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PWND or Owned? The Right of Publicity and Identity Ownership in League of Legends

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Abstract

E-sports is a new and growing form of entertainment, where gamers at the peak level of their skill compete for prestige and prizes. The contracts these athletes have are evident of a problem within the legal field of the right of publicity: there are few, if any, protections for individuals who want to license their right of publicity. The growth of E-sports has shown us the caveat emptor approach taken by courts does not adequately protect the licensee from having their privacy intruded upon. Adopting a set of standards for licensing the right of publicity would protect the privacy of the licensee, and let them control their identity as they see fit.

Keywords

right of publicity, e-sports, video games, League of Legends

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E-sports is a new and growing form of entertainment, where gamers at the peak level of their skill compete for prestige and prizes. The contracts these athletes have are evident of a problem within the legal field of the right of publicity: there are few, if any, protections for individuals who want to license their right of publicity. The growth of E-sports has shown us the caveat emptor approach taken by courts does not adequately protect the licensee from having their privacy intruded upon. Adopting a set of standards for licensing the right of publicity would protect the privacy of the licensee, and let them control their identity as they see fit.

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“Up until they lose the game, they’re winning.” - William “Scarra” Li

INTRODUCTION

The gates open, and the crowd begins to fill the stadium. Game time is hours away, but the excitement in the air is so thick you could cut it with Longsword.¹ After hours of waiting in line outside of the Mercedes-Benz Arena in Berlin, all 17 thousand seats are filled. Attendees are counting themselves among the lucky, as tickets sold out in 2 minutes. The venue isn’t as big as last year’s Olympic Stadium in Korea (50 thousand seats), but regions must be given equal time to showcase their venues. Millions more (27 million unique viewers in 2014) are watching at home on their computers, not counting the millions who are attending viewing parties, some of which are in theaters with hundreds of attendees.

As the countdown to the beginning of the end finishes, the crowd erupts with cheers as the players take the stage. 5 young Korean men are on each side of the bifurcated stage. The crowd cheers louder. The announcer’s voice booms out, “Introducing your League of Legends 2015 World Championship finalists...”

E-Sports is a growing form of entertainment, and as with any form of entertainment, there are marketable celebrities. When an individual is marketable, the right of publicity rises to the forefront of any contracts regarding that individual. The right of publicity is an extremely important and personal right that arose from the right to privacy. Sometimes called “personality rights,” the right of publicity is the right of an individual to control the commercial use of his or her name, image, likeness, voice, or any aspect of their identity. In essence, the right of publicity is the right to market yourself.

One can see the right of publicity being used all the time, most frequently with celebrity endorsements of products. When using the right of publicity, an individual typically attaches their name and image to a product, affirmatively endorsing said product. Sometimes, an individual will assign their rights of publicity to someone in full. That someone can then use their image to affirmatively endorse products, subject to the terms of whatever contract the parties sign.

Recently, the right of publicity has been frequently associated with celebrities and athletes endorsing video games. EA Games is a common user of athletes’ rights of publicity. They have a monopoly on the sports-themed video game market; their titles include FIFA, NHL, NBA, Madden Football, the PGA, and more. They use the likeness of athletes, often putting their

1. A Longsword is a purchasable item in League of Legends.

image and name directly in the game, thereby creating the image that these athletes endorse the game. Fans aspire play the game more because their favorite athletes play.

With video games becoming more and more popular, e-sports has risen to prominence as a growing form of entertainment. E-sports is a form of sports where professional video game players play to an online (and sometimes live) audience of millions. These players (sometimes referred to as athletes) are revered by the gaming community for their skill of and dedication to their chosen game. With their popularity, the players' endorsement of games, gaming equipment, and other products is highly sought after. League of Legends (League) is a multiplayer online battle arena (MOBA) video game developed by Riot Games, and playable on Microsoft Windows and Mac OS X. The game is free to play, and is supported by micro-transactions, where users can purchase virtual goods through small payments.

In League, players assume the role of an unseen "summoner" that controls a "champion" with unique powers and abilities. Five of these players then battle against a team of five other players, with the goal being to destroy the "Nexus" which lies at the heart of the opponent's base.

League has an immense following and player base. In 2014, Riot reported that 27 million people play the game daily, while 67 million unique players play the game every month. To put this in perspective, World of Warcraft, the longtime king of the gaming world, peaked at 12 million monthly players in 2010, while the popular game Candy Crush has approximately 46 million monthly players. What caused this insane popularity? There are many likely factors, but one of the most probable is the growth of E-sports.

"E-Sports" is a term used for multiplayer video game competitions between professional players. These competitions are typically streamed on streaming services such as Twitch.tv (insert footnote describing Twitch). The World Finals League Championship in 2014 had 27 million unique viewers, with likely millions more watching rebroadcasts or recordings of the game.² The World Finals in 2015 had 36 million unique viewers, showing the growth potential of e-sports.³ Again for perspective, the average viewership of the MLB World's Series was 15 million viewers, while the NBA finals in 2015 averaged almost 20 million viewers. With rebroadcasts and recordings being watched, the World Finals League Championship is rapidly overtaking the finals of traditional sports.

2. Magus, *Worlds 2015 Viewership*, LEAGUE OF LEGENDS E-SPORTS (Dec. 9, 2015), http://www.lolesports.com/en_US/worlds/articles/worlds-2015-viewership.

