which different outcomes took place, the game will not be transformative simply due to the reason that it provides for those multiple outcomes as well. No matter which of the outcomes happens, it will always fall within a situation that is still part of a player's identity and reputation. If the game provides for an outcome that falls outside of these bounds, then it would no longer mimic reality and would be transformative, regardless of the interactivity involved.

The redefined test focuses on the parts of a work that change it from being realistic to fanciful. These are the parts that change a celebrity's identity into a new, creative work. If a game contained a quarterback capable of throwing a football to the moon, it would not be the interactive experience of the user controlling the throw that makes the game transformative. Rather it is the ability to throw the ball impossibly far (something built into the game) that makes the overall experience fanciful. Controlling the likeness and being interactive cannot itself change the reputation of a celebrity unless the built-in environment allows for such change. That is why interactivity should not come into play under a test that focuses solely on the key aspect of the right of publicity – the right to maintain one's identity.

IV. APPLYING THE REDEFINED TRANSFORMATIVE TEST

A. *The Other Modern Video Game Case:* No Doubt v. Activision Publ'g, Inc.

The *Hart* decision suggests, as discussed *supra*,[142] that the baseline non-transformative case is *No Doubt v. Activision Publ'g, Inc.*.[143] The court argued that singers in that case were intended to mimic the actions of their real life counterparts, and the likenesses' environments imitated those in which the band built their reputation, namely playing and singing their band's songs.[144] The fact that "the game does not permit players to alter the No Doubt avatars in any respect; they remain at all

141 *See Sam Keller Game-by-Game Stats*, ESPN.COM, http://espn.go.com/college-football/player/gamelog/_/id/144960/sam-keller (last visited November 23, 2011); *Ryan Hart Game-by-Game Stats*, ESPN.COM, http://espn.go.com/college-football/player/gamelog/_/id/135377/ryan-hart (last visited November 23, 2011).

142 *See supra* text accompanying notes 80–83.

143 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011).

144 *See* Hart v. Elec. Arts, Inc., 808 F. Supp. 2d. 757, 782 (D.N.J. 2011).

times immutable images of the real celebrity musicians"[145] would seem to suggest that that the use is not eligible for First Amendment protection. Under the original transformative test, the analysis would end there, but under the redefined test proposed in this Note, it becomes much less clear as to whether the use in the *No Doubt* case is transformative. This is because the game that is the focus of that case, *Band Hero*, puts quite a bit of emphasis on environment. The game features concerts in a number of environments, ranging from the realistic (concert halls and music festivals) to the less likely (shopping malls) to the absurd (outer space).[146]

B. *The Environmental and "Base Version" Factors*

The redefined test takes the realistic nature of the various environments into account. *No Doubt* does not feature a sports video game but it features a video game nonetheless. Because it presents such a close call, and a potential conflict between the old and new tests, it is the best place to see the effect and change that could come about from the application of the redefined transformative test.

An environment can put a game in the "Altered Reality" category if the environment is different from the one in which the celebrity built his or her reputation. If the environment is different from a particular one in which the celebrity's identity is bound up, it will transform the avatar even if it matches the celebrity exactly.[147] However, just as the ability to alter the appearance of an avatar is not alone dispositive, so too is the environment alone not enough. Like in the case of changeability, if the differing environment is not part of the base version of the game, the use is not automatically transformative. If the base environment, both in its characteristics and its relation to the celebrity's real life environment, is not transformative then the mere existence of a transformative environment in the game will not be enough.

There are two environmental elements in *Band Hero*. One such environmental element has to do with the context in which No Doubt plays songs. In the video game, No Doubt can be used to play songs that they would "never perform in the real world."[148] The second environmental element is the more traditional sense of environment: the surrounding environments in which the avatars are used within the game. On both of these elements, subjective determinations must be made as to what the base version of the game truly is. With regard to

145 No Doubt, 122 Cal. Rptr. 3d at 410.
146 *See Venues in Band Hero*, WIKIHERO, http://guitarhero.wikia.com/wiki/Category:Venues_in_Band_Hero (last visited Jan. 17, 2012).
147 *See supra* text accompanying note 98.
148 Brief of Defendant - Appellant at 20, No Doubt v. Activision Publ'g, Inc., No. B223996 (Cal. Ct. App. July 14, 2010).

the first element, without unlocking extra features a band in the game can only perform songs that their real life counterpart performs.[149] That seems to demonstrate that the ability to play other bands' songs is not intended to be part of the base version and does not alone make the game transformative.

