

Face Value: Where's My NCAA Football Game?

By Steve S. Chang

Steve S. Chang is a partner at Banner & Witcoff, Ltd., in Washington, D.C. He specializes in intellectual property, including utility and design patents in the computer, electrical, and video game spaces. Steve can be reached at schang@bannerwitcoff.com.

Many gamers have noticed that there was no new *NCAA Football* game from Electronic Arts Inc. (EA) this past fall, and those same gamers are probably wondering when (if ever) the series will make its return. The answer is . . . complicated, and is going to depend on the outcome of a trio of lawsuits filed by former collegiate athletes. The lawsuits generally focus on two issues: (1) whether EA has improperly used the athletes' likenesses in its basketball and football games; and (2) whether the National Collegiate Athletic Association's (NCAA's) rules, which prevent athletes from receiving licensing revenue from video games and other merchandise, are a violation of the Sherman Antitrust Act. This article will give a summary walkthrough of the issues and rulings in these lawsuits, and the issues that will need to be resolved before we see the next round of college football and basketball video games.

Cases 1 and 2: The Publicity Cases

The first two cases date back to 2009, and both were filed by former collegiate athletes who alleged that their likenesses were unlawfully used without their permission in EA's football and basketball video games. In *Hart v. Electronic Arts, Inc.*,¹ lead plaintiff Ryan Hart was a quarterback for the Rutgers University football team from 2002–2005, and he filed suit against EA in New Jersey. In *In re NCAA Student-Athlete Name & Likeness Licensing Litigation (Keller)*,² lead plaintiff Samuel Keller was a quarterback for the Arizona State University and University of Nebraska football teams in 2005 and 2007, respectively, and he filed suit against EA, the NCAA, and Collegiate Licensing Company in the Northern District of California. The *Keller* case was eventually consolidated with numerous other cases filed by other athletes in the Northern District of California, including one by Ed O'Bannon, who was a power forward for the UCLA men's basketball team, leading UCLA to a national championship in 1995. As discussed below, these cases reached opposite conclusions at the trial level, but on appeal to the Third and Ninth Circuit Courts of Appeals, both cases resulted in findings in the athletes' favor.

In both of these cases, the athletes alleged that their likenesses were used in EA's *NCAA Football* and *NCAA March Madness* video games without permission, and in violation of the athletes' rights of publicity. In the video games, players assume control of their favorite team and play virtual football or basketball games. The games seek to replicate each school's team with a great degree of accuracy. Each real-life player on the team has a corresponding avatar in the game that has the same jersey number, height, weight, build, skin tone, hair color, home state, play style, skills set, facial features, and helmet visor preference, although the actual player names are not included in the games. The games have real-

Published in *Landslide*, Volume 7, Number 4, ©2015 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

istic virtual versions of the schools' respective stadiums as well, with coaches, cheerleaders, fans, mascots, and sounds helping to replicate the real-life game experience.⁴ In both of these cases, EA asserted that any athlete's likeness appearing in EA's video games is protected by the First Amendment.

These cases reached different outcomes at the trial level. In *Hart*, the district court granted summary judgment to EA on the grounds that EA's First Amendment right to free expression outweighed the athletes' right of publicity.⁵ In *Keller*, the district court found that the athletes' right of publicity claims had a probability of prevailing over EA's First Amendment defense, and denied a motion by EA to strike the claim under a California law that permitted such motions in cases involving the First Amendment.⁶

On appeal, both appellate courts (Third and Ninth Circuits, respectively) ruled in the athletes' favor. In *Hart*, the Third Circuit ruled that EA's use of the plaintiff's likeness did not escape the plaintiff's right of publicity claim, and that the lower court had erred in granting summary judgment to EA. In *Keller*, the Ninth Circuit found that EA's use of the likenesses of college athletes was not protected by the First Amendment, and affirmed the lower court's denial of EA's motion.

The analysis and reasoning that led to these decisions was largely in common, and will be discussed in detail below.