3. *Id.*

E-sports athletes are becoming more accepted in the mainstream of U.S. entertainment consciousness. E-sports athletes are being issued P1 Visas by the U.S. government to come to American soil and play their game of choice.⁴ ESPN is covering the largest League tournaments on its website,⁵ while Soledad O'Brien did a 14 minute segment on E-sports for HBO's *Real Sports* series.⁶

A game that is watched and played by so many individuals around the world has rules and terms that govern it. Riot Games is the promoter and sponsor of the League Championship Series (LCS), which is the most official/professional Series that League players can play in. As such, most aspiring League players strive for this degree of professionalism, in much the same way a college basketball player would strive to be drafted by a major team and play in the NCAA. Riot Games holds extraordinary power over these young players, because agreeing to Riot Games' terms and conditions of playing in the LCS is the only way to be considered a legitimate professional player. Players effectively cannot say no. The players are part of a negotiation where they hold almost no power. Using this imbalance, Riot has drafted their LCS contract such that players assign their "right of publicity" over to Riot games, for eternity. This is, suffice to say, rather imbalanced in favor of Riot Games.

These gamers are young, typically 17-25 years of age. They have devoted themselves to mastering a game, much as any chef masters a style of cooking, or an athlete masters their particular sport. However, unlike athletes and celebrities, these gamers have little in the way of bargaining power, and their legal representation consists of what the teams or organizations they are attached to can afford. Furthermore, the privacy rights and rights of publicity of gamers are typically not at the forefront of the venerable minds of judges and academics. Yet, the importance of the right of publicity to these young players' privacy and the lucrative nature of these rights to companies and organizations cuts right to the heart the right to publicity, and therefore the nature of personal identity.

Part I of this paper will discuss the history and case law relevant to the right to privacy and the right of publicity. Part II will discuss a contract

4. Yannick Lejacq, *Score! Professional video gamers awarded athletic visas*, NBC NEWS (Jul. 19, 2013), <http://www.nbcnews.com/technology/score-professional-video-gamers-awarded-athletic-visas-6C10679998>.

5. Patrick Dorsey, *League of Legends ratings top NBA Finals, World Series clinchers*, ESPN (Dec. 3, 2014), http://espn.go.com/espn/story/_/page/instantawesome-leagueoflegends-141201/league-legends-championships-watched-more-people-nba-finals-world-series-clinchers.

6. Tim Sampson, *Are eSports a sport? HBO weighs in*, THE DAILY DOT (Oct. 25, 2013), <http://www.dailydot.com/esports/esports-hbo-bryant-gumbel-real-sports/>.

from the most popular game on the planet, League of Legends (League), and the way the controller of League, Riot Games, has taken away the rights of publicity from its players. Part III will discuss the ways in which a player's right of publicity might be better protected, both from a legal and policy standpoint. Part IV will be the conclusion.

I. RIGHT OF PUBLICITY: OWNING YOUR IDENTITY

In the United States, the right to privacy is commonly discussed in terms of governance.

When asking a citizen what privacy means to them, chances are you'll get an answer relating to NSA wiretapping, computerized data collection, or unreasonable searches by police. The right to privacy no longer conveys any single coherent concept.⁷ Not many in the U.S. would consider the relationship between privacy personal identity in advertising. Privacy has different meanings to different cultures around the world. James Whitman contends that Europeans primarily view privacy as an interest in personal dignity and respect, while Americans view privacy as the right to be free from governmental intrusion.⁸

The U.S. Supreme Court has defined privacy in a myriad of ways, creating legal semantic confusion. It has broadly defined "privacy" as one's right to control the dissemination of information about oneself:

[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person....the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private.⁹

However, starting in the 1960s, the Supreme Court used the word "privacy" to describe a group of fundamental constitutional rights that protect citizens from government intrusion. *Roe* held that the "right to privacy" embodied in the 9th or 14th amendments to the constitution "is broad enough to encompass

7. See Ernst & Schwartz, *Privacy: The Right to be Let Alone*, 1 (1962).

8. J.Q. Whitman, *The Two Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151 (2004).

9. U.S. Dept. of Justice v. Reporters Committee For Freedom of Press, 489 U.S. 749, 109 S. Ct. (1989).

a woman's decision whether or not to terminate her pregnancy.”¹⁰ This is far afield from the concept of privacy in tort law (which will be discussed later), and even farther afield from the “right of publicity.” So, how did the “right of publicity” evolve out of “the right to privacy?”