The surrounding environments present a tougher question. There are eleven different environments playable in *Band Hero*.[150] These environments, or venues, can be unlocked as the game goes along and as the player gathers achievements.[151] At the beginning of the game's career mode, only one venue can be used.[152] This raises the question of whether it is this initial venue alone that is considered the game's base version. It is the only venue that can be used out of the box and it is the starting point of any *Band Hero* career. However, since the user is meant to be able to unlock all the venues eventually (unlike the unlockable extra features mentioned above with regard to songs), it is only proper for them all to be included in a determination of the base version of the game.

This particular application shows how intent still plays a role under the redefined test. The creators of *Band Hero* intended a course to be undertaken by the player. It could take longer to unlock some venues than it will to unlock others. Indeed, if the player is not very proficient, they may never unlock some of the venues. Nevertheless, the entirety of career mode is set up so that if a player completes all of the necessary tasks he or she will be able to use all of the venues.[153] Because of this, all eleven venues are considered to be part of the 'base version' of *Band Hero*. Note how this is different from the alterations available in *NCAA Football*. In that instance the entire game can be played without using the alteration feature discussed above.[154] In addition, although teams can play against historical opponents or other players with mascot heads,[155] these are minor pieces of the game and are not meant to be used as part of the base version. That was the creators' intent and that is

149 *See id*. at 1.

150 Joe Rybicki, *The Consensus Band Hero Review*, GAMESPY (Nov. 6, 2009), http://xbox360.gamespy.com/xbox-360/band-hero/1043107p1.html ("Each of the 10 venues you visit before unlocking the final venue and song has two or three songs with an appeal far beyond 'tween girls -- and nailing two or three songs is almost always all it takes to access the next venue.").

151 *Id*.

152 Greg Miler, *Band Hero Review*, IGN (Nov. 3, 2009), http://xbox360.ign.com/articles/104/1041639p1.html ("Band Hero packs a career mode, but it's the same stripped-down version you saw in G[uitar]H[ero]5. You start with a venue, earn stars by playing the available songs, and then watch as more venues open up.").

153 *Id.*

154 *See supra* text accompanying notes 107–109.

155 Oral Argument at 7:57, Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb 8, 2010), *appeal docketed*, No. 10-15387 (No. 10-15387), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000007013.

why those features do not alone render the game transformative. In *Band Hero* however, that is not the case. Playing the game as intended will eventually lead a user to outer space,[156] which is certainly not a place where No Doubt built its reputation and identity.

The next step in the application is to determine whether the venues are, in fact, transformative. Of the eleven venues, some are realistic generic venues such as music festivals and an awards show.[157] Some are unlikely spots for a concert, such as a canyon and an ordinary shopping mall.[158] However, these are not impossible venues and bands have been known to perform in odd locations. There is one location that No Doubt could not perform in, that is nonetheless featured in *Band Hero*. That venue is called "Hypersphere," where bands perform in outer space.[159] It is true that "Hypersphere" is the final venue to be unlocked in career mode,[160] but as established above, that does not prevent it from making the game transformative. An apt comparison would be if *NCAA Football* featured a stadium in outer space. That alone would render the game transformative just as "Hyperspace" does in *Band Hero*.

Ultimately, an application of the redefined test to the facts of *No Doubt* results in an outcome that is contrary to the one reached by the Court in *No Doubt*.[161] Further, applying the redefined test to the facts of *No Doubt* illustrates that under the redefined test, video game fact patterns can result in both transformative and non-transformative outcomes where the old test would result in the opposite. It is not a test that leans toward one side or another. Instead, it takes into account the specific factors important to video games, remains faithful to the logic of the original transformative test, and makes a determination on that basis.