The Analysis

Both appellate courts began by noting that video games are entitled to the full protections of the First Amendment,⁷ citing *Brown v. Entertainment Merchants Ass'n*.⁸ In *Brown*, the Supreme Court addressed a California law that governed the labeling and sale of violent video games. In striking down the law, the Supreme Court noted that video games are entitled to First Amendment protection, and found that the California law did not comport with the First Amendment.

The appellate courts also both acknowledged that the First Amendment right was not absolute, and that it may need to be balanced against a state-recognized right of publicity.⁹ The courts cited *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁰ for this balancing. In *Zacchini*, a news program had recorded and broadcast the entire "human cannonball" act of the plaintiff, Hugo Zacchini.¹¹ The producers of the news program argued their First Amendment right to disseminate the news, but the Supreme Court ruled in favor of Zacchini, noting that there must be a line between Zacchini's right to publicity and the press's First Amendment rights, and that "[w]herever the line . . . is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."¹²

So *Zacchini* established that there was a line, and said that a wholesale rebroadcast of a performer's entire act was clearly on the "not protected" side of that line, but it was left to subsequent courts to decide the other contours of that line. The *Hart* opinion addressed the three main balancing tests that were developed in the wake of *Zacchini*: (1) the predominant use test, (2) the *Rogers* test, and (3) the transformative use test, and these tests are summarized below.

The Predominant Use Test

The predominant use test originated in *Doe v. TCI Cablevision*,¹³ which dealt with the *Spawn* comic book. *Spawn* had a villainous character named “Anthony ‘Tony Twist’ Twistelli,” which a hockey player (named Tony Twist) alleged violated his right to publicity.¹⁴ To conduct the balancing between Twist’s right of publicity and the comic book creator’s First Amendment rights, the Supreme Court of Missouri adopted a test that was based on the predominant use of the individual’s identity:

If a product is being sold that predominantly exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some “expressive” content in it that might qualify as “speech” in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.¹⁵

The *Doe* court applied the test and ruled in favor of the hockey player, finding that the reference to Tony Twist had “very little literary value compared to its commercial value.”¹⁶ The Third Circuit in *Hart*, however, declined to use this test because it felt that the test was too subjective and required judges to be both jurists and discerning art critics.¹⁷

The Rogers Test

The *Hart* opinion then addressed, and rejected, the *Rogers* test.¹⁸ The *Rogers* test originated in *Rogers v. Grimaldi*,¹⁹ a case in which Ginger Rogers sued the makers of a film entitled *Ginger and Fred*, a film that was neither about Ginger Rogers nor Fred Astaire. The case was analyzed from a more trademark point of view (the name “Ginger” in the title was the only link to Ginger Rogers), and the Second Circuit’s analysis held that Oregon would not “permit the right of publicity to bar the use of a celebrity’s name in a movie title unless the title was wholly unrelated to the movie or was simply a disguised commercial advertisement for the sale of goods or services.”²⁰ In applying the test to the *Ginger and Fred* film, the Second Circuit concluded that the title was not wholly unrelated to the movie and was not a disguised advertisement, so it dismissed the right of publicity claim.

The Third Circuit in *Hart* declined to apply the *Rogers* test because it doubted whether the *Rogers* test could be applied beyond the title of a work, and it felt that the test did not adequately balance all of the nuances of the rights of publicity and free speech.²¹ The *Hart* opinion noted that the very reason for Hart’s fame was football, so anyone misappropriating his likeness would necessarily be doing so for a product that is not “wholly unrelated” to Hart himself. Under the *Rogers* test, all such uses of Hart’s identity would be protected by the First Amendment.

After dismissing the *Rogers* test, the *Hart* opinion arrived at the test it ultimately used—the transformative use test.

The Transformative Use Test

The third test, and the one ultimately used by both the *Hart* and *Keller* opinions, originated with *Comedy III Productions, Inc. v. Gary Saderup, Inc.*²² In *Comedy III*, the issue was an artist’s sale of T-shirts and prints bearing his charcoal rendition of the Three Stooges.