Building the Right of Publicity

Judge Jerome Frank and Professor Melville Nimmer were the architects of the right of publicity. Judge Frank authored the *Haelan* opinion, which set the foundation for the right of publicity. The facts are as follows: Plaintiff manufacturer and baseball players entered into contracts that provided plaintiff with the exclusive right to use players' photographs in connection with plaintiff's gum sales. The players were not to grant any other gum manufacturer a similar right during such term, and plaintiff had an option to extend the term. Defendant manufacturer induced the players to enter into contracts that authorized defendant to use the players' photographs in connection with sales of defendant's gum during the original and extended term of plaintiff's contracts. Defendant then used the players' photographs.¹¹ The court found that if the defendant had knowingly and deliberately induced a ballplayer to break the promise to the plaintiff, then the defendant had “behaved tortuously.”¹²

The problem was that defendant obtained some of the grants through a third party, and as such, the defendant could not be held liable for inducing a breach. There were also instances where the defendant had used the ballplayers' pictures without any authorization from the player. The plaintiffs were not the ballplayers, merely a company who the ballplayers had given exclusive rights to use their image. The only possible claim was that the plaintiffs had some sort of property right in the identities of the ballplayers. Judge Frank, arguably to fight the injustice being done here, coined the “right of publicity”:

We think that in addition to and independent of the right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made “in gross,” i.e., without an accompanying grant of a business or anything else.... This right might be called a “right of publicity.” For

10. Roe v. Wade, 410 U.S. 113, 153, 93 S. Ct. (1973).

11. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

12. *Id.*

it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains, and subways.¹³

This created a property right in a person's identity. Judge Frank held that identity is a personal right, commercial, and property right. It is a matter of privacy that individuals be allowed to use their identity how they see fit, without interference from outside parties, unless that individual themselves wishes it. This allowed the ballplayers to assign their right of publicity over to a company for commercial gain. The company now owned the right to use the individual's identity however the contract between the individual and company stated.

Nimmer's article, "The Right of Publicity," built upon the foundation that Judge Frank had laid. Nimmer argued that traditional privacy law would not do enough to protect an individual because such law hinged on the embarrassing and humiliating impact of unpermitted use. There was nothing to protect an individual's personal interest in the commercial value of their identity. Nimmer identified that privacy values were inapplicable, because privacy was a nonassignable right. If all an individual had was a privacy right, then a grant to a commercial advertiser would only be a release from suit for invasion of privacy.¹⁴ Nimmer was primarily concerned with the efficiency of the commercial market, and this would be extremely inefficient because the commercial entity would have no legal right to assert against a party, for it would not "own" an enforceable right or property.

Nimmer also touched upon the issue of whether only celebrities should have the right of publicity. He concluded that, while celebrities are the clearest example of the right of publicity, the right should be available to everyone.¹⁵ Every person should have the right to recover the commercial value of the unpermitted taking of identity.

Further, I argue that, following along this line of logic, every person should have vested within them the right to control their identity as they see fit. For Nimmer and Judge Frank, this was primarily based on unpermitted commercial usage. However, with the advent of vast communication technology, the right of publicity is not necessarily purely commercial anymore. Social media has made it so easy to market your image, you are

13. *Haelan Laboratories, Inc.*, 202 F.2d at 868.

14. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMPORARY PROBLEMS 203 (1954).

15. *Id.* at 217.

almost a social pariah if you are *not* marketing yourself. I will next examine the modern development of the right of publicity, up to the current era.

Modern Development of the Right of Publicity

A deluge of litigation in the 1970s marked the rise of the right of publicity, all focused around the rights of deceased celebrities. These cases are not particularly relevant for the purpose of this article. However, they have relevance in that, by the end of the 1970s, the vast majority of states accepted the right of publicity as a separate legal right from the right of privacy.¹⁶ The right to publicity finally became a solidified tenant of common law when the U.S. Supreme Court decided the *Zacchini* case.

Hugo Zacchini performed a "human cannonball" act, in which he was shot from a cannon into a net 200 feet away. A free-lance reporter for Scripps-Howard Broadcasting Co. recorded the performance in its entirety without consent and it aired on the nightly news. Subsequently, Zacchini sued Scripps-Howard, alleging the unlawful appropriation of his professional property. Zacchini sued for lost revenue, not to enjoin the production. Ultimately, the Ohio Supreme Court ruled in favor of Scripps-Howard. While recognizing that Zacchini had a cause of action for the infringement of his state-law right to publicity, the court found that Scripps-Howard was constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some non-privileged purpose.

The Supreme Court reversed in a 5-4 decision that, while narrowly tailored, ushered the right of publicity into the national legal consciousness. The Court constantly used the term "right of publicity" in its opinion, and praised the state courts for creating an economic incentive similar to copyright laws.¹⁷ The Court held that infringement of the right of publicity was "an entirely different tort" from the embarrassment and false light types of invasion of privacy torts, and from defamation law. Both invasion of privacy torts and defamation liability are based on falsehoods, while right of publicity liability is "triggered by the unpermitted taking of a property right in human identity."¹⁸

McCarthy contends that the importance of the case is not in the holding (it was narrow, and did not discuss the right of publicity in-depth), but in the fact that the Supreme Court had favorably mentioned the right of publicity. The mention of the right of publicity by the Supreme Court made

16. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* 65 (2d ed. 2015).

17. *Zacchini v. Scripps-Howard Broadcastintg Co.*, 433 U.S. 562, 576 (1977).

