

NOTE

LOCALLY FAMOUS, NATIONALLY VINDICATED: A COMPARATIVE ANALYSIS OF LIKENESS-BASED RECOVERY AVENUES FOR STUDENT-ATHLETES UNDER THE RIGHT OF PUBLICITY AND LANHAM ACT

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ABSTRACT

We exist in a time in which an individual's name, likeness, and persona may carry great value. Every year businesses pay billions to have products endorsed by our favorite athletes and celebrities. Those who are lucky enough to become so highly recognizable – whether through entertainment, sports, or as a social media mogul – are able to use state right of publicity claims to protect the commercial interest they have developed in their name, likeness, persona and other aspects of their identity. While professional athletes have succeeded with likeness-based claims, student-athletes face much greater barriers to recovery. This is due, in no small part, to the lack of uniformity among state right of publicity laws. This challenge is best illustrated by the following hypothetical: Imagine that a student-athlete notices that someone has started using her name and likeness without obtaining permission. As that student's attorney, what would you recommend that she do? Can she sue at all? Where should she sue? What are the risks she faces? What avenues of recovery are available to her? How much could she recover? Should she bring a false endorsement action under the Lanham Act instead? Would a right of publicity suit in state court best vindicate her interests? Can she do both? What remedy is sought? Money damages? Injunctive relief? What body of law provides the most consistent injunctive effect? Do the National Collegiate Athletic Association ("NCAA") Operating Bylaws bar her from recovery? These questions only the surface of the many uncertainties student-athletes face due to the lack of uniformity in the present right of publicity scheme and the restrictiveness of the NCAA Operating Bylaws. This Article examines the pitfalls of the right of publicity from a damages perspective and proposes two changes that will foster consistent application of the law and increase the likelihood that student-athletes will benefit from the exploitation of their identities. Section I of this Article contextualizes the question of student-athletes and the NCAA. Section II

proposes that the right of publicity be brought into the federal scheme under the guise of a likeness-based claim rooted in the Lanham Act. Section III advocates for the NCAA to revise its amateurism rules and adopt a hybrid amateurism model to allow student-athletes to recover and benefit from their likeness.

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I. CONTEXTUALIZING THE QUESTION: THE NCAA, STUDENT-ATHLETES, AND INITIAL THOUGHTS ON THE RIGHT OF PUBLICITY

Current and former collegiate athletes are seeking an expansion of their rights.¹ Student-athletes have attempted to establish a legal right to a slice of the millions of dollars generated through television broadcast deals, as well as ticketing and merchandise sales related to their sport.² This movement for the expansion of student-athletes' rights has led to many lawsuits and in one case, an unsuccessful attempt at unionization.³ The National Collegiate Athletic Association ("NCAA") currently implements two primary restraints that eliminates a student-athlete's ability to benefit from and recover damages for violations of their right of publicity.⁴ These restraints include the NCAA's stringent limitations on the permissible promotional activities in which current student-athletes may participate during their tenure and the implementation and use of the amateurism model.⁵

A. NCAA Restraints: Impermissible promotional activities and the assignment of student-athlete's rights

Article 12.5.2 of the NCAA Division I Manual details a variety of promotional activities that become impermissible upon a student's entrance into the world of a student-athlete:

After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such

¹ See, e.g., Marc Tracy & Ben Strauss, *Court Strikes Down Payments to College Athletes*, N.Y. TIMES (Sept. 30, 2015), <https://www.nytimes.com/2015/10/01/sports/obannon-ncaa-case-court-of-appeals-ruling.html?mcubz=3> (explaining the Ninth Circuit's decision in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) that "limiting compensation to the cost of attendance in exchange for use of the players' names, images and likenesses was sufficient under antitrust law.").

² *Id.*

³ Tom Farrey, *Northwestern Athletes Denied Request to Form First Union for Athletes*, ESPN (Aug. 17, 2015), http://espn.go.com/college-football/story/_/id/13455477/nlr-says-northwestern-players-cannot-unionize [<http://perma.cc/Z8BB-28L2>] (noting the National Labor Relations Board refusal to allow Northwestern University football players to unionize and other related student-athlete litigation).

⁴ See Michael Marrero, *A Primer On NCAA Athletes' Right of Publicity*, LAW360 (Jul. 16, 2013, 12:49 PM), <http://www.law360.com/articles/456776/a-primer-on-ncaa-athletes-right-of-publicity>.

⁵ See *id.*

product or service.⁶

In effect, this bylaw eliminates student-athletes' interest in their individual right of publicity. This elimination further reinforces student athletes' assignment of their right of publicity to their respective universities and the NCAA.⁷ This assignment occurs the instant a student-athlete signs her NCAA compliance forms, which prohibit the athlete from taking part in any licensing during her tenure and for a period of time after she graduates.⁸ The NCAA retains broad control over the use of student-athletes' publicity rights in exchange for scholarship money and the privilege of competing as part of a collegiate team.⁹ Where an unauthorized use of a student-athlete's name or likeness occurs, Article 12.5.2.2 of the NCAA Division I Manual is instructive:

If a student-athlete's name or picture appears on commercial items (e.g., T-shirts, sweatshirts, serving trays, playing cards, posters) or is used to promote a commercial product sold by an individual or agency without the student-athlete's knowledge or permission, the student-athlete (or the institution acting on behalf of the student-athlete) is required to take steps to stop such an activity in order to retain his or her eligibility for intercollegiate athletics. Such steps are not required in cases in which a student-athlete's photograph is sold by an individual or agency (e.g., private photographer, news agency) for private use.¹⁰

Clearly, the NCAA is very specific about what actions that student-athlete and university must take to protect their interests in the student-athlete's publicity right, while also assuring that the athlete complies with NCAA regulations. The NCAA's behavior has raised questions about the breadth of the assignments and whether "the NCAA could significantly limit the future professional opportunities of the athletes and constrain their ability to develop and direct their own identities" as well as the potential effect of the NCAA enforcing its assignments against athletes who seek to play in major professional sports leagues.¹¹

⁶ NAT'L COLLEGIATE ATHLETIC ASS'N, 2016-2017 NCAA DIVISION I MANUAL, art. 12.5.2.1, at 67 (2016), available at <https://www.ncaapublications.com/p-4435-2016-2017-ncaa-division-i-manual-august-version-available-august-2016.aspx> [http://perma.cc/A8VR-KBJE] [hereinafter NCAA Manual].

⁷ Brittany L. Kaplan, *Throwing the Challenge Flag: NCAA Athletes Successfully Demand Expansion of Publicity Rights*, CDAS LEGAL BLOG (Sep. 9, 2015), <http://cdas.com/throwing-the-challenge-flag/> [http://perma.cc/P58H-ECSX].

⁸ See *id.* (noting student athletes are barred from participating in the related licensing market valued at \$4 billion per year under NCAA rules).

⁹ *Id.*

¹⁰ NCAA Manual, *supra* note 6, art. 12.5.2.2, at 68.

¹¹ Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 188 (2012).

Absent the assignment of their rights to the NCAA, student-athletes may have viable right of publicity claims when their images and names are used without permission in advertisements or on products. Presently, a student-athlete who turns to the right of publicity seeking redress for the unauthorized use of her likeness will likely fail.¹² So long as their rights are assigned to the NCAA, attempts for student-athletes to recover under the right of publicity are futile.

B. NCAA Restraints: The NCAA's amateurism model

In addition to its restrictions on permissible promotional activities for student-athletes, the NCAA's amateurism model restrains a student-athlete's ability to profit from her fame, name, image, or likeness. The NCAA claims that the amateurism requirement draws a line of demarcation between intercollegiate athletics and professional sports.¹³ As outlined in the NCAA's Division I Manual, the NCAA states their basic purpose "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."¹⁴

Article 12 of the NCAA's Operating Bylaws requires student-athletes to maintain amateur status in order to participate in collegiate athletics.¹⁵ Article 12 states that:

An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) Signs a contract . . . to play professional athletics . . . ; (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules . . . ; (e) Competes on any professional athletics team . . . , even if no pay or remuneration for expenses was received . . . ; (f) After initial full-time collegiate enrollment, enters into a professional draft . . . ; or (g) Enters into

¹² See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1289 (9th Cir. 2013) (Thomas, J., dissenting) (explaining that "[b]efore being allowed to compete each year, all Division I NCAA athletes must sign a contract stating that they understand the prohibition on licensing and affirming that they have not violated any amateurism rules. In short, even if an athlete wished to license his image to EA, the athlete could not do so without destroying amateur status. Thus, an individual college athlete's right of publicity is extraordinarily circumscribed and, in practical reality, nonexistent.").

¹³ NCAA Manual, *supra* note 6, art. 1.3.1, at 1.

¹⁴ *Id.*

¹⁵ *Id.* art. 12.01.1, at 53.

an agreement with an agent.¹⁶

In other words, because student-athletes are prohibited from using their athletics reputation or ability to receive compensation, the NCAA's current regulations limit the permissible forms of compensation for athletes to scholarship money. Article 15 details permissible forms of aid a student athlete may receive and limits such compensation to tuition, fees, fee remission, room and board, and funds to cover the cost of books.¹⁷ In addition to its financial aid and benefits guidelines, the NCAA also maintains stringent student-athlete employment rules. Although the NCAA does not prohibit employment, a student-athlete's compensation must not "include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability."¹⁸ It is clear that without revision to the NCAA Operating Bylaws, student-athletes will be precluded from recovery for right of publicity violations.