In resolving the question of whether the artist's First Amendment rights prevailed over the Stooges' rights of publicity, the California Supreme Court borrowed a concept from copyright law, and articulated a test based on whether the celebrity's likeness was sufficiently transformed as to create the defendant's own expression:

The balance between the right of publicity and First Amendment interests turns on "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether the product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word 'expression,' we mean expression of something other than the likeness of the celebrity."²³

In applying this test, the California Supreme Court found that the charcoal drawing violated the Stooges' rights of publicity because there was "no significant transformative or creative contribution" and "the marketability and economic value of [the work] derives primarily from the fame of the celebrities depicted."²⁴

Later court decisions followed *Comedy III*, and additional contours of this analysis began to emerge. While the *Comedy III* charcoal drawings lacked the requisite transformation, another example, found in *Winter v. DC Comics*,²⁵ showed the other end of the transformation spectrum—an example in which sufficient transformation was found. In *Winter*, two musicians, Johnny and Edgar Winter, objected to the "Johnny and Edgar Autumn" characters in the DC Comic Book *Jonah Hex*.

In discussing the transformative use test, the Supreme Court of California explained that "[a]n artist depicting a celebrity must contribute something more than a 'merely trivial' variation, [but must create] something recognizably 'his own,' in order to qualify for legal protection."²⁶ The *Winter* court noted that the celebrities were not literally depicted in the comic book and were "distorted for purposes of lampoon, parody, or caricature."²⁷ The *Winter* court also noted that "fans who want to purchase pictures of [the Winter brothers] would find the drawing of the Autumn brothers unsatisfactory as a substitute for conventional depictions."²⁸

As another example of sufficient transformation, the *Hart* opinion referred to the Sixth Circuit decision in *ETW Corp. v. Jireh Publishing, Inc.*,²⁹ in which a collage that included a photograph of the golfer Tiger Woods, along with photographs of other golfers, was deemed transformative enough partly because it did not "capitalize solely on a literal depiction of Woods."³⁰

The *Hart* opinion addressed two other uses of the transformative use test, both in the context of video games: one in which there was enough transformation, and one in which there was not. In *Kirby v. Sega of America, Inc.*,³¹ the celebrity was a musician (Kierin Kirby) who claimed that Sega misappropriated her likeness for the character "Ulala," appearing in the video game *Space Channel 5*.

The California Court of Appeal noted that, although there were similarities in appearance and in the signature phrases spoken by Kirby and the Ulala character, there were also differences in appearance and movement, and that the Ulala character was not a mere digital recreation of Kirby.³² Based on these differences, the California Court of Appeal found that the work passed the transformative use test, adding “new expression” beyond the celebrity, and that Kirby’s likeness was not the “sum and substance” of the Ulala character.

While *Kirby* was an example of a video game that passed the transformative use test, the *Hart* opinion also addressed an example of a video game that did not pass the test. In *No Doubt v. Activision Publishing, Inc.*,³³ the musical group No Doubt objected to aspects of their appearance in Activision’s *Band Hero* game, a karaoke-style game that allowed players to simulate performance in a rock band by playing simulated instruments along with popular songs. The *No Doubt* court highlighted the fact that the No Doubt avatars could not be changed and were images of the celebrity musicians. Despite the other aspects of the game that may be considered transformative, it found that “no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame.”³⁴ The court found that in the game, the No Doubt avatars always appeared as depictions of the No Doubt members “doing exactly what they do as celebrities.”³⁵ The court also noted that the game developers used depictions of the No Doubt bandmembers to capitalize on the fan base of the No Doubt musical group. With these factors in mind, the *No Doubt* court concluded that there was insufficient transformation, and that the use violated the group’s right of publicity.