18. *Id.*

those who had not paid attention to the right now take the matter more seriously. This led to numerous commentators both questioning and supporting the right of publicity.¹⁹

The Restatement and the Right of Publicity in the 21st Century

In 1995, the new Restatement of the Law of Unfair Competition was released, containing strong support for the right of publicity. The Restatement says that it is illegal to use the commercial value of a person's identity for the

19. See e.g., Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993); Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 U.C.L.A. ENT. L. REV. 97 (1994); Stephen Barnett, *At the Crossroads: The Right of Publicity in the United States*, *Revue Internationale du Droit D'Auteur* (Apr. 1994); Nicholas J. Jollymore, *Expiration of the Right of Publicity—When Symbolic Names and Images Pass into the Public Domain*, 84 *Trademark Rep.* 125 (1994); W. Mock Webner, *The Right of Publicity: A Commercial Property Right—Not a Privacy Right*, 84 *Trademark Rep.* 586 (1994); Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47 (1994); Stephen Barnett, *First Amendment Limits on the Right of Publicity*, 30 *TORT & INS. L.J.* 635 (1995); Amy Hogue and Michael Garfinkel, *The Right of Publicity: Does It Survive Death and Abandonment?*, 30 *TORT & INS. L.J.* 663 (1995); Moen, *Lifestyles of the Rich and Famous: Personality Rights—A Canadian-American Perspective*, 6 *Australian I.P.J.* 30 (1995); Sheldon Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 *HASTINGS L.J.* 853 (1995); Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 *COLUM-VLA J.L. & ARTS* 129 (1995). David Welkowitz, *Catching Smoke, Nailing Jell-O to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 *U. GA. J. INTELL. PROP. L.* 67 (1995); Stephen Barnett, *The Right of Publicity Versus Free Speech in Advertising: Some Counterpoints to Professor McCarthy*, 18 *HASTINGS COMM. & ENT. L.J.* 593 (1996); Oliver Goodenough, *Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity*, 47 *S.C. L. REV.* 709 (1996); Rochelle Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 *COLUM-VLA J.L. & ARTS* 123 (1996); Paul Heald, *Filling Two Gaps in the Restatement (Third) of Unfair Competition: Mixed Use Trademarks and the Problem with Vanna*, 47 *S.C. L. REV.* 783, 807 (1996); Ira Kaplan, *They Can't Take That Away From Me: Protecting Free Trade in Public Images from Right of Publicity Claims*, 18 *LOY. L.A. ENTER. L.J.* 37 (1997); Kwall, *Fame*, 73 *IND. L.J.* 1 (1997); R.S. Robinson, *Preemption, the Right of Publicity and a New Federal Statute*, 16 *CARDOZO ARTS & ENT. L.J.* 183 (1998); Panel Discussion, *Right of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 *CARDOZO ARTS & ENT. L.J.* 209 (1998); D.L. Zimmerman, *Who put the Right in the Right of Publicity?*, 9 *DEPAUL JOUR. ART. & ENTERT. L.* (1998); A. Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 *DUKE L.J.* 383 (1999); F.J. Dougherty, *Foreword: The Right of Publicity—Towards a Comparative and International Perspective*, 18 *LOY. L.A. ENT. L.J.* 421 (1999); J. Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 *CARDOZO ARTS & ENTER. L. JOUR.* 213 (1999).

purposes of trade without their consent.²⁰ It also endorses the difference between the right of publicity and the right to privacy, saying that while privacy relates to injured personal feelings, the right of publicity provides a cause of liability for the unpermitted appropriation of the commercial value of identity.

The Restatement further emphasizes that infringement of the right of publicity is not simply false advertising or false endorsement. Proof of falsity, deception, or confusion is not required for infringement on the right of publicity.²¹ The unpermitted use of a person's identity to draw attention to a product constitutes infringement. The Restatement concludes that the right of publicity rests on protection of "personal dignity and autonomy,"²² saying that only persons (not corporations) can possess the right.

In 2000, academic interest sparked in the right of publicity yet again, while a number of cases were decided, and whose holdings began mucking up the already murky tests used to detect and infringement of the right of publicity. We will examine the academic arguments in part III. Here, we will examine the separate tests used by the different courts and circuits. This will illustrate the uncertainty surrounding the exact tenants of the right of publicity.

In 2001, the California Supreme Court utilized a "transformative" test in *Comedy III Productions*, where the registered owner of the Three Stooges rights of publicity sought damages against an artist for the violation of those rights. The artist was selling lithographs and T-shirts bearing the Three Stooges' likeness. The Court held that, when faced with a right of publicity challenge, the artist may raise an affirmative defense that their work contains significant transformative elements, and as such the value of the work does not derive primarily from the celebrity's fame.²³

In 2003, the Missouri Supreme Court used a "predominant use" test to balance the right of publicity of professional hockey player Tony Twist against free speech policies. The defendant published a comic book which featured a character named "Anthony 'Tony Twist' Twistelli," who was an evil Mafia Don. Despite having transformed the original likeness of the plaintiff significantly, this defense was rejected because the court viewed the use of the plaintiff's likeness as predominantly commercial, and not expressive.²⁴

20. RESTATEMENT (THIRD) UNFAIR COMPETITION § 46 (Am. Law Inst. 1995).

21. RESTATEMENT (THIRD) UNFAIR COMPETITION § 46.

22. *Id.*

23. *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 407 (2001).

24. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003).