C. *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*

The primary case addressing student-athletes' right of publicity is *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* ("*In re NCAA*").¹⁹ *In re NCAA* consolidated two class action suits, *O'Bannon v. National Collegiate Athletic Association* and *Keller v. Electronic Arts*, brought by former student-athletes against the NCAA.²⁰ The plaintiffs in *O'Bannon* asserted various antitrust claims against the NCAA²¹ and the plaintiffs in *Keller* alleged violation of their state and common law right of publicity.²² *O'Bannon* involved a former member of the University of California, Los Angeles' men's basketball team who alleged that the NCAA's rules constituted anticompetitive conduct in violation of § 1 of the Sherman Act.²³ *Keller* involved a former quarterback for Arizona State University and University of Nebraska who alleged that Electronic Arts ("EA") used his likeness in its NCAA football video game without his consent and that the NCAA facilitated the use by approving the game contrary

¹⁶ *Id.* art. 12.1.2, at 55-56.

¹⁷ *See id.* art. 15.2, at 182-86.

¹⁸ *Id.* art. 15.2.7(a), at 185.

¹⁹ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

²⁰ *Id.* at 1272 n.2; *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. C 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010); *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

²¹ *O'Bannon*, 2010 WL 445190, at *1 (other claims included unjust enrichment and accounting).

²² *Keller*, 2010 WL 530108, at *2 (other claims asserted against the NCAA included civil conspiracy and breach of contract).

²³ *O'Bannon*, 2010 WL 445190, at *1-2.

to its Operating Bylaws, which prohibit the commercial licensing of the name, picture or likeness of student-athletes.²⁴ Keller asserted his claims under both Indiana and California law.²⁵

The consolidated amended complaint asserted several causes of action arising from the antitrust allegations and state and common law right of publicity.²⁶ In *In re NCAA*, EA attempted to convince the court to expand the First Amendment defense that is used in Lanham Act false endorsement claims and apply it in the right of publicity context.²⁷ The court rejected EA's reasoning, explaining that the interests in protecting against false endorsements differed from those underlying the right of publicity.²⁸ In order to balance First Amendment rights against claims under the Lanham Act, the *Rogers* test must be applied.²⁹ The *Rogers* court found that "titles of artistic or literary works were less likely to be misleading than 'the names of ordinary commercial products,' and thus that Lanham Act protections applied with less rigor when considering titles of artistic or literary works than when considering ordinary products."³⁰ The *Rogers* court concluded, "the Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."³¹ The court in *In re NCAA* declined to expand the First Amendment defense to the student-athletes' right of publicity claims.³²

Additionally, the court based its holding on the fact that the *Rogers* test works in conjunction with the Lanham Act to protect consumers from confusion and that this is not the goal of the right of publicity, which "protects a form of intellectual property [in one's person] that society deems to have some social utility."³³ Furthermore, Keller's claim was not based on consumers being misled to believe that he endorsed EA's game, but rather on the fact that "EA has appropriated without permission and without providing compensation, his talent and years of hard work on the football field."³⁴

While the former student-athletes in *In re NCAA* seemingly prevailed on their

²⁴ *Keller*, 2010 WL 530108, at *1.

²⁵ *Id.* at *2.

²⁶ *In re NCAA Student-Athlete Name & Likeness Litig.*, No. C 09-1967 CW, 2010 WL 5644656, at *2 (N.D. Cal. Dec. 17, 2010).

²⁷ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1279 (9th Cir. 2013).

²⁸ *Id.* at 1280-82.

²⁹ *Id.* at 1279 (citing to *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989)).

³⁰ *Id.* (quoting *Rogers*, 875 F.2d at 999-1000).

³¹ *Id.* at 1279-80 (quoting *Rogers*, 875 F.2d at 999).

³² *Id.* at 1282.

³³ *Id.* at 1280 (quoting *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001)).

³⁴ *Id.* at 1281.

right of publicity claim,³⁵ in his dissent Judge Thomas acknowledged that the NCAA's amateurism scheme prevents current student-athletes from pursuing right of publicity claims and collecting damages.³⁶ Judge Thomas explained, "even if an athlete wished to license his image to EA, the athlete could not do so without destroying amateur status. Thus, an individual college athlete's right of publicity is extraordinarily circumscribed and, in practical reality, nonexistent."³⁷

D. Reconciling the NCAA's Restraints and the Right of Publicity

Absent the restraints imposed by the NCAA's amateurism requirement, §43(a) of the Lanham Act may provide a viable federal avenue of recovery for student-athletes who seek to recover for the unauthorized use of their identity.³⁸ As the law in this area is not entirely clear as to whether *current* student-athletes have a right of publicity, let alone whether they may successfully recover, this article proposes a two-part solution to resolve limitations imposed on student-athletes' ability to benefit from and recover for violations of their right of publicity. This article attacks the issue of amateurism and inconsistent state right of publicity laws with two complementary proposals: (1) to bring the right of publicity into the federal scheme under the guise of likeness-based claims rooted in the Lanham Act, and (2) for the NCAA to adopt a hybrid-amateurism model in order to loosen current restraints on student-athletes' right of publicity. These two proposals will streamline right of publicity law, in turn making damages calculations more consistent, and the NCAA Bylaws more equitable by better balancing the interests of student-athletes, universities, and the NCAA.

II. RIGHT OF PUBLICITY AND LANHAM ACT: TWO BODIES OF LAW TO ADDRESS

³⁵ See *id.* at 1284 (holding that "EA's use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment. We reject EA's suggestion to import the *Rogers* test into the right-of-publicity arena, and conclude that state law defenses for the reporting of information do not protect EA's use."); see also *\$60 Million Settlement Approved in N.C.A.A. Video Game Lawsuit*, N.Y. TIMES (Jul. 17, 2015), <https://www.nytimes.com/2015/07/18/sports/ncaa-video-game-lawsuit-60-million-settlement-is-approved.html> (explaining the approval of a "\$60 million settlement for college athletes in a class-action lawsuit filed against the N.C.A.A. and the video game maker Electronic Arts.").

³⁶ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1289 (Thomas, J., dissenting).

³⁷ *Id.*

³⁸ It is understood that in order to make a claim of violation under §43(a) of the Lanham Act, claimants must show likelihood of confusion and commercial use. See Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2012). These elements are discussed *infra* Section II.B.

UNAUTHORIZED USE OF LIKENESS

The two primary areas of law that address claims involving the unauthorized use of an individual's likeness are the right of publicity and § 43(a) of the Lanham Act. The right of publicity is a common law right that is articulated uniquely by each state that recognizes it.³⁹ The Lanham Act is a federal trademark statute that provides a national system of trademark registration and aids in the prevention of consumer confusion by creating a civil action for trademark infringement.⁴⁰ While § 43(a) and the right of publicity sometimes address similar situations, the right of publicity is much broader than § 43(a) in terms of the aspects of identity that it protects. § 43(a) of the Lanham Act specifically creates a narrow cause of action against individuals who make use of a third party's identity in a way that creates confusion as to the affiliation of that third party with another's goods or services.⁴¹ While both the Lanham Act § 43(a) and the right of publicity will protect against the unauthorized use of an athlete's likeness, the federal scheme provided by the Lanham Act may offer student-athletes more consistent evaluative methods and thus, more predictable damages calculations and uniform injunctive effect.

A. The Right of Publicity: Inadequacies of the existing right of publicity

The right of publicity fails to provide adequate protection to student-athletes who seek redress for the unauthorized use of their likeness. This issue stems primarily from the fact that states differ in the remedies available for right of publicity violations. This section will discuss the various approaches to remedies, the inadequacy of state-based injunctions for those seeking effective national relief, and the resulting inequities for student athletes.

The right of publicity provides redress for "commercial injury."⁴² The right of publicity aids identity-holders in the protection and control of the commercial use of their identities.⁴³ While states vary in their precise articulation of what is necessary to recover under the right of publicity, generally, individuals must demonstrate that: 1) the plaintiff owns an enforceable right in her identity; 2) the defendant has used that identity without the plaintiff's permission; and 3) the use causes damage to the commercial value of plaintiff's identity.⁴⁴

³⁹ 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:2 (2d ed. 2017) (acknowledging that roughly thirty states recognize a right of publicity).

⁴⁰ *See generally* Lanham Act §§ 1-45, 15 U.S.C. §§ 1051-1127 (2012) (§ 1 of the Lanham Act details the general trademark registration process, while § 43 creates a civil action for trademark infringement).

⁴¹ *Id.* § 43(a).

⁴² 2 MCCARTHY, *supra* note 39, §11:30.

⁴³ *Id.* § 1:3.

⁴⁴ *Id.* § 3:2 (In this context, an "enforceable right" refers to a plaintiff's own right of

State recognition of the right of publicity varies from one state to the next. Some states recognize it under the state's common law,⁴⁵ others through express statutory provision,⁴⁶ and still others through broader statutes that address privacy.⁴⁷ Currently, thirty-three states recognize a right of publicity.⁴⁸ The legal root of the right of publicity is not the only variance from state to state, as the substance of state law also differs drastically. These variances encompass different aspects of identity that the right covers, the type of acts that violate the right, the damages available to claimants and the effect of state issued injunctions.⁴⁹

i. Problems with the scope of right of publicity coverage

There are several key aspects of identity that may be protected by the right of publicity: name, likeness, photographs, and voice.⁵⁰ Presently, of the twenty-two states that provide statutory protection to claimants for the right of publicity, only twelve provide protection covering all four aspects.⁵¹ There is seemingly very little consistency in aspects of identity protected from state to state. Some states protect only narrow aspects of identity: Massachusetts, for example, only protects name, portrait and picture.⁵² On the other hand, some states like Ohio construe the right of publicity so broadly that they recognize the use of any name, image, photograph, voice, signature, likeness, and distinctive appearance as a protectable facets of identity.⁵³ Similarly, Indiana also affords protection to all the aspects of identity protected by Ohio, but also includes gestures and mannerisms.⁵⁴ The scope of identity protected by each state's right of publicity may negatively impact a claimant's ability to prove her case or state a viable claim at all. Claimants who seek to recover for right of publicity violations may be barred from bringing a claim, especially if the state in which the violation occurred does not protect the aspect of identity they seek to vindicate.

publicity or that a plaintiff is the assignee or exclusive licensee of another's right of publicity. *See id.* at §§ 10:10, 10:53.).