The current test is simply not equipped to deal with video games in this manner. Even if courts were to properly take intent into account as part of the current Transformative Use test, there would be no way to apply that intent to video games because there is no such thing as a base version of the different media that the test was created to deal with. Paintings do not have different levels and greeting cards do not contain multiple environments and levels. Courts need a new way to ascertain intent, and thereby determine whether a game feature is included simply

156 *See* Miler, *supra* note 146 ("When you click on each new venue, you get a short animated clip of some generic rockers getting the invite to play at Spring Break or in space or whatever.").
157 *See Venues in Band Hero*, *supra* note 147.
158 *Id*.
159 *Hypersphere*, WIKIHERO, http://guitarhero.wikia.com/wiki/Hypersphere (last visited Jan. 17, 2012).
160 *Id*.
161 *See* No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 411–12 (Cal. Ct. App. 2011) (holding that the depictions of No Doubt in the video game were not transformative.).

to avert the right of publicity or to justly contribute to the overall work. The redefined test, by way of the base version analysis, supplies this much-needed method.

C. *Similarities to Precedential Transformative Rationale*

The further analyses of these particular factors (changeability and environment viewed through the lens of intent) serve to resolve right of publicity claims in the video game arena in a manner similar to the analyses in all other prior right of publicity claims. This similarity arises from using an updated version of classic transformative test rationale which fits the newer medium. For example, in *ETW Corp. v. Jireh Publ'g, Inc.*,[162] the court's decision is largely based on environmental changes in the subsequent work in question. The work discussed was a painting of Tiger Woods as portrayed after winning the 1997 Masters Tournament.[163] Though the work did show Woods in a situation in which he actually participated and built his reputation, the court nevertheless ruled that the work was protected.[164] This was largely because of changes to the environment. The court held:

> [The painter]'s work includes not only images of Woods and the two caddies, but also carefully crafted likenesses of six past winners of the Masters Tournament: Arnold Palmer, Sam Snead, Ben Hogan, Walter Hagen, Bobby Jones, and Jack Nicklaus, a veritable pantheon of golf's greats. [The painter]'s work conveys the message that Woods himself will someday join that revered group."[165]

The addition of former players changed the environment and thereby rendered the entire environment transformative.

ETW does not actually use the word environment but the distinction it makes is clear: the presence of additional elements that surround the original unchanged likeness are themselves enough to render a work transformative. The application of the test proposed in this Note to *No Doubt* shows that the addition of an environmental factor would yield a satisfactorily similar result. Just as Tiger Woods built his reputation playing golf, so too did No Doubt build its reputation by playing music. But just as Woods never played with a plethora of golf greats watching in the background, No Doubt never played in outer space. Using the old tests, without an environmental factor, the applications to these two cases resulted in different outcomes despite their obvious similarity simply because they are in different media. Redefining and standardizing the transformative test would fix

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162 332 F.3d 915 (6th Cir. 2003).
163 *Id* at 918.
164 *Id* at 936.
165 *Id*.

this application problem. In the seemingly foggy area of law that is the right of publicity, the one thing that is clear is that environment has been deemed relevant to the right of publicity in the past and needs to be consistently viewed as a potentially transformative factor in the future. This can be achieved by the redefined test alone; for no other test even considers environment as a transformative factor.

There are a number of other important right of publicity cases that fall within this same application. In *White v. Samsung Elec. Am., Inc. (White II)*,[166] Judge Alex Kozinski famously dissented from the majority,[167] arguing that "a robot dressed in a wig, gown and jewelry reminiscent of Vanna White's hair and dress . . . posed next to a Wheel-of-Fortune-like game board"[168] was considered a transformative use of Ms. White's image. Though Judge Kozinski failed to explicitly mention environment, it plays a role in his reasoning. If not for the fact that Ms. White was portrayed as a robot, the game board in the background would serve to identify her and where she built her reputation. "Samsung's ad didn't simply copy White's schtick—like all parody, it created something new."[169] However, this argument was included in a dissent only because the majority did not see the work's environment as a crucial factor. This is contradictory to other decisions, such as *ETW*. The redefined test standardizes the issue by laying out the transformative effect of a fanciful and impossible environment to end these contradictions.