In *Faloona v. Hustler Magazine*, the Fifth Circuit held that parents who had signed releases for the use of their children's images in photographs of their children in the nude, could not reclaim those images or control their future uses. Nor could the children do so because they had not been presented in a "false light." The court based its decision on the "right to privacy," and as previously mentioned, the right to privacy is infringed when false and often libelous claims are made about the plaintiff. None were made here. The Court did not rule that there was a violation of the right of publicity because those rights had been legally assigned when the children were younger. This case is instructive because, despite seemingly offhand comments from the Court that signing releases of your children's nude pictures might not have been the best thing for the children, the Court declines to enter into a decision regarding the fairness of the contract signed. This indicates a lack of willingness to comment on the terms of the actual contract itself, simply the circumstances surrounding the contract. The Court appears to be taking a *c'est la vie* approach to the right of publicity: once you've licensed it, as long as the signee's signature was, at least facially, done voluntarily and knowingly, the deal is done.²⁵

In 2006, the California Court of appeal decided *Kirby v. Sega*, which addressed a musician's right of publicity against a video game company. Musician Kierin Kirby claimed that Sega misappropriated her likeness when they used her signature phrases for creating a character in one of their games. The court held that the character was not a simple recreation of Kirby, but was influenced by her. The character was deemed to have sufficient transformative elements because new expression alone is sufficient; it does not need to convey a new expression.²⁶

In 2011, the California Court of Appeals decided another video-game case related to the right of publicity: *No Doubt v. Activision Publishing*. Activision published a game called *Band Hero* where players could simulate performing in a rock band by selecting digital avatars to represent them in an in-game band.²⁷ The band No Doubt sued, claiming a violation of their rights of publicity. The Court used the transformative test, and held that Activision's use of the musician's identities was insufficiently transformative because they used the actual identities of the musicians in-game, as well as having the character do what their real life counterparts would ordinarily do (playing music).²⁸

25. *Faloona v. Hustler*, 799 F.2d 1000 (1986).

26. *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 50 (2006).

27. *No Doubt v. Activision Publishing Inc.*, 192 Cal. App. 4th 1018 (2011).

28. *Id.*

In 2013, in *Hart v. EA Games*, the Third Circuit ruled that EA's use of a player's likeness in their video game was not sufficiently transformative to overcome the players' right of publicity. Hart was a quarterback signed with the NCAA from 2002 to 2005. As a condition of participating in the NCAA, Hart would lose his status if 1) he used his skills (directly or indirectly) in the sport in any way for pay, or 2) he accepted any remuneration or permitted the use of his name or picture to advertise the sale of a commercial product of any kind.²⁹ In accordance with this, Hart refrained from seizing on various commercial opportunities.³⁰ Hart used his skills to bring success to his team, the Scarlet Knights. This success ensured that Hart would be included in EA's extremely successful NCAA Football videogame franchise. Hart was recreated as a playable character in-game. Hart alleged that EA misappropriated his likeness to enhance the commercial value of the game.³¹

The court adopts the transformative test, holding that EA was insufficiently transformative in its use of Hart's likeness. Despite the ability to alter the avatar, the Court holds that simple player interactivity is not enough to satisfy the transformative requirement. The realism of the game is central to its appeal.

As you can see from the lengthy history of the right of publicity, the vast majority of actual cases are primarily focused on unpermitted use of an individual's identity. This is likely because most other issues are solved by separate bodies of law. Specifically, contracts issues containing a license or assignment of the right of publicity (which will be explained in detail in part II), are often resolved by contract law. However, a growing new form of entertainment calls into question the validity of focusing on the right of publicity as a primarily commercial issue regarding *unpermitted* use of identity. Instead, I believe that the legal lens should be focused on protecting those who license their right of publicity to commercial entities. There are few protections for those who would make their money professionally playing video games, a burgeoning new form of entertainment called E-sports. There is no structure in place to ensure that these gamers are not being taken advantage of. In the next section of the paper, I will examine a specific example of this issue regarding licensing the right of publicity, and how what is happening with E-sports undermines the very nature of the right of publicity.

29. *Hart v. Electronic Arts, Inc.*, 717 F.3d 147, 170 (2013).

30. *Id.* at 148.

31. *Hart*, 717 F.3d at 147.

II. LEAGUE OF LEGENDS AND E-SPORTS: PWNED

As previously stated, the LCS is the highest form of professionalism that any North American League player can attain. Riot Games runs the LCS exclusively. They provide a small salary to players that is supplemented by the team that they are on. The path to become a professional is as follows: first a player must get to the top of the North American ranked ladder. The ranked ladder is a method for ranking players based on how many games they win. The top 200 players are called “challengers.” North America currently has over 1.7 million players playing ranked, trying to better their play.³² This means that the top 200 must devote themselves to the game, often playing for hours on end to maintain their position. Once in this elite group, players can join teams in one of two ways. They can either apply for a position that is open on a team, or they can hope that their play will be good enough to be noticed by another professional player, who recommends them to a team. There are then two tiers of teams: the Challenger teams and the LCS teams. The Challenger teams are, as their namesake suggests, Challengers to the LCS teams. The Challenger teams play in the Challenger Series, and the winners of this series get the chance to fight the last place LCS teams for a spot in the LCS. There are 10 teams in LCS, consisting of 5 players each. Therefore, there are 50 LCS players in the LCS. The LCS is divided into Seasons, where each season is one-year long. Season 5 occurred in 2015.