⁴⁵ *Id.* § 6:2. (These states include Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Utah, West Virginia, and Wisconsin.).

⁴⁶ *Id.* § 6:3.

⁴⁷ *Id.*

⁴⁸ *Id.* § 6:2.

⁴⁹ *See infra* Sections II.A.i-iii.

⁵⁰ *See* MCCARTHY, *supra* note 39, § 6:6.

⁵¹ *Id.*

⁵² MASS. GEN. LAWS ch. 214, § 3A (2016).

⁵³ OHIO REV. CODE ANN. §§ 2741.01-2741.02 (LexisNexis 2016).

⁵⁴ IND. CODE §§ 32-36-1-6, 32-36-1-8 (2013).

ii. Problems with right of publicity legal and equitable remedies

As remedies afforded to right of publicity claimants also vary from state to state, inconsistencies in available damages have resulted in inconsistent damages calculations and valuation procedures. Some state statutes vaguely indicate that plaintiffs are simply entitled to a legal remedy⁵⁵ whereas others list injunction, punitive or exemplary damages, treble damages, and attorney's fees along with minimum and maximum recovery amounts as statutory remedies.⁵⁶

"Wide variations between these state laws often lead to choice of law disputes and disparate results for both plaintiffs and defendants."⁵⁷ Some state statutes provide a narrow array of remedial options. New York, for example, allows prevailing plaintiffs to obtain an injunction, discretionary punitive damages, and compensatory damages.⁵⁸ Other states explicitly list a broad range of remedies available to claimants. California, for example, allows claimants to obtain an injunction and to recover the greater of \$750 or actual damages, profits received from the unauthorized use, punitive damages, and attorney's fees.⁵⁹ Interestingly, Ohio and Indiana provide the most extensive expressly stated remedial options: both allow plaintiffs to obtain temporary or permanent injunction, destruction or impoundment of goods and merchandise used in the violation, actual damages including profits or statutory damages,⁶⁰ punitive or exemplary damages, attorney's fees and treble damages.⁶¹ Less detailed state statutes, such as Nebraska's, state that plaintiffs are entitled to a legal remedy but do not explicitly offer any other remedial options⁶² – whereas some state statutes, such as Kentucky's, make no mention of any remedies available for plaintiffs.⁶³ This variation in remedial options contributes to the lack of uniformity and predictability in outcomes of right of publicity disputes. As is evidenced by inconsistent remedies available across states, some states are simply more plaintiff friendly than others and it is only natural that such wide variances in available remedies encourage forum shopping.

While the methods employed across state lines vary, courts have used the fair market value of the identity, future earning potential, and profits derived from

⁵⁵ See, e.g., NEB. REV. STAT. § 20-201 (2012) ("It is the intention of the Legislature to provide a right of privacy . . . and to give to any natural person a legal remedy in the event of violation of the right.").

⁵⁶ See generally 2 MCCARTHY, *supra* note 39, §§ 11:21-11:38.

⁵⁷ Matthew Savare, *Image is Everything*, INTELL. PROP. MAG., Mar. 2013, at 52.

⁵⁸ N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009).

⁵⁹ CAL. CIV. CODE § 3344 (West 2016).

⁶⁰ With the exception of statutory damages, Indiana and Ohio are perfectly aligned.

⁶¹ IND. CODE §§ 32-36-1-10 to -15 (2013); OHIO REV. CODE ANN. § 2741.07 (LexisNexis 2016).

⁶² NEB. REV. STAT. § 20-201 (2012).

⁶³ KY. REV. STAT. ANN. § 391.170 (LexisNexis 2010).

the unauthorized use as the measure of right of publicity claimants' damages.⁶⁴ In order to understand the need to look to a federal scheme under which to pursue identity-based claims, it is important to understand the pitfalls of the most common remedial and evaluative tools used in right of publicity cases: injunctive relief, fair market value, and future earning potential. These various valuation methods, paired with the inconsistent state remedial offerings, further complicate the right of publicity scheme, as no one valuation method has emerged as the primary assessment tool.

I. Injunctive Relief

Almost all states that recognize a right to publicity list injunctive relief as a remedy.⁶⁵ Injunctive relief has proven to be problematic, as it is unclear how far a state issued injunction may reach when states differ in their recognition of the right of publicity. A prime example lies in *Ali v. Playgirl, Inc.*, in which boxer Muhammad Ali sought injunctive relief and damages against Playgirl, a magazine that printed and published a nude photo of Ali without his authorization.⁶⁶ Whether or not an injunction could be granted hinged on showing that Ali suffered irreparable injury that only an injunction could remedy.⁶⁷ The court did not dispute the other elements necessary to bring a right of publicity claim under New York law and found that Ali "established a commercially valuable proprietary interest in his likeness and reputation, analogous to the good will accumulated in the name of a successful business entity. To the extent that defendants are unlawfully appropriating this valuable commodity for themselves, proof of damages or unjust enrichment may be extremely difficult."⁶⁸ The court recognized not only that Playgirl profited from the use of Ali's image, but that the unauthorized use of the picture harmed his marketable reputation.⁶⁹ Upon enjoining Playgirl from further distribution and dissemination of the magazine featuring Ali,⁷⁰ the court recognized the challenges that granting an injunction created when the conduct giving rise to a right of publicity violation extends beyond state boundaries. The court instructed Playgirl to "neither transfer nor remove from the jurisdiction any such copies presently in its custody, as well as the printing plates or devices used to reproduce the portrait, until further order of the court."⁷¹ Although the injunction

⁶⁴ Matthew Savare, *The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA ENT. L. REV. 129, 151-52 (2004).

⁶⁵ MCCARTHY, *supra* note 39, § 6:6.

⁶⁶ *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 725 (S.D.N.Y. 1978).

⁶⁷ *Id.* at 729.

⁶⁸ *Id.* at 726-29.

⁶⁹ *Id.* at 729.

⁷⁰ *Id.* at 732.

⁷¹ *Id.*

issued by the court enjoined the production and distribution of the infringing magazines to New York, it felt constrained to limit its relief to the state borders; this case thus raises the question of how far an injunction may reach when a claim is brought in one state but the claimant's harm extends beyond that state.

It is unclear whether a claimant like Ali would have been able to use the New York injunction to prevent the sale of goods already in a state that does not recognize the right of publicity. From a practical standpoint, inconsistencies in state law on the right of publicity may even make it difficult to advise clients seeking redress. As Goodman explains in his article *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*:

There is also a question of whether an injunction issued under one state's law will have any effect on activities in another state. An injunction may easily be obtained in Tennessee, but it is not clear how far that injunction will reach. In New York, for example, courts have held that the state's publicity law does not extend to violations involving out-of-state sales. Lawyers cannot give their clients anything even resembling an unqualified opinion under the current scheme of various state laws.⁷²

This scope of injunctive relief in right of publicity cases is an issue on which even courts sitting in the same circuit vary.⁷³ Case law seems to suggest that claimants may have great difficulty enforcing injunctions issued in one state in another.⁷⁴ The inconsistent national injunctive effect of state-issued injunctions in right of publicity cases may force claimants to bring claims in multiple states – a costly task for claimants. States that issue injunctions lack the backing of a federal statute to give that injunction national effect. For this reason, a federal scheme for likeness-based claims may be a powerful alternative, as it will provide the power of a federal statute and the ability to obtain an injunction with a national effect.

2. Fair Market Value

Some courts use fair market value – the marketplace value of the property right that was impermissibly used⁷⁵ – to assess damages in right of publicity cases. Presently, there is no uniform method to calculate an individual's fair

⁷² Eric Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227, 244 (1999).

⁷³ Compare *Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104, 105 (6th Cir. 1987) (per curiam) (upholding the nationwide injunction imposed against the defendant), with *Herman Miller, Inc., v. Palazzetti Imports & Exports*, 270 F.3d 298, 327 (6th Cir. 2001) (allowing modification of the injunction imposed against Herman Miller, Inc. to be limited to certain states due to disparities in their laws).

⁷⁴ See e.g., discussion of *Ali v. Playgirl* *supra* Section II.A.ii.1.

⁷⁵ 2 MCCARTHY, *supra* note 39, §11:32.

market value. In *Waits v. Frito-Lay, Inc.*, musician Tom Waits sought to recover from Frito-Lay for misappropriation and false endorsement under the Lanham Act as a result of Frito-Lay's use of a Waits sound-alike in a Doritos commercial.⁷⁶ Although Waits' claims arose under the Lanham Act, the Ninth Circuit found that because his voice was sufficient indicia of his identity, Waits could support a right of publicity claim for the imitation of his voice for commercial purposes.⁷⁷ The court upheld the jury's finding that Frito-Lay violated Waits' right of publicity in airing the commercial.⁷⁸ In its instructions to the jury on Waits' right of publicity and Lanham Act claims, the court below, the Central District of California, told the jury that it could assess damages for the fair market value of Waits' services.⁷⁹ On his right of publicity claim, the lower court awarded Waits \$2,000,000 in punitive damages in addition to a total of \$375,000 in compensatory damages: \$100,000 for the fair market value of his voice, \$200,000 for injury to his peace, happiness, and feelings, and \$75,000 for injury to his goodwill.⁸⁰ Waits was awarded an additional \$100,000 for the fair market value of his voice and attorney's fees under his false endorsement claim by the court below.⁸¹ Because the court awarded Waits \$100,000 for his fair market value in addition to \$100,000 for the fair market value of his voice under his false endorsement claim, the Ninth Circuit vacated the award under the Lanham Act as duplicative.⁸²

The court in *Waits* failed to explain how fair market value should be calculated, but other courts have addressed this issue. There seems to be agreement that expert testimony is acceptable in demonstrating fair market value;⁸³ these experts, however, employ a variety of competing formulas and methods.⁸⁴ In some cases, these competing methods have resulted in strategic evidentiary challenges to the sufficiency or reliability of the methodology of the opposing party's expert.⁸⁵ There are several acceptable fair-market-value-

⁷⁶ *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1096 (9th Cir. 1992), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

⁷⁷ *Id.* at 1098; *see also* *Midler v. Ford Motor Co.*, 849 F.2d 460, 463-64 (9th Cir. 1988) (recognizing that a sound-alike voice of Bette Midler was sufficient indicia of her identity).