There is also precedent to suggest that it is possible to take intent into account when there is "something new" created in a medium which is not part of the base version. This is something that will generally only come up in the video game context, since in all other media all aspects of a work are readily apparent and there is no real base version. Nevertheless, precedential cases suggest that the above application is consistent with the original goals of the transformative test. In *Comedy III Prods., Inc. v. Gary Saderup, Inc.*,[170] the court stated that, under the transformative test, "when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist's right of free expression is outweighed by the right of publicity."[171] In other words, the sole intent to profit off a celebrity's likeness and reputation can outweigh the tangential creative additions to the work in

166 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting).
167 *See* Sean T. Masson, *The Presidential Right of Publicity*, 2010 B.C. INTELL. PROP. & TECH. F. 12001 ("Judge Kozinski's infamous dissent in White v. Samsung Electronics America (White II), attempted to rebut the use of Locke's labor theory to justify the right of publicity on the ground that celebrities' identity are not solely their own creation.").
168 *White*, 989 F.2d at 1514.
169 *Id* at 1517.
170 21 P.3d 797 (Cal. 2001).
171 *Id* at 810.

rendering a work transformative.

Intent is also explicitly discussed in *Hoffman v. Capital Cities/ABC, Inc.*[172] which is a case regarding an ad that recreated a scene from the movie *Tootsie* featuring Dustin Hoffman.[173] "The American flag and Hoffman's head remained as they appeared in the original, but Hoffman's body and his long-sleeved red sequined dress were replaced by the body of a male model in the same pose, wearing a spaghetti-strapped, cream-colored, silk evening dress and high-heeled sandals."[174] In this instance the court seemed to find that although Hoffman in a dress and heels adequately represented transformative non-commercial speech, the fact that his body type was changed was "actual malice" that could render the use unprotected under the First Amendment.[175] However, perhaps because it was unclear if this body type change was "manifestly subordinated" by the overall portrait, the court looked to the creator's intent in its application. Because the creator "did not intend to convey to readers that Hoffman had participated in some way in the article's preparation, and never thought that readers would believe Hoffman posed for the photograph in the new dress,"[176] the court ruled that the use was entitled to First Amendment protection.[177]

In *Keller* and *Hart*, where the changeability factor is a minor part of the game and not part of the base version, the new artistic addition is indeed "manifestly subordinated" to the goal of portraying the two quarterbacks as they were when building their reputation. However in *No Doubt*, where playing the game as it was intended to be played will lead to a use of the band in unlikely and impossible environments, the new portion is not "manifestly subordinated" to the "conventional portrait" of No Doubt. One can make an argument that there are more "conventional" levels than impossible or unlikely ones. However, because the latter levels are part of the base version, although they may be subordinated, they are not manifestly so. In fact, one could argue that because "Hyperspace" is the ultimate level, it is a critical part of the game and thus not subordinated. No such argument can be made in the *NCAA Football* cases.

When applying the redefined transformative test to these cases, it

172 255 F.3d 1180 (9th Cir. 2001).
173 *Id* at 1183.
174 *Id*.
175 *Id* at 1186.
176 *Id* at 1188.
177 *Id* at 1189. In *Hoffman*, the intent factor was relevant because the court was dealing with actual malice, which factors in the question of intent. However, the fact that the court determined that the perception of readers (or more generally users of a work) is important in determining intent can transfer over to help decide whether a relatively minor change can affect the transformativeness of a work. The *Hoffman* discussion of intent is not dispositive with regard to the right of publicity. Rather, it is simply useful in deciding what intent can mean in such an area.