Each LCS team practices every day in games called scrimmages (“scrims” for short). Players typically play 8 hours of scrims, and then multiple hours afterwards of solo play on the ranked ladder. These players are the pinnacle of skill out of almost 2 million players, and they need to practice this much per day to maintain their skills. Once a player reaches this level and enters the LCS, they are subject to a number of rules, and must sign a contract that takes away most of their right of publicity.

The Contract

The contract with Riot Games is an “Eligibility and Release Form” that players *must* agree to in order to compete in the LCS. Thus far, as far as I know, every player that has the opportunity to compete in the LCS has signed the contract. There are sections of the contract that deal with limitations on liability, arbitration and limitations of remedies, and defamation. However, the most worrisome part of the contract is Section 5:

32. *League of Legends Summoners*, (2015), <http://www.lolsummoners.com/stats/na>.

“Use of My Name and Likeness.” I have reproduced Section 5 in its entirety below:

Unless prohibited by law, I hereby grant to the League and the other Riot Parties unlimited permission to use, alter, edit, or modify my name, tag, nickname, initials, likeness image, picture, photograph, animation, persona, autograph/signature, voice, statistics, biographical information and/or any and all other personal indicia, identifying characteristics or information supplied by me...each in whole or in part in any and all present and future media, worldwide, in perpetuity, in connection with the Season, Tournaments, the Game, the Riot Parties, and/or the sale, publication, display, promotion, advertising, sponsorship, and the trade of the forgoing....the foregoing grant of rights includes the right and authority of the Riot Parties to use, and to authorize or sublicense affiliates, licensees or sponsors to use and display the Team Member Materials (a) on websites and in social media postings and editorial content relating to the LCS...(b) in connection with the webcast, streaming, telecast, broadcast, and other distribution of the LCS, Game, Season, Tournament, and related events, including the right to use after the 2014 Season any Team Member Materials fixed in a tangible medium...during the 2014 Season (or derivatives thereof); and (c) otherwise in connection with the marketing, advertising, sponsorship, and promotion of the LCS...In connection with these matters, I hereby release the Riot Parties from any and all liability...I understand and agree that I will have no right to inspect or approve the Advertising. I understand and agree that I will not receive compensation, fees, royalties, or any other form of payment for use of Team Member Materials...”³³

Let us break this down piece by piece. The first part of the agreement grants Riot the right to use any of the player’s identifying characteristics and alter them as they see fit *in perpetuity*. Riot Games has the right to use a player’s identity as they see fit, forever. The next part of the agreement stipulates that the grant of rights allows Riot to sublicense the identity of the player to any party Riot deems appropriate. They are allowed to do this with the player’s identity forever. The contract goes on to stipulate the mediums that Riot or sublicensed parties can use the player’s identity in. They can use any of the materials obtained during the 2014 Season for any form of marketing or advertising.³⁴ The player will have no right to inspect any advertising that features their identity. Finally, the player will receive no compensation for use of their identity.

33. LCS Contract §5 *Use of My Name and Likeness* (2014).

34. I contacted Riot for an updated version of the Contract, or confirmation that Section 5 had remained the same as the 2014 Contract. Riot Games has not responded.

There are two ways for an individual to grant their right of publicity to another: the individual can assign that right to someone else, or license that right. Assignment of the right of publicity is total and exclusive transference of the right to use an individual's identity. This most frequently happens in cases where the individual is elderly and assigns their rights of publicity to their heirs. Licenses are ostensibly temporary and limited grants of rights to a commercial entity. Unlike the assignment of rights, licenses are supposed to be more limited and revocable, and are frequently non-exclusive.

What we have here is likely considered a license due to the non-exclusive nature of the contract. A complete assignment of the right of publicity would necessarily include exclusion of all other possible licenses to other commercial entities and possible competitors. However, as Jennifer Rothman points out, licenses and assignments of the right of publicity are frequently used interchangeably by the courts.³⁵ And despite the non-exclusive nature of the contract, the economic limitations on the players still remain. If a player decides to play another game professionally, their sponsorship and potential economic earnings will be limited by the fact that Riot Games holds their rights of publicity. Sponsors will likely be unwilling to take a chance on a player whose image could be used by a rival gaming company.

This contract is favorable to Riot Games in the extreme. Retaining the right to modify a person's identity, edit or use it as they or their affiliates please, without giving any compensation or allowing the individual to inspect the usage, for eternity, could be detrimental to the commercial value of the players themselves.³⁶

Unfortunately, as I stated before, there is little precedent regarding these types of unfair assignments/licenses of the right of publicity. J. McCarthy, in his annual republication of *The Rights of Publicity & Privacy*, comments that there have been practically no cases regarding the terms contained within a contract that licenses the right of publicity beyond what is already settled contract law. Based on both McCarthy's formidable research and my own study, there seem to be few, if *any* cases that discuss practices of licensing the right to privacy. The courts are adopting an attitude of *caveat emptor* towards possible unfair right of publicity contract terms. As noted in our discussion of *Faloona* above, the Court's disposition towards a

35. Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 186 (2012).

36. Stephen Ellis, a former LCS player, offers a counterpoint. He says that Riot is not the "bad guy." He contends that Riot is protecting themselves in a quickly growing industry with little precedent. Telephone interview with Stephen Ellis (Feb. 1 2016).

detrimental use of the right of publicity was essentially: “Tough luck, you signed for it.”