⁷⁸ *Waits*, 978 F.2d at 1098-1102.

⁷⁹ *Id.* at 1111.

⁸⁰ *Id.* at 1103-04.

⁸¹ *Id.* at 1111-12.

⁸² *Id.* at 1111.

⁸³ *See* *Jordan v. Dominick's Finer Foods*, 115 F. Supp. 3d 950, 957 (N.D. Ill. 2015); *see also* *Doe v. TCI Cablevision*, 110 S.W.3d 363, 367 (Mo. 2003) (en banc).

⁸⁴ *See, e.g., Jordan*, 115 F. Supp. 3d at 957-58 (noting the parties' dispute regarding the methodology of each other's experts, including whether hypothetical negotiation should be utilized in an expert's methodology in determining fair market value).

⁸⁵ *Id.*

assessment theories, though such theories often result in drastically different fair market value calculations, many of which are skewed based upon opposing parties' desired outcomes. For example, in *Jordan v. Dominick's Finer Foods*, a case addressing the reliability of expert testimony on fair market value in a right of publicity suit, both parties moved to exclude the opposing party's expert testimony on damages.⁸⁶ Jordan initially asserted a right of publicity claim under Illinois law and false endorsement, false designation, and dilution claims under the Lanham Act.⁸⁷ The Lanham Act claims, however, were dismissed and the parties proceeded to a jury trial on the fair market value of Jordan's identity under the right of publicity claim.⁸⁸ The expert witnesses for both parties premised the fair market value of Michael Jordan's identity on what the court found to be sufficiently reliable valuations.⁸⁹

Jordan's experts assessed the fair market value of his identity by looking to the amounts received by comparable persons for comparable uses and by looking to the amount Jordan previously obtained from similar licensing programs.⁹⁰ Alternatively, the expert witnesses for Dominick's relied on the hypothetical negotiation test,⁹¹ which was imported from patent law to assess fair market value. The test is often articulated as:

In calculating . . . a reasonable royalty, the jury has to pretend that the parties sat down and negotiated a reasonable royalty before the day that defendant began its infringement of the plaintiff's patent. . . . Unlike a real negotiation, this hypothetical negotiation assumes that the infringer must agree to some amount of royalty payment; it does not have the option of walking away from the table.⁹²

The court in *Jordan* avoided deciding between these evaluative methods; instead, it explained that valuation methods for evaluating fair market value must satisfy two requirements: 1) the method must be based on the fair market value of the infringing use at the time of infringement; and 2) the method must not be based on speculation or conjecture.⁹³ Although the *Jordan* court emphasized the importance that expert reports be "supported by reasonable assumptions" rather

⁸⁶ *Id.* at 958.

⁸⁷ *Jordan v. Dominick's Finer Foods*, 2015 WL 5656038 (N.D. Ill. 2015) (Verdict and Settlement Summary) [hereinafter *Jordan Verdict and Settlement*].

⁸⁸ *Id.*

⁸⁹ *Jordan*, 115 F. Supp. 3d at 961-64.

⁹⁰ *Id.* at 959-60.

⁹¹ *Id.* at 960.

⁹² *Innogenetics, N.V. v. Abbott Labs.*, 578 F. Supp. 2d 1079, 1093-94 (W.D. Wis. 2007), *aff'd in part, rev'd in part*, 512 F.3d 1363 (Fed. Cir. 2008).

⁹³ *Jordan*, 115 F. Supp. 3d at 957.

than “speculation or conjecture,”⁹⁴ this acknowledgement is of little help when the resulting figures are drastically different. Jordan’s experts valued his persona at over \$10,000,000, while Dominick’s expert valued Jordan’s persona at \$126,900.⁹⁵ In failing to select the best valuation method, the court refused to invade the province of the jury and its decision-making in regard to the fair market value of Jordan’s persona.⁹⁶ The jury ultimately awarded Jordan \$ 8,900,000 for violation of his right of publicity.⁹⁷

Regardless of which method is used, it is very likely that opposing experts will offer polar opposite valuations – claimants will want experts to use a valuation method that skews their fair market value upward, whereas defendants will want to utilize valuation methods that skew the claimant’s fair market value downward so as to reduce damages liability. *Jordan* exemplifies how the lack of consistency in fair market value assessments results in both over-and under-value estimations that can force the fact finder either to award damage amounts that do not truly reflect the fair market value, or to pick from two extremes.

3. Future Earning Potential

Where an individual’s image is cheapened or deemed less valuable after an unauthorized use, some courts seek to rectify the damage by awarding the individual her future earning potential.⁹⁸ The rationale behind this form of remedy is that:

An unauthorized commercial appropriation of one’s identity converts the potential economic value in that identity to another’s advantage. The user is enriched, reaping one of the benefits of the celebrity’s investment in himself. The loss may well exceed the mere denial of compensation for the use of the individual’s identity. The unauthorized use disrupts the individual’s effort to control his public image, and may substantially alter that image. The individual may be precluded from future promotions in that as well as other fields.⁹⁹

Thus, an assessment of future earning potential aims to help an individual recoup the commercial harm she may suffer in the future as a result of the unauthorized use – such as diminished value or lack of exclusivity in a particular aspect of

⁹⁴ *Id.*

⁹⁵ *Id.* at 958.

⁹⁶ *See id.* (explaining that “the key decision-making with regard to which data points are, in fact, ‘comparable’ will be done by the jury”).

⁹⁷ *Jordan Verdict and Settlement*, *supra* note 87.

⁹⁸ 2 MCCARTHY, *supra* note 39, §11:33.

⁹⁹ *Lugosi v. Universal Pictures*, 603 P.2d 425, 438 (Cal. 1979) (citations omitted), *superseded by statute*, CAL. CIV. CODE § 3344.1 (West 2012).

identity.¹⁰⁰ This is the type of remedy exemplified in *Clark v. Celeb Publ'g., Inc.*, where a model/actress sought to recover against *Celeb Magazine* for the unauthorized publication of her image in a pornographic magazine and for invasion of privacy.¹⁰¹ Under California law, Clark recovered damages for mental anguish, loss of compensation in the amount of \$6,750, \$25,000 in punitive damages and \$7,000 for the economic loss of her proprietary interest in her identity due to its unauthorized use.¹⁰² The court justified the damages for economic injury on the grounds that Clark was criticized and disparaged by other publishers who did not know that the images appearing in *Celeb Magazine* were unauthorized.¹⁰³ As a result of the unauthorized pictures, Clark claimed that other magazines no longer desired her as a model.¹⁰⁴ The court limited Clark's projected earnings to one year into the future.¹⁰⁵ The relevant period over which future loss should be calculated is within the discretion of the court because no objective standards exist to evaluate this kind of harm.¹⁰⁶ Thus, the primary challenge with this remedy is the great discretion given to the court in determining how far out a court must look in order to adequately compensate for future loss.

iii. The Need for a Federal Right of Publicity

Even states that provide far-reaching remedies under the right of publicity fail to avoid the difficulties presented when courts are forced to evaluate the value of an individual's right of publicity. This issue lends its roots to the courts' inability to reconcile the articulated approach in its state with the approaches of other states when that court seeks precedential aid in damages calculations. The fact that damages calculations in right of publicity suits center heavily around

¹⁰⁰ See *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 138 (Wis. 1979) (explaining that "the publicity value of a celebrity's name is built up by the investment of work, time, and money by the celebrity. The economic damage caused by unauthorized commercial use of a name may take many forms, including damage to reputation if the advertised product or service is shoddy and the dilution of the value of the name in authorized advertising.").

¹⁰¹ *Clark v. Celeb Publ'g., Inc.*, 530 F. Supp. 979, 981 (S.D.N.Y. 1981).

¹⁰² *Id.* at 983–85.

¹⁰³ *Id.* at 984.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See *Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 512 (2d Cir. 1977) (citing *Manger v. Kree Inst. of Electrolysis*, 233 F.2d 5, 9 n.5 (2d Cir. 1956)) (refusing to overturn the trial court's award of \$35,000 for damage to John Lennon's reputation after the release of a cheap looking album cover and recording of poor quality and explaining that "[o]bjective standards for measuring injury resulting from an invasion of privacy or an appropriation of one's name, likeness, or reputation are unlikely to be available, so that a considerable degree of discretion must rest with the finder of fact.").

facts that are unique to each individual claimant contributes to the unpredictability of these calculations. The right of publicity fails to provide the national protection and injunctive effect that is offered under the Lanham Act, as it is a right articulated only by state law.¹⁰⁷ What is lawful in one state may thus prove to be unlawful in another¹⁰⁸ and even when substantive standards are consistent, variations in remedies lead to inconsistency and uncertainty.

Despite the seemingly abundant remedies that some states allow, no one method of evaluating right of publicity damages has emerged. As demonstrated above, courts rarely explain how they value an individual's right of publicity. While out of court settlement is often praised, settlement eliminates the opportunity for any formal explanation or establishment of publicity value in right of publicity suits. Presently, there is no indication of an adoption of a federal right of publicity. However, the closest federal counterpart to the right of publicity is a false endorsement claim under the Lanham Act.¹⁰⁹ Where the state right of publicity law falters, the Lanham Act provides predictable and reliable value determinations and forceful national injunctive relief.