Having established some contours of the transformative use test, the *Hart* court set about applying the test to *NCAA Football*. The court noted that the appearance of the football player matched the avatar, with hair, skin, helmet visor, and biographical traits, such that it was a digital recreation of the person.³⁶

The court then noted that, like the bandmembers in *No Doubt*, the football player avatar in *NCAA Football* always appeared in exactly the same context as the real-life counterpart—as a football player playing football. As for EA’s argument that other aspects of the game, such as the stadiums and sounds, were creative and transformative, the court disagreed, noting that the *No Doubt* environments were even more transformative because some of the songs could be performed in outer space.³⁷

Because the *No Doubt* court gave weight to the fact that the game did not allow alterations to the appearance of the No Doubt bandmembers, the *Hart* opinion addressed the ability in the *NCAA Football* games to alter the player avatars. The game allows players to change the avatars, to alter their appearance, skills, and various other aspects.³⁸ The court dismissed this, however, by noting that those changes are at the discretion of the user, and that if this option were deemed sufficient, then it would be easy for future game developers to misappropriate and benefit from a celebrity’s identity and avoid liability by merely offering an option to change it in the game. The *Hart* court ultimately concluded that the *NCAA Football* game seeks to create a realistic depiction of the game of college football, with realis-

tic representations of the schools and players, and like the game in *No Doubt*, seeks to capitalize on the fan base of the teams and players.³⁹ The court held that the use of the likeness in *NCAA Football* was not sufficiently transformative, and not protected by the First Amendment.

The *Keller* court followed nearly the same path of analysis as *Hart*. The *Keller* court addressed the same *Comedy III/Winter/Kirby/No Doubt* line of cases, and further addressed another case in which the Ninth Circuit applied the test.⁴⁰ In *Hilton v. Hallmark Cards*,⁴¹ the Ninth Circuit doubted that a birthday card depicting Paris Hilton in a manner reminiscent of her appearance in her television show was transformative enough.

The *Keller* court then applied the test to *NCAA Football* and found that the use of Keller's likeness did not contain significant transformative elements.⁴² The court found the current case to be very similar to the facts in *No Doubt*—that the celebrity appears in the same context as in real life—and found that there was not enough transformation. The *Keller* court also disagreed that the other aspects, such as the ability to edit a player's appearance, constituted transformation, by downplaying the importance of this point in the *No Doubt* decision. To the court's eye, the key issue was that in *Winter* and *Kirby*, there were fanciful, creative characters that, although created based on the public figures, were nevertheless new characters.

Dissents

Notably, neither *Hart* nor *Keller* were unanimous opinions. The dissent in *Hart* pointed out that the video games included a myriad of additional graphics, videos, sounds, and game scenarios, beyond the player likeness, and that these additions should be sufficient to transform the player likeness into a different work, satisfying the transformative use test.⁴³ To the dissenting judge, the player likeness is merely one of the "raw materials" from which the video games were synthesized, and the games were not the very "sum and substance" of the athletes themselves.⁴⁴ Indeed, it is notable that, if the additional photos in the Tiger Woods collage in *ETW* were sufficiently transformative, then the video games would also seem to have a comparable amount of added subject matter.

The dissent in *Keller* similarly felt that the video games added many other creative elements, beyond just the athletes' likenesses, to warrant a finding of sufficient transformation.⁴⁵ The dissenting judge noted that these additions were akin to the changes that were deemed sufficient in *Winter* and *Kirby*, and that the current facts distinguished over *No Doubt* because EA's games allowed players to alter the athletes' appearances. The dissent also noted that the sheer number of athletes, whose names are not actually provided in the game, involved in these video games should serve to diminish the right of publicity angle. Indeed, the dissent noted that one could play *NCAA Football* thousands of times without ever encountering a particular avatar, and wondered "if an anonymous virtual player is tackled in an imaginary video game and no one notices, is there any right of publicity infringed at all?"⁴⁶

Takeaway from the Publicity Cases

From these decisions, it appears that the likenesses in EA's video games are not protected by the First Amendment, and that the next generation of NCAA football/basketball video games will likely need to obtain permission from the athletes to use their likenesses. The athletes, EA, and the Collegiate Licens-

ing Corporation reached a \$40 million class settlement agreement in May 2014, which is currently in the approval process by the class members and eventually the district court. The final decision on that settlement is expected in mid-2015.