becomes clear that the test does not favor one side or another. Rather it provides consistency and clarity in an arena that presents a number of heretofore unused and unsettled factors. It does this while preserving the decisions in cases involving other forms of usage. It minimizes the necessity of making subjective determinations, and when those determinations are required, the redefined test does so in a manner that matches up with the analyses done in the cases in which the transformative test originated. It also sticks to the reasoning of the original copyright fair use doctrine from which the transformative test originated. By using factors like environment and overall realism, the logic of the redefined test, in looking to context when determining transformativeness, matches up with transformative discussion in modern copyright decisions.[178] The inconsistencies between the decisions in *Comedy III*,[179] *ETW*,[180] *No Doubt*,[181] *Keller*[182] and *Hart*[183] show that the same cannot be said for applications of the original transformative test.

V. REALITY OF REDEFINITION: THE FUTURE OF TRANSFORMATIVE USE

A. *Alternate Versions*

One issue that may come up more frequently with specific regard to tablets and smartphones is the prevalence of less feature-filled versions of existing games. The current iteration of *NCAA Football* for the iPhone and iPad features many of the same elements as its video game console counterpart.[184] However, one important difference is the lack of a changeability option for users when it comes to the players' physical attributes.[185] Considering the emphasis that the *Hart* court put on this particular aspect,[186] it seems at the very least possible that an identical suit based on the mobile version of the game would succeed where the first failed under the original transformative test. Under the redefined test there would be even less of a question because there is no base version question regarding the changeability option. Without a specific provision for changeability, it will be unclear to courts if the

178 *See Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) ("Courts have found a transformative purpose both where the defendant combines copyrighted expression with original expression to produce a new creative work and where the defendant uses a copyrighted work in a different context to serve a different function than the original." (internal citations omitted)). *See also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (holding that moving a work from one context to another can render it transformative).
179 Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 (Cal. 2001).
180 ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 936 (6th Cir. 2003).
181 No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011).
182 Keller v. Elec. Arts, Inc., No. 09-1967, 2010 WL 530108 (N.D. Cal. Feb 8, 2010).
183 Hart v. Elec. Arts, Inc., 808 F. Supp. 2d. 757, 778 (D.N.J. 2011).
184 *See NCAA Football for iPhone*, *supra* note 95.
185 *See id.*
186 *See* Hart v. Elec. Arts, Inc., 808 F. Supp. 2d. 757, 785 (D.N.J. 2011).

option's removal changes the transformativeness of the work. Any combination of similar situations can take place based on differing levels of interactivity or differing environments. Under the original transformative test, for instance, would the court's ruling in *No Doubt* stand if the iPhone version of *Guitar Hero* featured only unrealistic environments? There is no provision in the old test to deal with this sort of judgment call and therefore the decisions would be subjective and opinion-based which would only serve to cause more confusion.

B. *Graphic Quality/Visual Realism*

Another issue that may come up with regard to smartphone and tablet gaming is visual realism. This issue can present a problem under both the current and redefined transformative tests. One of the basic principles of the transformative test is that generally if the depiction of a celebrity is not considered a likeness (excluding the use of specific identifying characteristics such as names, voices, signatures, etc.) then the celebrity's right of publicity cannot be considered violated.[187] Robots, for one, might not be considered likenesses[188] but charcoal lithographs,[189] comic book characters,[190] and video game avatars[191] can be. As advanced as smartphone gaming is, the depictions in that platform's games are still not nearly as visually realistic as their video game counterparts. At what point do the avatars become "robotic" enough that they themselves are transformative based only on their lack of realism? Is there a way to draw the line regarding visual realism at all? These are questions that need to be answered as the right of publicity versus First Amendment conflict approaches these new platforms.

It would seem from the language of precedential opinions that visual realism is not a factor that comes into play. Rather, the question is whether the likeness is transformed by the lack of visual realism. As Judge Freda Wolfson stated in *Hart*: "Whether EA has attempted to create a realistic experience . . . is not the focus of my inquiry. The pertinent question is whether EA's use of Hart's image is

187 *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) ("In most cases an appropriation of identity is accomplished through the use of a person's name or likeness.").