B. Lanham Act: An Alternative Avenue of Recovery for Likeness Based Claims

The primary difference between the Lanham Act and the right of publicity is that the right of publicity is derived from state and common law, whereas the Lanham Act is an act of the United States Congress.¹¹⁰ Unlike the variable right of publicity, false endorsement claims are rooted in the federal trademark statute and in turn offer great uniformity and predictability.¹¹¹ False endorsement claims provide a relatively narrow but unique point of entry for student-athletes who hope to circumvent the right of publicity's inconsistent and unpredictable avenue of recovery. The narrow entryway created by false endorsement claims is due in part to the fact that these claims require a demonstration of falsity – a showing of a false inference that plaintiff endorses or approves of a particular product.¹¹² This is also articulated as likelihood of confusion as to the claimant's

¹⁰⁷ MCCARTHY, *supra* note 39.

¹⁰⁸ Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act Is a Proper Substitute for a Federal Right of Publicity*, 94 TRADEMARK REP. 1202, 1202-03 (2004).

¹⁰⁹ Kevin L. Vick and Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAW. 14, 15 (Aug. 2011).

¹¹⁰ Lanham Act §§ 1-45, 15 U.S.C. §§ 1051-1127 (2012).

¹¹¹ Kimberly Rubin, *The Key to Being a Good Referee: The Call the Ninth Circuit Missed When Evaluating False Endorsement Claims*, 64 EMORY L. J. 1389, 1399 (2015) (“This is an important distinction because a federal statute creates greater uniformity across courts when deciding a claim, whereas states may, and do, decide similar right of publicity claims differently depending on the state’s law.”).

¹¹² 5 THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §

endorsement or sponsorship of the goods.¹¹³ While the falsity requirement is difficult for some claimants to demonstrate, and may bar potential claimants from recovery, false endorsement claims are often asserted in addition to right of publicity claims.¹¹⁴

A comparative examination of the right of publicity and false endorsement claims under the Lanham Act aids in understanding how the two claims stack up against each other.

28:14 (5th ed. 2017).

¹¹³ 15 U.S.C. § 1125(a).

¹¹⁴ *See, e.g.*, *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 918-19, 926 (6th Cir. 2003) (involving a false endorsement claim against a sports artist by the licensing agent of golfer Tiger Woods); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 999, 1007-09 (9th Cir. 2001) (involving Lanham Act claims by surfers against a clothing company for its use of their photograph and names in a catalog); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 966-68 (10th Cir. 1996) (involving Lanham Act claims against parody trading card creator by professional baseball players association); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399-1401 (9th Cir. 1992) (involving a lawsuit by the Wheel of Fortune hostess against Samsung for a commercial the company created).

	Source of Law	Goal	Scope of Coverage	Prima Facie Case
Right of Publicity	State common law, state statute, privacy statutes	-Give individuals control and protection for the commercial use/ value of their identity -Repair commercial harm	4 aspects of identity: - name - likeness - photo - voice	Ownership: Plaintiff owns an enforceable right in the identity or persona Infringement: 1) Defendant used some aspect of the protected identity without permission; 2) Use is likely to cause commercial harm to owner
False Endorsement - Lanham Act §43(a)	Federal Statute	- Prevent consumer confusion	“mark” = word, name, symbol, -Often construed to include registered and unregistered marks, names and likeness	- Legally protectable mark - Plaintiff owns the mark - Likelihood of confusion that P is supporting, endorsing, or approving the product (<i>commercial use</i>)

The right of publicity centers on the individual and his right to control the commercial use of his image.¹¹⁵ On the other hand, false endorsement claims shift the focus from the individual to the consumer, by grounding the analysis in falsity and likelihood of confusion.¹¹⁶ This shift speaks to the primary goal of trademark law of protecting consumers against mistakenly believing that an individual actually endorses a product. The nature of a defendant’s use of a student-athlete’s image or likeness may justify a claim under the Lanham Act for false endorsement. Claims brought under the Lanham Act would require two showings: 1) that the defendant used the student-athlete’s likeness without permission; and 2) that the use is likely to create confusion amongst consumers about the student-athlete’s endorsement of the product at issue. Such a consumer-centric approach to the unauthorized use of a student-athlete’s likeness allows for protection of rights traditionally addressed by the right of

¹¹⁵ MCCARTHY, *supra* note 39, § 1:3.

¹¹⁶ See 15 U.S.C. § 1125(a)(1).

publicity while also aligning these claims directly with the goal of trademark law to prevent consumer confusion.

i. Prima facie case

Claimants who look to federal law to protect the use of their identity often bring claims for false endorsement under the Lanham Act.¹¹⁷ While false endorsement as it pertains specifically to an individual is not explicitly discussed in the Lanham Act, it permits individuals to recover as §43(a) provides the underlying framework upon which “claims of falsely implying the endorsement of a product or service by a real person” may be based.¹¹⁸ Courts agree that false endorsement occurs when a one’s identity is used in connection with a product or service in such a way that consumers are likely to be misled about the individual’s sponsorship or approval of the product or service.¹¹⁹

Courts read §43(a) to provide protection against the unauthorized use of a person’s likeness in the sale of goods or use of promotional material when consumers might falsely believe that an individual endorses the defendant’s product or service.¹²⁰ In accordance with §43(a)(1)(A), courts view false endorsement by an individual to fall directly under § 43(a) as a false or misleading representation of fact and thus a form of trademark infringement.¹²¹ Therefore, § 43(a)(1)(A) specifically prohibits false representations of an individual’s endorsement that is likely to create confusion, mistake, or deception regarding the affiliation or association of the individual with another person or entity as to the sponsorship, affiliation, or approval of that entity’s goods or services.¹²²

Plaintiffs seeking recovery under §43(a) for false endorsement must demonstrate that: 1) there is a protectable mark; 2) the plaintiff owns the mark; and 3) there is a likelihood of confusion that the individual is in some way affiliated or supporting the good or product with which the mark has been associated.¹²³ Under the statute the term “mark” includes “any word, term, name, symbol, or device, or any combination thereof,”¹²⁴ and is construed to include both registered and unregistered marks in addition to the use of a person’s name and likeness.¹²⁵ The scope of false endorsement claims is not limited to the use

¹¹⁷ See cases cited *supra* note 114.

¹¹⁸ MCCARTHY, *supra* note 112, § 28:15.

¹¹⁹ See *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1014 (3d Cir. 2008); *ETW Corp.*, 332 F.3d at 925-26; *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 812 (9th Cir. 1997).

¹²⁰ MCCARTHY, *supra* note 112, § 28:15.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Facenda*, 542 F.3d at 1014.

¹²⁴ Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2012).

¹²⁵ Andrew Beckerman-Rodau, *Toward a Limited Right of Publicity: An Argument for the*

of an individual's identity in advertisements, but also reaches "unpermitted use of plaintiff's identity on a product itself, as with a name or image on a t-shirt or poster."¹²⁶ In evaluating the likelihood of confusion most courts use a variation of the 8-prong *Downing* test,¹²⁷ which includes weighing:

- (1) the level of recognition that the plaintiff has among the segment of the society for whom the defendant's product is intended;
- (2) the relatedness of the fame or success of the plaintiff to the defendant's product;
- (3) the similarity of the likeness used by the defendant to the actual plaintiff;
- (4) evidence of actual confusion;
- (5) marketing channels used;
- (6) likely degree of purchaser care;
- (7) defendant's intent on selecting the plaintiff;
- and (8) likelihood of expansion of the product lines.¹²⁸

Thus, a false endorsement claim lies where there is an unauthorized reference to a celebrity in a commercial context and consumers are likely to believe that the celebrity endorses the product, in turn giving rise to the association-based confusion that is necessary to sustain a false endorsement claim.¹²⁹

ii. The Lanham Act as a parallel to the right of publicity

The Lanham Act arguably offers adequate protection and the much-needed structure to guide courts that hear claims involving the unauthorized use of an individual's likeness. The right of publicity and the Lanham Act have much more in common than some scholars are willing to acknowledge. For one thing, the early law of trademarks and right of publicity took similar developmental pathways. The right of publicity emerged from the realm of privacy and is now nestled in the property realm as an intellectual property right with commercial value similar to trademark.¹³⁰ Though nuanced, the underlying goals of the right of publicity and trademark law are of great assistance in analogizing the two bodies of law. Claimants typically use the right of publicity to fight against another's wrongful commercial gain as a result of the unauthorized use of their

Convergence of the Right of Publicity, Unfair Competition and Trademark Law, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 132, 182 (2012).

¹²⁶ MCCARTHY, *supra* note 112, § 28:15.

¹²⁷ See, e.g., *Facenda* 542 F.3d at 1020 (3d Cir. 2008) (applying a modified version of the *Downing* test and holding that the *Downing* factors appropriately tailors the language to false endorsement claims); MCCARTHY, *supra* note 112, § 28:15.

¹²⁸ *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007–08 (9th Cir. 2001) (articulating the factors to be considered when determining likelihood of confusion as to whether a plaintiff has endorsed a product).

¹²⁹ Beckerman-Rodau, *supra* note 125, at 182.

¹³⁰ See MCCARTHY, *supra* note 39, § 1:31; see also Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1172-75 (2006).

image – especially where damages are concerned.¹³¹ Similarly, trademark law allows mark owners to promote brand loyalty and achieve commercial success by preventing others from free riding off their mark.¹³² Thus, as Rooney argues, the similarities between the right of publicity and trademark law make the Lanham Act a forceful, efficient, and effective guide to address the pitfalls of the right of publicity.¹³³

Where state law fails to protect against an unauthorized use of an individual's likeness, the Lanham Act offers another set of benefits. In her article addressing the inadequacy of the Lanham Act in protecting the unauthorized use of an individual's likeness and the need for a federal right of publicity, Barbra Solomon provides a formulation of the most critical differences in state laws that recognize the right of publicity; these differences include:

- (1) what is covered by the right of publicity; . . . (4) who can exercise the right of publicity; (5) whether the persona sought to be protected has to have acquired fame before a claim can be brought; and (6) whether the right of publicity extends to non-domiciliaries of the state.¹³⁴

It is imperative that differences in damages and valuation methods be added to this list. In determining that the Lanham Act is an unfit replacement for claimants seeking regress based on the unauthorized use of likeness,¹³⁵ Solomon fails to acknowledge the relative benefits that claimants receive that result from pursuing a false endorsement claim under the Lanham Act.