However, even if the settlement concludes these two cases, gamers shouldn't expect to see new NCAA games right away. There remains the sticky question of whether NCAA student-athletes would be entitled to receive any compensation for the permission to use their likenesses, because NCAA rules do not currently permit student-athletes to license their own identities. The third case in our trio, *O'Bannon v. NCAA*,⁴⁷ addresses this issue, and is discussed in the section that follows.

Case 3: The Antitrust Case

In the third case of our trio, Ed O'Bannon sued the NCAA in 2009, alleging that the NCAA rules, which bar student-athletes from receiving revenue that the NCAA receives from licensing the student-athletes' likenesses for use in video games, live game telecasts, and other footage, violate the Sherman Antitrust Act. In August 2014, the presiding judge delivered findings of fact and conclusions of law after a bench trial, finding that the NCAA rules unreasonably restrained trade.⁴⁸ The remaining portion of this article will address the main issues presented and conclusions reached in this 99-page document, and the take-aways from this decision.

The *O'Bannon* court's antitrust analysis focused on: (1) identifying the relevant market, (2) determining whether the alleged anticompetitive acts restrained the trade in that market, and (3) determining whether the restraint was unreasonable. The athletes identified two potential markets. One market, which the court ultimately rejected, was a "group license" market, in which the individual students could group together to offer their likeness licenses to telecasters and video game developers. The court concluded, however, that there was no restraint of trade in such a market, because such group licenses would not really compete against one another.⁴⁹ A television network that wanted to broadcast a game would need to secure licenses from all the student-athletes in the game, and the individual student-athlete's license would only have value if all of the student-athletes agreed. So the court concluded that there would not truly be any "competition" in such a market, and no restraint of trade by the NCAA rules.

The athletes' second market, however, survived the court's analysis. In this second market, the court agreed that there exists a "college education" market, which consists of the larger divisions of NCAA schools.⁵⁰ In this market, the various schools compete to "purchase" the services of the prospective college recruit by offering scholarships. The *O'Bannon* court found that the NCAA's rules restrained trade in this market, because the rules result in a price-fixing agreement between the schools—all of whom agree to pay the same price (e.g., the same bundle of academic and athletic opportunities).⁵¹

Having established that the NCAA rules restrained trade in the college education market, the court set about determining whether the restraint is justified, by determining whether the procompetitive effects of the NCAA rules outweighed their anticompetitive effects.⁵²

The NCAA offered four potential beneficial effects to justify its rules. The NCAA contended that the rules are necessary to: (1) preserve the tradition of amateurism, (2) maintain competitive balance between the divisions of schools, (3) promote integration of academics and athletics, and (4) increase the total output of its product.⁵³ The court did not find any of these to be sufficient to justify the challenged restraints.

As for the beneficial effects of amateurism, the NCAA offered evidence of its history of amateurism, and survey evidence showing that fans favored the amateurism and were opposed to paying student-athletes. The court acknowledged that the NCAA's evidence could justify some limited restrictions on student-athlete compensation, but that it did not justify the "sweeping prohibition" on players receiving any compensation.⁵⁴ Specifically, the court noted that the NCAA's own history was inconsistent on amateurism, and that even the current rules inconsistently allow tennis players to accept up to \$10,000 in prize money prior to enrollment in college, while track and field recruits cannot.⁵⁵ The court agreed that limits on large payments to athletes may have the procompetitive effects touted by the NCAA, but that the broad prohibition was not justified.

As for the promotion of competitive balance, the court was more persuaded by the athletes' economic expert, who testified that the NCAA rules did not have any effect on competitive balance.⁵⁶ Indeed, the court noted that other NCAA rules did not seem concerned with maintaining competitive balance (e.g., there are no limits on what a school can spend in hiring football coaches, or in building athletic training facilities).⁵⁷ The court also doubted the importance of competitive balance to the market, citing evidence showing fans' loyalty was due more to the fans being alums of the school, or living in the geographic region of the school, and not due to competitive balance.