188 White v. Samsung Elec. Am., Inc., 989 F.2d 1512 (9th Cir. 1993).

189 Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001). Recently, the District Court of California denied EA's motion to dismiss in a suit brought by retired National Football League players challenging the use of their images on historical teams in EA's "Madden" franchise. The court followed Keller and stated that taking the athletes' images was the digital equivalent of transferring the Three Stooges' images onto a t-shirt. Davis v. Elec. Arts, Inc., No. 10-cv-03328 (N.D. Cal. Mar. 29, 2012) (order denying defendant's motions to dismiss and strike).

190 Winter v. DC Comics, 69 P.3d 473 (Cal. 2003).

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

transformative . . . ."[192] The characters in the *NCAA Football* iPhone game, while lacking in the true visual realism present in the video game version, still bear a resemblance strong enough that the likeness itself would not be considered transformed. The idea of courts' ignoring the possibility of a handheld, but still truly realistic environment would be the legal equivalent of Steinbeck's *ad astra per alas porci*.[193] Because the graphics technology improves with each passing year, the depictions will only become more visually realistic. Therefore, determinations of transformativeness based solely on graphic quality are unlikely to be used by courts, as the line drawn would be fluid and as time passes it would have to change with absurd frequency.

C. *The "Twitterjacking" Example*

Expressive works can come in many different forms and the goal of a standardized test is to have the ability to deal with all of them. The redefined transformative use test has the benefit of being able to deal properly and consistently with all media in which this conflict currently occurs. Before it is adopted though, it should be determined if there are or will be other media which the test is not capable of handling. As Hobbes (of Calvin and Hobbes fame) once said, "The problem with the future is that it keeps turning into the present."[194] We can look to modern technology to see where future right of publicity issues may lie. One such area is in the "twitterjacking" of celebrity accounts.[195] This involves the creation of a fake account by a Twitter user, meant to imitate the account of a celebrity for a variety of purposes.[196] There has already been at least one lawsuit that cited the right of publicity as a cause of action in a claim regarding "twitterjacking."[197] Tony La Russa filed suit against Twitter after the site failed to remove an account in his name that posted inappropriate and mocking tweets relating to La Russa

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192 Hart v. Elec. Arts, Inc., 808 F. Supp. 2d. 757, 784 (D.N.J. 2011).

193 *Ad astra per alas porci*, meaning "to the stars on the wings of a pig," was the personal motto of author John Steinbeck who adopted it after being told by his college professor that he would be an author when pigs flew. *See quidquid Latine dictum sit altum videtur*, NEEDINC.ORG (July 5, 2012), http://needinc.org/2012/07/05/quidquid-latine-dictum-sit-altum-videtur/ (last visited July 12, 2012). According to his wife, this also led Steinbeck to use the "pigasus"—a pig with wings—as his personal symbol. *See Pigasus*, CENTER FOR STEINBECK STUDIES, http://as.sjsu.edu/steinbeck/biography/index.jsp?val=biography_pigasus (last visited July 12, 2012). Although this footnote may seem overly lengthy and complicated for the seemingly unnecessary purpose of including an obscure phrase, it actually serves the function of meeting the unspoken law school quota of at least one incredibly obscure Latin phrase per law journal article. *See* David A. Golden, Comment, *Humor, the Law, and Judge Kozinski's Greatest Hits*, 1992 B.Y.U. L. REV. 507, 508 n.2 (2011) ("It is a firmly established legal maxim that one should always use a Latin word even when a perfectly good English word or phrase exists.").

194 Bill Watterson, *Calvin and Hobbes*, UNIVERSAL PRESS SYNDICATE (Dec. 31, 1989), http://www.gocomics.com/calvinandhobbes/1989/12/31.

195 Joshua Rhett Miller, *'Twitterjacking' – Identity Theft in 140 Characters or Less*, FOX NEWS (May 1, 2009), http://www.foxnews.com/story/0,2933,518480,00.html.

196 *See id*.