Some critics argue that seeking redress for the unauthorized use of their likeness by means of a false endorsement claim is not in line with the goals the Lanham Act or trademark law.¹³⁶ A claimant who seeks redress under the Lanham Act, however, is provided with an alternative and more stable means of recovery. It is commonly understood that the primary goals of trademark law are to protect consumers from confusion and to protect the interests of trademark owners in their marks.¹³⁷ The tensions created between these two goals is not a new phenomenon as courts are forced to balance the interests of both consumers

¹³¹ 2 MCCARTHY, *supra* note 39, § 11:30-11:31.

¹³² Susannah M. Rooney, *Just Another Brown-Eyed Girl: Toward a Limited Federal Right of Publicity Under the Lanham Act in a Digital Age of Celebrity Dominance*, 86 S. CAL. L. REV. 921, 948-49 (2013).

¹³³ *Id.*

¹³⁴ Solomon, *supra* note 108, at 1202-03 (footnote omitted) (arguing that the Lanham Act also fails to provide adequate protection for the unauthorized use of an individual's likeness and advocating for a federal right of publicity).

¹³⁵ *Id.* at 1206.

¹³⁶ *Id.*

¹³⁷ Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1841 (2007).

and trademark owners, ultimately forcing the question: whose interests reign supreme, the public's interest in not being misled or the trademark owner's property right?¹³⁸ The Lanham Act adequately balances both of these interests as it seeks to ensure that consumers are not misled and that mark owners receive adequate protection for their marks.

iii. When is a false endorsement claim the better alternative for likeness-based claims?

There are several situations in which a false endorsement claim is a suitable alternative to a right of publicity claim. These situations include: 1) instances where state right of publicity law is too narrow in the aspects of identity protected; 2) instances of unauthorized use that are also highly suggestive of consumer confusion; and 3) instances where the claimant seeks a recovery avenue with a national effect.

1. Situation: State right of publicity laws are too narrow in the aspects of identity protected

While plaintiffs seeking to recover for the misuse of their image may plausibly bring a right of publicity claim in addition to a false endorsement claim, some claims of unauthorized use of an individual's likeness are better addressed under the Lanham Act – especially where state right of publicity laws are too narrow in the aspect of identity protected. In *Allen v. Nat'l Video, Inc.*, for example, Woody Allen asserted claims for violation of his right of publicity and false endorsement as a result of National's unauthorized use of his persona in the form of a celebrity look-alike in a national campaign in a way that Allen alleged was both misleading and likely to result in consumer confusion.¹³⁹

In determining that this case was best suited for resolution under the Lanham Act, the court noted that the evocation of persona was insufficient to support a right of publicity claim under §51 of New York Civil Rights Law, which strictly requires unauthorized use of a "portrait or picture" to make a complete right of publicity claim.¹⁴⁰ The court continued on to explain, however, that the evocation of Allen's persona may create a likelihood of confusion under the Lanham Act.¹⁴¹ Finally, the court explained that likelihood of confusion under the Lanham Act could be decided by the court, as opposed to the inquiry surrounding "identifiability" under New York Civil Right Law, which is a

¹³⁸ Joel R. Feldman, *Reverse Confusion in Trademarks: Balancing the Interests of the Public, the Trademark Owner, and the Infringer*, 8 J. TECH. L. & POL'Y 163, 164 (2003).

¹³⁹ 610 F. Supp. 612, 617-18 (S.D.N.Y. 1985).

¹⁴⁰ *Allen*, 610 F. Supp. at 628 (quoting N.Y. CIV. RIGHTS LAW § 51 (McKinney 1995)).

¹⁴¹ *Id.*

question of fact typically left for the jury.¹⁴²

Similarly, in *Burck v. Mars, Inc.*, a case involving M & M characters dressed like The Naked Cowboy, plaintiff alleged defendant “implied, falsely, that Burck’s character, The Naked Cowboy, endorse[d] M & M’s product.”¹⁴³ Upon review of a motion to dismiss, the court found Burck’s reliance on New York’s privacy statute to be misplaced because “there was no attempt to create a portrait or picture of Burck” as is required under New York privacy law.¹⁴⁴ Nevertheless, the court found that Burck presented sufficient facts to support a claim of false endorsement under the Lanham Act.¹⁴⁵ As these cases demonstrate, where state right of publicity law is too narrow and fails to extend protection to a particular part of identity, such as persona, false endorsement claims under the Lanham Act can serve as the appropriate vehicle in which to bring these identity-based claims.

2. *Situation: Facts are highly suggestive of consumer confusion*

Although consumer confusion is viewed as just another element necessary to make out a claim for false endorsement under the Lanham Act, courts seem to agree that the presence of such confusion signals probable success on a false endorsement claim.¹⁴⁶ Courts even encourage the resolution of likeness-based claims under the Lanham Act when the facts are suggestive of consumer confusion. In *Allen* the court emphasized that although a right of publicity claim was asserted, the facts were highly suggestive of consumer confusion and thus, the case should be resolved under the Lanham Act because all that was necessary was a *likelihood* of confusion.¹⁴⁷ Courts continue to affirm and reaffirm celebrities’ entitlement to potential recourse under the Lanham Act when their identity is used without permission and consumers are likely to be confused as to the celebrities’ association with or endorsement of the commercial activity at issue.¹⁴⁸

¹⁴² *Id.* at 629.

¹⁴³ 571 F. Supp. 2d 446, 456 (S.D.N.Y. 2008) (citation omitted).

¹⁴⁴ *Id.* at 454.

¹⁴⁵ *Id.* at 456 (finding that “The complaint plausibly argues that consumers would believe that the M & M Cowboy characters were promoting a product rather than merely parodying The Naked Cowboy, and that viewers would believe that The Naked Cowboy had endorsed M & Ms”).

¹⁴⁶ See generally *Allen*, 610 F. Supp. at 628 (quoting N.Y. CIV. RIGHTS LAW § 51 (McKinney 1995)).

¹⁴⁷ *Id.* at 629 (“Enough people may realize that the figure in the photograph is defendant Boroff to negate the conclusion that it amounts to a “portrait or picture” of plaintiff as a matter of law. All that is necessary to recover under the Act, however, is that a *likelihood* of confusion exist.”).

¹⁴⁸ See *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (involving the use of Rosa

3. *Situation: Claimant seeks recovery avenue with national effect*

Unlike state right of publicity statutes that vary in available damages,¹⁴⁹ the Lanham Act provides a uniform and detailed articulation of remedies available to plaintiffs.¹⁵⁰ Generally, the Lanham Act allows the holders of registered and unregistered marks to obtain injunctive and monetary relief.¹⁵¹ Section 35 of the Lanham Act explicitly lists remedies available to those seeking redress for false endorsement including: the defendant's profits from the infringing activity, damages and costs sustained by the plaintiff, and in exceptional cases, attorney's fees.¹⁵² As a claimant's ability to recover the defendant's profits is rooted in its unjust enrichment, such an award is thus limited to the benefit that the claimant's image or persona brought the defendant. In addition to the remedies detailed in Section 35, Section 36 of the Lanham Act allows for the destruction of all infringing articles such as "labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of the defendant."¹⁵³ This option of destruction of infringing articles goes beyond most states' right of publicity remedial options, which in their most restrictive forms list injunction as a resolution¹⁵⁴ to aid in the prohibition of making and distributing goods that impermissibly use an individual's persona, name, or likeness.

iv. Injunctive Relief

The Lanham Act lists injunctive relief as a remedy for false endorsement claims.¹⁵⁵ As the Lanham Act is a federal statute, remedies are enforceable across all jurisdictions. Therefore, plaintiffs need not worry about the patchwork effect of state-by-state injunctions under the right of publicity. Claimants who seek injunctive relief under the Lanham Act will find greater ease in vindicating their rights nationally as the reach of a federal injunction is uniform. Instead of needing a judgment from each state in which the violation occurs, claimants only

Parks' name as a song title); *see also* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (involving the use of a singer sound-alike in a national commercial), *abrogated by* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

¹⁴⁹ Compare N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009) (remedies only include injunction, discretionary punitive damages, and compensatory damages), with CAL. CIV. CODE § 3344 (West 2016) (remedies include recovering the greater of \$750 or actual damages, injunctive relief, profits received from the unauthorized use, punitive damages, and attorney's fees.).

¹⁵⁰ *See generally* Lanham Act §§ 35-36, 15 U.S.C. §§ 1116-17 (2012).

¹⁵¹ *See id.*

¹⁵² *Id.* § 1117.

¹⁵³ *Id.* § 1118.

¹⁵⁴ *See* MCCARTHY, *supra* note 39, § 6:6.

¹⁵⁵ 15 U.S.C. § 1116.

need to obtain one judgment. Thus, the national reach of the Lanham Act avoids the jurisdictional problems¹⁵⁶ that state right of publicity creates when an injunction is granted. Furthermore, pursuing a claim under the Lanham Act benefits all parties as claimants and defendants will not have to pursue and defend claims in multiple jurisdictions – in turn promoting procedural efficiency. Claimants who bring claims under the Lanham Act will avoid the risk of not being able to enforce a state granted injunction for a right of publicity violation and having to bring claims in other states to vindicate their rights.