The third beneficial effect, integration of athletics and academics, was acknowledged by the court to be a good thing, but the court found that the integration of athletics and academics could be achieved through other rules, such as requiring class attendance, and without the full prohibition on compensation in the current rules.⁵⁸ The court acknowledged, however, that this beneficial effect could also justify limited restrictions on compensation—just not the "sweeping prohibition" in the current rules.⁵⁹

The court found that there was insufficient evidence to support the fourth alleged justification—increased output by attracting schools that were philosophically committed to amateurism, and enabling schools to participate in more sports than they otherwise might.⁶⁰

Having found that the NCAA rules were not justified, but that some limited restrictions could still be justified, the court then discussed two less restrictive alternatives that could still achieve the stated goals of the NCAA, but without the "sweeping prohibition" in the current rules. The first alternative involved a stipend to cover the true cost of attendance, which may fill gaps in the current level of aid. The second alternative involved the schools allowing the student-athletes to be awarded compensation for their likeness, but holding the compensation in trust for the student-athlete, to be released when the student graduates or loses athletic eligibility.⁶¹ The court ultimately used these acceptable alternatives in its injunction order, which enjoined the NCAA from: (1) prohibiting deferred licensing compensation of \$5,000 per year or less to be held in a trust fund for the athletes' licensed names/images/likenesses; or

(2) prohibiting compensation from the licensing of a student's name/image/likeness in an amount up to the full cost of attending the student's school (to cover any shortfalls between scholarship offers and the actual cost of attendance).⁶²

Takeaway from the Antitrust Case

The *O'Bannon* trial court essentially found that the NCAA's current "sweeping prohibition" against students receiving any compensation for the licensing of their individual name/likeness/image is not justified by the NCAA's stated benefits, but that some less restrictive restrictions may be justified. The court felt that the NCAA could reasonably cap such compensation to a smaller amount held in trust until the student graduates, and also provide such compensation if needed to cover living/cost-to-attend expenses not covered by the student's scholarship package. The case is currently under appeal to the Ninth Circuit,⁶³ with briefing yet to commence at the time of this writing. For now, the NCAA's broad prohibition appears at an end, and we may be entering a new era of collegiate sports, in which students are permitted to profit, at least in some small way, from their individual likenesses.

Conclusion

NCAA video game fans are eagerly following these cases.⁶⁴ So far, it seems the future of collegiate sports will require video game developers to obtain licenses for the use of the athletes' names/images/likenesses, and the NCAA will need to develop mechanisms to allow student athletes to receive at least some compensation for the use of their names/images/likenesses. On the bright side, the next *NCAA Football* game will probably include actual player names as a result, and we may begin to see actual player names on college jerseys (currently licensed NCAA apparel does not include player names), and perhaps college athlete endorsement deals.

That is all still a ways away, though. The *O'Bannon* appeal needs to resolve itself, and the *Hart/Keller* settlement needs to go through. Assuming those cases are resolved, there will then be some new negotiations, as scholarship contracts and licensing contracts are modified to account for compensating the athletes. A new game for the fall of 2016 might be nice . . . n

Endnotes

1. 717 F.3d 141 (3d Cir. 2013).
2. 724 F.3d 1268 (9th Cir. 2013).
3. *Id.* at 1271.
4. *Id.*
5. *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757 (D.N.J. 2011).
6. Order on Defendants' Motions to Dismiss (Docket Nos. 34, 47, 48) and Electronic Arts' Anti-SLAPP Motion to Strike, *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW (N.D. Cal. Feb. 8, 2009). EA's anti-SLAPP motion was brought under a state law that allowed challenges to First Amendment actions to be stricken if the plaintiff could not establish a probability of prevailing on the challenge.
7. *Keller*, 724 F.3d at 1270–71; *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 148 (3d Cir. 2013).
8. 131 S. Ct. 2729, 2733 (2011).
9. *Keller*, 724 F.3d at 1271; *Hart*, 717 F.3d at 148–49.
10. 433 U.S. 562, 574–75 (1977).