197 La Russa v. Twitter, Inc., No. CGC09488101 (Super. Ct. Cal. filed May 6, 2009).

and his troubles with drunk driving at the time.[198] Twitter did eventually remove the page in question and a settlement was reached before a judge could rule on the matter.[199]

The questions in this area of law could be varied and difficult. If a celebrity is "twitterjacked," he or she might have a legitimate claim that his or her social networking likeness was being used without consent. Assuming that the celebrity could make the argument that the account was being used for the purposes of trade, a determination would have to be made as to whether this constitutes a legitimate claim.

The Restatement (Third) of Unfair Competition states that "[i]n most cases an appropriation of identity is accomplished through the use of a person's name or likeness. The person can be identified by a real name, nickname, or professional name, or by a likeness embodied in a photograph, drawing, film, or physical look-alike."[200] It is unclear, however, if an account as a whole identified by a moniker such as @notchipcaray[201] is using the likeness of a celebrity even if one called @TonyLaRussa is. It would seem from the Restatement though, that even less obviously named accounts doing impersonations could be open to a right of publicity claim if their names identify a particular celebrity. "The use of other identifying characteristics or attributes may also infringe the right of publicity, but only if they are so closely and uniquely associated with the identity of a particular individual that their use enables the defendant to appropriate the commercial value of the person's identity."[202] In cases such as @notchipcaray, this would still appear to apply, despite the fact that it clearly identifies itself as an impersonator.

There would still need to be a determination as to how the redefined transformative test could apply to Twitter accounts. The redefined test could succeed here by looking not just to the tweets made, but also to the overall environment of the account. If the account is making no attempt to truly impersonate the celebrity in question, and is simply parodying his or her style or personality, the account would be transforming the true identity of its subject and would thus be transformative. In this way, as long as there is some change made, even as slight as adding "fake" or "not" to the user name, the lack of intent to fool others will render the use transformative with regard to the right of publicity just as it did in the *Hoffman* case with regard to actual malice,

198 *See id*.
199 Kristina M. Sesek, Comment, *Twitter or Tweeter: Who Should Be Liable For A Right of Publicity Violation Under The CDA?*, 15 MARQ. INTELL. PROP. L. REV. 237, 238 (2011).
200 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).
201 *See* Andrew M. Jung, Note, *Twittering Away The Right Of Publicity: Personality Rights And Celebrity Impersonation On Social Networking Websites*, 86 CHI.-KENT L. REV. 381, 403 (2011).
202 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

as discussed *supra*.[203] If the account, including the tweets and overall environment, is meant to truly imitate a celebrity (perhaps going so far as to get the account verified[204]) there would be no expressive work and no creative elements, thus leaving the user no protection under the First Amendment. Similar applications of the test could be used to make determinations if cases arose regarding LinkedIn, Facebook, or other social networking profile-driven sites. From this example, it can be seen that the redefined transformative test can standardize both current issues and ones that may arise in the future.

CONCLUSION

The conflict between the right of publicity and the First Amendment cannot survive as it is currently situated in American jurisprudence. More than eight tests exist, each favoring different ideas and different factors.[205] Within each test are conflicting views regarding different media. Even the most popular test is unequipped to deal with modern issues such as video games, leading to completely contradictory opinions like *Keller* and *Hart*. The best solution is to take that test that is most widely accepted and build on it to make it fair, easily applicable, and faithful to the ideas upon which it was based. The right of publicity should be fairly judged in all cases in a manner that truly determines if a celebrity has been transformed. By taking into account environmental factors, changeability, and intent to include original creative elements as an essential part of the work, the redefined transformative test does just this. Therefore, when the virtual Sam Keller drops back to pass once more, he will be able to use the right of publicity to finally get the compensation that he has rightfully earned.

*Joseph Gutmann**

[203] *See supra* text accompanying notes 173–179.

[204] *See* Zorik Pesochinsky, Note, *Almost Famous: Preventing Username-Squatting on Social Networking Websites*, 28 CARDOZO ARTS & ENT. L.J. 223, 239–40 (2010).

[205] Hart v. Elec. Arts, Inc., 808 F. Supp. 2d. 757, 775 (D.N.J. 2011).

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