Injunctive relief is perhaps the most compelling reason to turn to a federal scheme for the resolution of misappropriation of an individual’s likeness. It is particularly important to note that no significant recovery is ever guaranteed under the right of publicity because states vary so widely in the remedies they afford plaintiffs, their calculation methods, and the scope of identity that is protected.¹⁵⁷ Thus, the national effect of injunctive relief resulting from false endorsement claims under the Lanham Act provides a strong justification for turning to the federal scheme when possible.¹⁵⁸

v. Interchangeability of the Lanham Act

Presently, some courts and scholars consider false endorsement claims to be comparable with right of publicity claims.¹⁵⁹ Some courts and scholars have gone so far as to suggest, “a Lanham Act false endorsement claim is the federal equivalent of the right of publicity.”¹⁶⁰ In the instances where plaintiffs assert a claim for both a right of publicity and false endorsement, the damages under the Lanham Act serve as a guiding force. *Waits v. Frito-Lay, Inc.*,¹⁶¹ discussed *supra* Section II.A.ii.2, is particularly illustrative of this point. On appeal, the Ninth Circuit vacated the damages award under the Lanham Act as duplicative of the damages award for the right of publicity claim.¹⁶² *Waits* demonstrates that the

¹⁵⁶ See *supra* Section II.A.ii.1.

¹⁵⁷ MCCARTHY, *supra* note 39, §6.6.

¹⁵⁸ 2 MCCARTHY, *supra* note 42, §11.25 (explaining that where use in a commercial setting of the identity of an individual who has a national reputation violates § 43(a) of the Lanham Act, an injunction can be nationwide in scope); See, e.g., *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612, 630 (S.D.N.Y. 1985) (distinguishing an injunction based upon violation of New York right of publicity laws but granting a nationwide injunction due to Plaintiff’s nationwide reputation).

¹⁵⁹ *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003).

¹⁶⁰ *Id.* (citing Bruce P. Keller, *The Right of Publicity: Past, Present, and Future*, 1207 PLI CORP. L. AND PRAC. HANDBOOK 159, 170 (2000)).

¹⁶¹ 978 F.2d 1093 (9th Cir. 1992), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

¹⁶² *Id.* at 1111-12.

Lanham Act is readily available as a more consistent and equivalent method for calculating damages – even in complex cases where the plaintiffs also assert their right of publicity.

As discussed *supra*, when courts calculate damages for right of publicity violations, the harm sought to be repaired is the commercial harm caused to the claimant in the form of lost profits resulting from injury to their name, image, or likeness.¹⁶³ As right of publicity damages vary between states, the remedies afforded to claimants can be as comprehensive as the remedies afforded to plaintiffs in Ohio, or as restrictive as the remedies afforded to plaintiffs in New York.¹⁶⁴ These state inconsistencies coupled with the limited injunctive power of each state encourages claimants to forum shop so that they may bring their claim in plaintiff friendly states, like California and Indiana.¹⁶⁵ While the Lanham Act does not eliminate the need to make valuation assessments on claimants' fair market value, it significantly limits forum shopping, while also providing national injunctive remedies for claimants.

vi. Challenges with the Lanham Act Approach

Despite the anticipated benefits to those who use the Lanham Act as the basis for their claims, other aspects of the Act pose significant challenges. For example, claimants alleging false endorsement must demonstrate falsity – this is not required under any state right of publicity scheme.¹⁶⁶ Other potential concerns include the *Rogers* test,¹⁶⁷ and the unique issues that pose a threat to plaintiffs asserting false endorsement claims involving expressive works. These secondary issues all function to narrow the pool of athletes to whom this avenue of recovery is available. Furthermore, the protection the Lanham Act offers is restricted by the various interests that it balances amongst consumers, mark holders, and infringers.¹⁶⁸ Therefore, these potentially damning restrictions, especially the fame factor¹⁶⁹ – which bears on the likelihood of confusion analysis – and issues arising in the context of claims involving expressive works,¹⁷⁰ substantially limit the scenarios in which a student-athlete may

¹⁶³ MCCARTHY, *supra* note 39, at § 11:31.

¹⁶⁴ See *supra* Section II.A.ii.

¹⁶⁵ *Id.*

¹⁶⁶ MCCARTHY, *supra* note 112.

¹⁶⁷ *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

¹⁶⁸ *Feldman*, *supra* note 138.

¹⁶⁹ See *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007–08 (9th Cir. 2001) (identifying fame as a factor to be considered when determining likelihood of confusion as to whether a plaintiff has endorsed a product).

¹⁷⁰ *Trademarks and Expressive Works*, TRADEMARKOLOGY (Apr. 28, 2015), <http://www.trademarkologist.com/2015/04/trademarks-and-expressive-works> [<https://perma.cc/X6DV-EYB9>].

recover. Those, however, who fall outside the purview of these limitations may still circumvent the confusion surrounding state law on publicity rights and inconsistencies in damages awards.

Student-athletes face the particular challenge of demonstrating that consumers actually believe that the athlete endorsed the product¹⁷¹ when they pursue a false endorsement claim. As articulated in *Rogers v. Gramaldi*, “Because the right of publicity, unlike the Lanham Act, has no likelihood of confusion requirement, it is potentially more expansive than the Lanham Act.”¹⁷² It is important to note, however, that the *breadth* the *Rogers* court refers to does not extend to remedial measures but instead refers to the broad range of individuals who may assert right of publicity claims.¹⁷³

While the Lanham Act presently allows claims based on the unauthorized use of an individual’s image, likeness, or persona, this is a very narrow claim that few student-athletes would actually be able to bring. More importantly, the Lanham Act demonstrates the great benefits that a federal right of publicity would have. The expansive coverage and protection that a federal right of publicity offers would smooth over inconsistencies in state law while also allowing a greater number of student-athletes to bring identity based claims without having to funnel down the narrow halls that make false endorsement claims somewhat difficult to bring by student-athletes. There is no shortage of state right of publicity law. Thus, in determining the scope of a federal scheme, the question becomes: Which state law should serve as the backbone for a federal scheme? While many states including New York, California, and Ohio offer appealing solutions to this problem, modeling a federal right of publicity after California state law may provide the most plausible solution as it strikes a middle ground between the overly broad Ohio standard and more restrictive New York standard. Until this is realized, student-athletes may have better luck bringing false endorsement claims. Even here, though, student-athletes face an insurmountable hurdle due to the restrictions stated in the NCAA Operating Bylaws. As long as the NCAA strictly enforces its amateurism rules, student-athlete claims for false endorsement will ring hollow, because the students cannot receive compensation for their performance or reputation under the current NCAA Operating Bylaws.

III. ALTERNATIVE SOLUTIONS: ATTACKING THE NCAA’S AMATEURISM BYLAWS

This section advocates for the modification of the current NCAA Operating Bylaws, with regard to the amateurism policy detailed in the NCAA Division I

¹⁷¹ See generally Lanham Act § 43, 15 U.S.C. § 1125 (2012).

¹⁷² *Rogers*, 875 F.2d at 1004.

¹⁷³ See generally *id.*

Manual, to allow student-athletes to recover for the unauthorized use of their image. This section advocates for the adoption of a Student-Athlete Employment Incentive Program (“SAEIP”) to tackle the issue of amateurism while also striking a balance between the NCAA’s guiding principles and the desire of student-athletes to benefit from their marketability. The NCAA’s current amateurism policy has spurred debate on the issue of whether student athletes should be paid and whether student-athletes who prevail in right of publicity or false endorsement lawsuits may actually receive any damages awarded by the court.¹⁷⁴ A more concerning question is posed when the amateurism issue is framed as a failure to recognize a student-athlete’s basic economic freedoms and right to sue in order to collectively benefit the NCAA.¹⁷⁵ In order to avoid future conflict on the issue of amateurism, the NCAA should modify its current amateurism model and adopt the herein proposed SAEIP, which allows student-athletes to capitalize on their marketability while providing an incentive towards degree completion.

A. Contextualizing the Question of Amateurism in Division I Athletics

As stated by the NCAA’s Constitution, the “basic purpose of this Association [the NCAA] is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”¹⁷⁶ The NCAA’s amateurism requirement draws the line of demarcation between intercollegiate athletics and professional sports. Article 12 of the NCAA’s Operating Bylaws requires that student-athletes maintain amateur status in order to participate in collegiate athletics.¹⁷⁷ Article 12 states that:

An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) Signs a contract . . . to play professional athletics . . . ; (d) Receives, directly or

¹⁷⁴ See e.g., Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/4CZ9-K3QF>].

¹⁷⁵ Antitrust law suggests that the NCAA should not be able to limit the economic freedoms of student-athletes in order to create greater competition in another sector of the economy. See Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 207-08 (1990) (arguing that the NCAA’s amateurism rules constitute antitrust violations).

¹⁷⁶ NCAA Manual, *supra* note 6, art. 1.3.1, at 1.

¹⁷⁷ *Id.* art. 12.01.1, at 53.

indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations; (e) Competes on any professional athletics team . . . , even if no pay or remuneration for expenses was received, . . . ; (f) After initial full-time collegiate enrollment, enters into a professional draft . . . ; (g) Enters into an agreement with an agent.¹⁷⁸

In other words, the NCAA's current regulations limit the form of athletes' compensation to scholarship money and disallows financial gain from their right of publicity or athletics identity. Article 15 details permissible forms of aid that a student athlete may receive, and limits such compensation to tuition, fees, fee remission, room and board, and funds to cover the cost of books¹⁷⁹ – it is critical to note that identity based compensation is not included. In addition to its financial aid and benefits guidelines, the NCAA also maintains stringent student-athlete employment rules. Although the NCAA does not prohibit employment, a student-athlete's compensation must not “include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.”¹⁸⁰ The SAEIP does not seek to modify Articles 12.1.2(b) 12.1.2(c), 12.1.2(d), 12.1.2(e), 12.1.2(f), or 12.1.2(g). These subsections adequately address the effect on amateurism should a student-athlete receive impermissible pay, enter into a professional contract or agreement with an agent, engage in professional play, or enter a draft. These sections must be included for a successful hybrid amateurism model.