11. *Hart*, 717 F.3d at 152 (citing *Zacchini*, 433 US at 563–66).
12. *Id.* (quoting *Zacchini*, 433 US at 574–75).
13. 110 S.W.3d 363 (Mo. 2003) (en banc).
14. Professional NHL hockey player Tony Twist was “notorious for his violent tactics on the ice,” and the comic book’s creator, Todd MacFarlane, was an avowed hockey fan. *Id.* at 366.
15. *Hart*, 717 F.3d at 154 (quoting *Doe*, 110 S.W.3d at 374).
16. *Id.* (quoting *Doe*, 110 S.W.3d at 374).
17. *Id.*
18. *Id.* at 154–57.
19. 875 F.2d 994 (2d Cir. 1989).
20. *Hart*, 717 F.3d at 155 (quoting *Rogers*, 875 F.2d at 1004).
21. *Id.* at 157.
22. 21 P.3d 797, 804–08 (Cal. 2001).
23. *Hart*, 717 F.3d at 159–60 (emphasis omitted) (quoting *Comedy III*, 21 P.3d at 809).
24. *Id.* at 160 (alteration in original) (quoting *Comedy III*, 21 P.3d at 811).
25. 69 P.3d 473, 476 (Cal. 2003).
26. *Hart*, 717 F.3d at 160 (alterations in original) (quoting *Winter*, 69 P.3d at 478).
27. *Id.* (quoting *Winter*, 69 P.3d at 479).
28. *Id.* (alteration in original) (quoting *Winter*, 69 P.3d at 479).
29. 332 F.3d 915 (6th Cir. 2003).
30. *Hart*, 717 F.3d at 161 (quoting *ETW*, 332 F.3d at 938).
31. 50 Cal. Rptr. 3d 607 (Ct. App. 2006).
32. *Hart*, 717 F.3d at 161–62.
33. 122 Cal. Rptr. 3d 397 (Ct. App. 2011).
34. *Hart*, 717 F.3d at 162 (emphasis omitted) (quoting *No Doubt*, 122 Cal. Rptr. at 410–11).
35. *Id.* (quoting *No Doubt*, 122 Cal. Rptr. at 411).
36. *Id.* at 166.
37. *Id.*
38. *Id.* at 168.
39. *Id.*
40. *In re NCAA Student-Athlete Name & Likeness Licensing Litig. (Keller)*, 724 F.3d 1268, 1273–76 (9th Cir. 2013).
41. 599 F.3d 894, 899 (9th Cir. 2009).
42. *Keller*, 724 F.3d at 1276–78.
43. *Hart*, 717 F.3d at 171–73 (Ambro, J., dissenting).
44. *Id.* at 175 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001)).
45. *Keller*, 724 F.3d at 1285–87 (Thomas, J., dissenting).
46. *Id.* at 1287–88.
47. 7 F. Supp. 3d 955 (N.D. Cal. 2014).
48. *Id.*
49. *Id.* at 993–99.
50. *Id.* at 986–88 (referring to the Football Bowl Series (FBS) division in football, and the Division I in basketball).
51. *Id.* at 988.

52. *Id.* at 999.
53. *Id.*
54. *Id.*
55. *Id.* at 1000.
56. *Id.* at 1001–02.
57. *Id.* at 1002.
58. *Id.* at 1002–03.
59. *Id.* at 1003.
60. *Id.* at 1003–04.
61. *Id.* at 1004–07.
62. Permanent Injunction, *O’Bannon v. NCAA*, No. 4:09-cv-03329-CW (N.D. Cal. Aug. 8, 2014), ECF No. 292.
63. *O’Bannon v. NCAA*, No. 14-17068 (9th Cir. Oct. 21, 2014), consolidated with No. 14-16601 (Nov. 14, 2014).
64. *See, e.g., In re: NCAA Student-Athlete Name & Likeness Licensing Litigation*, PAT. ARCADE (July 2, 2013), <http://www.patentarcade.com/2013/07/in-re-ncaa-student-athlete-name.html>.