The attitude of the courts, the lack of representation for professional gamers, and their lack of bargaining power creates a situation where these gamers are giving their rights up for sparse consideration. Riot Games pays every player \$12,500 per half-season for LCS, which works out to \$25,000 per year. Player’s wages are usually supplemented by their team, possible sponsors, and any live-streaming of themselves playing League, with any ad revenue, donations, etc. that may apply.³⁷ However, this is still a pittance compared to salaries of other professional and even amateur athletes. Remember, these athletes are at the highest level of play for their sport. Players in the NBA and NFL get salaries in the hundreds of thousands and millions of dollars.³⁸

Furthermore, an examination of NFL and NBA contracts reveals limitations built into the license granting a player’s right of publicity to the overseeing organization. The NFL’s contract has two specific limitations built in that Riot’s LCS contract does not have. First, players have a right to refuse to participate in the licensing aspect of the contract. There is language in the section relating to assignment of player’s rights of publicity that says that a player can strike out the section, and thereby declare his intention not to give the NFL their right of publicity.³⁹ This does not appear to affect the player’s salary, or other portions of the contract in any way. Second, the contract provides a temporal limitation to the license, saying that the license ends on December 31 of the year the contract expires. The NFL contract addresses two major issues present in the LCS contract: the temporal concern and the concern that the right of publicity *must* be licensed to participate in the LCS. The NFL contract is more fair to the players, giving them the right of refusal, as well as limiting the amount of time the players’ right of publicity is licensed for.

The NBA contract does not spell out as many terms and conditions of the license of the right of publicity as the LCS and NFL contracts do, but it does come with a stipulation unique to both contracts: the player must be issued royalties for advertisements.⁴⁰ This addresses an issue of the LCS contract: players are paid a pittance at the beginning of each term. They are

37. *How much do pros earn?*, LOL-SMURFS.COM (2014), <https://www.lol-smurfs.com/blog/how-much-do-lol-pros-earn/>.

38. *NBA Player Salaries 2015-2016*, ESPN (2015), <http://espn.go.com/nba/salaries>.

39. *NFL Player Contract*, §4(b) (2012), http://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10_3.htm.

40. *National Basketball Association Uniform Player Contract*, §14, http://blog.techprognosis.com/wp-content/uploads/2011/05/NBA_Constitution.pdf.

not compensated for the use of their image in any advertisement. Giving royalties to the players would alleviate some of the concerns of potential unfair business practices, and give them something for licensing their right of publicity to Riot.

III. 3...2...1...LICENSE!

There have been a number of suggestions on how to increase the bargaining power of and representation of professional gamers, which I will examine in the next section. I will also discuss the policy concerns, including why the right of publicity of e-sports athletes matter. Finally, I will lay out a section of what I consider to be “best practices” when drafting a license from the perspective of the player.

Increasing the Power and Representation of the Players

Increasing the bargaining power of players is a challenge that can be accomplished in several ways: unionizing, education, and legal/commercial representation.

The E-sports industry, despite its tremendous growth, is still in its infancy. Stephen Ellis, a former LCS player, has worked extensively on increasing player bargaining power, and is one of the foremost authorities on the subject. Mr. Ellis argues that a Player’s Union is not necessary right now. He considers it to be too complex a legal structure, costly, and “extremely time consuming (labor law, define bargaining unit, global/regional).”⁴¹ Mr. Ellis argues that players need education, support, and advocacy before formalizing a union. He believes that creating an advocacy group that isn’t a traditional union is more appropriate for the time and money that E-sports currently has.^{42,43} Furthermore, Mr. Ellis reasons that education of players on their rights is the foremost method of increasing bargaining power of players.

41. *I’m Stephen “Snoopeh” Ellis and I want to talk about Player Representation AMA* (2015), https://www.reddit.com/r/leagueoflegends/comments/2u3qw1/im_stephen_snoopeh_ellis_and_i_want_to_talk/.

42. An organization similar to the PFA (Professional Footballer’s Association), which aims to protect, improve, and negotiate the conditions, rights, and status of all professional players by collective bargaining agreements. <http://www.thepfa.com/thepfa/about>.

43. *I’m Stephen “Snoopeh” Ellis and I want to talk about Player Representation AMA* (2015), https://www.reddit.com/r/leagueoflegends/comments/2u3qw1/im_stephen_snoopeh_ellis_and_i_want_to_talk/.

Players frequently assign their right of publicity over to their team, not fully aware that they are foreclosing on other options.⁴⁴

Increasing bargaining power in a more community-based manner such as this is extremely difficult because Riot has a monopoly on the highest form of professionalism in League. No other entity has so far had the ability to create a tournament series similar to Riot's. Creating such an infrastructure requires money and sponsors that most organizations are not capable of. There is no other avenue for League players to pursue their talent, and as such Riot can dictate the terms of any contract.

Policy Concerns

Looking into the cases surrounding the right of publicity, there is a severe dearth of case law that discusses licensing the right of publicity. Furthermore, the right of publicity is entirely a matter of state law. When courts consider the right of publicity, they are adhering to a state created structure. At least thirty-one states recognize a right of publicity.⁴⁵ Among these there is a lack of uniformity concerning the scope and substance of the right of publicity.