If enacted, the SAEIP modifies bylaws 12.1.2(a) and 15.2.7(a) to include ‘. . . except as permitted under the Student-Athlete Employment Incentive Program.’ Furthermore, the SAEIP adds subsection 15.2.7.1 to Article 15.2.7 entitled “Student-Athlete Employment Incentive”, which outlines the endorsement opportunity screening process and academic eligibility requirements for participation in the SAEIP.

B. The Hybrid Amateurism Alternative: The Student-Athlete Employment Incentive Program

The NCAA prides itself on its emphasis on the holistic development of student-athletes, with special emphasis on the priority of academics. Under the SAEIP, student-athletes' ability to profit from their marketability in the form of a part-time job hinges directly on the athletes' academic standing. In order to comport with the NCAA's emphasis of academics first, the SAEIP incorporates

¹⁷⁸ *Id.* art. 12.1.2, at 55-56.

¹⁷⁹ *Id.* art. 15.2, at 182-86.

¹⁸⁰ *Id.* art. 15.2, at 185.

strict eligibility and retention requirements. This supports the NCAA's and universities' goals of ensuring that athletes are students first, while also providing more incentive for student-athletes who would otherwise not take their academic responsibilities seriously.

i. Compliance officers remain essential to the effective execution of SAEIP

In order to achieve optimal efficiency and to ensure student-athletes are not taken advantage of, compliance officers that already exist in most athletic departments must serve as a mechanism to help facilitate requests for student-athlete endorsements and appearances, which is similar to their current roles. Under the SAEIP, compliance officers thoroughly evaluates each employment opportunity to determine the scope of the opportunity in addition to determining fair and reasonable compensation for the athlete's work. The scope of the employment opportunities envisioned by the SAEIP is expansive and may include: endorsements, photo-shoots, posting to social media to endorse products, hosting events, and speaking engagements. This list, however, is not exhaustive and merely serves to illustrate the wide variety of endorsement activities that compliance officers may evaluate. Under the SAEIP, the university retains the right to reject any student-athlete endorsement activity that is inappropriate, in conflict with the universities' current partnerships, not in the best interest of the student-athlete, or contrary to the institutions' values and ideologies.

ii. The SAEIP academic eligibility requirements are rooted in the NCAA's current eligibility requirements and empower universities to enact more stringent SAEIP eligibility requirements.

Eligibility for participation in an endorsement activity requires the student-athlete's compliance with the academic standards of her University and the NCAA. Before any student-athlete is eligible to take advantage of a pre-approved endorsement opportunity, the student-athlete must complete at least three consecutive semesters in good academic standing. Under the SAEIP, good academic standing remains consistent with the academic standing requirement illustrated in NCAA Operating Bylaw 14.01.2.1. Under this section, each university sets the minimum GPA requirements a student-athlete must maintain to be eligible to participate in athletics.¹⁸¹

As is evidenced by the University of Michigan, which requires at least a 1.8 cumulative GPA from sophomores,¹⁸² the minimum GPA necessary to participate in athletics is extraordinarily low. The University of Michigan then

¹⁸¹ *Id.* art. 14.01.2.1, at 143.

¹⁸² Univ. of Mich., *Academic Eligibility Standards*, M GO BLUE, <http://www.mgoblue.com/sports/2017/6/16/compliance-sa-academic-standards-html.aspx?id=330> [https://perma.cc/UEH8-AP24] (last visited Dec. 1, 2016).

requires a 1.9 for juniors and a 2.0 for seniors and fifth-year seniors for eligibility.¹⁸³ The similarly low Ohio State University eligibility requirements supports the notion that universities openly exercise their right to create their own GPA minimums for eligibility.¹⁸⁴ Under the SAEIP, educational institutions retain the right to establish minimum eligibility requirements for competition and gain the right to implement higher GPA requirements beyond the established minimums as a prerequisite to eligibility for participation in endorsement activities. Should a student-athlete become academically ineligible at any point in time after engaging in an endorsement activity, the student-athlete is barred from participation in any future endorsement activities until the completion of two consecutive semesters in good standing.

C. Challenges to the SAEIP

A major source of tension in the amateurism debate is that “adding part-time employment to the lengthy time spent on playing, practicing, and training for the sport would detract from academic work by not-so-stellar students.”¹⁸⁵ The SAEIP directly addresses this concern in light of the overarching goals of the NCAA. The SAEIP is structured to incentivize student-athletes to make steady progress towards degree completion by requiring the completion of three consecutive semesters in good standing before becoming eligible to participate in any endorsement based employment. Furthermore, student-athletes must maintain good standing for the duration of their participation. This element echoes the NCAA’s guiding principle that, “[t]o truly benefit from college, student-athletes have to succeed in more places than on the field. The NCAA provides opportunities to learn, compete and grow by setting standards that help prepare prospective student-athletes for college coursework and by measuring progress toward a degree once they’re on campus.”¹⁸⁶ Furthermore, it is commonplace for regular students to work while also balancing course work and other extracurricular activities. There is no doubt that these students still receive a quality education and make steady progress toward their degrees while taking advantage of the practical and monetary gains resulting from employment. Participation in an endorsement activity is no more of a distraction from academics than that faced by the average student who is also employed.

¹⁸³ *Id.*

¹⁸⁴ The Ohio State University requires a minimum cumulative GPA of 1.8 for sophomores and a 2.0 for juniors, seniors, and fifth-year student-athletes. Ohio State Univ., *Academic Eligibility*, OHIO STATE BUCKEYES, <http://www.ohiostatebuckeyes.com/compliance/current-academic-eligibility.html> [<https://perma.cc/24T6-8A9N>] (last visited Dec. 1, 2016).

¹⁸⁵ PAUL WEILER ET AL., *SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS* 895 (5th ed. 2015).

¹⁸⁶ *Academics*, NCAA, <http://www.ncaa.org/about/what-we-do/academics> [<https://perma.cc/8E5Y-TCX4>] (last visited Dec. 1, 2016).

Proponents of the current NCAA amateurism policy argue that “it would be very difficult to prevent athletic departments and their supporters from arranging ‘jobs’ with lucrative pay for little or no work for star athletes”¹⁸⁷ To counter the possibility of inequitable conduct, the SAEIP expands the responsibilities of compliance officers to include the task of screening all potential job opportunities for eligible student-athletes and negotiating fair and reasonable compensation for the athlete’s work. Additionally, the university serves as a check on the decisions of compliance officers when endorsement activities are not in the best interest of a student-athlete or compromises the values of the university.¹⁸⁸

The SAEIP has the potential to benefit only the best and most recognizable student-athletes. An amateurism model under which the most popular student-athletes receive more potential endorsement prospects is analogous to the résumé submission process that regular students endure in order to obtain student employment. During the traditional job application process, students submit résumés with their qualifications and achievements in an effort to demonstrate that they are the most qualified for the position. Similarly, in the context of student-athletes, individual skill and marketability based on athletic talent serves as the justification for selection and in some instances higher pay.

The SAEIP uses the current NCAA amateurism guidelines to police the boundary between amateurism and professionalism, while also carving out a regulated space to allow student-athletes the opportunity to receive compensation for their marketability. Presently, the most lucrative option for top-tier athletes is to become professional athletes. The SAEIP broadens amateurism and allows student-athletes to receive compensation for their marketability based on athletic talent, thus making amateurism a more attractive option and alternative to early entrance into a professional sports league. In turn, the retention of student athletes for longer times creates more competitive intercollegiate competition. As a result of the heightened competition, the NCAA will produce a highly marketable amateur sports product.

Universities also stand to benefit from the SAEIP, as graduation rates would increase because more student-athletes would stay through degree completion. More importantly, however, the SAEIP allows universities to maintain existing partnerships and sponsorships while also upholding the ideologies and integrity

¹⁸⁷ WEILER ET AL., *supra* note 185, at 895.

¹⁸⁸ While there is some concern that compliance officers would not be objective in fulfilling their duties, the nature of their involvement is to protect the university from misrepresentation. Such situations may include promotional opportunities in which a student-athlete is requested to promote a strip club or where a student-athlete is requested to endorse an alcoholic beverage where the university has a zero-tolerance policy. These unsavory representations are mere examples of the types of misrepresentations that compliance officers may serve to screen out and they are in no way limited to the included examples.

of the institution by exercising control over the types of opportunities that are appropriate for student-athletes. Finally, the SAEIP allows room for universities to retain their current authority over academic eligibility requirements and grants universities the discretion to impose more stringent academic eligibility requirements for participation in the SAEIP.

CONCLUSION

For the reasons stated above, the right of publicity should be brought out of state law and into the federal landscape under the Lanham Act. Doing so would not only allow for more uniform and predictable case law that would inform future student-athletes of their rights, but would allow for more consistent remedies for students who prevail in their claims. This in turn would reduce the need for forum shopping, limit the need for expensive expert testimony, and lower the overall cost of a jury trial.

But a federal right of publicity will only go part of the way toward addressing student-athletes' concerns about commercial use of their identity. To fully compensate athletes, the NCAA should adopt the SAEIP, a hybrid amateurism model that strikes a balance between the NCAA's guiding principles and the desire of student-athletes to benefit from their marketability. The SAEIP injects flexibility into the NCAA Bylaws that allows student-athletes, the NCAA and universities to benefit. The SAEIP creates an opportunity for student-athletes to enjoy the same economic freedoms as other university students while also providing an incentive for student-athletes to maintain academic eligibility, make steady progress towards degree completion, and cultivate transferable skills beyond athletic ability.