At one extreme, we have Indiana's expansive right of publicity law. Indiana's right of publicity extends to "personality," a label defined by statute to encompass any and every attribute that any court across the country has ever found to fall within the right of publicity.⁴⁶ At the other end of the spectrum, New York has no common law right of publicity, and only recognizes a narrow statutory right of publicity limited to uses of a person's name, portrait, picture or voice.⁴⁷ Kevin Vick and Jean-Paul Jassy argue that a federal right of publicity statute is necessary to clean up the mess that states have created.⁴⁸ Specifically, they contend that there needs to be a uniform set of items included within the right of publicity, defined in a federal statute. Vick and Jassy draw the distinction between assigning and licensing your right of publicity, and argue that the right of publicity should not be

44. Mr. Ellis argues that the players themselves should be sponsored by corporations, rather than the teams. This would prevent players from giving up their right of publicity, and dramatically increase their earning potential. However, he says this could be detrimental to the team, because the team could not control their players' sponsors, and might have an undesirable entity sponsor a player. Telephone interview with Stephen Ellis (Feb. 1, 2016).

45. *C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007).

46. BURNS IND. CODE ANN. §§ 32-36-1-6, 32-36-1-7.

47. NY CLS CIV. R. § 51.

48. Kevin Vick, Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, *Communications Lawyer*, Vol. 28 2 17 (2011).

assignable during a person's lifetime.⁴⁹ However, they ignore, and indeed most scholars ignore, the concern with being able license your right of publicity. There are few safeguards, either court created or state created, that protect an individual licensing their right of publicity.

You can see from the contract with Riot Games how easy it is to write a contract that creates a license granting the right of publicity to one party that is *very* much in favor of one party. This as shown in *Faloona*, this is not exclusive to E-sports. This is an issue of a party taking advantage of their superior position to get a license that favors one party to the detriment of another.

The right of publicity is not like other property rights, because it implicates the right to privacy, a right that has been written about extensively. The "right of publicity" in the U.S. began with the Warren and Brandeis article, "The Right to Privacy." The duo argued that the law should protect a right of privacy so as to create a "quiet zone" in a person's life, immune to the prying eyes of the public.⁵⁰ Case law evolved to find that allowing companies to use the image of a person without their consent was a violation of the right to privacy; that permitting companies to do that created an intrusion upon their right to have a quiet zone.⁵¹ If companies were allowed to take a person's identity without permission, they could have the person endorse products, use that person's statements, etc. This would ensure that said person would never have another private moment.

The if we examine the right of publicity from a privacy standpoint, we see that a license that takes away the right of publicity without limitations is akin to infringing upon an individual's right to privacy, even when, unlike in almost every case that has come before the courts, the use was permitted. The unpermitted use of a person's identity takes away their privacy. The permitted use of a person's identity can take away their privacy if the permission granted is extremely broad. *This* is why the LCS contract matters: it is emblematic of a problem that exists within the right of publicity; that the

49. Kevin Vick, Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, Communications Lawyer, Vol. 28 2 17 (2011), (If a person's right of publicity were assignable like ordinary property, it would lead to strange results. A person's right of publicity might be seized by the government to settle tax liabilities and then exploited to serve government and political interests. It might be ordered sold and its proceeds split as part of a divorce settlement, with the buyer viewing it as a purely economic property...).

50. Warren & Brandeis, at 195 (1890).

51. See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977); *Faloona v. Hustler*, 799 F.2d 1000 (1986); *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 407 (2001); *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 50 (2006); *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 150 (2013).

right of publicity of the person signing the contract can be taken without much legal recourse. Let the signee beware.

Best Practices

There are a number of practices that can be employed to protect signees who license their right of publicity.

1. **Temporal Limitation:** A temporal limitation on the usage of the license would prevent abuse of the license. Having the usage of the license forever decreases the value of the signee's identity, because the entity that has the usage for eternity can use the license even when that signee could make agreements with other entities. Therefore, other entities would be unwilling to contract with the signee when the signee's image could be used by another competing entity. Having a temporal limitation on the license ensures that the signee can continue to make full use of their identity.
2. **Royalties:** Giving appropriate consideration when using the identity of the signee is simply a good business practice. This could likely be offset by an appropriate salary.
3. **Right of first approval:** Give signees the opportunity to approve of the way in which their identity is used. This protects the signee from approving a product, slogan, or idea that they might not agree with. This is especially important when contracts give the entity receiving the license the right to grant usage of the license to other organizations. Giving signees the right of first approval lets signees protect their image so that they can cultivate their identity in the way that they want to.
4. **Right of refusal:** As in the NFL contract, the signee could have the right to refuse to license their right of publicity. While this would not grant the entity any rights, this would also not let the signee make use of the growth of their image that would accompany the entity using the license.

I believe that these limitations would protect the signee while not overburdening the overseeing entity with needless regulation. The entity could still make effective use of the license, while the signee has protection to grow their identity as they see fit.

CONCLUSION

The growth of E-sports has shown us that there is a hole left in the right of publicity law: the *caveat emptor* approach taken by courts does not adequately protect the licensee from having their privacy intruded upon. This is especially evident in new, growing industries where the licensees do not have much bargaining power. Adopting a set of standards for licensing the right of publicity would protect the privacy of the licensee, and let them control their identity as they see fit.